

1 SUPERIOR COURT OF NEW JERSEY
2 MIDDLESEX COUNTY
3 LAW DIVISION, CIVIL PART
DOCKET NO. MID-L-3284-15
APP. DIV. NO. _____

4 WASHINGTON MUNOZ,)
5)
6 Plaintiff)
7)
8 v.)
9)
10 L.P. CIMINELLI, and)
11 PAINO ROOFING CO., INC.,)
12)
13 Defendants)

TRANSCRIPT
OF
JURY TRIAL

14 Place: County Court House
15 56 Paterson Street
16 New Brunswick, NJ 08903

17 Date: July 11, 2017

18 BEFORE:

19 HONORABLE ANDREA G. CARTER-LATIMER, J.S.C. AND JURY

20 TRANSCRIPT ORDERED BY:

21 JOSEPH J. GULINO, ESQ. (Nicoletti Gonson Spinner LLP)

22 APPEARANCES:

23 GERALD H. CLARK, ESQ. (Clark Law Firm, PC)
24 LAZARO BERENGUER, ESQ.
25 Attorney for plaintiff

JOSEPH J. GULINO, ESQ. (Nicoletti Gonson Spinner LLP)
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1 THE COURT: Good morning.

2 MR. GULINO: Good morning, Your Honor.

3 THE COURT: Please be seated. All right.

4 So, we were able to get a panel of 35 jurors that are
5 now waiting. So, we are on the record in the matter
6 of Washington Munoz vs. NJ Sports and Exposition
7 Authority, New Meadowlands Racetrack and LP Ciminelli.
8 If I could please have the appearances of counsel.
9 It's docket 3284-15.

10 MR. CLARK: Good morning, Judge Carter.

11 It's Gerald Clark from the Clark Law Firm, for the
12 plaintiff, Washington Munoz.

13 MR. BERENGUER: Good morning, Judge Carter.

14 Lazaro Berenguer from the Clark Law Firm, on behalf of
15 the plaintiff, as well.

16 THE COURT: Okay.

17 MR. GULINO: And Joseph J. Gulino from
18 Nicoletti, Gonson and Spinner, LLP. I represent all
19 the defendants, Your Honor.

20 THE COURT: Okay. Thank you. You may be
21 seated. All right. So, this matter comes before the
22 Court having been scheduled for a trial. I did
23 conference the matter yesterday to address a number of
24 issues.

25 As I indicated to counsel, I would like to

1 get started with jury selection this morning. Since
2 we were fortunate enough to gather up 35 jurors, we'll
3 get started with jury selection.

4 I did indicate to counsel yesterday,
5 however, that I would allow Mr. Clark, you to put any
6 -- argument you had or any record you needed to make,
7 in terms of the jury voir dire sheet. I have prepared
8 a jury voir dire sheet that did not include the
9 questions that were the basis of an objection by
10 defense. And so, I will allow you, however, to -- if
11 you feel the need to, address that at this time before
12 we bring in the panel.

13 (Pause in dialog)

14 MR. CLARK: Judge, you -- you didn't include
15 any of them?

16 THE COURT: I did not include any of the--

17 MR. CLARK: Ones that were objected to?

18 THE COURT: The ones that were objected to.

19 MR. CLARK: Okay.

20 THE COURT: So -- I think we went over them
21 in chambers yesterday. On your voir dire sheet it's
22 question -- 2, 5, 6, 9, 1, 2, 3, 4, 6 and 8 [sic].

23 (Pause in dialog)

24 THE COURT: And when I started at 1 again,
25 that was under the section entitled "Immigrant and

1 non-English speaking bias."

2 (Pause in dialog)

3 MR. CLARK: Just with regard to -- I'm --
4 I'm not going to be heard -- I'm not going to say
5 anything on -- 1 through 9. But with regard to the
6 immigrant issue -- I think that is important. And I'm
7 not -- I'm not standing here, you know, asking the
8 Court to -- to reconsider and do all those, but
9 perhaps something about that. I -- I think would be
10 important, particularly with the things that are going
11 on today. My client being a non-English speaking
12 immigrant.

13 I -- I think it is important to draw out
14 those biases. I think there was some recent case or
15 something on -- on this issue, not on the immigrant
16 issue specifically, but I mean sim -- like a catchall
17 question to the jury is -- a catchall question that
18 says -- will you be fair and impartial? Of course,
19 just about everyone is going to say, well, of course
20 I'll be fair and impartial.

21 And if you say it to them they're going to
22 speak through an interpreter, do you have any problem
23 with that? Most people aren't going to say -- you
24 know, I have a problem with that. And if you say, do
25 you have any problem with immigrants, most people

1 aren't going to say, yes, I don't like immigrants or I
2 have a problem with immigration in the country.

3 So, the questions -- and I'm -- and I'm not
4 -- I'm not standing here saying I'm absolutely wed to
5 the way they're phrased. But perhaps a couple of
6 questions that would deal with that -- that would --
7 that would -- address that issue.

8 And based on prior experience in cases where
9 I have had non-English speaking immigrant clients, and
10 courts have asked simpler questions, not necessarily
11 how they're phrased here, it definitely, definitely, I
12 can represent to the Court, including in this County,
13 has drawn out biases.

14 So, I would just ask perhaps if some kind of
15 question could be phrased, if the Court can look into
16 that or -- that's all. Thank you.

17 THE COURT: Did you want to be heard?

18 MR. GULINO: I'm sorry, Judge, I didn't --
19 which one are we talking about? What number?

20 THE COURT: It's the immigrant and non-
21 English speaking bias questions. So, 1 through 8 -- 1
22 through 9.

23 MR. GULINO: We're talking about --

24 THE COURT: I'm sorry, 1 through --

25 MR. GULINO: -- the second section,

1 immigrant section?

2 THE COURT: -- the second. Correct.

3 MR. GULINO: I -- I didn't make -- we didn't
4 discuss it yesterday, Judge, but I did object to
5 pretty much all of them. First of all, my
6 understanding is that--

7 THE COURT: We didn't discuss it --

8 MR. GULINO: Yes, we did discuss it.

9 THE COURT: -- in terms of the specific,
10 yes.

11 MR. GULINO: My understanding is that --
12 Mr. Munoz obtained his citizenship in 2015. He's a
13 citizen of the United States. That's one.

14 Two. It shouldn't make a difference because
15 under our Constitution he's entitled to the same
16 rights as anyone else, whether he's an immigrant or he
17 was naturally born here.

18 Three. We're not alleging that he's not
19 hard working. We're not alleging any of that at all.
20 Some of these questions here that the plaintiffs want
21 to bring in are just "feel good" type questions,
22 trying to weed people out who what? The man got hurt;
23 the allegation is while he was gainfully employed in a
24 Union. That's what this case is about.

25 I have no issue with the questions about

1 interpreters. Of course, that is paramount and that
2 is relevant because some people don't like that. The
3 fact that Mr. Munoz was here for 20 years and doesn't
4 speak English, well, that may affect him. And I have
5 no objection at all with those type of questions. But
6 as to his immigration status and where he came from,
7 no, I -- I don't think it's relevant here. I really
8 don't.

9 THE COURT: All right. So -- I did include
10 the question that asks whether or not a jury would be
11 affected by the fact that the plaintiff will be
12 utilizing the services the interpreter. And so, from
13 the Court's perspective and the Court's experience, in
14 terms of having tried many cases, both as a judge and
15 -- and being on the other side of the table, as well,
16 when there are Spanish speaking plaintiffs or
17 defendants, there is typically a question that's posed
18 to the panel that addresses biases related to that.

19 And I found, based on the experiences that
20 I've had that -- when the question is asked about
21 whether or not anybody has an issue with the plaintiff
22 or defendant utilizing the services of an interpreter,
23 it -- it does tend to weed out those jurors who have
24 biases related to someone who is not English speaking.
25 And -- and folks general, if they're -- if they're

1 being honest and, quite frankly, you could ask a
2 number of questions and if a juror is not going to be
3 honest they're just not going to be honest. Right?
4 So, if a juror is going to be honest about their --
5 their specific biases -- many jurors, in my
6 experience, have not been shy about saying I have a
7 problem with the fact that the instructions that are
8 provided to the Court requires that we speak English,
9 but yet we have a plaintiff or defendant, whichever
10 one it may be, who is not fluent in -- in English or
11 doesn't speak the English language -- and so, I do
12 have a problem with that.

13 So I -- I have heard that response on more
14 than one occasion. And typically, those jurors are --
15 are excused as a result of that.

16 One of the other questions I think also,
17 that I included that -- may address -- some of that
18 issue, although sort of in a general way, is there's a
19 question that asks -- or at least indicates to the
20 panel that in our country, under our Constitution, in
21 cases such as this, when people have a right to a jury
22 trial. And so, do you have any feelings about the
23 jury system. And sometimes, it is that a question
24 such as that can also elicit, you know, the -- the
25 issue of whether or not there are biases related to

1 people that -- that don't speak the language.

2 So, I'm -- I'm confident -- confident that
3 the question related to the interpreter sufficiently
4 covers any concern in that -- in that regard. All
5 right.

6 MR. CLARK: Your Honor, not to be pushy.
7 But what about just asking question one -- that -- it
8 -- how about that? I mean, that directly squarely --
9 I mean, is there any harm in doing it, other than the
10 additional time it might take?

11 THE COURT: Immigration?

12 MR. CLARK: Yeah, immigration or immigrants.
13 Yeah, the -- immigration. Because I -- I -- I
14 understand Mr. Gulino feels the way he does. And his
15 feelings are correct about it shouldn't matter. But
16 it does matter to some people. I think it's just good
17 to know who it -- I think it's good to know that. I'm
18 just simply asking perhaps question one. Or some
19 version of that.

20 (Pause in dialog)

21 THE COURT: All right. So, when we are
22 speaking to the jurors at sidebar and addressing the
23 question related to the use of the interpreter,
24 perhaps -- that question, in terms of whether or not
25 there are any issues related -- any issues related to

1 bias concerning someone's immigration status, I mean,
2 I don't really see how -- especially in this case, as
3 -- as I've indicated, there's no assertion that the
4 plaintiff is not here legally. There's no issue with
5 that.

6 But to the extent -- I'm assuming that
7 you're going to elicit some testimony that the
8 plaintiff is not from the United States, then -- then
9 perhaps we can address it when we're addressing the
10 interpreter question.

11 (Pause in dialog)

12 THE COURT: All right. So, we're going to
13 bring in a panel and get -- get started.

14 MR. GULINO: Judge, I have one request.

15 THE COURT: Yes.

16 MR. GULINO: My hearing is okay, but it
17 isn't the greatest. And would you mid during the voir
18 dire if I sit on this side of the table, so I can hear
19 them? I want to be --

20 THE COURT: I'm sorry?

21 MR. GULINO: The jurors. If you mind if I
22 sit on this side of the plaintiff's table right here,
23 so I can hear.

24 THE COURT: I'm -- you mean when the jurors
25 are in the jury box? Is -- is that --

1 MR. GULINO: When the jurors are in the box,
2 are they going to be questioned or you were going to
3 question them one at a time?

4 THE COURT: No, they remain in the box.

5 MR. GULINO: Okay. So, I may not be able to
6 hear them from here. Can I move on this side of the
7 table and get a little closer. That's all.

8 THE COURT: Um -- I mean, I -- I don't want
9 it to be something that's distracting, necessarily.
10 Do -- do --

11 MR. GULINO: If we do it before they walk in
12 I don't think it would be.

13 THE COURT: They're going to come out --
14 let's see how it goes.

15 MR. GULINO: Okay, fine.

16 THE COURT: If you can't hear, then --

17 MR. GULINO: Okay.

18 THE COURT: -- then, certainly you can move.

19 MR. GULINO: All right.

20 THE COURT: I wouldn't deny you that
21 opportunity if you can't hear. All right. So let's
22 see. You may be able to hear. It -- it may --

23 MR. GULINO: Okay.

24 THE COURT: -- that they're talking loud
25 enough. I'll ask them to keep their voices up; I'll

1 try to do the same. And so, if you have any issue,
2 just alert me and then you can move at that time. All
3 right.

4 MR. CLARK: Judge, is it okay if my
5 assistant helps with the jury selection? (Inaudible)
6 from my office.

7 THE COURT: Sure.

8 MR. CLARK: And --

9 THE COURT: You say how -- I mean, help you
10 out.

11 MR. CLARK: Correct. She won't speak --

12 THE COURT: But not --

13 MR. CLARK: -- or address the Court or
14 anything.

15 THE COURT: Okay.

16 MR. CLARK: But is it okay if she comes up
17 to sidebar from time to time, to listen to what the
18 jurors are saying?

19 THE COURT: That I would not allow. She's
20 not an attorney. And so -- yeah --

21 MR. CLARK: That's fine.

22 THE COURT: -- no.

23 MR. CLARK: All right. Thank you, Your
24 Honor.

25 THE COURT: All right. Good morning.

1 INTERPRETER: Mr. Robert (phonetic),
2 (indiscernible) interpreters.

3 THE COURT: Okay. Great. Did you want the
4 interpreters for jury selection?

5 MR. CLARK: No. Did you --

6 MR. BERENGUER: (Inaudible) --

7 MR. CLARK: You told them that?

8 MR. BERENGUER: -- (Inaudible) --

9 (Pause in dialog)

10 THE COURT: So, I think that the attorneys
11 are going to waive the interpreters for jury selection
12 purposes only. Yes?

13 MR. CLARK: Well, we -- we only need the
14 interpreters for the testimony of the plaintiff. And
15 -- and any other testimonies -- and any other
16 witnesses that need the interpreter.

17 THE COURT: Okay.

18 MR. CLARK: But we have spoke with our
19 client and he's in agreement to not have the constant
20 translating/interpreting going on throughout the
21 trial.

22 THE COURT: Okay.

23 INTERPRETER: Just -- in case, Your Honor--

24 THE COURT: Yes.

25 INTERPRETER: -- we have the equipment; we

1 will not be obstructing anything. We have equipment
2 where the person can listen.

3 THE COURT: Okay.

4 INTERPRETER: If that was your concern
5 (inaudible).

6 THE COURT: Counsel, it's -- it's your call
7 to make. If you're comfortable with waiving the
8 interpreter for having discussed it with your client
9 for purposes of at least this part of the process.

10 MR. CLARK: Yes, that's correct.

11 THE COURT: That -- that's what you're
12 referencing.

13 MR. CLARK: We -- we have discussed it.

14 THE COURT: Yes.

15 MR. CLARK: We are familiar with the
16 interpreting equipment.

17 THE COURT: Okay. All right. So, they're
18 waiving it for jury selection.

19 INTERPRETER: Okay.

20 THE COURT: All right.

21 INTERPRETER: (Inaudible) office.

22 THE COURT: All right. Thank you.

23 INTERPRETER: (Inaudible).

24 (Pause in dialog)

25 THE COURT: And just so -- the defendants

1 that remain in the case are New Jersey Sports and
2 Exposition Authority, the New Meadowlands Racetrack
3 and LP Ciminelli?

4 MR. GULINO: Everyone but --

5 THE COURT: Just in terms of the caption,
6 what I'm going to read to the --

7 MR. GULINO: Yes, the --

8 THE COURT: -- the panel.

9 MR. GULINO: -- I am everyone except --
10 there was an agreement yesterday, which we did not put
11 on the record, Cooper Plastering Corporation --

12 THE COURT: Okay.

13 MR. GULINO: -- plaintiff's employer --

14 THE COURT: Is dismissed from the case.

15 MR. GULINO: -- has --

16 THE COURT: Yes.

17 MR. GULINO: -- been discontinued against,
18 gentlemen?

19 MR. CLARK: Yes. There is an in limine
20 motion filed to dismiss the plaintiff's direct W2
21 employer, Cooper Plastering, based upon the exclusive
22 remedy provisions of the worker's compensation bar.
23 And we have no basis to oppose that motion. There is
24 no Laidlaw claim in this case. Thank you.

25 THE COURT: All right. So that -- any

1 claims against Cooper --

2 MR. GULINO: I'm not too sure --

3 THE COURT: -- Plastering --

4 MR. GULINO: -- gentlemen, about --

5 THE COURT: -- is dismissed.

6 MR. GULINO: -- about the John Does. I
7 don't know if you want to keep them in the caption or
8 not. I don't know who they are.

9 THE COURT: Well, I won't be announcing a
10 John Doe.

11 MR. GULINO: Okay.

12 THE COURT: So that's --

13 MR. GULINO: That's fine.

14 THE COURT: All right.

15 (Pause in dialog)

16 MR. GULINO: Judge, the other motions that
17 we had yesterday, can we do those after voir dire on
18 the record?

19 THE COURT: Well, what I'd like to do is get
20 a jury first.

21 MR. GULINO: Yes.

22 THE COURT: And then, once we --

23 MR. GULINO: That's what I mean.

24 THE COURT: -- get a jury. That's what we
25 discussed. Yes.

1 MR. GULINO: Sure.

2 THE COURT: Yes.

3 MR. GULINO: Okay.

4 THE COURT: Yes.

5 MR. CLARK: Judge, the only defendants we
6 intend to try the case against is -- LP Ciminelli,
7 Inc., Paino Roofing Company, Inc. -- and Countryside
8 Plumbing and Heating, Inc.

9 (Pause in dialog)

10 THE COURT: Okay. So, give me those names
11 again, counsel.

12 MR. CLARK: Yes, Your Honor.

13 THE COURT: Paino, Countryside, LP
14 Ciminelli.

15 MR. CLARK: And taking it from the top it
16 would go --

17 THE COURT: Okay.

18 MR. CLARK: -- LP Ciminelli, Inc. And then
19 it is Paino Roofing Company, Inc. And Countryside
20 Plumbing and Heating, Inc.

21 THE COURT: Okay.

22 MR. CLARK: Thank you.

23 (Pause in dialog)

24 MR. GULINO: Are we -- forgive my ignorance,
25 but are -- are we discontinuing against New Jersey

1 Sports and Exposition Authority, New Meadowlands
2 Racetrack -- and some of the other ones that weren't
3 mentioned? Or?

4 MR. CLARK: There's no motion or anything.
5 All -- all I'm saying is that's who I intent to try
6 the case against. I do not intend to try the case
7 against those three. So yeah, I mean, essentially,
8 they can be dismissed. That's fine.

9 MR. GULINO: Well, can we just have a
10 discontinuance and you can just say, okay, the case is
11 against LP Ciminelli, Paino Roofing Company and
12 Countryside Plumbing? It's a lot easier.

13 MR. CLARK: That's what I just said.

14 THE COURT: Yes. I think that's --

15 MR. GULINO: Okay.

16 THE COURT: -- what he just said.

17 MR. GULINO: All right.

18 MR. CLARK: Okay.

19 THE COURT: The case is dismissed as to the
20 remaining defendants.

21 MR. GULINO: I just wanted something formal.
22 That's all.

23 THE COURT: Well -- I think he was sort of--

24 MR. GULINO: I understand --

25 THE COURT: -- saying there was no motion.

1 MR. GULINO: -- he's not going to put any --
2 he doesn't --

3 THE COURT: He was waiting for you --

4 MR. GULINO: -- intend to put proofs on.

5 THE COURT: -- to file the motion.

6 MR. GULINO: I understand he --

7 THE COURT: So --

8 MR. GULINO: -- doesn't intend to put proofs
9 on. I understand that. But -- he might change his
10 mind. I want to know whether we're going to
11 discontinue against these people or not.

12 THE COURT: Yes. The case is --

13 MR. GULINO: Okay.

14 THE COURT: -- dismissed as to those
15 defendants -- as is indicated, there's no intention to
16 pursue a claim --

17 MR. GULINO: Okay.

18 THE COURT: -- as against them.

19 (Pause in dialog)

20 MR. CLARK: I always said it's a lot easier
21 to be a defense lawyer.

22 (Laughter)

23 (Pause in dialog)

24 UNIDENTIFIED FEMALE: Good morning, Your
25 Honor. How are you?

1 THE COURT: Good, thank you.

2 UNIDENTIFIED FEMALE: I'm sorry to
3 interrupt. If -- could counsel (indiscernible) --
4 interpreters -- or narrow down the time they're going
5 to need the interpreter? If they could.

6 MR. BERENGUER: I'm sorry?

7 UNIDENTIFIED FEMALE: Could you narrow down
8 the (inaudible) time (inaudible) the interpreter?
9 Because we have so many things going on, maybe I could
10 use them for someone else.

11 MR. BERENGUER: I understand. As of right
12 now, we believe we're going to need the interpreters
13 Wednesday and Thursday.

14 UNIDENTIFIED FEMALE: Wednesday and
15 Thursday.

16 MR. BERENGUER: (Inaudible).

17 UNIDENTIFIED FEMALE: You had said that.
18 Somebody had come and said that.

19 MR. BERENGUER: Right.

20 UNIDENTIFIED FEMALE: But do you have any
21 idea when Wednesday -- morning, afternoon, or
22 Thursday? Because it will be just one day, right? Or
23 -- or you going to --

24 MR. BERENGUER: (inaudible) --

25 UNIDENTIFIED FEMALE: -- you have two days.

1 MR. CLARK: It will probably be the
2 afternoon. Possibly late morning Wednesday. Possibly
3 late morning Wednesday.

4 UNIDENTIFIED FEMALE: Okay. Late --

5 MR. CLARK: Wednesday afternoon. And then
6 definitely Thursday morning.

7 UNIDENTIFIED FEMALE: Wednesday afternoon,
8 Thursday morning.

9 MR. BERENGUER: Right. And late morning
10 Wednesday, as well --

11 MR. CLARK: Possibly.

12 UNIDENTIFIED FEMALE: Late -- starting -- in
13 other words, starting late -- late --

14 MR. CLARK: It's -- it's really --

15 UNIDENTIFIED FEMALE: -- late Wednesday --

16 MR. CLARK: (Inaudible).

17 MR. BERENGUER: Okay.

18 UNIDENTIFIED FEMALE: All right. Thank you.

19 MR. BERENGUER: You're welcome.

20 (Pause in dialog)

21 UNIDENTIFIED FEMALE: Thank you, Your Honor.

22 THE COURT: All right. Thank you.

23 UNIDENTIFIED FEMALE: Have a nice day.

24 THE COURT: You too.

25 MR. CLARK: Mr. Gulino, are you going to --

1 you're going to read off your people, right? Joe
2 Mella (phonetic), Ragusa (phonetic), Peno (phonetic),
3 Beardsley (phonetic)?

4 MR. GULINO: I have -- I have not, but my
5 office has been in contact with --

6 MR. CLARK: But I'm saying, are you going to
7 read them off when you tell the jury?

8 MR. GULINO: Um --

9 (Pause in dialog)

10 MR. CLARK: All right, we'll just do it.
11 That's fine.

12 MR. GULINO: I mean if you want me to --
13 they're not from around here, I don't think anybody is
14 going to know them. You want me to, I will. That's
15 not a problem.

16 MR. CLARK: Okay. Why don't (indiscernible)
17 -- since they're your -- (inaudible).

18 (Pause in dialog)

19 COURT OFFICER: Jury entering.

20 (Pause in dialog)

21 (Jury Selection Begins)

22 MR. GULINO: Your Honor, if I may?

23 THE COURT: Sure.

24 MR. GULINO: I had mentioned before, one of
25 the questions that I wanted the Court to ask and voir

1 dire--

2 THE COURT: Yes.

3 MR. GULINO: -- and we had a short
4 discussion, if I --

5 THE COURT: Yes.

6 MR. GULINO: -- may, may I go on the record
7 (phonetic).

8 THE COURT: Well, we were on the record at
9 sidebar, so you've made your record.

10 MR. GULINO: Can I read the question into
11 the record.

12 THE COURT: Sure.

13 MR. GULINO: The question is number four, as
14 a proposed voir dire question, on behalf of the
15 defendants. "Mr. Munoz was fired from this particular
16 project based upon his failure to alert the proper
17 people of his alleged accident. Knowing that, would
18 you still be able, without hesitation, to separate
19 that from the issues in the case, namely whether the
20 defendant's negligent and that the plaintiff's
21 injuries result from the accident." Thank you.

22 THE COURT: All right. Thank you. See you
23 back in 15 minutes.

24 (Pause in dialog)

25 (Recording off)

1 (Recording on)

2 (Jury selection continues)

3 (Jury Selection concluded)

4 THE COURT: So as I look back at the
5 remainder of the panel, I see disappointment.

6 (Laughter)

7 THE COURT: I see how disappointed you are.
8 In all seriousness, I do want to thank you for your
9 willingness to be a part of this process. And when I
10 said what we do here doesn't work without you, I meant
11 that. It's very easy to raise your hand and give me
12 reasons why you cannot serve, why you can be doing
13 other things rather than being here. But it doesn't
14 work without you, you recognize that and we appreciate
15 that. So with that, you are now discharged.

16 COURT OFFICER: (Inaudible) please stand,
17 gather your personal belongings. Paper and pencils,
18 as well.

19 (Pause in dialog)

20 MR. CLARK: Judge, can I (inaudible) I left
21 my personal belongings.

22 THE COURT: Sure.

23 (Pause in dialog)

24 JUROR: Excuse me, Your Honor? Do we have
25 to keep these papers --

1 THE COURT: We'll collect those -- we'll
2 collect those from you.

3 JUROR: Okay.

4 THE COURT: Okay.

5 (Pause in dialog)

6 THE COURT: Okay. Be seated. Thank you.

7 (Pause in dialog)

8 THE COURT: All right, so my officer will be
9 back and we'll collect those from you before we recess
10 for the lunch hour.

11 But I do have some preliminary instructions
12 that I am required to give you that will take you
13 through this case before we break for the lunch hour.
14 All right.

15 So, members of the jury, as the jury in this
16 case you will be the judges of the facts and you will
17 be the only judges of the facts. You will have to
18 decide what happened. I will play no part in judging
19 the facts. That will be your responsibility.

20 My role is to be the judge of the law, and
21 that is to say that I will make whatever legal
22 decisions that need to be made during the course of
23 this trial. And I will explain to you the legal
24 principles that must guide you in your decision on the
25 facts.

1 Now, you are to judge the facts in this case
2 based upon the evidence presented to you and based
3 only on the evidence presented. The evidence will
4 consist of the testimony of witnesses who appear live
5 or witnesses that may appear by way of video tape.

6 As the trier of fact, it will be your job to
7 judge the believability of the witnesses. How is it
8 that you do that? It's something that each and every
9 one of you have done and will continue to do in your
10 daily lives when you're deciding whether or not
11 something that someone is telling you is the truth.
12 So, how do you size -- how do you judge the
13 credibility of a witness? You size the witness up.
14 Are they telling you the truth? Do they know what
15 they're talking about? How good is their
16 recollection? Are they accurate? Are they correct in
17 what they're saying?

18 You can also consider the demeanor of a
19 witness. And by that I mean, how is the witness
20 behaving or responding to the questions that are being
21 asked. You may believe part of what a witness tells
22 you and not believe other parts of it.

23 Now, during the trial I may be required to
24 rule, either on the admission or the rejection of
25 certain evidence. You are to give no consideration to

1 any evidence that I rule to be inadmissible and you're
2 not to speculate or guess about what you think the
3 evidence might have been or what it might have meant.

4 Please do not infer from any rulings that I
5 make in this case, or anything that you might hear me
6 say in this case that I have an opinion one way or the
7 other about the outcome of this case.

8 Even if you felt that I had feelings and
9 that you knew what they were, you should dis --
10 disregard what you might perceive to be my feelings
11 because it's your role to decide this case, not mine.

12 At the close of the entire case, I will
13 explain to you the law that applies and you must
14 accept that law. You must apply that law to the facts
15 as you find them to be based on the evidence.

16 During the course of the trial you will hear
17 from the attorneys on a number of occasions. Always
18 bear in mind that the attorneys are not witnesses and
19 what they say is not evidence. So, whether it is that
20 the attorney is asking a question, objecting or
21 arguing an objection -- or the -- the attorneys are
22 here as advocates or spokespersons for their client's
23 position.

24 This case is important to all of the parties
25 involved. They are entitled to your full attention

1 throughout this trial. And to a fair and impartial
2 consideration of the evidence. It is important,
3 therefore, that you keep an open mind about this case
4 until the very end, up until you are in that jury room
5 and you are deliberating.

6 You are not to make any judgments or come to
7 any conclusions about this case until you have heard
8 the whole story. And that means until all the
9 evidence is presented and I have explained the law to
10 you.

11 You are not to have any contact or any
12 discussions with any of the parties, their attorneys
13 or any of the witnesses. You are not to discuss this
14 case with anyone or permit anyone to discuss this case
15 with you.

16 So, whether it is here in the courthouse or
17 anywhere outside of the courthouse, you are not to
18 discuss this case. And if anyone attempts to discuss
19 the case with you or attempts to influence your
20 judgment about this case, it is important that you
21 report that to me immediately.

22 If you are to keep an open mind you must not
23 even discuss this case amongst yourselves until it is
24 over and you are deliberating. So this means, when
25 you convene each morning and as you are leaving at the

1 end of each trial day, during your recesses and your
2 breaks you are not to talk about this case amongst
3 yourselves.

4 And you will have me as a daily reminder.
5 So, every time we get up -- whether it's taking a
6 break or you're leaving at the end of the day -- I
7 will say to you, please don't talk about the case,
8 it's not time yet.

9 You are not -- and -- and I do that not
10 because I think you're not listening to me. But
11 because it is instinctual to -- there's a witness that
12 has testified, we take a break and then you want to
13 turn to your neighbor and say, what did you think of
14 that? It's sort of instinctual to want to do that, so
15 I will be the constant reminder that you're not to
16 talk about this case.

17 You are also not to discuss this case with
18 anyone that is not on the jury. This would include
19 your family and/or your friends. So, when you go home
20 today you can certainly tell your family and friends
21 that you've been selected to serve as a juror in this
22 civil matter. You can tell them the length of the
23 trial, but you should say nothing more. Because -- if
24 you have friends and/or family -- like mine -- and you
25 tell them that you have been selected to serve on this

1 case, and then you tell them a little bit about what
2 you think you know about the case, they don't just
3 stand there and go, okay.

4 Inevitably, they want to offer you an
5 opinion of theirs. They want to share an experience
6 that either they or another family member or friend
7 had. And we do not want your thinking to be
8 influenced by anything other than what you hear here,
9 in this courtroom. So, you tell them that you were
10 selected; the trial should be over no later than
11 Monday. When it's over, I'll tell you about it. All
12 right.

13 So while the case is pending, don't try to
14 go visit where you think it happened to try to figure
15 things out on your own. Things may very well have
16 changed since then. And moreover, it's not your job
17 to do so. Right? While this case is pending, you
18 don't conduct any type of research or investigations
19 at all. You are prohibited from doing so.

20 Your job is to decide this case based solely
21 on the evidence presented to you here, in this
22 courtroom. So, you do not investigate, research,
23 review or seek out information about the issues in the
24 case, either specifically or generally, the parties,
25 the attorneys or the witnesses, either in traditional

1 formats, such as newspapers, books, advertisements,
2 television, radio broadcasts, magazines, through any
3 research or inquiry on the internet, in any blog or
4 any other computer, phone, text device, smart phone,
5 tablet or any other device.

6 You must also not attempt to communicate
7 with others about the case or even about general
8 subject matters raised during this case, either
9 personally or through computers, cell phones, text
10 messaging, instant messaging, blogs, Twitter,
11 Facebook, My Space, personal, electronic and media
12 devices and other forms of wireless communication.

13 You must not go on the internet, participate
14 in or review any websites, internet chat rooms or
15 blogs. And you must not seek our photographs,
16 documents or information of any kind that in any way
17 relate to this case.

18 This prohibition includes any inquiry,
19 search or investigation into the facts of the case,
20 identities of the parties, the identities of the
21 attorneys or the court personnel, news articles or
22 reports, legal research, research regarding general
23 subject matters raised during the case, or even to
24 look up in a dictionary or on line the definition of a
25 word or phrase that has been used in the trial, either

1 by a witness, an attorney or the Court that you do not
2 understand.

3 It is the job of this Court to ensure that
4 you are provided with all of the information that you
5 are permitted to have in order to decide this case.
6 And you might ask why is such a restriction being
7 imposed? I have really already answered that. You
8 are here to decide this case based solely on the
9 evidence or lack of evidence that is presented to you
10 here, in this courtroom.

11 You may wrongly be inclined to think that
12 either different or additional information might
13 somehow be helpful to you, or that this prohibition is
14 somehow artificial. Many of you use the internet to
15 do research or to examine matters of interest to you.
16 You may have seen some information in the media that
17 suggests that either the type or the quality of
18 information that you're being presented with is not
19 what you expected or what should be presented. But
20 that's not for you to determine.

21 You must understand that any information you
22 might access from sources outside of the courtroom is
23 not evidence. One of the problems is that what you
24 are examining could be wrong, it could be incomplete,
25 it could be inaccurate. The material could be

1 outdated or simply not be applicable to this
2 particular case.

3 Indeed, there is often no way to determine
4 whether the information that we access from other
5 sources, such as the internet, is correct or has any
6 relevance to this case. There also may be other
7 reasons why certain information is not being presented
8 to you and it's not for you to question why that may
9 be.

10 Our system of justice requires that you, as
11 a juror, not be influenced by any information outside
12 of this courtroom. Otherwise, your decision may be
13 based upon material, which only you and none of your
14 fellow jurors know. And this would unfairly and
15 adversely impact the judicial process.

16 We must make certain that all of you hear
17 the same evidence. And so, just as you must not
18 obtain any information individually, you must not
19 obtain that information and then turn around and share
20 it with your fellow jurors. We must make certain that
21 each party has a fair opportunity to either refute or
22 to explain any evidence that is either offered against
23 it or that may be unfavorable to its case.

24 Please understand this clearly. If it is
25 determined that any one of you has violated this

1 directive and conducted any type of research or
2 investigation outside of this courtroom it may result
3 in a mistrial, which would require the case to be
4 tried again, at great cost to the parties and to the
5 judicial system.

6 It also may lead to a penalty being imposed
7 upon the person who either violates the directive or
8 fails to advise the Court if another member of the
9 jury has violated this directive.

10 Note taking, there will be none. This is a
11 relatively -- relatively short trial. We are often
12 concerned that note taking sometimes tends to be
13 distracting. We want you to listen to the testimony
14 that's being presented and not be concerned with
15 writing a note and perhaps missing an answer to -- to
16 the next question. So, note taking can be
17 distracting, we don't want you to give undue emphasis
18 to your notes.

19 Please have no concern that how is it that
20 I'm expected to remember every single thing there is
21 to remember. That's why there are eight of you
22 sitting in the box. So, we want you to rely on your
23 combined recollection of the evidence as the jury.

24 So, the first order of business in this case
25 will be the opening statements of the attorneys. In

1 their opening statements, the attorneys will explain
2 to you the position of their clients in their
3 litigation. They will tell you what they think this
4 case is about and what they believe the evidence will
5 show.

6 The opening statements are designed to
7 highlight for you the factual differences and the
8 disagreements between the parties in order to help you
9 judge the significance of the evidence when it is
10 presented.

11 Once the attorneys have given you their
12 opening statements then each party is given an
13 opportunity to present its evidence. First, the
14 plaintiff presents their evidence, then the defense
15 will present its evidence.

16 Each witness that is presented undergoes
17 direct examination, which means the attorney calling
18 that particular witness will ask direct questions of
19 that witness. And then the other attorney is given an
20 opportunity at cross examination.

21 Once all of the evidence is presented then
22 the attorneys give you their closing arguments. They
23 will give you their analysis of what the evidence
24 means and they will attempt to highlight for you the
25 significant evidence that they believe is helpful to

1 their client's position. Once the closing arguments
2 are completed, I then will instruct you on the legal
3 principles that must guide you when you're deciding
4 the case.

5 Very important if, during the course of this
6 trial, you have a cell phone, pager or other
7 communication device I do ask that you turn that
8 device off while you are in the courtroom. And I do
9 mean off. So, please don't try to put it on silent or
10 vibrate -- because there is a story that I'm going to
11 share with you that I share with all-- every time pick
12 a jury.

13 They're so tired of hearing me tell this
14 story. But I think it's important that I share it
15 with you because it -- sort of emphasizes the
16 importance of remembering to turn your phone off. And
17 I think that when I tell this story, people tend to
18 try to remember it. Right?

19 So, you are that juror that didn't turn your
20 phone off, because you thought -- I don't know, I can
21 put it on silent, it's no big deal. Right? But you
22 also know, some of those vibrate sounds are louder
23 than the ring. Not to mention, you thought you turned
24 it on vibrate or silent but you didn't, you left it on
25 the ringer. Right?

1 So, you're sitting in the jury box and a
2 phone starts to ring. And you recognize the ring.
3 Why? Because you have that special ring and you know
4 it's your ring. So, you hear the phone ringing and
5 you think to yourself, oh boy, I cannot -- I cannot
6 get that, because Judge Carter said to turn it off, I
7 forgot, or I thought I -- I thought it put on vibrate
8 and nobody would know -- and so I can't. Right?

9 So, you just let it ring. And this happens
10 to be the one time that, for whatever reason, the call
11 does not go into voicemail. So, it just keeps
12 ringing. And you're sitting there going -- I should
13 probably get that. And we are all thinking you should
14 probably get that.

15 And so, what do you do? You bend down to
16 get it and now all of us know who you are. So, you
17 now turn off the phone and then there's the ring that
18 turns off the ring. Right? Everybody is distracted;
19 you're embarrassed, you feel and that you should have
20 turned the phone off when you didn't. And nothing
21 good comes of it. Nothing good comes of it. And --
22 and this is a true story. And it's like -- it -- it
23 seems like every -- some version of it sort of happens
24 every trial. Right?

25 So, I say that for your benefit, but also

1 the lawyers benefit, as well, so they can remember to
2 turn their phones off. So that the phones aren't
3 ringing. Not to mention the microphones that are
4 throughout the courtroom -- are -- they don't make
5 things louder, necessarily, but they pick up sound.
6 Right? So, vibrating sounds are often things that
7 tend to -- to interfere with the recording.

8 So, if I -- I do ask that you try to
9 remember to turn your phones off. It's not as if
10 during the trial you can go -- you hear it ringing and
11 go, hello? You can't take the call, so why even have
12 it on? Right? You can use your phones during your
13 recesses and your breaks. Obviously not to do
14 research or to talk to anyone or communicate with
15 anyone about the case. But if you're using them, just
16 remember to -- to turn them off when you come back in.

17 So, the schedule for this trial is, as
18 follows. We are -- our court day, we ask that you be
19 here typically at 8:30. And 8:30 allows us to start
20 at 9 o'clock. So, we don't tell you to be here at 9
21 because we don't want you running through the door at
22 9 o'clock. Right? That doesn't allow us to start at
23 9. So, if you could be here at 8:30 it allows you to
24 get through security, get yourself settled, perhaps
25 take a restroom break if you need that, and then we

1 can bring you up at -- to start at 9 o'clock.

2 We usually take a midmorning recess, which
3 could be anywhere between 10:30, 11 -- it sort of
4 depends on how the testimony is -- is moving in the
5 case. Then we break usually for the lunch hour at
6 12:30. If a witness is on the stand and it's 12:30
7 and 12:35 makes sense to sort of let them finish, I'm
8 going to go to the 12:35, right? But no matter what
9 time we break, I always give you an hour for lunch.

10 We come back for lunch, usually we have a
11 midafternoon recess, which is -- 2:30, 3-'ish,
12 somewhere around there. Again, depending on how the
13 testimony is going in. And then our court day ends at
14 4:30.

15 If at any point in time there is a
16 scheduling change that requires perhaps that you come
17 a little bit later, I'll let you know that. Usually,
18 when we give you the time frame that we expect the
19 case will take, we try to account for things like
20 maybe a witness is running a little bit late or -- or
21 something like that. So, that sort of factors all of
22 that in.

23 But if there is any change to the schedule,
24 I try to let you in advance know that if -- if I'm
25 able to do so. And if there is a day that the

1 testimony ends a little bit early, then we'll release
2 you earlier than the 4:30. So, that's the schedule
3 for the case.

4 So it's today, Wednesday, Thursday, Friday,
5 maybe we finish on Friday, but the latest we anticipate
6 the case will go will be Monday. All right? So,
7 that's the schedule.

8 Now, if along the way you do have questions
9 or anything like that that comes up that you want
10 answered, please don't start waving to me as you're
11 going by, okay, because you want to ask me something.
12 My officer is -- will take any questions that you
13 have, he's very good about that. And then, whatever
14 questions you have, if he can't answer them he'll
15 bring them to me and I'll respond to you as promptly
16 as I -- as I can.

17 Now, if for some reason we're in the middle
18 of the trial and you need a break and you -- you don't
19 know or you don't foresee a break coming any time soon
20 and you're thinking I really need a break; you can
21 start waving at me at that point. All right. So,
22 just get my attention and -- and we'll -- we'll take a
23 break.

24 So, that completes my instructions. And so,
25 what we're going to do is -- it is 12:40, so we're

1 going to give you a little bit longer for lunch so
2 that we can address some issues. You -- you wanted to
3 be heard? Okay.

4 (Sidebar discussion begins)

5 MR. CLARK: So, we were going to do like
6 some motions after -- I have whittled them down --

7 THE COURT: Okay.

8 MR. CLARK: -- so they're substantially less
9 than (inaudible) -- working on --

10 THE COURT: Okay.

11 MR. CLARK: But I was thinking perhaps we
12 can open tomorrow and start with Dr. -- Mr. Gallagher
13 in the morning, and then I have my doctor lined up for
14 the afternoon.

15 THE COURT: Okay. I mean, as long as you're
16 telling me that that -- that's not going to in any way
17 move the case back out any further.

18 MR. CLARK: I don't think so. My -- my
19 opening is going to be maybe 20 minutes.

20 THE COURT: Okay.

21 MR. CLARK: You know.

22 THE COURT: Okay. And you (inaudible) --

23 MR. GULINO: So, we're just going to do
24 openings and --

25 THE COURT: And then we can deal with the

1 motions.

2 MR. GULINO: -- motions today. Okay.

3 THE COURT: Okay.

4 MR. GULINO: Fine.

5 MR. CLARK: Wonderful.

6 THE COURT: So, we'll send them home--

7 MR. GULINO: Good.

8 MR. CLARK: (Inaudible).

9 THE COURT: Okay.

10 MR. GULINO: I'm easy.

11 (Sidebar discussion concluded)

12 THE COURT: All right. So you're -- this is
13 one of the days that you'll get an early release. And
14 as I said, this isn't interfering with the scheduling
15 in any way because we factor all of this in. There
16 are matters that we can address outside of your
17 presence when you're not here, so we make good use of
18 our time.

19 So, I'm going to excuse you for today. And
20 then we'll get started first thing in the morning.
21 We'll take care of what we need to take care of, so
22 that we are ready for you. Rather than me giving you
23 an extended lunch and then perhaps we -- we have to go
24 a little bit further because we haven't quite resolved
25 some of our issues.

1 So, we will release you for today. And this
2 is the first time of many times that you will hear me
3 say, please remember -- do not talk about this case.
4 So, we'll see you tomorrow morning at 8:30 to start at
5 9 o'clock. Get home safely. We'll collect your
6 sheets on the way out. All right. And remember, you
7 are Judge Carter's jury, remember to bring your --
8 your jury -- your badge, all right, you're going to
9 need that to get in.

10 (Pause in dialog)

11 (Jurors exit courtroom)

12 THE COURT: Okay. So, let's take an hour.
13 See you back in an hour.

14 (Recording off)

15 (Recording on)

16 THE COURT: Okay.

17 (Pause in dialog)

18 THE COURT: All right. So, we're back on
19 the record in Munoz vs. Ciminelli, et al.

20 All right. So, we left off, Mr. Clark, you
21 were indicating that you were narrowing down a number
22 of the preliminary motions that you filed. And so,
23 what have you been able to accomplish?

24 MR. CLARK: Well, I'll just --

25 THE COURT: What's left for me to decide?

1 MR. CLARK: All right. Let me just -- I may
2 need the assistance of the Court. Let me see.

3 (Pause in dialog)

4 MR. CLARK: Okay. So, the ones would be --
5 the ones I believe we definitely need the Court's
6 assistance on now, I'm on my pretrial on page four.

7 THE COURT: Right.

8 MR. CLARK: Roman numeral 1, 4, 5 -- 10 --
9 and that's it for now. And then the other ones to be
10 aware of, or I don't even know if we should do it, at
11 least I can identify it but I'm not sure we need to
12 spend much if any time on it today, would be --
13 additional ones would be 2, 6, 7, 8 -- and 15. But I
14 don't need to discuss those -- those additional ones
15 now or today, I just -- but in -- in any event, those
16 are the ones.

17 THE COURT: Okay.

18 (Pause in dialog)

19 THE COURT: So then we can start, I guess,
20 with number one, which is the defense being precluded
21 from referencing plaintiff's history of stomach
22 cancer, radiation therapy and other irrelevant
23 illnesses.

24 MR. CLARK: Yes. And so, for many of these
25 we did submit a -- a pocket brief. And -- just to

1 alert the Court to that. So basically, I believe the
2 defendant is going to want to introduce evidence
3 primarily by cross examining the plaintiff as to those
4 medical issues. And I believe the defendant's
5 argument is going to be that -- there's a permanency
6 charge and that would go to the life expectancy issue.

7 But the problem is that the defendant has no
8 expert that opines within a reasonable degree of
9 medical probability that his life will probably be
10 shortened because of cancer, because of a history of
11 stomach cancer.

12 That is something that would require medical
13 testimony. The cancer -- is it in remission, is it
14 not in remission, what are the circumstances. And
15 that's all expert testimony because if you're just
16 going to say, well, you had stomach cancer that's just
17 invites the jury to speculate that, oh, what's that
18 all about and he made -- that -- that sort of thing.

19 And we do have case law directly on point,
20 that's in my -- my papers. The one that appears to be
21 most relevant is Green vs. NJM, 160 NJ 480, at 492, a
22 Supreme Court opinion from 1999.

23 The Court held it was an error to allow
24 evidence of an injury from a prior accident where the
25 defendant had not shown the injury was related to

1 plaintiff's claims in the subject trial.

2 And then, the Paxton case, is a 1961 Supreme
3 Court opinion. Evidence of prior injuries in the
4 absence of a logical relationship to the issue in the
5 case should be excluded.

6 And then, in the unpublished opinion,
7 Appellate Division opinion from 2012, Oppansia
8 (phonetic), the Court found that the absence of expert
9 testimony linking a previous condition to plaintiff's
10 injuries is impermissible, that is it is likely to
11 lead the -- mislead the jury or cause the jurors to
12 speculate that the previous condition contributed to
13 or even caused the plaintiff's injury.

14 So, just as a plaintiff is not permitted to
15 present speculative medical evidence in the case, like
16 -- the plaintiff can't start testifying that, you know
17 -- I have liver issues now, without a doctor linking
18 liver issues to the incident.

19 And in the same way, the defendant should
20 not be permitted to -- generally talk about other
21 issues to make an argument that his life expectancy
22 will therefore be shorter -- and the absence of expert
23 testimony showing that. Thank you.

24 MR. GULINO: Part of, I believe, the
25 plaintiff's claim for pain and suffering is loss of

1 enjoyment of life. And if he's got these liver
2 issues, he's got a certain level of enjoyment of life.

3 Now, be that's as it may, Dr. Helwig's
4 (phonetic) records refer to an x-ray taken on, I
5 think, February -- 16th, 2016, and I believe the
6 plaintiffs are making an allegation that there is some
7 type of lumbar injury, as well, here. And the x-ray
8 report, which is in Dr. Helwig's records, which I will
9 probably try to bring out on cross examination. I'm
10 reading it for the record.

11 "X-rays," and this is Dr. Helwig's
12 interpretation and/or synopsis of the report. "I
13 reviewed a report from Barnabas Imaging of an MRI of
14 the lumbar spine dated 2/4/16. Straight lordosis is
15 noted, with small central protrusion at L5-S1.
16 Herniated disc or significant central canal stenosis
17 is otherwise not seen. Signal abnormality is also
18 noted that the radiologist states is," open quote,
19 "suggestive of prior radiation therapy," end quote.

20 Part of his condition. They're going to
21 start talking about his lower back and changes in its
22 configuration that are shown in an x-ray or in an MRI,
23 I think I'm entitled to (indiscernible), to explain
24 why.

25 THE COURT: You said something about liver.

1 MR. GULINO: I'm sorry?

2 THE COURT: You said something about a
3 liver. Is that something --

4 MR. GULINO: Well, he was talking before
5 about the fact that he's got liver issues or
6 something. Okay.

7 THE COURT: All right. I didn't hear liver.

8 MR. GULINO: Yes.

9 THE COURT: I heard cancer.

10 MR. GULINO: And --

11 THE COURT: It --

12 MR. GULINO: -- that's -- that --

13 THE COURT: Stomach cancer.

14 MR. GULINO: Okay.

15 THE COURT: Is that separate from --

16 MR. GULINO: And then he had his stomach
17 cancer. Are they all related or not? I don't know.
18 But it goes to the issue of loss of enjoyment of life,
19 which is part of his pain and suffering.

20 But -- but this is more important. This is
21 really the reason that I'm not too sure. Do I intend
22 to do it? I don't know. I just don't want to be
23 precluded from that. If the doctor is going to start
24 talking about changes in his lower spine -- then I
25 believe I'm entitled to start talking about the

1 "suggestive of prior radiation therapy."

2 Now, if the Court wants me to limit it to
3 just radiation therapy and no stomach cancer, okay.
4 But I -- I can't be -- I don't believe I should be
5 precluded from that -- or at least try to explain what
6 that shows. And that shows a difference in his lower
7 spine. And that is from the radiation, according to
8 the x-ray report, which is used by Dr. Helwig, their
9 expert.

10 THE COURT: Do you want to address that?

11 MR. CLARK: Yes, just briefly. I think
12 important, defense counsel admits he does not know if
13 there's any relationship, medical relationship of the
14 stomach cancer issue to the issues in this case. So,
15 I think that that -- that -- that part is easy.

16 So, the proffer that defendant has of the
17 relevance of this is that it goes to the claim for
18 loss of enjoyment of life. So, basically, the
19 argument, as I'm hearing it now, is that I want to
20 tell the jury about stomach cancer and radiation,
21 because he's claiming loss of enjoyment of life, so
22 therefore I want to go into various things why his
23 life may not have been enjoyable before.

24 So, under that logic you could bring in
25 every unrelated medical condition a plaintiff has ever

1 had. And for that matter, you could bring in every
2 bad experience in life that a plaintiff has ever had
3 on the basis that that's all relevant to his loss of
4 enjoyment of life claim.

5 And I -- I don't see any linkage between the
6 loss of enjoyment of life claim and bad things that
7 happen in someone's life. I see -- I -- I don't -- I
8 don't think there's a fair relationship there, in
9 terms of basic relevance. And there is no expert
10 testimony. The expert testimony issue seems to be now
11 moot as defense counsel app -- as I understood it, was
12 conceding that he doesn't have any evidence of a
13 linkage.

14 THE COURT: I thought that I was hearing,
15 you're not necessarily going to be raising that he had
16 stomach cancer--

17 MR. GULINO: I'm sorry?

18 THE COURT: I thought that I heard from you
19 you weren't raising that he had stomach cancer. You
20 want to address that part of the record that --

21 MR. GULINO: That would be my fall back
22 position. The reason, Your Honor, that -- that maybe
23 the stomach issue comes out, maybe -- is if Mr. Munoz
24 gets on the stand and says he was the healthiest guy
25 in the world on the day of his accident. That there

1 was nothing wrong with him. That he could eat what he
2 wants, drinks what he wants, do what he wants. Now it
3 becomes relevant. It depends on what his direct
4 testimony is, in that regard.

5 On the second part of that argument, though,
6 is about the radiological film studies and the effect
7 of the -- the radiation treatment on that and how it's
8 changed it.

9 THE COURT: So -- so are you -- I think I'm
10 hearing sort of confusing arguments. So, are you
11 arguing that -- your cross examination on this issue
12 goes to his loss of enjoyment of life claim? Or are
13 you arguing that that which is contained in the record
14 related to radiation -- and the -- the link between
15 that and the lower back claims, so -- so is your
16 argument more that it's -- whatever lower back issues
17 the plaintiff has are really not related to this fall,
18 but rather related to the radiation, as is suggested
19 in the report.

20 MR. GULINO: At least the interpretation of
21 the films.

22 THE COURT: Okay.

23 MR. GULINO: In what they see.

24 THE COURT: So --

25 MR. GULINO: And what I --

1 THE COURT: -- so that has nothing to do,
2 necessarily, with the loss of enjoyment -- I mean,
3 that's a separate issue --

4 MR. GULINO: Totally separate.

5 THE COURT: That's a separate argument.

6 MR. GULINO: Those are two separate issues.
7 And they -- and they really depend on the plaintiff's
8 direct, Judge. You know, these are cross examination
9 type items. These aren't -- these aren't the kind of
10 things I'm going to do on direct. But on cross
11 examination [sic], if they start saying that he was --
12 the best shape of anybody you have ever met five
13 minutes before the accident, then it come -- becomes
14 relevant.

15 If they say that his lower back was affected
16 by this fall and it shows up in films, then I think
17 I'm entitled to say what makes the films different.
18 And it goes back to that. That's all. It has to do
19 with what they do on direct more than what I do.

20 THE COURT: Are you -- are you claiming a
21 back injury related --

22 MR. CLARK: Absolutely. And they know that.
23 It's in the expert reports.

24 THE COURT: Okay.

25 MR. CLARK: That's not an "if"; they know

1 that that's the case.

2 THE COURT: Okay.

3 MR. CLARK: And when I look at the note of
4 2/16/16, he -- there's an x-ray report -- I'm sorry,
5 not an x-ray, there's an MRI and the treating doctor
6 talks about that and says her -- and he's -- quoting
7 about the herniated disc -- "significant central canal
8 stenosis is otherwise not seen."

9 And then it says, "The signal abnormality is
10 also noted that the radiologist states is suggestive
11 of prior radiation therapy." So, the fact that
12 there's a signal abnormality in there -- there's --
13 there's -- I mean, if he wants to -- if he wants to
14 cross Dr. Helwig and say, well, there was a signal
15 abnormality, right? And he could say, yes, but he
16 shouldn't say -- and that's from radiation therapy
17 because he had cancer. I mean, it has nothing to --
18 to do with the two. And I do have the note here, if
19 the Court wants to take a look at it.

20 THE COURT: Sure.

21 MR. CLARK: The one from -- from 2/16/16 is
22 basically the bottom section.

23 MR. GULINO: That's what I quoted to you,
24 Your Honor. The exact passage.

25 (Pause in dialog)

1 MR. GULINO: So, if we find a signal
2 abnormality we cannot explain it away? Does that mean
3 a signal abnormality means an injury from a trauma?
4 But we can't explain it away by saying maybe?
5 According to the x-ray report -- it's suggestive of
6 prior radiation therapy.

7 (Pause in dialog)

8 THE COURT: Who -- whose note is this,
9 specifically?

10 MR. GULINO: It's in Dr. Helwig's report. I
11 don't know. It's in his records. He used them.

12 THE COURT: You said it's in his records or
13 in his -- his report? Which one is it?

14 MR. GULINO: This is --

15 MR. CLARK: That's the treating --

16 MR. GULINO: -- what you have --

17 MR. CLARK: -- physician's records.

18 MR. GULINO: I'm sorry.

19 THE COURT: Okay.

20 MR. GULINO: What you have in front of you
21 is what I have, what I quoted to you. These are from
22 Dr. Helwig's records. I guess his office records.

23 (Pause in dialog)

24 THE COURT: So this is from the plaintiff's
25 treating physician.

1 MR. GULINO: He -- yes. Who is scheduled to
2 testify.

3 THE COURT: Okay.

4 MR. GULINO: He's their surgeon.

5 THE COURT: Okay.

6 MR. GULINO: He operated on the plaintiff
7 twice for the -- for the shoulder.

8 THE COURT: Okay. Was -- was the treating
9 physician deposed?

10 MR. GULINO: No.

11 THE COURT: Okay.

12 MR. GULINO: No, he was not.

13 (Pause in dialog)

14 THE COURT: And so -- if the treating
15 physician is causally relating the plaintiff's back
16 injury to this accident, why is it not fair cross
17 examination if there is a report that the doctor
18 considered and used -- having considered that report
19 in ultimately forming his opinion?

20 MR. CLARK: Just very quickly, I just want
21 to start with the basis, which is the defense counsel
22 -- defendant wants to introduce the stomach cancer and
23 the radiation issue to have the jury speculate that
24 maybe he won't live long, without linking that up.

25 THE COURT: I think that's --

1 MR. CLARK: That --

2 THE COURT: -- a separate issue.

3 MR. CLARK: -- it is -- it is separate.

4 THE COURT: Because I kept saying that there
5 -- there are two different arguments.

6 MR. CLARK: Yes.

7 THE COURT: So, put -- putting that aside.

8 MR. CLARK: Yes. So, with regard to this, I
9 think it is fair for defense counsel to be able to ask
10 Dr. Helwig, cross examine Dr. Helwig on the report,
11 which says that there was a signal abnormality. But I
12 don't see any basis when we do -- when we weigh
13 relevance and prejudicial evidence when we -- when we
14 do that -- that weighing, why do we need to talk about
15 radiation.

16 There's no -- first of all, there's no
17 indication that the abnormality somehow affects the
18 herniated disc or not. The reading of that.
19 Secondly, even if the signal abnormality does affect
20 the ability to read whether or not there's a herniated
21 disc, there's no need to talk about radiation therapy.
22 They can -- they can simply say there's a signal
23 abnormality and go from there. But there's no need to
24 inject radiation, which connotes cancer in many
25 people's mind, if people have had radiation treatment.

1 So, I think that it can be done without
2 bringing in radiation or (indiscernible) --

3 THE COURT: But if you --

4 MR. GULINO: If I --

5 THE COURT: -- bring up a signal abnormality
6 what does a jury do with that? Because it -- like,
7 what does that mean?

8 MR. CLARK: Well, the doctor could explain
9 that and say what it is. I'm -- I'm not sure what a
10 signal abnormality means, but I guess it could also be
11 if a patient moves in the MRI machine or something. I
12 don't -- I just don't know. Or -- I don't know.

13 And -- and I think it's -- yes. I just want
14 to bar radiation and cancer -- because they don't have
15 a doctor to link it up. And I think that they can
16 explore -- what a signal abnormality is without saying
17 it's from radiation. A doctor could explain what the
18 signal abnormalities are.

19 THE COURT: What it seems like the doctor is
20 saying himself that that signal abnormality is
21 something that's suggestive of prior radiation
22 therapy.

23 MR. CLARK: That's the -- that's the
24 radiologist's --

25 THE COURT: But --

1 MR. CLARK: -- and then our doctor is
2 putting it in his report, so it's like double hearsay.

3 THE COURT: Well, that's the reason I asked
4 whose report was this, number one.

5 MR. CLARK: Yes.

6 THE COURT: But -- and I don't know if this
7 is just a typo in it, it says, "Signal abnormality is
8 also noted at -- the radiologist states -- which -- it
9 suggest that he's agreeing that as the radiologist
10 states is sug -- he meant to say, as the radiologist
11 states is suggestive of prior radiation therapy. So,
12 I think it would be improper for him necessarily to
13 say that, as the radiologist states, unless the
14 radiologist himself is coming in.

15 But if he's drawn the conclusion himself
16 that this abnormality is somehow suggestive of prior
17 radiation therapy and that factors into a finding of a
18 herniated disc, I don't see why that is something that
19 could not be explored. You're --

20 MR. GULINO: Well, isn't the doctor on cross
21 examination -- am I not permitted to cross examine him
22 on his report? In which he quotes the radiologist as
23 saying the signal abnormality is suggestive of prior
24 radiation therapy?

25 THE COURT: So -- so I -- that's -- I don't

1 think you heard me correctly.

2 MR. GULINO: Okay. All right. I --

3 THE COURT: I don't think you heard me--

4 MR. GULINO: -- maybe I didn't. I'm sorry.

5 THE COURT: -- yes, I don't think you heard
6 me. Yes.

7 MR. GULINO: But -- but --

8 MR. CLARK: I --

9 MR. GULINO: -- abnormality is abnormality,
10 Judge, that's what it means. So, we have to explain
11 it away. We can't just say, well, he's got a signal
12 abnormality. What do they know? The jury is not
13 going to know anything. They're six lay people.
14 We've got doctors coming in on the stand that are
15 going to explain to them what medicine is and what
16 these things are. And we're entitled to get an
17 explanation from him.

18 THE COURT: I think I -- I think I said
19 exactly what --

20 MR. GULINO: Okay.

21 THE COURT: -- you're saying --

22 MR. GULINO: All right.

23 THE COURT: -- and you're getting a little
24 hyper -- and that's exactly what I said. What -- what
25 is an abnormality and why shouldn't the jury be -- be

1 told what it is. And, to the extent that -- so -- so
2 here's the problem, right, so this doctor --

3 MR. CLARK: I have -- I have the actual
4 report here.

5 THE COURT: Okay.

6 MR. CLARK: And what's -- I'll give it to
7 Your Honor. But it's saying the signal abnormality is
8 in the thoracic -- thoracic through the lumber, but
9 anyway, so -- it's on the second page, towards the
10 bottom. Not highlighted. Thank you.

11 (Pause in dialog)

12 MR. CLARK: So, that's where it comes from.

13 THE COURT: Okay. So, we're back to why
14 couldn't this doctor testify if -- if this is in his
15 report and he used his having reviewed that record and
16 ultimately coming to a conclusion one way or the other
17 -- it seems to the Court that this is fair game. That
18 -- that he can certainly explain what this signal
19 abnormality is and how that factored into his
20 determination that this injury alleged by the
21 plaintiff is or is not related to the accident.

22 So, if there's a back injury in this case,
23 which there is, there doesn't have to be cross
24 examination necessarily that the plaintiff had cancer,
25 but -- but certainly, it -- it seems to me that it's

1 fair game, once it's in his report and he used his
2 examination of that particular record in ultimately
3 formulating an opinion one way or the other that --
4 that it's fair game.

5 MR. CLARK: So, under the -- under the case
6 law, the expert is not allowed to rely on the reports,
7 they have to view the films themselves.

8 THE COURT: Okay.

9 MR. CLARK: So, I do not expect Dr. Helwig
10 will be relying on the radiologist's report -- I guess
11 that the Perone (phonetic) case. He's going to be
12 relying on his own view of the films, which we'll have
13 up.

14 THE COURT: Okay.

15 MR. CLARK: So in that scenario, I don't
16 know about cross examining him on the report of a --
17 non-testifying radiologist.

18 THE COURT: Well, and this is why I said --
19 the sentence as it reads, and this is the problem with
20 trying to interpret what somebody else is saying. But
21 it seems as if there is a typo in the sentence. So it
22 says, "Signal abnormality is also noted at the
23 radiologist states" [sic] -- I don't think that should
24 be "at," he probably meant to put "as the radiologist
25 states."

1 So, I don't think it's appropriate,
2 necessarily, for him to say the radiologist also
3 agrees that that's what this -- this signal
4 abnormality is. But to the extent that this doctor
5 formulated his own opinion that having reviewed the
6 films, that this was a signal -- signal abnormality
7 and, in fact, it is suggestive of prior radiation
8 treatment, that's his own opinion. Despite whether or
9 not it's also the radiologist's opinion.

10 And I don't think that he can sort of also
11 want to throw in that -- that it's -- it happens to be
12 the radiologist's opinion, as well. He can say these
13 are the records that he reviewed. To the extent that
14 the radiologist also says that is neither here nor
15 there -- if he came to his own opinion based upon his
16 review of the films. All right.

17 MR. CLARK: That's helpful.

18 THE COURT: All right.

19 MR. CLARK: Thank you, Judge.

20 THE COURT: Okay. Thank you.

21 (Pause in dialog)

22 THE COURT: Let's see, let's move on then to
23 number four, which is --

24 (Pause in dialog)

25 THE COURT: The defendant should be

1 precluded from seeking to enter evidence, including
2 testimony that there were no prior incidents and/or
3 OSHA violations.

4 MR. CLARK: Judge, this is a standard motion
5 that we've made in these cases.

6 (Pause in dialog)

7 MR. GULINO: (Inaudible) -- I thought it was
8 2, Your Honor.

9 MR. CLARK: I am seeking to bar the
10 defendant from arguing -- it's almost really in the
11 line of character evidence, from arguing hey, you
12 know, we're like -- generally we're a really safe
13 contractor, we have had no prior accidents, we have
14 had no prior OSHA violations. And there's no OSHA
15 violations in this case, OSHA didn't come out and cite
16 anything. So, that is the -- nature of this motion.

17 And the basis for that, legally speaking is
18 -- I have this in the Rograf (phonetic) case, and just
19 take a simple fall down. You're not permitted to
20 argue something is safe because no one else fell in
21 the past. And that's the idea with that one.

22 And then -- just put in here, based on the
23 Rograf and the Schaefer case that the lack of -- the
24 absence of prior act -- incidents is not admissible to
25 refute a claim of an unsafe condition, or otherwise to

1 show the defendants were not negligent. So, that's
2 that. And then -- that's with regard to -- we've had
3 no prior accidents, no prior incidents or minimal
4 incidents, generally speaking.

5 And then the second one deals with, we've
6 had no prior OSHA violations and OSHA didn't come out
7 and cite anyone here. OSHA is very important in this
8 case. When I say OSHA I mean the -- the regulations,
9 the statutory scheme. It's -- it's really no
10 different than in an auto case, where the Title 39 is
11 important. So, if you have a red light/green light
12 case -- the stop sign is important, the rules about
13 stopping at red lights and stop signs is important.

14 But you don't get to say in those cases I
15 didn't get a ticket or the police didn't ticket me.
16 It's evidence upon which the jury can use to decide if
17 the defendant was negligent.

18 It talks about it in the Alloy (phonetic)
19 case. It says, "Although OSHA issued a violation to
20 one defendant and not to the defendant at trial, the
21 failure by OSHA to find a violation does not preclude
22 a determination that the party was negligent. And
23 also, if OSHA did fine someone or issue a ticket, that
24 doesn't say they're definitely responsible.

25 So, whether or not law enforcement issues a

1 ticket is separate from whether or not a regulation
2 was violated. It's just another industry standard or
3 another standard upon which the jury can decide the
4 issue of negligence.

5 And also in this case, there's -- OSHA
6 didn't even investigate the incident. So, to have the
7 jury start to speculate off and say, oh, well, OSHA
8 decides this case and they didn't ticket. So
9 therefore, we're not going to do anything. I think
10 that's not permissible under the law.

11 (Pause in dialog)

12 MR. CLARK: And that's the basis for that
13 motion.

14 THE COURT: Okay.

15 MR. CLARK: Thank you.

16 MR. GULINO: There were 2,000 workers at
17 this site, over the course of time. Tens of millions
18 of dollars (inaudible). Gallagher's report -- unless
19 I'm reading into it -- basically says it was a mess.
20 And he's going to come after my guys for,
21 quote/unquote, without saying it, "OSHA violations."
22 He's going to talk about holes need to be covered.
23 OSHA violations. He's going to talk about a few other
24 things. OSHA violations. Well --

25 THE COURT: Who is going to say OSHA

1 violations?

2 MR. GULINO: Mr. Gallagher, who is his
3 expert. He's his liability expert.

4 THE COURT: Okay.

5 MR. GULINO: Who worked --

6 THE COURT: And he talks --

7 MR. GULINO: -- for OSHA --

8 THE COURT: -- about OSHA violations?

9 MR. GULINO: -- in 1985 and then has been
10 doing this for the last 32 years.

11 THE COURT: He -- he talks about OSHA
12 violations?

13 MR. GULINO: That's the basis of their case.

14 THE COURT: Okay.

15 MR. GULINO: So, they're going to say that
16 we have OSHA violations -- but I'm not allowed to say
17 there were never any OSHA violations.

18 MR. CLARK: The only OSHA violation Mr.
19 Gallagher talks about is --

20 (Pause in dialog)

21 MR. CLARK: The only OSHA violation Mr.
22 Gallagher talks about is that these holes were not
23 properly covered and posed a tripping hazard. And a
24 fall down hazard. OSHA has a very specific standard
25 on this. If a hole is two inches or more it has to be

1 covered with plywood and marked out because it's a
2 tripping hazard.

3 THE COURT: Are those the -- those the hole
4 -- he only fell in one hole, though. Right?

5 MR. CLARK: Well, there's -- there was just
6 one hole caused the fall.

7 THE COURT: Right.

8 MR. CLARK: There were -- there were two on
9 the roof. The -- I'm just -- for the reference, I'm
10 holding up plaintiff's exhibit 8 and plaintiff's
11 exhibit 3. Plaintiff's exhibit 8 is the holes after
12 the fact, after the construction was complete and the
13 -- the caps were put on and they're clearly visible.

14 But plaintiff's exhibit 3 more shows how the
15 holes were at the time of the incident. They were
16 covered up and -- and concealed.

17 So, the only OSHA violation -- and when we
18 say "OSHA violation", it's a little bit of a word play
19 -- because the violation isn't OSHA coming out and
20 issuing a ticket and saying you have now been
21 violated. The violation is violating a standards, and
22 OSHA standard, an industry standard, what should be
23 done.

24 And those are the only violations that --
25 that Mr. Gallagher talks about. He doesn't go into a

1 history of OSHA violations at this site, or violations
2 dealing with other stuff.

3 And the argument and -- and we just heard
4 the argument and -- that argument is -- highly
5 prejudicial, not relevant and specifically, it's
6 excluded in the Rograf and Schaeffer case, which is
7 defendant wants to stand up and say there were 2,000
8 employees at this time and of all the 2000 people this
9 is the only person who claimed an injury. Or there
10 was very few injuries.

11 And that -- that kind of testimony is --
12 that kind of argument and testimony is exactly what
13 we're trying to preclude here. That's -- that's --
14 it's almost character evidence to say that. You know,
15 to go in--

16 THE COURT: I mean I -- this is the problem
17 with trying to anticipate, I guess, what people are
18 going to argue and then rule in advance. It's very
19 difficult. Because you're not -- you're not -- first
20 of all, you're not arguing that you didn't have prior
21 incidents there.

22 MR. GULINO: But and -- and that's part of
23 it. We have no prior incidents -- this is a notice
24 case, it's a negligence case. They have to show that
25 we either created a condition, which obviously

1 somebody must have.

2 THE COURT: Okay.

3 MR. GULINO: But they have to prove that
4 it's dangerous, right?

5 THE COURT: Okay.

6 MR. GULINO: Unreasonably safe. Or not
7 reasonably safe. And this -- notice. And we're going
8 to say no, there's no notice, nobody has ever made any
9 complaints, nobody has ever had any accidents. They
10 were walking up on this roof all the time.

11 THE COURT: Okay. And --

12 MR. GULINO: This was a work area.

13 THE COURT: -- and so, with respect to the
14 OSHA violations, I'm not sure I'm understanding the
15 argument that if one side is going to say that there
16 were, that the other side is going to say -- I mean,
17 you're not talking about in general that there's never
18 been OSHA violations.

19 I mean -- I mean, what is it that -- I don't
20 like doing this at all. Because it -- it's not fair,
21 necessarily, to you to -- to -- to basically have to
22 tell me exactly everything that you're going to ask on
23 cross examination. Right?

24 MR. GULINO: I --

25 THE COURT: So -- and I can appreciate us

1 wanting to make this as clean as possible, so that --
2 that perhaps there's fewer objections, it's less
3 annoying to the jury and -- and we can make the case
4 go in clean, so we don't have to do it again. Right?

5 But -- your questions, as far as OSHA, are
6 you asking questions related to OSHA violations, to
7 the extent that the -- the plaintiff's expert
8 references that hole being an OSHA violation? Why
9 isn't that --

10 MR. CLARK: Well, I --

11 THE COURT: -- something that can be cross
12 examined on?

13 MR. GULINO: If I may, Judge, just -- just
14 because Gerry mentioned this. OSHA violation -- on
15 page seven of his report, which was exchanged--

16 THE COURT: Okay.

17 MR. GULINO: And I have it.

18 THE COURT: Okay.

19 MR. GULINO: He makes reference to one, two,
20 three -- four, five particular OSHA standards that he
21 considers to be violated.

22 THE COURT: Okay.

23 MR. GULINO: All right.

24 THE COURT: Okay.

25 MR. GULINO: And --

1 MR. CLARK: In connection with this
2 incident. He's not talking about prior violations--

3 MR. GULINO: Okay.

4 MR. CLARK: -- on the --

5 MR. GULINO: Okay. But we didn't get any
6 violations, all right.

7 MR. CLARK: It's the --

8 MR. GULINO: One --

9 THE COURT: In -- in connection --

10 MR. GULINO: -- was -- he's talking about
11 we're supposed to have accident prevention programs.
12 We did.

13 THE COURT: In connection with this
14 incident. Right?

15 MR. GULINO: It's in his report.

16 THE COURT: I --

17 MR. GULINO: And he's claiming it --

18 THE COURT: -- nobody is answering my--

19 MR. GULINO: -- and he's going to get on the
20 stand and -- talk about these five.

21 THE COURT: My frustration is going through
22 the roof.

23 (Pause in dialog)

24 THE COURT: I'm trying to help --

25 MR. GULINO: I --

1 THE COURT: -- but it seems as if I might as
2 well just leave. Because I'm trying to ask a
3 question, I'm not getting the answer to it. I'm not
4 going to do this if -- there's just going to have to
5 be an objection when -- when the time comes. Because
6 we're not going to do this back -- we're not going to
7 get anywhere if we keep going at this rate.

8 So my question is whether or not you are
9 addressing OSHA violations previously or OSHA
10 violations with respect to this particular hole and
11 this particular incident.

12 MR. GULINO: This particular incident.

13 THE COURT: Okay. Why isn't that fair game?
14 If your guy is saying that there was one, then why
15 couldn't he argue that there wasn't?

16 MR. CLARK: I have absolutely no problem
17 with him trying to argue that this does not constitute
18 an OSHA violation.

19 THE COURT: Okay.

20 MR. CLARK: That's not -- that's not a
21 problem.

22 THE COURT: Okay.

23 MR. CLARK: And the reason I bring this up
24 is because I have seen this before and I have seen
25 these arguments. And that's why I'm trying to head it

1 off at the pass.

2 THE COURT: Okay.

3 MR. CLARK: But -- what the other argument,
4 which is not permissible under the Rograf and
5 Schaeffer case, is that no one else fell here, he's
6 the only guy that fell here. Therefore, this must be
7 safe. And that is specifically precluded under the
8 2000 opinion of Rograf.

9 THE COURT: Who said -- who says he's going
10 there? Who says that that's what he is going to do?
11 You're -- you're anticipating that he's going to argue
12 that nobody else but him fell, so it couldn't possibly
13 be--

14 MR. CLARK: Be dangerous.

15 THE COURT: Right.

16 MR. CLARK: Right. He's -- he's making the
17 argument that the plaintiff is the only person that
18 fell here --

19 THE COURT: Okay.

20 MR. CLARK: -- ergo, it must not be
21 dangerous and that is specifically precluded --

22 THE COURT: That's not the --

23 MR. CLARK: -- under Rograf --

24 THE COURT: -- argument that --

25 MR. CLARK: -- and Schaeffer.

1 THE COURT: -- you're making. Is it?

2 MR. GULINO: It's a -- it's a static
3 condition that hasn't changed. If you've got people
4 who fall over a particular step in a movie theater and
5 you have 500 patrons a night, and you go for an entire
6 month and nobody has fallen, it goes to the issue of
7 whether or not the condition is dangerous. Because
8 it's the same condition. And so --

9 THE COURT: Well, how --

10 MR. GULINO: -- lack of --

11 THE COURT: -- well, how do you know how
12 long the condition has been there?

13 MR. GULINO: Somebody is going to come in
14 and testify that -- that this was done by the -- the
15 roofing people --

16 THE COURT: Okay.

17 MR. GULINO: -- Paino -- is going to come in
18 and talk about when the roof was laid and when those
19 holes were cut and why they were cut. Now, I can't
20 tell you off the top of my head, Judge, I apologize--

21 THE COURT: Okay.

22 MR. GULINO: -- I don't know exactly what
23 he's going to say. But it was a period of time before
24 this accident.

25 MR. CLARK: That is squarely what was

1 addressed in Rograf and Schaeffer. That was a fall
2 down on a sidewalk case, where there was a declivity,
3 where it was up and it's a trip and fall. And the
4 evidence was no one else fell here, therefore it must
5 be safe.

6 The law is clear that the absence of prior
7 incidents is not admissible to refute a claim of an
8 unsafe condition or otherwise to show the defendants
9 were not negligent. It's squarely -- two cases,
10 Rograf and Schaeffer, we've -- so that -- that's why.
11 The defendants should not be permitted to -- they can
12 -- they can argue, no problem with them saying this
13 didn't violate OSHA or this was -- this was a safe
14 condition. But they can't enter lack of prior
15 accidents to prove it's safe. And that's not me
16 saying it, it's the -- those --

17 THE COURT: The notice --

18 MR. CLARK: -- two cases.

19 THE COURT: -- perhaps, is a separate issue.

20 MR. GULINO: It's -- it's a notice issue,
21 yes, Your Honor. And -- and it does show -- it goes
22 to the issue of whether or not it's a -- it's in a
23 reasonably safe condition. Because -- because ---

24 THE COURT: That nobody --

25 MR. GULINO: -- if five people fell --

1 THE COURT: -- else fell?

2 MR. GULINO: -- if five people fell - that
3 shows one thing. You've got maybe an unreasonably --
4 a -- an unreasonably safe condition [sic] --
5 unreasonably whatever. An unsafe condition.

6 THE COURT: I don't think you get to --
7 we're addressing a bunch of issues that may not
8 necessarily come up through -- during your openings.
9 Because you're not making those claims in your
10 openings until the --

11 MR. GULINO: No, I'm not.

12 THE COURT: -- evidence is what the evidence
13 is.

14 MR. GULINO: I'm not.

15 THE COURT: Right?

16 MR. GULINO: Yes.

17 THE COURT: So once the evidence is in--

18 MR. GULINO: All of this stuff so far that
19 he's brought out is all stuff maybe for cross
20 examination. I -- I don't know what I'm -- right now,
21 the burden is on him to show it's an unsafe condition.
22 And to show that I had notice.

23 MR. CLARK: I do have the Rogra case here.
24 And as long as defense counsel is not going to make
25 that argument in opening, I think we're good for now.

1 THE COURT: It -- it's -- that's not --
2 that's what I'm hearing.

3 MR. CLARK: Yes.

4 THE COURT: That -- that he's not going
5 there in his opening --

6 MR. GULINO: Assuming --

7 THE COURT: -- I think much of it is going
8 to await what happens on direct examination.

9 MR. GULINO: I'm assuming on openings you're
10 not going to mention what Mr. Gallagher is going to
11 say, that it is unsafe. If that's the case, then I'm
12 not going to say anything.

13 MR. CLARK: The --

14 THE COURT: Here we go.

15 MR. CLARK: I'm sorry, I have the case here
16 and it's in my hand.

17 THE COURT: Listen, we know what the case
18 says.

19 MR. CLARK: Yes.

20 THE COURT: I know what the case says. So -
21 - so you're not going to make that argument in your
22 opening. To the extent that it is an issue that's
23 unresolved, let's just stay away from it. Right? End
24 of story. Next.

25 MR. CLARK: Okay.

1 (Pause in dialog)

2 THE COURT: The Dr. Decter's videotape
3 deposition. What portions are you seeking that the
4 defendants be precluded from referencing?

5 MR. CLARK: So what we did, Judge, is I -- I
6 -- I had a -- I spent a lot of time on this, I have
7 submitted -- I did a thing and I broke it down by
8 page, line. And then I said in there why. And then I
9 attached those pages and lines so the Court can
10 actually see it in context.

11 It may -- I don't know if you want to sit
12 here and do it or walk through it, or maybe it's
13 something -- take a look at. But we don't expect
14 Decter to be for some time. I guess perhaps Thursday
15 or Friday. He's by videotape, but I guess they would
16 need to -- to redact the video. I mean, I could just
17 give some -- you want me to just give a sense?

18 THE COURT: Yes, what -- what --

19 MR. CLARK: Okay. So, we have -- I have it
20 here, it's -- it's the -- kind of brief we did, number
21 5 on page one. So, what Dr. Decter does in that
22 section, which is page 33 through page 36, is the
23 doctor starts to speculate and say -- because he had -
24 - he had -- a torn bicep tendon, which is up in the
25 shoulder, and that a year later -- and that was

1 repaired. And then they -- a year later he had
2 surgery for a rotator cuff tear.

3 And the doctor in this portion of the
4 testimony says, well, that rotator cuff tear I think
5 might have been from football or from working more or
6 this sort of thing. He starts to speculate. And I
7 think it's -- it's kind of evident when you read that
8 portion -- particularly that portion of the testimony.
9 So, he's just speculating about it. He has no --
10 there's no basis for that. So, that is that section.

11 (Pause in dialog)

12 MR. CLARK: So, like here's one of the
13 questions, for example. This is the defense counsel
14 on direct examination of their doctor. "Impingement
15 syndromes many times are not caused by trauma but can
16 be caused by congenital issues or it's really
17 congenital issues. But there's no evidence in the
18 case that this was, in fact, caused by --

19 MR. GULINO: Excuse me one second. Can you
20 give me what page that was?

21 MR. CLARK: I'm on page -- well, I'm on
22 number one.

23 MR. GULINO: No, I understand that, but--

24 MR. CLARK: Which lays it out, this is page
25 33 through page 36 of Decter.

1 MR. GULINO: Okay.

2 (Pause in dialog)

3 MR. CLARK: And then, well, maybe if you
4 have arthritis, that can cause impingement. And he
5 starts giving all these general things about what
6 could possibly cause impingement. And because that
7 testimony -- he's not saying that the impingement was,
8 in fact, caused by a congenital condition, within a
9 reasonable degree of probability, I don't think that's
10 permissible.

11 And all this kind of -- and then he says,
12 "Any athlete can get it, it can be baseball, it can be
13 football, it could be swimming." It's just complete -
14 - it's -- it's inviting the jury to speculate that
15 this condition was caused by things like baseball or
16 swimming or maybe he was born with it -- without ever
17 actually giving an opinion within a reasonable degree
18 of probability that that condition in the shoulder,
19 which we contend is from trauma, was in fact caused by
20 swimming or baseball or some other thing. So, he just
21 goes on and speculates about that.

22 Just another in the same section, from 33 to
23 36. I mean, you know, people get it using the mouse.
24 Now we see repetitive of the shoulder using a mouse on
25 a computer, like it's just -- it's very, very

1 speculative.

2 THE COURT: Is this -- so you're asking to
3 deal with redacting his -- I mean, is that what we're
4 addressing now?

5 MR. CLARK: Yes.

6 THE COURT: Okay.

7 MR. CLARK: Because they're going to do it
8 by videotape. So, I'm asking to redact that portion
9 of the video out.

10 THE COURT: Oh, okay. So, is this coming up
11 in the opening?

12 MR. CLARK: Not --

13 THE COURT: This isn't coming up in the
14 opening.

15 MR. CLARK: No, no.

16 THE COURT: Right?

17 MR. GULINO: This --

18 THE COURT: The portions of the doctor's
19 testimony.

20 MR. GULINO: -- Your Honor, this is
21 testimony -- de bene esse testimony --

22 THE COURT: Okay.

23 MR. GULINO: -- which is trial --

24 THE COURT: How are your openings --

25 MR. GULINO: No, I understand but --

1 THE COURT: -- your openings are going to be
2 three hours long. I mean --

3 MR. GULINO: But -- but the beauty of de
4 bene esse is that we know what the witness said. And
5 when we tell a jury in opening statements what the
6 evidence is going to be --

7 THE COURT: Okay.

8 MR. GULINO: -- or what we hope it to be --

9 THE COURT: Okay.

10 MR. GULINO: No, this will be the evidence
11 because this is what the doctor testified to.

12 THE COURT: Okay.

13 MR. GULINO: He testified under oath, under
14 cross examination by their attorney, and no
15 objections. One objection in the four pages that he's
16 just talking about.

17 THE COURT: Okay.

18 MR. GULINO: We waived to him -- they waived
19 to him. You can't pull it back because now we're
20 going to show the jury this film that they knew was
21 going to be used at the time of trial.

22 THE COURT: So --

23 MR. GULINO: They waived it.

24 THE COURT: -- so have you -- have you
25 reviewed whatever it is that they're objecting to, as

1 far as that video is concerned? And are --

2 MR. GULINO: What? I'm sorry?

3 THE COURT: -- you intending to -- is this
4 something that we need to address for purposes of the
5 opening?

6 MR. GULINO: I -- will tell the jury, and I
7 -- I'll tell you right now, part of my opening
8 (indiscernible) that. When it comes to damages, what
9 he says he has --

10 THE COURT: Okay.

11 MR. GULINO: -- did not come from this
12 accident.

13 THE COURT: Okay.

14 MR. GULINO: All right. I can leave it at
15 that. I -- I will be very short --

16 THE COURT: Okay.

17 MR. GULINO: -- but I will tell them that he
18 underwent two surgeries and that he didn't fall, and
19 that the first surgery was done by his doctor, this is
20 what was done.

21 THE COURT: Okay.

22 MR. GULINO: And then he didn't work for a
23 year, didn't go to therapy for a year. And then
24 showed up and had an MRI and it shows that he has
25 edema, meaning he had trauma in the shoulder.

1 THE COURT: Okay.

2 MR. GULINO: Which wasn't there the first
3 time.

4 THE COURT: Okay.

5 MR. GULINO: And then he had surgery.

6 THE COURT: Okay.

7 MR. GULINO: And that they are not related.
8 That's pretty much what I'm going to say on damages.

9 THE COURT: Okay. So, let's reserve on that
10 one and come back to it.

11 MR. CLARK: Just the -- defense counsel
12 would need time to redact the video. That's all.

13 (Pause in dialog)

14 THE COURT: If you want to give me the --
15 the portions, so that I can look at them as you've
16 described. And then I can -- I'll be more prepared to
17 address it.

18 MR. CLARK: Do you have another copy of this
19 (phonetic)?

20 MR. BERENGUER: Yes.

21 THE COURT: Did you include it in your --

22 MR. CLARK: Yes.

23 THE COURT: Okay. So then I --

24 MR. CLARK: It should be toward the end of
25 the paper clipped --

1 (Pause in dialog)

2 THE COURT: Okay.

3 MR. CLARK: You see the dep testimony?

4 THE COURT: Yes.

5 MR. CLARK: That's the one.

6 THE COURT: Yes. Okay.

7 (Pause in dialog)

8 MR. GULINO: Judge, if you'd like, I have a
9 copy of Dr. Decter's transcript.

10 THE COURT: I think I have it here.

11 MR. GULINO: An extra one for you.

12 THE COURT: I have it here.

13 MR. GULINO: Okay.

14 (Pause in dialog)

15 MR. CLARK: Judge, some of the objections in
16 there are also because they're outside the scope of
17 the reports. So, I should give you the copies of the
18 reports, as well.

19 MR. GULINO: That was subject of a motion
20 that Your Honor decided already. You decided that
21 back a few months ago.

22 THE COURT: Okay.

23 MR. GULINO: That they said that the doctor
24 went outside his scope.

25 THE COURT: Okay.

1 MR. GULINO: I have a copy of your decision
2 somewhere, Judge, it's right here.

3 THE COURT: Okay.

4 MR. GULINO: And you denied their motion.

5 THE COURT: Okay.

6 (Pause in dialog)

7 MR. CLARK: That was a motion to bar a late
8 report.

9 THE COURT: Okay.

10 MR. CLARK: We're not contesting that here.
11 We're -- in this section. We're saying that this
12 testimony is not in any of the reports. We did not
13 file a previous motion to say it was outside the scope
14 of a report. It was simply a motion to bar a late
15 report. And defense counsel is correct, that motion
16 was denied and we're not raising it here.

17 THE COURT: Okay.

18 MR. GULINO: And he's correct, it's not in
19 his report. And I'll explain why. If a doctor was on
20 the stand -- and gives a report and testifies to that
21 report, when newly discovered evidence comes in, this
22 Court and any Court would allow the doctor, if it
23 affects his opinion, to give an opinion upon newly
24 discovered evidence.

25 And the newly discovered evidence for the

1 doctor was, and it's in the transcript, when I
2 questioned him. If it is shown that the plaintiff did
3 not fall on his shoulder -- would you change your
4 opinion. And he said yes.

5 Because when he first examined the plaintiff
6 the first time and wrote his first IME report -- well,
7 report, doctor's report, he was told by the plaintiff
8 and the medical records that he fell on his shoulder.
9 Subsequent to that examination, there was testimony by
10 Mr. Mella (phonetic), a coworker, who was five feet
11 behind him, who said the plaintiff never fell.

12 Now, the doctor was questioned about that
13 during his testimony. That's newly discovered
14 evidence.

15 THE COURT: Which -- which one are we
16 dealing with now?

17 MR. CLARK: It's -- it's --

18 THE COURT: The -- the --

19 MR. CLARK: -- it's the same motion.

20 THE COURT: Okay.

21 MR. CLARK: May I approach, Judge?

22 THE COURT: Sure.

23 MR. CLARK: All right.

24 (Pause in dialog)

25 MR. CLARK: I just want to show the Judge,

1 if that's okay. This is the one -- it's Roman numeral
2 five.

3 THE COURT: Okay.

4 MR. CLARK: And it has -- what I did is I
5 just give the thing and then I said this is the page
6 and line, and then I gave my argument there. And then
7 I just gave the page and line and the argument for
8 each one.

9 THE COURT: Okay.

10 MR. CLARK: And then I attached what I did
11 for -- for the Court is I attached the portions of the
12 dep transcript. And to make it easy, I bracketed --

13 THE COURT: Okay.

14 MR. CLARK: -- I bracketed the stuff that's
15 in issue.

16 THE COURT: Okay.

17 MR. CLARK: I did not include the report.
18 Do you want the reports for -- the doctor's report?

19 THE COURT: Yes, please.

20 MR. CLARK: All right. That -- that's it.

21 THE COURT: Thank you.

22 MR. CLARK: (Inaudible) reports.

23 (Pause in dialog)

24 MR. CLARK: So there's like -- on that
25 presentation, two and three are -- say it was outside

1 the scope of the report, the four corners rule. Then
2 number four was a James vs. Ruiz, where they were
3 attempting to backdoor in hearsay statements and
4 medical records. That's -- that issue number four.

5 Same on five, it's a James vs. Ruiz
6 violation. Six is the same. Seven is the same.
7 Trying to backdoor in the opinions of non-testifying
8 experts. So -- and I kind of laid it out and I
9 bracketed it to try to make it easy for the Court
10 (indiscernible).

11 (Pause in dialog)

12 THE COURT: Do you want to address the
13 argument that -- that there was objections that are
14 now belated, and so you waived your objections?

15 (Pause in dialog)

16 MR. CLARK: Before -- I had prepared those
17 papers that I -- that I handed up, and -- in looking
18 at the areas that I bracketed, which are the areas at
19 issue, my recollection is in most if not all of those
20 bracketed areas there were objections. It may not
21 have come exactly there, but it's certainly within the
22 area of questioning. There are definitely objections
23 in there.

24 I'm looking at the first one, there's an
25 objection. Second bracketed section there's an

1 objection. The third bracketed section there's an
2 objection. The fourth section that's bracketed there,
3 there's an objection.

4 And it's true, they're not necessarily right
5 in the beginning -- to each question, but there's
6 objection certainly made in there. In -- yeah, and
7 then Mr. Berenguer, please note a continuing
8 objection.

9 And the continuing objection is important
10 because the rule at issue here is Rule 4:14-9, which
11 talks about objection to videotape depositions. And
12 it says that the objection -- it says, "All evidential
13 objections shall, to the extent practicable, be made
14 during the course of the deposition. Which was done
15 in this case. It doesn't say you must be question,
16 answer and then objection. And if you don't it's
17 gotcha, you didn't make it, you waive it. That's not
18 what the court rule says. And that's not within the
19 spirit of the court rule.

20 So, that is my argument to the issue with
21 regard to objections. And I would -- I would also
22 note -- yes, that's my argument to that. And I would
23 also note in that regard -- that defense counsel never
24 in his deposition actually moved to qualify Dr. Decter
25 as an expert. Um --

1 (Pause in dialog)

2 MR. CLARK: What did you say?

3 MR. BERENGUER: (Inaudible).

4 MR. CLARK: Did I say that in the paperwork?

5 (Pause in dialog)

6 MR. CLARK: So, in any event, that's my --
7 A, the objections are there. So they are sufficiently
8 -- and the court rule does not necessarily require
9 there -- it says they should be made at the deposition
10 to the extent practicable. And objections were made
11 to all these areas. And certainly, to the extent
12 practicable.

13 It -- it would be -- various times, Mr.
14 Berenguer noted a continuing objection, so as to not
15 continually object and stunt the proceeding. Which I
16 think is within the spirit of the court rule.

17 (Pause in dialog)

18 THE COURT: Let's move on to the next one.
19 I mean, there's -- there's a ton of -- to the extent
20 that this is not something that's coming up in your
21 openings, it -- it doesn't make sense for me to sit
22 here and try to read through all of this deposition to
23 address your arguments. So, let's move on to the next
24 one.

25 MR. CLARK: Judge, I think in that spirit,

1 I'm good for now. I'll want to really try to whittle
2 this stuff down.

3 THE COURT: Okay.

4 MR. CLARK: So that --

5 THE COURT: So --

6 MR. CLARK: -- that's -- I think that's
7 sufficient. The only other thing is, I -- I believe I
8 noted in the defendant's pretrial that they had no
9 exhibits.

10 And I just want to make sure that, you know,
11 we're not going to pull any rabbits out of the hat,
12 that there's no surveillance videotape that we don't
13 know about. That there's you know, no internet
14 printouts or -- of some sort, that kind of thing. I -
15 - I note in the pretrial, if I'm not mistaken, they
16 did not have any exhibits, so --

17 MR. GULINO: I need to look at my hat.

18 (Pause in dialog)

19 MR. GULINO: How about your pretrials, you -
20 - your jury instructions. I haven't seen them either.
21 And his pretrial was sent back in March. I'm still
22 waiting for yours. I submitted mine in March.

23 (Pause in dialog)

24 MR. GULINO: If you're looking for one
25 possible exhibit that I might introduce, Judge, and we

1 were supposed to do this the other day, but I saw
2 photographs that were never exchanged. But we never
3 got to our --

4 THE COURT: We're getting to yours now.

5 MR. GULINO: -- accommodation. It was an
6 accident report. That's the only thing that I would
7 put in.

8 THE COURT: Okay.

9 MR. GULINO: And that has been exchanged and
10 that has been talked about at depositions and referred
11 to in testimony.

12 THE COURT: Okay. You want to address your
13 motion?

14 MR. GULINO: Yes, please. Thank you very
15 much, Your Honor. What I would like to do first,
16 Judge, is we talked about it yesterday, I know we
17 didn't do it on the record, and that concerns the
18 plaintiff's lost wage claim.

19 THE COURT: Okay.

20 MR. GULINO: And for the record, initially,
21 the plaintiff did make a claim for lost wages. It was
22 in his original interrogatory responses. On March --
23 May 10th, 2016, Mr. Munoz, who was represented by Mr.
24 Berenguer at the time, was questioned by my partner at
25 a deposition. And when the deposition began there was

1 a statement on the record by my partner, Angela
2 Lainhart, concerning outstanding discovery as to
3 plaintiff's lost wage claim.

4 And the language between the two attorneys,
5 if I can find it because I do have it --

6 (Pause in dialog)

7 MR. GULINO: And if I may quote Ms.
8 Lainhart, "Before we start the deposition, the
9 attorneys have an agreement in place that, since we
10 have not been provided with practically any records
11 regarding the plaintiff's wage history, his employment
12 history.

13 "We are seeking an additional deposition of
14 the claimant once we obtain those records and we
15 reserve our rights, as well, to depose the claimant
16 once we're in receipt of any further medical records
17 and union records.

18 "My understanding is Mr. Berenguer is
19 agreeable to producing Mr. Munoz for a limited purpose
20 of dealing with the wage history and the earnings
21 history, employment history. But we reserve our
22 rights to explore the areas on damages in further
23 deposition.

24 Mr. Berenguer, "As far as any -- any wage
25 reports or any documentation showing wage reports, we

1 will provide them to counsel -- the W2's, if and when
2 we obtain them.

3 Ms. Lainhart responds, "For the record, we
4 provided to the plaintiff an IRS form" -- which is a
5 4506, Your Honor, it's called -- "to enable either one
6 of the forms [sic] -- one of the firms to get those
7 records from the I -- from the Internal Revenue
8 Service. And I request that the plaintiff process the
9 authorization so that we can get at least certified
10 copies of those records.

11 The deposition was completed. They never
12 supplied us with the signed forms. It led to motion
13 practice, which was decided by Judge Happas on or
14 about -- it looks like October 14, 2016. And I
15 believe it was closed -- the close of discovery in
16 this case was about a week or two later.

17 Part of the number 11 -- and it's crossed
18 out by Judge Happas' order. Plaintiff is precluded
19 from pursuing a lost wage claim based upon his refusal
20 and failure to provide discovery. The Judge then
21 handwrote in, "May be made as motion in limine at the
22 time of -- I assume, Judge -- trial.

23 THE COURT: So, just to be clear --

24 MR. GULINO: Yes, you want to see it?

25 THE COURT: -- the language that you cited

1 was the proposed order and Judge Happas crossed that
2 language out.

3 MR. GULINO: And she added that language.

4 THE COURT: And said - -

5 MR. GULINO: That we would review it at the
6 time of trial. Which I did. Which I'm doing now.

7 THE COURT: Okay.

8 MR. GULINO: Formally.

9 (Pause in dialog)

10 MR. GULINO: In response to that order -- on
11 November 8th, 2016, my office received a letter from
12 Mr. Berenguer on behalf of his client under the Clark
13 Law Firm, that said that -- November 8th, 2016, "Dear
14 Ms. Lainhart, I write this letter in response to a
15 clause in Judge happens' order dated October 14th,
16 2016. Please note that the plaintiff will not pursue
17 a lost wage claim in this matter.

18 "Therefore, we will not provide you with a -
19 - with plaintiff's tax returns/proof of earnings and
20 signed IRS Form 4506 -- which is the form that I spoke
21 about that helps us or anyone to get W2's from the
22 IRS.

23 It goes on to talk about photographs of the
24 plaintiff's second surgery and the rest of the letter.

25 (Pause in dialog)

1 MR. GULINO: I came here for a Bar Panel, I
2 mentioned it then. At some point, Mr. Clark sent a
3 letter saying this is a mistake and -- and if you
4 like, I can read it for you. But I think I gave a
5 copy yesterday to you. That is dated March 15th, 2017,
6 when we were here for the first time to pick a jury.

7 I renewed the -- I didn't make a motion in
8 limine on the lost wage claim, because I figured it's
9 a done deal. They withdrew it. They didn't try to
10 reassert it. They didn't send me any of the
11 authorizations that they were supposed to or that they
12 said they would.

13 And now at trial, when they haven't done
14 anything they're saying, well, I'm going to try to
15 prove it without any records. Not good. I was
16 entitled to at least an authorization, to at least
17 conduct some type of discovery.

18 Yesterday, when we discussed this, the Court
19 suggested or I suggested in response to the Court
20 looking as if you were going to grant or deny my
21 motion -- or grant his, that I depose Mr. Munoz
22 yesterday afternoon. We had to scramble. I had to
23 get a court reporter, a law firm down the street, and
24 a Spanish interpreter. And I deposed him. And I have
25 a copy of the transcript for you, if you need it. I'd

1 like to make reference to some of the pages.

2 (Pause in dialog)

3 MR. GULINO: When I spoke with him the other
4 day -- yesterday, I asked him was he a union member at
5 the time of the accident. He said, yes. I believe
6 it's Local 24, 25 -- 21, I'm not sure. And at some
7 point I say, do you have a union card? Yes, I have it
8 in my wallet. Can I see it? No. Objection and no.
9 Mr. Clark gets on the phone and he goes on the record
10 and says, no, we're not supplying that.

11 I wanted his union card because he didn't
12 know where the owner (phonetic) was located. He
13 didn't know their address. He didn't know his union
14 number. He didn't want to give me any discovery
15 whatsoever. Because his attorneys told him don't hand
16 anything over.

17 Now, the first time they don't give me an
18 IRS form, the 4506 authorization, here it is -- we'll
19 get the W2s for you. We'll do it. And we didn't get
20 the authorizations. And when I asked him yesterday
21 about W2s he told me he didn't really know what they
22 were. I asked him how many employers he's had since
23 he's been a member of the union in 2012. He couldn't
24 tell me. I asked him, did you get W2s? He couldn't
25 tell me.

1 But we both know he's going to get on that
2 stand and tell us he was making \$1800 a week. I'm
3 entitled to ascertain whether or not that's true. I'm
4 entitled to the discovery before trial. They knew
5 that we -- that we considered them withdrawing that
6 lost wage claim. They knew it. They did nothing.
7 Nothing. Short of coming into court and saying, well,
8 we don't have the document.

9 You don't have to have the documents. You
10 have to give me the means -- to discover -- to find
11 them. You have to give me the proper authorizations.
12 They never did. Now it's too late. I'm not going to
13 get authorizations. I'm not going to get a union to
14 comply with this. I'm not going to know whether or
15 not he truly made 1700 or \$1800 a week. Except that
16 he's going to say it.

17 Our hands are tied. And it's really unfair
18 and very prejudicial. And it wasn't a mistake. And I
19 think I mentioned it yesterday. That is a very
20 explicit letter by that law firm that said we are
21 hereby withdrawing this.

22 THE COURT: When did discovery end in this
23 case?

24 MR. GULINO: I'm sorry?

25 THE COURT: When did discovery end?

1 MR. GULINO: October 2016. October 20th,
2 21st, Your Honor. Right?

3 MR. BERENGUER: January 1st.

4 THE COURT: No, I'm sorry, January, Your
5 Honor, the new discovery date by Judge Happas. Mr.
6 Berenguer is correct, January 1st, 2017.

7 (Pause in dialog)

8 MR. GULINO: And -- and, just so I'm clear.
9 I'm not asking for his tax returns. Because I know
10 maybe that's not admiss -- discoverable. I want his
11 W2s. To show his income as a union plasterer. He
12 wants to post and -- before this jury and ask for
13 \$800,000 in lost wages.

14 (Pause in dialog)

15 THE COURT: Mr. Clark.

16 MR. CLARK: I'll start backwards and I'll be
17 relatively brief because I know we did discuss this
18 yesterday at length -- somewhat at length in chambers.

19 With regard to the union card, there is a
20 deposition yesterday afternoon. And as a rule, I
21 never permit clients to turn a deposition into an ad
22 hoc document production. It's a rule I have. Um, I
23 don't allow them to take out their wallets and start
24 producing stuff. And my position is well supported in
25 the law, under a case called Serano (phonetic), which

1 was a case dealing with immigrant plaintiffs. And the
2 defense attorney essentially turned the deposition
3 into -- into an interrogation session and said, let me
4 see your Green Card, let me see your license, let me
5 see this. So I -- I never permit that. And I fell
6 that's well founded.

7 And with respect to the request yesterday
8 for the union card. Defense counsel is saying I need
9 that union card, I'm prejudiced without that union
10 card. I'm entitled to have it. And because I don't
11 have that union card the lost wage claim should be
12 dismissed.

13 I would just like to direct everyone's
14 attention to plaintiff's deposition of May 10, 2016.
15 Exhibit D-9, at page 45, was the photocopy of the
16 union card at issue. So, defense counsel has had that
17 union card for a long time. So, I think on that basis
18 -- and we actually have the -- deposition transcript
19 here with the union card attached as D-9, which was
20 provided by defense counsel since (indiscernible)
21 their court reporter.

22 And it -- it is true that we sent a letter
23 that said basically we will -- it's -- it says, quote,
24 plaintiff -- "Please note that plaintiff will not
25 pursue a lost wage claim in this matter. As I

1 explained to the Court yesterday, that letter was sent
2 by Mr. Berenguer of our office. That letter was a
3 mistake. There was a miscommunication between myself
4 and Mr. Berenguer with respect to that. And that --
5 that letter was sent out in error. And when we had
6 the Bar Panel in February of this year, Mr. Gulino had
7 raised that issue. And I had said at the Bar Panel --
8 which took place on February 6th of 2017, that -- I
9 mean, frankly, when he said that I wasn't aware of
10 that letter.

11 And I was surprised when Mr. Gulino was
12 saying that we withdrew the lost wage claim. So, the
13 note I wrote down -- was because -- and I took the
14 position at the Bar Panel that we did not withdraw
15 that lost wage claim. So I wrote down on my two
16 (indiscernible) after that was, quote, "Nail down if
17 we did not withdraw the -- basically the wage claim.

18 And then when we came to court in March for
19 a trial date, and this was raised again and I had time
20 to look into the issue, I wrote the letter to Mr.
21 Gulino, which the Court, you know, I have it here and
22 I'd like to have it just -- recognized as a record of
23 excluded evidence for the record, of March 15, 2017.

24 And our position was basically this is in
25 response to your suggestion today that plaintiff is

1 not pursuing any lost wage claim. I said that
2 plaintiff's sworn answers to interrogatories are clear
3 that he is, in fact, pursuing a wage claim. At his
4 deposition, he was quite -- quite clear in his
5 testimony about his inability to work at his prior
6 occupation.

7 And then I said, to be clear, plaintiff is
8 pursuing his wage claim. And I referenced the Bar
9 Panel. And at that time, I recall telling you that I
10 disagreed with your position that plaintiff is not
11 pursuing a wage claim. And then I referenced the
12 letter and I said -- the letter contradicts this. It
13 was sent in error as no such -- and there was no order
14 or anything barring the wage claim.

15 And just another point I would make, and --
16 and I agree that -- that letter should not have been
17 sent and I can understand that that would obviously
18 give a defendant a misimpression on the case. And we
19 do admit that. And I take responsibility for that.
20 That letter should not have been sent.

21 But I -- I think that if a claim in a case
22 is going to be withdrawn, particularly if it is viewed
23 as an important claim or a big claim, I think that the
24 proper way to do it under the rule and the safe way to
25 do it is to actually file a stipulation of dismissal

1 of that claim. I think that's probably the way that
2 you give the Court sealed approval on it. And if a
3 wage claim can be withdrawn or say it's going to be
4 withdrawn at some point in the future just by a
5 letter, certainly I think it's fair under the rules to
6 have that undone -- in a letter, which was done and
7 that was done back in March, a long time ago.

8 And defendant says, well, I'm prejudiced and
9 I need certain things because the wage claim was
10 withdrawn or because I received that letter. But I
11 would note that no steps were taken when we sent the
12 letter, the unambiguous letter of March 15, 2017,
13 which pulled back the prior letter and said, to be
14 clear, plaintiff is pursuing his wage claim.

15 And I think it was correct what the Court
16 did yesterday, so the defendant is saying I'm
17 prejudiced and they're saying I'm prejudiced because I
18 don't have the union card, but they do have the union
19 card. And then they say, well, we're prejudiced
20 because we're entitled to IRS authorizations.

21 And the IRS authorizations and tax returns
22 and that sort of thing was the subject of the motion
23 that was filed on October 12 of 2016. The moving
24 papers, at paragraph 30 -- 13, it addresses that and
25 addresses the plaintiff's failure to turn over

1 documents the defendants were demanding in a notice to
2 produce. And they said because they have not turned
3 over the documents in that notice to produce that we
4 want to dismiss the case. We want to dismiss the wage
5 claim.

6 And we argued and set forth the -- the same
7 law that we set forth in response to this motion,
8 which is brief Roman numeral eight in our papers. And
9 there's a case called Hawkins (phonetic). It's an
10 unpublished Appellate Division decision from '95, but
11 it really gives a -- a very comprehensive block quote
12 on all the reported law.

13 And that is on -- on -- in our papers, and
14 it says the fact that no pay stubs or tax returns were
15 presented was a factor for the jury to consider as to
16 the weight to be given to the plaintiff's claim. And
17 similarly, a plaintiff is not required to provide
18 expert testimony.

19 There's also a reported decision of Langley
20 (phonetic), Appellate Division '85, where the
21 plaintiff wasn't able to produce documentation of the
22 -- it was a death, a wrongful death case. And the mom
23 couldn't produce documentation of the son's employment
24 as a bartender because, according to the testimony,
25 her son had been paid under the table.

1 There was a sim -- similar situation in the
2 Ubey (phonetic) case, which is an unpublished case,
3 but that deals with an employment at a -- at a
4 restaurant. And -- and the -- the court said that you
5 do not have to prove -- that you do not have to
6 present documentation for a wage claim -- that you can
7 rely upon the testimony of the plaintiff. And then
8 similarly, this was discussed in the Caldwell
9 (phonetic) case, which is also in our papers.

10 And in this case, we do have more than the
11 evidence in Langley and Ubey, we have the -- the
12 paystub from the two weeks or so, his last paystub at
13 his employer. So, we intend to rely upon the
14 testimony and the paystub and whatever weight the jury
15 accords that. And certainly, there's cross
16 examination as to, well, that's all you have, don't
17 you have any other? And that's proper cross
18 examination. And it's whatever weight the jury will
19 ascribe to it.

20 And finally, with regard to all the things
21 defense counsel is saying I now need, that was
22 requested in the motion papers before Judge Happas.
23 And Judge Happas had denied that. And indicated it
24 could be re-raised at trial or something to that
25 effect.

1 But the one thing I would note on that,
2 there is a little bit of an ambiguity in that because
3 -- there was also another issue that was crossed out
4 about barring Dr. Sociodad (phonetic), so it wasn't
5 perhaps that -- meant both or one, I don't know, they
6 were underneath each other in the order.

7 But in any event, that's our -- that's our
8 position on that motion. Thank you.

9 MR. GULINO: Judge --

10 (Pause in dialog)

11 MR. GULINO: Mr. Clark said that there was
12 some type of a miscommunication between he and Mr.
13 Berenguer. I'm sorry, I've only met the gentlemen a
14 couple of times. No letter goes out of that firm
15 without him knowing it.

16 During yesterday's deposition, when there
17 was an issue as to the union card, a call was made to
18 him to make a decision to go on the record.

19 Two, I don't want your tax returns. I
20 wanted the W2s. And I didn't even ask them to give
21 them to me. Because they say they don't have the
22 documents. They were supposed to give us a discovery
23 means to get them. They were supposed to give us
24 authorizations. If he knew that there was a mistake
25 on February 6th, which was the Bar Panel, I got the

1 letter six weeks later, on March 15th. That's when I
2 got the letter.

3 THE COURT: I --

4 MR. GULINO: And I still, if he said it's a
5 mistake in his letter -- I would assume if they were
6 pursuing a lost wage claim the first thing they would
7 have done is they would have attached the appropriate
8 discovery means in that letter. We're sorry, we made
9 a mistake, here are those authorizations. They
10 didn't. They didn't.

11 THE COURT: And so, when that didn't come,
12 in light of the fact that at that point, discovery had
13 ended --

14 MR. GULINO: I'm sorry?

15 THE COURT: So, when they didn't attach the
16 forms, at that point discovery had ended. Right?
17 Because --

18 MR. GULINO: Uh hum.

19 THE COURT: -- the discovery ended in
20 January.

21 MR. GULINO: Yes.

22 THE COURT: And so, there is this continuing
23 obligation to provide documentation that a party
24 intends to rely upon at the time of trial. So,
25 January rolls around, discovery ends. And in

1 February, low and behold, you're not faced with what
2 you say is a surprise because they had previously
3 indicated that that claim was not being pursued.

4 Right? Okay. So --

5 MR. GULINO: I think --

6 THE COURT: -- so --

7 MR. GULINO: -- I think he was surprised. I
8 told him you don't have --

9 THE COURT: Okay.

10 MR. GULINO: -- have a lost wage claim.

11 THE COURT: Okay. So they have no
12 documentation that they intend to rely upon in support
13 of their claim, other than that which has been
14 indicated by counsel. Right? One pay stub. One
15 paystub. They have nothing other than that. That --
16 and you're in possession of that at that time.

17 It is your position that you are entitled to
18 more information because you want to refute his claim.
19 Right? So -- so --

20 MR. GULINO: No, no. No. They, I assume--

21 THE COURT: Okay.

22 MR. GULINO: -- will take that one paystub--

23 THE COURT: Okay.

24 MR. GULINO: -- and extrapolate it and say
25 that was his weekly salary.

1 THE COURT: Okay.

2 MR. GULINO: How do I defend that?

3 THE COURT: You can.

4 MR. GULINO: I cannot. I don't have the
5 proper--

6 THE COURT: Okay.

7 MR. GULINO: -- authorization. What if I --

8 THE COURT: Stop. Stop talking. Stop
9 talking, please. Stop talking. What I'm suggesting
10 to you is -- January rolls around, discovery has
11 ended. That means you have all the discovery that
12 you're going to get, presumably.

13 MR. GULINO: Uh hum.

14 THE COURT: Just -- there's a reason that
15 there's a discovery end date. Discovery has ended.
16 February rolls around and now you're faced with
17 someone saying, no, no, we still have our wage claim -
18 - lost wage claim, despite what you may have thought
19 given our previous correspondence. The wage claim is
20 in the case. I'm sorry you had that impression. But
21 it's in the case. Right? So come February, you know
22 that.

23 MR. GULINO: Uh hum.

24 THE COURT: Discovery has ended. And you
25 know that from your perspective, you want other things

1 from the plaintiff that they have not provided.

2 Because they don't have it.

3 MR. GULINO: No, because at that point--

4 THE COURT: There's no question --

5 MR. GULINO: -- discovery --

6 THE COURT: -- that they didn't have them.

7 Right? They didn't have anything to turn over. You
8 wanted authorizations. From your perspective. What
9 did you do about it?

10 MR. GULINO: The burden goes to me when they
11 didn't give me the authorizations? That they said
12 they were going to give me? I missed that. They told
13 me they were going to give me the authorizations.

14 THE COURT: Okay.

15 MR. GULINO: Then they said you're not
16 getting them because we don't have it --

17 THE COURT: Because it's out. Right? So
18 now that they're in -- right, because you're having a
19 conversation now with somebody else --

20 MR. GULINO: Uh hum.

21 THE COURT: -- that's saying it's in. So do
22 you say hey, listen, not for nothing, but you owe me
23 some authorizations.

24 MR. GULINO: Why don't they have the burden
25 to say we want to put it in. You know what? I'm

1 going to give you the authorizations. Why does it
2 fall to me when he is the one who said we withdrew it
3 and we're not going to give you the authorizations.
4 Now they say we want it -- here's the authorizations.

5 THE COURT: Okay.

6 MR. GULINO: Go get them. They didn't.
7 They didn't. And the burden is on the defense side,
8 when they're the ones making the claim? They didn't
9 provide the proper discovery. The discovery date was
10 long past. But they didn't even try it and say, you
11 know what? Here is the authorizations. That's the
12 whole crux of the case, Judge.

13 THE COURT: Okay.

14 MR. GULINO: But they didn't.

15 THE COURT: Okay. You want to address that?

16 MR. CLARK: Yes. Just -- just briefly for
17 the record, Judge. Um -- we never agreed to provide
18 authorizations. The deposition transcript was May 10
19 of 2016, and Mr. Berenguer says any reports or
20 documentation showing wage reports we will provide
21 them to counsel, the W2s if and when we obtain them.

22 And then Ms. Lainhart says, well, I'm also
23 requesting an authorization so I can get all your IRS
24 records, which would include tax returns. And Mr.
25 Berenguer doesn't respond to it and wants to get going

1 with the deposition. That was in May of 2016.

2 In October of 2016, we're there -- after the
3 deposition, defense counsel -- it was either after or
4 before, I don't have it at my fingertips, they did a
5 notice to produce for all this stuff. And we -- that
6 motion was filed in October of 2016. We opposed it
7 and said under the rules you don't get tax returns, we
8 cited and -- and, therefore, we're not going to give
9 an authorization to the IRS. We never agreed to give
10 an authorization to the IR -- for the IRS records. We
11 cited a bunch of case law -- Herman vs. Sunshine. So
12 I just wanted to note that we did -- we never agreed
13 to provide authorizations.

14 (Pause in dialog)

15 THE COURT: So it -- I can certainly see why
16 there is a concern, especially in this case where the
17 claim is what the claim is. Right. So if what I'm
18 hearing is correct, that there is this purported
19 \$800,000 lost wage claim and there isn't a stitch of
20 documentation other than one pay stub. And the
21 intended -- the intent to rely upon the plaintiff's
22 testimony that he made this amount of money and that's
23 all that's in this case. You know, I'm always
24 perplexed at people from a defense perspective that
25 almost -- at times, want to help a plaintiff either

1 prove -- prove their case.

2 The burden remains on the plaintiff. What
3 proof does the plaintiff have to support his wage --
4 lost wage claim, other than his testimony. Now, the -
5 - the case law is clear that that's certainly enough
6 for it to get to the jury. But the question of
7 whether or not a jury buys that is for the jury to --
8 to concern themselves with.

9 Now, I can certainly accept that it -- it's
10 a little concerning. That you get a letter saying
11 there's no lost wage claim in the case. And that
12 letter comes as a result of Judge Happas' order
13 basically saying you haven't turned over this stuff,
14 so I'm -- I'm not going to at this time prevent it
15 from being in the case, but what I am going to say is
16 that this motion can come at a later point in time --
17 a motion in limine. That's really what she said by
18 the order.

19 And so, based upon that -- those comments in
20 the order, it appears that a letter then comes saying,
21 well, as a result of that order -- or following that
22 order, we're advising you basically that the lost wage
23 claim is out of the case.

24 A defense -- the defense now relies upon
25 that representation and does absolutely nothing. I

1 see that -- that -- that's a little concerning.
2 Because you should be able to rely upon someone's
3 representations. We do it all the time when attorneys
4 come before the Court and represent certain things.
5 You're an officer of the court and if you represent
6 that a claim isn't in there should be no reason why
7 another side shouldn't be able to rely upon that
8 representation.

9 But we also know that we are all human. And
10 the circumstances under which that letter went out and
11 why is it it went out and whether there was a
12 miscommunication -- I'm not going to get into that.
13 But at the end of the day, even assuming that -- that
14 -- that perhaps at some point in time the plaintiff
15 took a second look at their case and said, well, you
16 know -- I -- I don't know that we should have
17 withdrawn that, it's really in the case. Right?

18 So, okay. So it now is in the case, it's
19 January, discovery ends and February rolls around.
20 And come February it's -- it's clear that there is
21 some -- either confusion, call it whatever you want to
22 call it, whatever it was -- it was now becoming clear,
23 and even more clear with the March letter, that the
24 plaintiff was still pursuing this lost wage claim.

25 So the question becomes -- whose obligation

1 is it at that point to do something with that? So,
2 it's the plaintiff's burden to prove their case. And
3 it's their obligation to turn over whatever evidence
4 is it -- or documentation that's in their possession
5 over to the other side that they intend to rely upon.
6 They're not relying on anything other than one
7 paystub.

8 So, if the defense wants those
9 authorizations -- ask for them. The fact of the
10 matter is, discovery had ended. That would have
11 required at that point a motion to reopen discovery in
12 order to provide that -- that documentation. There's
13 no -- I don't know whether or not you would have
14 necessarily even gotten what you were asking for. But
15 that's not something that was done if it was something
16 that you felt was important for you to have.

17 Now, should the plaintiff have made that
18 move because it's -- it's their obligation to prove
19 their case? Perhaps. But they didn't do it. You
20 want that documentation then -- then an application
21 should have been made to the Court in order to address
22 the concern that this information had not been
23 provided, even though it had been, according to you,
24 and now I'm hearing two different versions of whether
25 or not they were really intending to provide those

1 authorizations.

2 So, to the extent that there was some
3 confusion or perhaps really not an agreement to
4 provide that -- that authorization, if you wanted them
5 there should have been something done at -- as early
6 as, if not February then March, when that letter came
7 that said this lost wage claim is in the case. Are
8 you prejudiced by a plaintiff who seeks to ask a jury
9 to give him \$800,000 based on one paystub? Nuh -- I
10 think you can do a lot with that. Right? So, let's
11 move on from this issue.

12 MR. GULINO: Judge --

13 THE COURT: You've made your record. You've
14 made your record -- I don't --

15 MR. GULINO: Then I move to exclude the
16 paystub. I move to exclude the paystub. If I didn't
17 get the authorizations for the paystubs and for the
18 W2s, and they only produced one -- how do I know that
19 that is --

20 THE COURT: Did you not get the paystub?

21 MR. GULINO: How do I know --

22 THE COURT: Did you not get the paystub?

23 MR. GULINO: He gave me one paystub.

24 THE COURT: Thank you. That was --

25 MR. GULINO: How do I know --

1 THE COURT: -- how -- on what basis, sir,
2 are you asking to exclude the paystub?

3 MR. GULINO: Because --

4 THE COURT: You got it.

5 MR. GULINO: -- because I don't know what
6 his average paystub was.

7 THE COURT: It --

8 MR. GULINO: He's going to turn around and
9 say this is my best --

10 THE COURT: And neither does this jury.

11 MR. GULINO: -- this --

12 THE COURT: Neither does this jury.

13 MR. GULINO: But we --

14 THE COURT: -- sir, sir, I really do want to
15 move on. I really do. Please. That's my ruling.
16 Next.

17 (Pause in dialog)

18 THE COURT: Why don't we take 15 minutes,
19 please.

20 (Pause in dialog)

21 (Recording off)

22 (Recording on)

23 THE COURT: Mr. Gulino, let's move on to
24 your next --

25 MR. GULINO: Yes, Your Honor.

1 (Pause in dialog)

2 MR. GULINO: I think I can make our life a
3 little easier by withdrawing one of my -- one of the
4 portions of my in limine. And that has to do with Dr.
5 Sociadad's testimony.

6 THE COURT: Okay.

7 MR. GULINO: When we were in your chambers
8 yesterday, and I -- I can't find it again, but -- but
9 Mr. Berenguer gave me an amended (indiscernible) log
10 or something, basically saying here is Dr. Sociadad's
11 (inaudible). Based upon that representation, I really
12 have no choice but to withdraw my objection to her
13 testimony.

14 THE COURT: Okay.

15 MR. GULINO: I did partake in it, it was a
16 de bene esse deposition. I did in the beginning
17 object to partaking in it. So, if that wanted to be
18 edited out, I -- you know, whatever the Court needs to
19 do or wants. So, I'll withdraw that based upon the --
20 the representation yesterday that they -- they served
21 me. All right?

22 THE COURT: Okay.

23 MR. GULINO: Is that okay?

24 THE COURT: Okay.

25 MR. GULINO: All right. Now, part of the --

1 I have -- it's a two fold request and it -- it deals
2 with Dr. Decter. One of the I -- I believe Mr. Clark
3 started before on, which was if you look at number
4 four of mine, Judge, I don't know if you have it
5 there.

6 THE COURT: I do have it.

7 MR. GULINO: Okay.

8 THE COURT: Yes.

9 MR. GULINO: I think that's what we were
10 talking about.

11 THE COURT: Right.

12 MR. GULINO: I don't know if you want me to
13 renew it or you just want to come back to it before
14 Dr. Decter testifies. I won't -- you know, I'm not
15 going to -- um --

16 THE COURT: Yes. I mean, you've made your
17 arguments, but I -- I -- and I understand what your
18 arguments are related --

19 MR. GULINO: Okay.

20 THE COURT: -- to that.

21 MR. GULINO: I'm not going to repeat them.

22 THE COURT: Okay.

23 MR. GULINO: I -- I think --

24 THE COURT: Okay.

25 MR. GULINO: -- I think you heard them.

1 Now, so let's just go to three. I think that's the
2 last one left. Cooper Plastering has been
3 discontinued against, so we're done with that.

4 THE COURT: Okay.

5 MR. GULINO: That's to number one. So, we
6 can go to number three. And that has to do with
7 various parts of the doctor's testimony when he was
8 produced on March 1st, 2017, de bene esse deposition.

9 And the first one has to do with --

10 MR. CLARK: What (inaudible) --

11 MR. GULINO: Number four. Do you guys have
12 my motions?

13 MR. CLARK: (Inaudible).

14 MR. GULINO: No, that's the exchange. I did
15 -- here.

16 (Pause in dialog)

17 MR. GULINO: The motion in limine. That's
18 what we're talking about.

19 (Pause in dialog)

20 MR. GULINO: You got it? Okay.

21 (Pause in dialog)

22 MR. GULINO: Prior to this case, the doctor
23 had begun a business, for want of a better term, and
24 it was called CFO Medical Services. And it had to do
25 with supplying experts for IMEs, as we like to call

1 the on our side. And at one point, the doctor was
2 very involved in the business.

3 I objected to the line of questioning at the
4 deposition. And he testified about it. He testified
5 about it was sold. He testified about, I believe, his
6 partner that he testified about how much money they
7 actually made in selling this business, which he no
8 longer owns. He was a retained expert in this case to
9 conduct an examination. I didn't have a problem with
10 that.

11 But to talk about his prior relationship
12 with this company -- in front of a jury -- is highly
13 prejudicial and not probative at all. And I'm moving
14 to exclude that part of his testimony. Any connection
15 that he had. I do have in the deposition transcripts
16 where I would like it removed.

17 (Pause in dialog)

18 MR. GULINO: It has to do with -- I believe
19 it starts at page 115 -- line 4, and it goes to page
20 116, line 2. Then there is reference again at 117,
21 line 1, and it continues on to 118, line 1.

22 (Pause in dialog)

23 MR. GULINO: And, quite frankly, it's a --
24 it's a substantial amount of money that the business
25 was sold for. So I'm hereby moving to exclude or

1 preclude that part of his testimony from being heard
2 by the jury. Would you like me to go on to my next
3 point? I'll stop here.

4 THE COURT: Mr. Clark, do you want to
5 respond to that?

6 MR. CLARK: I had a trial called Fernandez,
7 and that's where I first met Dr. Decter. And it -- it
8 was interesting, so Exam Works does all these defense
9 medical exams. And we did it -- we do -- one of our
10 in limine that I -- I don't want to burden -- was to
11 bar the defendant from referring to what Dr. Decter
12 does for a living and what he does in this case as an
13 independent medical exam, what Dr. Decter does and
14 what these doctors do is the farthest thing from
15 independent. So that was one of our -- our motions,
16 as well.

17 So, in the Fernandez case -- I cross
18 examined Dr. Decter on his relationship with Exam
19 Works. And Exam Works is a company that does all
20 these defense medical exams for the insurance
21 industry. We call it the defense industry in that
22 case. Just to -- so we didn't have to say the word
23 "insurance."

24 And Dr. Decter on the stand -- it was over
25 an objection, it was Judge Vena in -- in Essex County,

1 permitted the cross examination of Dr. Decter's
2 relationship with Exam Works.

3 And the defense medical exam in this case,
4 as I understand it, was set up through Exam Works.
5 And Dr. Decter denied that he has any interest in Exam
6 Works anymore. But then I cross examined him on the
7 fact that his wife is like a significant owner of the
8 company. And his son is like on the board or
9 something.

10 And -- and then -- and then -- he sold it
11 for \$26 million, his interest in -- in that business.
12 And the whole website and everything talks about how
13 they serve the defense industry. So, I feel that that
14 -- that is proper examination.

15 I remember on redirect they had asked him
16 about his opinion to the injury. And -- and he was
17 saying something didn't exist, which clearly was
18 showing on the film.

19 And then the final question I had for him
20 was, Doctor, you have 26 million reasons to testify
21 like that, don't you? And he stormed off the stand.
22 Um -- but that's the nature of that cross examination
23 that defense counsel wants to bar in this case.

24 And um -- going into the financial
25 arrangements and the financial positional bias of a

1 defense medical expert, is well founded in the law.
2 So, I think it's -- I think it's fair. In the case --
3 Berrie vs. Berrie, 188 NJ Super, Chancery Division
4 1983. In Elkins -- well -- in this case it says, a
5 part is entitled to inquire into the particular
6 financial arrangements between an adverse party and
7 the party's expert. A party may also ask for an
8 estimate of the extent to which the expert has
9 rendered opinions for plaintiffs versus defendants.

10 (Pause in dialog)

11 MR. CLARK: You know, these responses
12 provide a plaintiff with all the information necessary
13 to argue to the jury that Dr. Gerson (phonetic) is a,
14 quote, "hired gun" and his opinion therefore should
15 not be trusted. This is coming from an unpublished
16 decision called -- Solin (phonetic), 2010 Appellate
17 Division. The -- the docket number -- it was by Judge
18 Fisher -- (inaudible) -- Peterson, A-401-10.

19 So, I think going into the medical or the
20 financial bias of an expert and their financial
21 arrangements -- is -- is proper and permissible. So,
22 that's -- that's my response on that, with regard to
23 Dr. Decter.

24 THE COURT: I'd like to just take a look at
25 the extent of the cross examination. And counsel is

1 correct that financial -- that bias is an issue that
2 is relevant for the jury to consider, in terms of
3 whether or not -- what weight the jury should give the
4 expert's opinion. So, I'll review that line of
5 questioning on -- at the particular page and lines
6 that you've cited and then I'll give you my decision
7 on that.

8 MR. GULINO: You'll keep that out, Judge?

9 THE COURT: I'm sorry?

10 MR. GULINO: You're going to keep it out?

11 THE COURT: I haven't read it yet.

12 MR. GULINO: Okay.

13 THE COURT: So, I want to read it. But
14 financial bias is -- is relevant, certainly, for the
15 jury to consider in determining what weight they
16 should give the expert's testimony.

17 So with those comments, however, I -- I will
18 take a look at the -- the particular pages and lines
19 that you've cited to see whether or not it -- it sort
20 of stays within the -- the bounds that the Court
21 thinks is fair. So, the other part of your motion.

22 MR. GULINO: Yes. Mr. Berenguer, at one
23 point during the doctor's deposition, asked him -- let
24 me see if I have it --

25 (Pause in dialog)

1 MR. GULINO: I -- oh, here it is. Here it
2 is.

3 (Pause in dialog)

4 MR. GULINO: I wish I could find -- oh, here
5 it is, Your Honor. I apologize. So, it's part of
6 117, line 1, to 118 line 1, it's the second part of my
7 motion with the doctor. The question was posed, as
8 follows, on 117, line 21. And I objected to this.
9 Question, "What is your yearly income?" Answer, "MY
10 yearly income is probably -- I objected, objected, you
11 can answer the question. My yearly income probably is
12 around \$850,000, maybe \$900,000. Okay.

13 If he wanted to ask him what is his
14 percentage of yearly income stemming from litigation,
15 okay. If he wanted to ask him how much he gets from
16 doing IMEs, okay. But he's a doctor who performs
17 surgery. He's an orthopedic practicing doctor. What
18 his yearly income is is irrelevant. Highly
19 prejudicial. But irrelevant more than anything.

20 (Pause in dialog)

21 THE COURT: Did you give me the --

22 MR. GULINO: It's --

23 THE COURT: -- the transcript of Dr. Decter?

24 MR. GULINO: -- it's one -- 117. The one
25 that I quoted the last time, 117 through 118.

1 THE COURT: Right. So I'm asking you did
2 you give me the -- transcript of Dr. Decter's --

3 MR. GULINO: I have one here somewhere,
4 Judge.

5 (Pause in dialog)

6 THE COURT: Mr. Clark, I mean, why is it
7 relevant to know what his yearly income is rather than
8 what he earns from a -- from defense litigation cases?

9 (Pause in dialog)

10 THE COURT: I think you can probably concede
11 on that one.

12 MR. CLARK: Well -- well, um -- we continue
13 down and Mr. Berenguer asked that question, he starts
14 with the number and questioned how much of your
15 current income comes from testifying in cases.

16 And I think his testimony in this area about
17 his yearly income -- one can clearly infer, if not
18 hear that it is from his defense medical business.
19 The questions are about Exam Works and the sale of
20 Exam Works for 14 million. And how he split it with
21 Dr. Robbins (phonetic), another common defense medical
22 testifier. And --

23 THE COURT: I think he --

24 MR. CLARK: -- then he asks --

25 THE COURT: I'm sorry. I think he was

1 talking about the 850,000 or 950 -- or \$900,000 that
2 he makes on a yearly basis. I guess that has nothing
3 to do with Exam Works.

4 MR. CLARK: Well, he -- he does tie that in
5 on 117/118, and Mr. Berenguer asks him how much comes
6 from testifying in cases. And he -- the expert says,
7 well -- on 118, well, you mean like this? And the
8 question is yes. And answer, "That's all part of the
9 Exam Works number, so I just gave you -- that's the
10 number sir, I don't break it down by how much I make
11 doing depositions, how much I make doing testimony,
12 that's the total number, sir.

13 So the total number he's talking about is
14 all related to his defense medical expert business.
15 He testified to that.

16 THE COURT: The 850.

17 MR. CLARK: Yes.

18 THE COURT: Okay.

19 MR. CLARK: To 900. Yeah, Mr. Berenguer
20 asked that. So it's just basically on pages 117 to
21 118. And he -- he -- it's not like he's doing private
22 practice and, you know, 90 percent of his income comes
23 from that. And 10 percent is from this. He's
24 basically testifying that the majority if not all of
25 it comes from this whole defense medical expert

1 enterprise he's involved in.

2 And I think that is fair under the case law.
3 And I would note the defendant's papers do not cite
4 any case law in support of that -- you can't go into
5 the financial interest of an expert with regard to his
6 credibility and the weight the jury can ascribe to the
7 testimony in making it's critical credibility
8 determinations.

9 (Pause in dialog)

10 THE COURT: I mean, how would you propose --
11 I mean, if you're saying that the 850 to 900 includes
12 what he makes from -- how would you propose to redact
13 the testimony? Because it appears that everything
14 sort of --

15 MR. GULINO: Your Honor --

16 THE COURT: I -- I don't know how you would
17 redact it.

18 MR. GULINO: -- I didn't ask the questions.
19 They did. I think what the Court is now doing is
20 asking me to do their job and break it down.

21 THE COURT: I don't think --

22 MR. GULINO: They -- they had --

23 THE COURT: -- that's what I was doing.

24 MR. GULINO: -- an attorney present --

25 THE COURT: I --

1 MR. GULINO: -- who could have asked those
2 questions and he didn't.

3 THE COURT: Okay. So, here's what we're
4 left with.

5 MR. GULINO: I want to leave it all out.
6 Anything on that page deals with his yearly income is
7 out. They had the opportunity to ask him. How much
8 do you make when you testify? How much do you get an
9 hour when you do a report? What is the percentage of
10 income? It's very basic stuff that we ask experts.
11 They didn't.

12 THE COURT: All right. Let's move on.
13 Let's move on. I'm not going to engage in this trying
14 to figure out -- the fact of the matter is, to the
15 extent that the experts -- what -- what he earned and
16 some of what his earnings are -- are related to
17 defense litigation and that speaks to the bias that
18 he may or may not have, that's relevant for the jury
19 to consider.

20 And I'm not now going to try to figure out
21 which portions they should hear about and not hear
22 about, when the questions are such that, quite
23 frankly, if there was that much of a concern then
24 perhaps, to the extent a question was asked, then --
25 then perhaps it should have been cleared up. So that

1 later on, when it comes to redacting it -- it becomes
2 a little bit cleaner. But I'm not going to -- it's
3 relevant for them to consider how much he earns. And
4 part of that income being from defense litigation.

5 So, let's move to the next area.

6 (Pause in dialog)

7 MR. GULINO: You're letting it in?

8 THE COURT: Yes.

9 MR. GULINO: His yearly income.

10 THE COURT: Sir, you have given me no idea--

11 MR. GULINO: The burden is not on me, Judge.

12 THE COURT: I'm done. See you tomorrow
13 morning. 8:30. I'm done. I can't do it anymore
14 today.

15 (Recording off, matter concluded)

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CERTIFICATION

I, Jean Mirza, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on CourtSmart recording, index number 9:30 to 9:54, 11:25 to 11:26, 12:17 to 12:42, 1:48 to 3:14 and 3:33 to 3:51, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

Date: July 26, 2017

Jean Mirza

Jean Mirza, AOC #541
G & L Transcription of NJ