

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MIDDLESEX COUNTY
DOCKET NO. L-3284-15
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WASHINGTON MUNOZ,)
)
Plaintiff,) TRANSCRIPT
) OF
v.) TRIAL
)
L.P. CIMINELLI, and)
PAINO ROOFING CO., INC.,)
)
Defendant.)

Place: Middlesex County Courthouse
56 Paterson Street
New Brunswick, New Jersey 08903

Date: July 12, 2017
Volume 1 of 2
Pages 1 - 200

BEFORE:

HONORABLE ANDREA G. CARTER, J.S.C., AND JURY

TRANSCRIPT ORDERED BY:

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

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1 (Jury not present in courtroom)

2 THE COURT: Good morning. Thank you. Please
3 be seated. All right. So we are on the record in the
4 MUNOZ V. CIMINELLI, ET AL. matter. Good morning to
5 Counsel. And just -- the jury is on the floor and we
6 left off yesterday with the Court sort of abruptly
7 leaving the courtroom, in part, based upon Mr. Gulino,
8 your clear dissatisfaction with some of the rulings
9 that I've made and, certainly, you're entitled to be
10 dissatisfied with the decisions that I make. You don't
11 have to like them. My job is not to make either one of
12 you happy with the rulings that I make. My job is to
13 do the right thing based upon the facts that are
14 presented to me and the law as I understand it to be.

15 I've done the best that I can with what I
16 have and you certainly can disagree with that. But
17 your remedy is not to, in essence, throw tantrums.
18 Your arms are flailing. You're very animated in your,
19 for lack of a better word, dislike of what you
20 perceived to be an error in my ruling.

21 So regardless of that, that's not how this
22 works. You have a remedy, if you're dissatisfied with
23 my ruling. Your remedy is in the Appellate Division.
24 I have given you every opportunity and I always will
25 give you every opportunity to make a record, so that

1 you can do what you need to do in the Appellate
2 Division, if that becomes necessary.

3 What we cannot do is have these outbursts
4 because you're dissatisfied with my decision, that
5 become so disruptive, there are times when I feel as if
6 I'm competing to be heard and that should not be the
7 case. I gave you an opportunity to be heard over and
8 over again. I will continue to give you an opportunity
9 to be heard, but there comes a point in time when we
10 have to understand that my ruling is what my ruling is
11 and a temper tantrum is not going to change my ruling.
12 It is what it is. You don't like it. You've made your
13 record, and so your remedy will be in the Appellate
14 Division, if there is a need for that. So --

15 MR. GULINO: May I be heard, Your Honor?

16 THE COURT: I always will give you --

17 MR. GULINO: I want to -- I want to --

18 THE COURT: I always will give you a right to
19 be heard, but I just wanted to make that clear because
20 I don't -- this cannot continue. We're not going to
21 accomplish anything, if there is just this constant
22 sort of battle for a need to say further things. You
23 don't like what I decide? Then it's like, well, how
24 about this and how about this and how about -- and
25 that's fine. I give you some leeway in terms of that,

1 but there comes a point in time when it almost borders
2 on being disrespectful. I will never disrespect you,
3 and I ask to be extended the same courtesy. So I'll
4 hear you.

5 MR. GULINO: I agree with everything you've
6 said, and I apologize. I intended to apologize this
7 morning when I came in, but I thank you for what you
8 said. Yes. I do disagree with some of your rulings
9 but you know what, that's why we're here and that's why
10 we have a Judge. So I do apologize to you --

11 THE COURT: Thank you for that.

12 MR. GULINO: -- and to the Court and to my
13 adversaries.

14 THE COURT: Thank you for that.

15 MR. GULINO: Okay. I will make sure it
16 doesn't happen again. Your Honor, can we continue on
17 that motion? There was one last part on the doctor, or
18 do you want to wait?

19 THE COURT: We can wait. The one -- and I'm
20 going to just make sure that this is clear. So the
21 last part of your motion as I understand it to be,
22 addresses or seeks to address the issue of cross-
23 examination by the plaintiff of the doctor with a
24 sensor by --

25 MR. GULINO: It's a society. I believe it's

1 called the American Academy of Orthopedic Surgeons.

2 THE COURT: Correct. Correct. And so based
3 upon -- and I'll certainly, Mr. Clark, allow you to be
4 heard further. But based upon my reading of the law
5 and the rules of evidence, it appears from the Court's
6 perspective that that's not an area that you should
7 touch. Again, I'll allow you to be heard on that.

8 So to the extent that preliminarily, that's
9 my ruling, I don't anticipate that you should be saying
10 anything about that in your opening. Okay? All right.
11 Are we all set up and ready to go?

12 MR. CLARK: I think so. Yes.

13 THE COURT: Okay.

14 MR. CLARK: It's okay if I roll over the
15 podium for the opening and some easels and stuff?

16 THE COURT: Sure.

17 MR. CLARK: Okay.

18 MR. GULINO: Just one other housekeeping
19 issue. The plaintiffs and I have had discussions. He
20 had subpoenaed three witnesses on behalf of defendants.
21 One was an eyewitness to the occurrence, Mr. Mella
22 (phonetic), who actually is there in the back of the
23 room. One is Mr. Paino, who owns the roofing company,
24 who will be here in another hour, if less. And one is
25 Mr. Beardsley from L.P. Ciminelli, who is traveling

1 three hours to get here.

2 THE COURT: Okay.

3 MR. GULINO: Now, yesterday, I asked Mr.
4 Clark, are we going to get to these people today
5 because, otherwise, I'll bring them in Thursday and he
6 couldn't give me an answer, so I brought them in.

7 I'm asking the Court, if we might, to please
8 have these witnesses testify today, since they are
9 here. Mr. Mella is away from his job. Is he being
10 compensated? Yes. He is, for his time. But he was an
11 eyewitness to the occurrence. Mr. Paino owns the
12 company that he runs, and Mr. Beardley is coming three
13 hours from a project in Upstate New York.

14 MR. CLARK: I don't know that there's
15 anything for me to respond to.

16 THE COURT: Yes. I --

17 MR. CLARK: I told Mr. Gulino yesterday, I
18 gave him an estimate of what I can do. I said, I will
19 -- I have no interest in needlessly delaying people's
20 time, but I cannot predict how the trial is going to
21 go. I can't predict the objections. I can't predict
22 what evidence is going to be permitted or not and how I
23 may or may not need the witnesses. So I don't know how
24 else to respond to that.

25 I have no interest in needlessly, you know,

1 inconveniencing people, but it is a serious case. They
2 are on-call subpoenas, so I do the best I can. I want
3 to move the trial expeditiously.

4 THE COURT: Okay.

5 MR. GULINO: I had asked him, I'll bring them
6 in Thursday. You have two experts coming today. You
7 have Mr. Gallagher and you have a doctor this
8 afternoon.

9 THE COURT: Well, I guess, we'll have to see
10 how it goes.

11 MR. CLARK: Right.

12 THE COURT: Yes.

13 COURT OFFICER: May I bring the jury in?
14 Jury entering.

15 (Jury present in courtroom)

16 THE COURT: All right. Thank you. Please be
17 seated. All set? Good morning.

18 JURORS: Good morning.

19 THE COURT: All right. So members of the
20 jury, as I indicated to you, the first order of
21 business will be the opening statements of the
22 attorneys. We start first with plaintiff's Counsel.
23 Mr. Clark?

24 MR. CLARK: Thank you, Your Honor. Good
25 morning, ladies and gentlemen.

1 JURORS: Good morning.

2 MR. CLARK: The last trial I had, we got to
3 talk to the jurors after the trial and get their
4 feedback and one of the feedback was, we really would
5 have appreciated it if you guys had thanked us for our
6 time. So I'm reminded today in this trial, I want to
7 thank you guys for your time here today because I do
8 know it's a big inconvenience to you and it's
9 important.

10 Just a couple kind of common sense rules.
11 One is that any corporation that relies upon workers is
12 not permitted to needlessly endanger those workers. On
13 a construction site, a company that creates a hole two
14 inches or more that can pose a tripping hazard has to
15 cover that hole and guard against that hole to prevent
16 needless worker injury.

17 A company that comes upon a hole on a
18 construction site is not permitted to cover the hole,
19 so as to conceal it and make it more of a danger to
20 workers. And, finally, a general contractor on a job
21 site that has the power and control on a job site has a
22 responsibility to make sure basic worker safety rules
23 are enforced.

24 So let me tell you the story about this case.
25 If we go back to 2011, there's a company called L.P.

1 Ciminelli. They received some information that the
2 Meadowlands is going to build a whole new grandstand,
3 an \$88 million project. They submit their bid for this
4 construction project and L.P. Ciminelli gets the job to
5 be the developer, the general contractor of the new
6 Meadowlands Racetrack.

7 They get the architectural plans at that time
8 in 2011, and they see what has to be built. They see
9 that the grandstand and the buildings are going to have
10 flat roofs. They see on those plans that it's going to
11 require HVAC systems on the roofs and they see that
12 there are going to be pipes on the roofs to drain water
13 down from the HVAC system and to drain the roofs.

14 They know during construction there are going
15 to be holes on the roofs. They hire a company called
16 Paino Roofing to do the roofing work on those roofs, to
17 put down the membrane on the roofs. They hire a
18 company called Countrywide Plumbing and Heating to
19 create the holes on the roofs.

20 So let me take you back to May of 2013. In
21 May of 2013, on this project, Countrywide Plumbing
22 creates drain holes on the roofs with their PVC pipe
23 and drain holes about four to six inches across. That
24 same day or shortly after that, a few days later in May
25 of 2013, Paino Roofing is working on the job site.

1 They see these two holes, and they cover up the holes
2 wit their roofing.

3 Moving in time to July 25th of 2013, early
4 summer -- or -- or -- I'm sorry -- in June 25th of
5 2013, early summer, it's about 90 degree day and there
6 were some thunderstorms in the distance and the weather
7 reports were predicting thunderstorms later in the day.

8 A worker for a contractor on the job site,
9 the contractor is Cooper Plaster. Cooper Plastering is
10 required to do plastering on a wall that's on the roof.
11 A laborer for Cooper Plaster, a Union member, a member
12 of the Plaster and Mason's Division of the AFLCIO
13 worker is instructed to go up on the roof and work on
14 this wall. The worker has to carry his tool belts, his
15 mortar, about 70 pounds worth of equipment.

16 The worker comes out this door here on the
17 roof, Plaintiff's Exhibit 2, and begins to walk in this
18 direction. The worker -- take a look at Plaintiff's
19 Exhibit 4, is walking in this direction over to where
20 his assigned work is. His right foot steps in this
21 depression area here, which has been covered by roofing
22 material, and it causes him to fall and lurch down and
23 causes the equipment that's hanging on his right
24 shoulder to fall off and wrenches his shoulder down and
25 wrenches his back.

1 The worker -- this happened at about 3:00,
2 3:15 on June 25th. Right behind him is his foreman, a
3 person by the name of Joe Mella. Joe Mella sees this
4 happen. He sees what happened and the worker says,
5 look, I'm going to try to work through this and he
6 tries to work through the injury the rest of that time,
7 for about a half hour or so.

8 Joe Mella is his foreman supervisor and,
9 after trying to work for about 15 or 20 minutes more,
10 he tries to go report it to the safety office. He gets
11 down to the safety office a little over 3:30, and no
12 one in the safety office is there. They had left for
13 the day.

14 The worker is too banged up to work the next
15 day, but he comes back to the job site to report the
16 incident. He meets with L.P. Ciminelli's safety man on
17 the job. His name is Bob Beardsley. Joe Mella and Bob
18 Beardsley, -- Joe Mella and the worker that was injured
19 tell Bob Beardsley what happened. Bob Beardsley works
20 -- he works for the general contractor, L.P. Ciminelli,
21 on the job. He tells him what happens and Bob
22 Beardsley says, why didn't you report the incident
23 within one hour and they said, we tried to, no one was
24 here, and Bob Beardsley then fires the worker for not
25 reporting the incident within an hour.

1 After Bob Beardsley finds out about the
2 incident early that next day, -- the incident happens
3 on a Tuesday. He finds out about it that Wednesday
4 morning when they came to report it. Bob Beardsley
5 does not go up to the roof to do an inspection or find
6 out what happened. He waits until his boss -- either
7 the next day, the Thursday, or the Friday, tell him to
8 do so.

9 So let me tell you who we're suing in this
10 case and why. Basically, you know, we could draw this
11 but, you have the Meadowlands Project Racetrack and you
12 have the general contractor on the job, which is the
13 L.P. Ciminelli and L.P. Ciminelli hires all the
14 subcontractors on the job. One of the subcontractors
15 is --

16 MR. GULINO: Objection. Is this an opening,
17 Your Honor, or a comment on the evidence? It's a
18 summation.

19 THE COURT: Let me hear it at side bar.

20 (Discussion at side bar)

21 MR. GULINO: (Indiscernible) -- on everything
22 instead of saying this is what the evidence is going to
23 show. It's going to show this, this, this, this, and
24 this. Now, he's going and explaining everything. He's
25 going to have witnesses testify to that and he's doing

1 demonstrative evidence on an opening. And he's saying
2 who the hierarchy is. Is he going to be able to prove
3 that? Is he going to tell them how he's going to prove
4 it?

5 THE COURT: I guess we'll have to see.

6 MR. GULINO: Okay.

7 THE COURT: And if he doesn't, then you'll
8 talk about that.

9 MR. GULINO: Okay. All right, Judge.

10 (End of discussion at side bar)

11 MR. CLARK: What the subcontractor, this
12 Cooper Plaster, Cooper hires its workers, Paino Roofing
13 and you have Countrywide. The basic rule that we
14 talked about that holes two inches or more have to be
15 covered and protected, so that workers can't fall like
16 that and the basic rule that a general contractor on a
17 job site has to enforce these basic safety rules, it
18 comes from industry standards and OSHA.

19 And you're going to hear from an expert in
20 this case, Vincent Gallagher, who worked for OSHA for
21 many years and he's going to talk about that. OSHA was
22 passed in 1970, signed into law by President Nixon in
23 response to needless injury and death that would occur
24 on job sites and it was passed to prevent this kind of
25 thing.

1 So we are suing the general contractor on
2 this job site, L.P. Ciminelli, for not enforcing those
3 basic safety rules about covering holes and preventing
4 needless worker injury on the job site. We're also
5 suing Paino Roofing for having covered up that hole
6 with that membrane that is not a proper guard, not a
7 proper protection, and we're suing Countrywide Plumbing
8 for having created that hole and not taking steps to
9 make sure the hole is covered, so that workers aren't
10 injured.

11 On a job site, Mr. Gallagher is going to talk
12 about how the power on a job site rests at the top and,
13 therefore, safety rules, if we're going to be serious
14 about enforcing safety rules, that I has to be enforced
15 from the top down.

16 In the safety rules that we're talking about
17 are OSHA's fault protection safety rules. They are
18 meant to prevent people from falling off buildings.

19 MR. GULINO: Objection.

20 THE COURT: Let me hear it at side bar.

21 (Discussion at side bar)

22 THE COURT: What is your objection?

23 MR. GULINO: This is expert. We don't talk
24 about this or are we just going to comment on a fall
25 protection when it's not a fall protection case.

1 That's from one floor to another.

2 MR. CLARK: The expert is going to talk about
3 fall protection and the section dealing with holes.
4 He's (indiscernible) fall protection rules and it's in
5 his report.

6 THE COURT: I'm going to ask that you be a
7 little more general than so specific, all right?

8 MR. CLARK: Okay.

9 THE COURT: This is an opening.

10 MR. CLARK: Okay.

11 THE COURT: Okay.

12 (End of discussion at side bar)

13 MR. CLARK: So the type of harm that these
14 rules are meant to protect is fall injuries, falling
15 off roofs, falling in large holes, and stepping in
16 holes and falling down.

17 In this case, the defendants violating those
18 basic rules about covering the hole with the tarp,
19 creating a hole and not protecting against it, and the
20 general contractor's decision to allow these holes to
21 remain open on the job site is what caused this
22 incident, and you're going to hear from the testimony
23 in the case and the witnesses that we believe is going
24 to show that.

25 So what should the defendants have done

1 instead of choosing to violate those rules? Well,
2 Countrywide Plumbing, after it created the hole, should
3 have put a temporary drain on the top or some sort of
4 covering to warn and protect against the situation.
5 Instead, the holes were left open.

6 Paino Roofing, when they came on the job
7 site, they should have very simply not covered up the
8 hole because, by covering it up, it concealed it and
9 made it even more of a hazard because the worker can't
10 avoid it when he goes by it. And the general
11 contractor on the job site should have made sure that
12 those basic rules were followed.

13 And how would that have helped the situation?
14 Well, common sense tells you the --

15 MR. GULINO: Objection. He's commenting.
16 How would that help the situation?

17 THE COURT: Overruled.

18 MR. CLARK: By covering the hole with a
19 plywood and writing the word hole on it or by putting a
20 drain on it so it was readily seen --

21 MR. GULINO: Objection. May we approach?

22 (Discussion at side bar)

23 MR. GULINO: Unless I misread Mr. Gallagher's
24 report, there's nothing like that in it.

25 THE COURT: I don't know that. I haven't

1 read his report. So how would you like me to rule on
2 the objection?

3 MR. GULINO: Okay. I'll withdraw the
4 objection. I apologize.

5 THE COURT: Let me just remind the jury that
6 what the attorneys say is not evidence. The evidence
7 will come through the witnesses that testify and any
8 other evidence that you have once you begin your
9 deliberations. All right? Okay.

10 MR. CLARK: By covering the hole with plywood
11 and writing the word hole on it or putting a drain
12 cover on it to make it obvious, this incident never
13 would have happened. The worker never would have been
14 injured, and none of us would be sitting here today.

15 Now, before we decided to bring this case to
16 court, we had to determine some things and we've been
17 investigating this case for many years. We have taken
18 depositions --

19 MR. GULINO: Objection. Evidence?

20 THE COURT: Let me see you at side bar again.

21 (Discussion at side bar)

22 MR. GULINO: Comment again with, I have been
23 investigating this for years? Where is -- this is what
24 the evidence is going to show. What are you going to
25 prove except making statements? He's commenting. This

1 is a summation.

2 THE COURT: Okay. Go ahead.

3 MR. CLARK: All right. I was -- I was
4 talking about what the evidence is going to show. I
5 was just talking about depositions and then an
6 objection came. Part of investigating the case is
7 taking depositions, reviewing documents, and those are
8 the types of things we're going to talk about at trial
9 and that was what I was about to say.

10 MR. GULINO: You're making it sound like it's
11 a governmental investigation, like it's a criminal
12 investigation.

13 THE COURT: Okay. Your objection is noted.

14 (End of discussion at side bar)

15 MR. CLARK: As part of the work and
16 investigation that we've done on this case before
17 deciding to bring it to trial before you is we took
18 depositions in the case, we consulted with experts in
19 the field, and we reviewed a lot of documents. And the
20 first thing we wanted to find out is, is this hole,
21 this depression in the roof, is this a hazard? Does
22 this violate any industry safety standards? And we
23 reviewed the OSHA rules. We reviewed the OSHA rules.
24 We reviewed the industry standards and spoke to an
25 expert and the expert said, yes, that is a hazard. It

1 does violate the industry standards. It should not
2 have been there and the worker was injured as a result.

3 Now, because of the decision by the
4 defendants to violate some of these basic worker safety
5 rules, a worker was injured. The worker is our client,
6 happens to be in this case Nuno-- or Washington Munoz.
7 As I said, he was working for Cooper Plastering as a
8 plastering laborer on that walk.

9 When he fell, he tweaked his back, wrenched
10 out his shoulder, and was not able to work the next
11 day. He ended up tearing the ligaments in his
12 shoulder. He had an MRI done of the shoulder. He had
13 an MRI done of his back as well, and he ended up having
14 a lot of physical therapy for the injury to the
15 shoulder and to his back. In all total, he had four
16 films, diagnostic films, MRIs, x-rays taken because of
17 this. He had so far 39 doctor visits, including to his
18 treating orthopedic surgeon, Dr. Helbig, who you'll
19 hear from in this case. He had two operations in the
20 shoulder to repair the ligaments and tendons. And he
21 has gone to about a total of 110 physical therapy
22 sessions.

23 He incurred well over \$100,000 in medical
24 bills to date to treat the injury to the shoulder and
25 his back, and you're going to hear testimony in the

1 case that he's going to incur medical bills continuing
2 into the future and that he would benefit from further
3 medical treatment.

4 Now, I don't talk to you guys about the
5 treatment and the medical and the injury to sort of
6 like trigger sympathy or something like that because
7 we're not here in this case asking for sympathy.
8 Instead, we are asking you guys, if you find that the
9 defendants were negligent, that they needlessly
10 permitted this hazard to exist and didn't do anything
11 about it, if you find that, then we are going to ask
12 you at the end to follow the Court's instructions and
13 to award full and fair compensation for what happened
14 to the worker in this case to make up for the harms and
15 losses, and that's why I talked to you about the injury
16 and the damages.

17 Now, you're going to hear, also, about, you
18 know, how Washington Munoz was before the incident in
19 terms of the things he would do and his biggest pride,
20 which made his self-worth was his ability to work and
21 to work fully like he did before. We have his pay stub
22 from Cooper Plastering and as a Union employee at the
23 time, his pay rate was \$39 an hour.

24 Now, he has tried to go back to work since
25 that time, but he has not been able to earn what he

1 earned before, and he's not able to earn to that
2 amount, and you're going to hear more about that later
3 in the case. So there's the medical bills, there's the
4 wages, but the kind of most important harm or loss in
5 this case that I think you will hear about is the
6 permanent life changes that have happened to him, the
7 intangible things, his inability to play sports like he
8 used to instead of soccer, you know, working, the
9 depression that it's had on him, the effect that it's
10 had on him, and you're going to hear about that as well
11 in this case.

12 So the question then becomes, well, what can
13 you guys do about it? You know, we live -- we live in
14 kind of a multicultural age these days and the one
15 thing about America being the melting pot and all that
16 that really stands out is the democracy, how everyday
17 people can decide important issues like the place of
18 industry safety standards in our workplace today and
19 what is fair and just compensation to make up for harms
20 and losses that someone has.

21 You know, in America, we don't have, you
22 know, some board that does it or professional people
23 that decide these cases. The beauty of a democracy is
24 that all of us can decide, everyday people based on
25 everything you hear.

1 And so what can you do about everything that
2 happened here? How can you speak as representatives of
3 this community, as members of this jury? You can find
4 based on the evidence that you hear in this case that
5 the defendants were negligent. If you find that they
6 were negligent and that this shouldn't have happened
7 and that this was a needless risk that was supposed to
8 -- that was -- that was presented to a worker in this
9 situation, you can say so very simply by rendering a
10 verdict for the plaintiff and awarding full and fair
11 compensation to make up for the harms and losses, no
12 half measures, full and fair to make up for it, and
13 we'll speak to you more about that at the end of the
14 case. Thank you, again, for your time. Okay?

15 THE COURT: Mr. Gulino?

16 MR. GULINO: Thank you, Your Honor. Good
17 morning.

18 JURORS: Good morning.

19 MR. GULINO: I don't want to sit on the table
20 because my end will be on the other side. Good
21 morning, again. They fired him. They didn't fire him
22 from them. You're going to hear that Mr. Munoz knew
23 from his orientation day, like the other 2,000 workers
24 on this project, all went through an orientation.

25 Part of that orientation you're going to hear

1 is that each of them were told repeatedly -- and
2 they're given a list and you're going to see the list.
3 Part of the list says, if you have an accident, you
4 need to tell someone within an hour and you're going to
5 hear why. It's very important, is to make sure that if
6 it's a dangerous condition, other workers know. If you
7 are injured and don't go to a doctor and go three days
8 later, how would they know that you were hurt at that
9 time? It's very important.

10 Mr. Munoz wasn't fired because he had an
11 alleged accident, and that's another point that I'll
12 make. He was fired because he didn't report it and he
13 knew that. He hired a lawyer four or five days later.
14 He never went back to work.

15 Now, the evidence is going to show a few
16 things. One, the work area where the accident occurred
17 was not dangerous. Two, the evidence will show that
18 the accident did not happen the way Mr. Munoz claims.
19 It did not happen the way he claimed in the accident
20 report, and you will find out that it did not happen
21 the way he testified under oath at a deposition.

22 Third, you will find that the evidence will
23 show -- and we had a doctor look at him and I will
24 cross-examine their orthopedist who is scheduled today,
25 I believe, that the surgeries that he had have nothing

1 to do with a trauma or a fall.

2 I represent L.P. Ciminelli. I represent
3 Cooper -- I'm sorry -- Paino Roofing, and Countrywide
4 Plumbers, all right? Okay. Three of them. Now, they
5 were not rebuilding the Meadowlands. If you remember
6 back in 2014, we had the Super Bowl come to town and
7 because of the Super Bowl, which was going to be played
8 in the new Giants Stadium, part of the racetrack, not
9 for the horse lovers' benefit but for the television,
10 radio, cable, et cetera, a lot of them were going to
11 put studios in there, so they wanted to renovate it.

12 And so New Jersey Sports Exposition
13 Authority, I believe, puts out a bid and L.P. Ciminelli
14 looks at it and puts a bid in. All right? Now,
15 they're not a general contractor, first of all, and
16 that's a mistake. You're going to find out that
17 they're a construction manager, totally different.
18 Totally different.

19 L.P. Ciminelli is a pretty big company and a
20 pretty successful company and the reason they are, and
21 you're going to fine out, is because they run good jobs
22 and this was a good job.

23 It began in the summer of 2012. The alleged
24 accident -- and I keep calling it that. On June 25th
25 at the racetrack, they had Cooper Plastering as well.

1 That is the plaintiff's employer, and there was a
2 witness who is out in the hallway to testify. He was
3 subpoenaed by the plaintiff. His name is Joel Mella.
4 He also worked for Cooper Plastering. He was the
5 person who was standing right behind him, and you will
6 find out that he was not a foreman because he's going
7 to testify to that fact. He's testified to that fact
8 already at a deposition. He was a co-worker, five feet
9 behind him.

10 And they're going from one part of the roof
11 to another part and what you're going to hear is that
12 as they went in this area, which everyone knows has
13 drain holes and it has drain holes for a reason.
14 You're going to find out that it's a flat roof. And
15 when you have a flat roof and it leans, the water has
16 got to go somewhere. And you will find out that the
17 drain hole -- you can't tell from this photograph but
18 you will from others, it's pitched all around the
19 drain, hitched, sort of like in your bathtub. You know
20 the closer you get to the end of your bathtub, you know
21 you get to the drain for a reason. Water has to go
22 somewhere.

23 Now, they're going to talk about holes. It's
24 not a hole from one floor to another where you can walk
25 and your foot would go through, your leg would go

1 through. There's a drain pipe underneath it. You're
2 going to find out it's an "L" shaped drain pipe right
3 there. You're going to find out that it's six inches
4 maybe wide, maybe four, and what you're really going to
5 find out, under this, that they talk -- talk about a
6 cover. But you're going to find out that that was an
7 inch-and-a-half deep, the same thickness or depth as
8 the padding on the roof. This stuff is heavy. It's
9 this thick. It not only has to repel rain and snow, it
10 has to repel the elements and people walking on it and
11 it's also very soft if you fell.

12 So the two men are walking. It's about 11
13 o'clock in the morning by the way, between 10 and 11 in
14 the morning on the 25th of June, 2013. And you're
15 going to hear Mr. Mella testify, Mr. Munoz was in front
16 of him. Now, they do plastering and what plastering is
17 -- not plastering -- stucco. It's heavy, heavy paint.
18 It's liquid, but it's heavy. You know those big
19 buckets you see, the ones you can see at Home Depot? A
20 couple of those. All right?

21 He's either carrying one or two of them at
22 the time and he has a tool belt, you'll hear, always
23 your shoulder and he walks five feet in front of Mr.
24 Mella and does this. He puts the buckets down. Oh, my
25 bad. No fault. None at all.

1 The buckets, you're not going to find
2 anything about them being spilled because think about
3 it, if you tripped and you fell and you're carrying a
4 bucket and there's no top to it, it's all over the
5 place. He put them down because he didn't fall. Mr.
6 Mella testified to that under oath, and he will testify
7 again today. All right? Co-employee, both Union
8 members. He didn't fall. There will be no proof of
9 that except Mr. Munoz' own word.

10 Now, this inch-and-a-half gap with a cover on
11 it, with the roof and the membrane, he complains. Mr.
12 Mella says to him, go tell somebody. You have to tell
13 them about the accident. No. I'm going to work
14 through the day, which is commendable. That's fine.
15 I'll work it out, and he finishes the rest of the day
16 and it doesn't (indiscernible) -- And he goes home at
17 night and he doesn't go to a doctor and he comes in the
18 next day and he reports it.

19 Now, L.P. Ciminelli did what they said they
20 were going to do, but they also sent him to a doctor
21 immediately. You said you fell. You said you got
22 hurt. We're going to send you to a doctor and they do.

23 Mr. Munoz' job before this, you know, find
24 out you had a commercial driver's license. Okay? He's
25 a truck driver for a number of years. You're going to

1 find out that he also did this for a number of years.
2 Okay? It's called repetitive stress. We do it a lot.
3 It's a tough part of the job that many construction
4 workers get and what happens is, with repetitive
5 stress, -- and you'll hear Dr. Decter (phonetic) talk
6 about it -- you get a bone build up in your shoulder,
7 believe it or not, the bones. You're going to hear the
8 word hypertrophy, too much -- too much.

9 So anyway, he goes to the doctor and he makes
10 no complaints of his shoulder. They're making a claim
11 to you that the man cannot work because he injured his
12 shoulder so severely four years ago. Yet, he makes no
13 complaint of his shoulder the next day at all, no
14 complaint.

15 The accident report that he fills out the
16 next day with Bob Beardsley. You're hurt? Back. End.
17 End. I don't know if Mr. Clark mentioned his elbow.
18 He had a torn biceps tendon. Now, we don't know what
19 his condition was before, but he did complain, all
20 right, of a biceps tendon. It's a tear right here, and
21 you're going to find out what happens is that this
22 biceps tendon creates almost a Popeye look, not that we
23 want that kind of a Popeye look, but that's what it is.
24 And you're going to find out that through is entire
25 medical treatment history, nobody ever did anything

1 about it. They left it alone because it doesn't bother
2 him as a painter. You're going to find out that if he
3 was an electrician, it might bother him. That's it.
4 The only injury he possibly could have had from this
5 accident.

6 Now, he goes to a doctor. He eventually gets
7 what's called an MRI, and you're going to hear from the
8 doctors what an MRI is. It's a magnetic resonance
9 imaging. It's a fancy x-ray and what it really does is
10 it looks more for tissue than bones because you see he
11 makes these complaints to the doctor and they say, you
12 know, let's send him for a test. Let's see if the film
13 study can show what he has.

14 And what the MRI says is that nothing shows
15 trauma. It shows hypertrophic this and shows too much
16 of that, on and on and on. Dr. Helbig then does
17 surgery, right? You're going to find there were three
18 levels of examination that a doctor can do. One more
19 invasive than the next and one more accurate than the
20 next.

21 The first one they do is they do what's
22 called a clinical examination. You come in, they give
23 you a test. You're still making complaints. Well,
24 let's send you for a film study because maybe it's
25 inside somewhere that the doctor can't see. And the

1 third one, which is the most invasive but the most
2 accurate, you're going to find is arthroscopic surgery.
3 That's where the doctor takes a camera the size of a
4 small, small straw, a couple of them in there, and they
5 look right in and they eyeball it.

6 You're going to find that the biggest claim
7 that Mr. Munoz has is that he had a torn rotator cuff
8 from this accident. What you're going to find is that
9 when Dr. Helbig operated on him the first time four or
10 five months after the accident, rotator cuff intact, no
11 tears. None.

12 What the doctor does do is what we call clean
13 up. You're going to hear Dr. Decter talk about that.
14 The subacromial decompression, and what is that? The
15 top of your shoulder here is the acromion, all right,
16 bones and you have tendons that go through these bones,
17 unlike what we see when we look at a skeleton. Bones
18 don't touch each other. There's always something that
19 separates your bones, but sometimes, the bones grow
20 because of repetitive stress and the bones pinch the
21 tendons, not from trauma, from stress.

22 And what the doctor did in his operative
23 report, not only did he not find rotator cuff tear, but
24 you will find he did what's called a subacromial
25 decompression and you will hear what a decompression

1 means. It means -- this means compress, right?
2 Decompression means open. So all the doctor did was
3 shave the bone, no repair, just shave the bone. And he
4 did an acromioplasty. That means he took some bone at
5 the end of his shoulder because that was also impinging
6 (indiscernible) --

7 He sends him home, PT, physical therapy, does
8 that. He returns to physical therapy. He does not
9 return to work. You're going to find he goes almost a
10 year without physical therapy and no return to work.
11 He continues to see Dr. Helbig. Dr. Helbig's reports
12 -- and I will, hopefully, show it on cross-examination
13 -- show many times, he is about normal, 180 degrees
14 here, 90 degrees here. I give him a drop test to see
15 if he's got a problem with the shoulder. Everything is
16 normal, negative. But he can't go back to work, he
17 says.

18 Dr. Helbig then after a while of not seeing
19 the doctor comes back in, he says, I've got a problem.
20 I've got a problem on my shoulder. His problem is
21 looked at, again, by another MRI and that MRI is in
22 January of 2015. That's about 18 months around after
23 the accident, except -- and don't forget, he hasn't
24 seen a doctor in months and months and months -- the
25 MRI showed what's called edema, e-d-e-m-a. You will

1 hear what that is. It's fluid. Sort of like when you
2 sprain your ankle, you get fluid (indiscernible) --

3 The MRI report says, indicative of trauma,
4 recent trauma. Dr. Helbig then schedules surgery and
5 he performs it and you know what he finds? He finds a
6 torn rotator cuff that wasn't there 18 months before
7 and they're going to say that it's all connected to a
8 fall that didn't occur. Now, that's not the way it
9 went.

10 Now, we had Mr. Munoz looked at by Dr.
11 Decter, who is an orthopedic surgeon. It's going to be
12 on screen. It's already been done. It's televised,
13 and I believe the plaintiffs are going to produce Dr.
14 Sosiadad (phonetic), who is also done ahead of time,
15 right? It's like trial testimony.

16 What I want you to do in that instance is I
17 want you to do this. He's going to say one thing,
18 there were no repairs during the first surgery, just
19 maintenance. He's going to tell you swimmers,
20 pitchers, people who do overhead stuff, they're the
21 kind of people who get that surgery. Biceps tear was
22 never repaired, never repaired.

23 But what they're going to find -- what you're
24 going to find on their cross-examination to him is
25 about 20 minutes and I'm going to ask you to do this.

1 I want you to listen to the questions posed by the
2 plaintiff's attorney and I want you to find out if
3 there's one question -- one question that they
4 challenge him on his medicine. They challenge him on
5 how much money he makes a year. They challenge him on
6 does he have a business that does examinations? But
7 they never will challenge him on his medicine ever.

8 Please, when that testimony comes in, it's
9 the last 20 minutes of it, listen to see, do I hear a
10 question challenging his findings? There's none. Mr.
11 Gallagher is going to testify on behalf of the
12 plaintiffs. Mr. Gallagher used to work for OSHA. He
13 did about eight or nine years. He finished in 1985.
14 He has not done an OSHA investigation since 1985, 32
15 years ago.

16 He has testified 100, 200 times, and he's
17 testified in another case that five percent of his
18 work, his testimony, that means he's done over 2,000
19 cases. One hundred percent -- one hundred percent not
20 because of going to his work site and he gets hired by
21 a contractor to make sure that the place is safe. One
22 hundred percent, he works for lawyers and he tells the
23 juries how dangerous the area is, 32 years after he got
24 out.

25 Mr. Munoz is going to make a fight for wages.

1 You're going to find out that he was examined before
2 today. You will find out, Mr. Munoz cannot prove any
3 wages except one pay stub, one. He was working as a
4 truck driver, Union member for about a year, maybe a
5 little more. Not one pay stub. But he's going to come
6 in and tell you he can't work and he needs this money
7 that he can't prove that he ever earned. Okay?

8 Dr. Sosiadad is supposed to testify. They
9 say he has psychological problems. The first time she
10 saw him, you will find out from here because I
11 questioned her, three years after the accident. And he
12 was sent to her by the plaintiff's firm three times.
13 Never saw him again. Never referred him out again.
14 That's it. Okay?

15 So bring it back again very quickly and I
16 apologize for taking so long. I shouldn't have. You
17 will find this area is not dangerous because all the
18 workers know all about this because it's right there.
19 You will find that fall protection does not apply
20 because it's not a fall from one floor to another.
21 That is a drain. That is a not a dangerous condition
22 that everybody knew about it and then if it's covered,
23 -- because you can't have one thing or another. They
24 talk about covering it and they talk about not covering
25 it. It should be covered but not this way. Okay. One

1 or the other. It's either going to be covered or it's
2 not going to be covered.

3 Not dangerous. The accident didn't occur the
4 way he said it occurred. Remember? Mr. Mella is going
5 to testify he tripped. He lurched or crunched. That'
6 will be the term he used. These injuries did not or
7 these surgeries are not related to this accident.

8 I would just ask you to listen. I know it's
9 warm in here. I know I've been a little bit too long,
10 and I apologize for that. I want to thank you very
11 much for your time.

12 THE COURT: Your first witness?

13 MR. CLARK: Yes. At this time, we would like
14 to read in the deposition testimony of Joe Mella,
15 portions.

16 THE COURT: So members of the jury, you've
17 heard both in openings and now Counsel referenced
18 depositions. So in the first -- just give you a
19 definition, right? So attorneys have ways in which
20 they can obtain information about the case before the
21 case comes to trial and one of the ways they can get
22 that information is through the use of a deposition and
23 a deposition is essentially a question and answer
24 period where the attorney is asking questions of the
25 witness that is being deposed, and this question and

1 answer period is all done with the witness being placed
2 under oath. So this is the deposition testimony of one
3 of the witnesses in the case and it was done under
4 oath, right? Yes?

5 MR. GULINO: May we approach?

6 (Discussion at side bar)

7 MR. GULINO: Mr. Mella is down the hall.
8 He's waiting to testify. Can we put him on and he can
9 read that later?

10 THE COURT: Did you know he was here? I
11 mean, --

12 MR. GULINO: I told him this morning.

13 THE COURT: Okay.

14 MR. GULINO: He asked me yesterday to get him
15 here.

16 THE COURT: Okay.

17 MR. CLARK: I would like to --

18 THE COURT: Are you not going to call Mr. --

19 MR. CLARK: No. I'm not going to call him.
20 I'm going to read this -- I'm going to read the portion
21 of --

22 THE COURT: You're not going to call him?
23 You're not going to -- he forced me to bring him here
24 today, Judge. He told me to bring him here. Now, he's
25 not going to call him? He's here.

1 THE COURT: Okay.

2 MR. CLARK: I don't know why we're bickering
3 over this. It's not correct. He's under an on-call
4 subpoena. We talked about this on the record already
5 and --

6 THE COURT: Yes.

7 MR. GULINO: You said you were going to call
8 him. You made me bring him in. I told you I would
9 bring him in tomorrow.

10 THE COURT: All right. So read it.

11 (End of discussion at side bar)

12 (Attorney read-in of deposition of Joe Mella)

13 MR. CLARK: This is portions of the
14 deposition testimony of Joe Mella. The deposition was
15 taken on May 18, 2016, Page 13.

16 Q "Okay. Great. So what is the highest level
17 of education you have completed, Mr. Mella?

18 A High school."

19 Q "Where did you grow up?

20 A I grew up in the Bronx."

21 Q "Are you currently employed?

22 A Yes."

23 Page 14.

24 Q "What is the name of the company?

25 A Cooper Plastering."

1 Q "How long have you worked at Cooper?

2 A Six, seven years now."

3 Q "What kind of work?

4 A On and off."

5 Q "What kind of work do you do at Cooper
6 Plastering?

7 A I'm a plasterer."

8 Q "Have you been a plasterer for all the time
9 you've been at Cooper Plastering?

10 A Yes."

11 Q "What is your job title?

12 A Foreman."

13 Q "What does your -- what do you do -- what's
14 your job description?

15 A I run jobs. I'm a foreman, tell guys what to do."

16 That's from Page 14. Page 16, Line 23.

17 Q "How do you know Mr. Munoz?

18 A That was my first time on the job."

19 Q "You met him at?

20 A The job. Yes. At the job site. I never met --
21 from the first time I met him on the job."

22 Q "Where were you guys working when you met Mr.
23 Munoz?

24 A On the roof."

25 Q "Were you working doing the same job with

1 him?

2 A Yes. Yes. Yes."

3 Page 18.

4 Q "Can you tell me what happened on that day?"

5 There's an objection by the defense counsel.

6 Q "You can answer.

7 A What happened on that day was he was walking in
8 front of me. He had like mud tools and he went through
9 the hole. He didn't go through it, but he was like
10 walking. I was right behind him. He didn't fall or
11 nothing. He was walking and his back crunched like
12 that and he said, oh, my back, my back, he dropped
13 everything."

14 Q "And you're showing that he moved to his
15 right side?

16 A Yeah. He's like crunched like, you know, when
17 your body -- you know, when you're walking your body
18 like."

19 Q "You said he was carrying tools?

20 A I think he was carrying a bag of tools and a
21 bucket. I remember a bucket or two. I remember he was
22 carrying buckets."

23 Page 20.

24 Q "How far away were you from him when you saw
25 him?

1 A I was like couple of feet away, like about less
2 than two, three feet away, like from here to that, to
3 here from that door, basically."

4 Page 21.

5 Q "Did you see what caused him to crunch down?

6 A Yes."

7 Q "What caused that?

8 A The hole."

9 Q "What hole?

10 A In the ground."

11 Q "Did you see a hole in the ground?

12 A I didn't see it but when his foot went in, I saw
13 there was a hole. There was just a tarp covering it."

14 Q "So there was a --

15 A Just a black tarp covering it."

16 Q "Covering the hole?

17 A Correct. So when he went down, his foot went and
18 he crunched and I saw there was a hole."

19 Q "Did he have any other reactions?

20 A Just like his back and he's like my back, my back.
21 He dropped everything. He's like, my back my back, you
22 know."

23 THE COURT: Counsel let me stop you for a
24 moment. Let me see you at side bar.

25 (Discussion at side bar)

1 THE COURT: Did you provide him with these
2 read-ins before that you were going to read in all of
3 this?

4 MR. GULINO: Yes. He did.

5 MR. CLARK: Yes.

6 MR. GULINO: Two days ago. I'm not sure if
7 these are exact, but he did provide a list. Yes. He
8 did.

9 THE COURT: Okay. So are you -- are you
10 reading in the entire --

11 MR. CLARK: No. No. Just the sections that
12 we sent defense Counsel.

13 THE COURT: Okay. And do you have portions
14 of that that you're also reading in and --

15 MR. GULINO: I would like to put Mr. Mella on
16 out of turn and since he's here, let me put him on
17 after this.

18 THE COURT: I mean, the concern is this, so
19 the witness is here and you're essentially reading in
20 the testimony of a witness that's available to testify
21 and it seems to me that just in terms of making sure
22 the record is complete, that there should be an
23 opportunity to cross-examine that evidence.

24 MR. CLARK: It's his witness. It's --

25 THE COURT: Okay.

1 MR. GULINO: Can I put him on out of turn?

2 THE COURT: We'll have to address that later.

3 (End of discussion at side bar)

4 MR. CLARK: Page 23.

5 Q "Who is the other person up there?

6 A Jose Rodriguez."

7 Q "Who does Jose Rodriguez work for now?

8 A Right now?"

9 Q "Or --

10 A He used to work for Cooper."

11 Q "Do you know where he works now?

12 A No. He's not working for us no more."

13 Page 24.

14 Q "Do you know if Mr. Rodriguez saw him get
15 injured?

16 A He didn't saw him, but he went -- Munoz went to
17 him and told him, yeah, I hurt my back, you know, that
18 sort of thing but it happened so quick."

19 Q "Was there anything showing that there was a
20 tarp covering a hole? Were there any signs?

21 A Nothing. Nothing."

22 Q "Were there any flags?

23 A Nothing. Nothing. Nothing. It was like nothing,
24 like a tarp, nothing, you know."

25 Q "Like a tarp?

1 A It was nothing in the ground. It was just black
2 tarp covering it, you know, like it was a hole and put
3 a black tarp covering it. That's it. So, basically,
4 you're walking and you don't know where you're walking.
5 You know what I'm saying?"

6 Page 26.

7 Q "Was there any marking -- was there anything
8 that could have led anyone to know that the black tarp
9 was covering the hole?"

10 MR. GULINO: Objection. Objection.

11 THE COURT: Is there an objection as part of
12 the record?

13 MR. CLARK: I think he's reading --

14 MR. GULINO: Objection to form. Would you
15 like to --

16 MR. CLARK: Yeah. I wasn't --

17 THE COURT: Are you reading a question that
18 there was an objection to?

19 MR. GULINO: Yes. Who sent it?

20 (Discussion at side bar)

21 THE COURT: Yes. That's objectionable.
22 That's objectionable.

23 MR. CLARK: It's objectionable as to what?

24 THE COURT: I mean, this is the problem of
25 doing it this way and, quite frankly, I haven't made a

1 decision on whether or not, you know, the witness will
2 be allowed to testify out of turn. But, I mean, if the
3 witness is here, why is it that we're reading in and
4 then only -- I don't want to waste this jury's time
5 with them having to call him yet again in his case,
6 right? So --

7 MR. CLARK: I'm almost finished. There's --

8 MR. GULINO: Answer the question, though.

9 MR. CLARK: We sent -- we sent --

10 THE COURT: I mean, the jury is going to hear
11 from him again.

12 MR. CLARK: Not -- I'm not going to call him.
13 I'm just doing the read ins.

14 THE COURT: Yes. So that's what I'm saying.
15 So -- so, you know, let's not play games, right? So
16 that wastes the jury's time because they're going to
17 hear from him again when they can just hear from him
18 and direct and cross and the truth come out because
19 that's what we're looking to do, right? So you're
20 choosing to do it this way only to potentially have the
21 witness come back again either out of term or another
22 time.

23 MR. GULINO: If that's what they want to do,
24 that's fine.

25 (End of discussion at side bar)

1 MR. CLARK: Page 27.

2 Q "How long did he complain of his back pain?

3 A About five, ten minutes but, you know, he kept on
4 my back, but he was trying to work, wear it out, you
5 know?"

6 Q "So he continued to work afterwards?

7 A Continued to work."

8 Q "Was he complaining of back pain as he was
9 working?

10 A He was complaining at first about the back and
11 then come later on and complained, my back, you know,
12 like pause and come back."

13 Page 28. The witness --

14 MR. GULINO: What line?

15 MR. CLARK: Page 28.

16 MR. GULINO: I understand it's Page 28. What
17 line?

18 MR. CLARK: It's Line 15.

19 MR. GULINO: Okay.

20 MR. CLARK: "THE WITNESS: He was trying to
21 wear it out. He was trying to see if it goes away."

22 Q "Is that what she told" --

23 MR. GULINO: What was the question? That's a
24 statement.

25 MR. CLARK: My question.

1 Q "Is that what he told you?

2 A Yes."

3 MR. GULINO: There wasn't a question.

4 MR. CLARK: Page 29.

5 Q "Anyone could -- could have fallen?

6 A Yeah."

7 Q "Anyone could have walked through the hole,
8 you know," --

9 MR. GULINO: Objection. There was an
10 objection posed.

11 THE COURT: Okay. Let me see you at side
12 bar.

13 (Discussion at side bar)

14 THE COURT: If there is an objection, there's
15 no reason that we should be reading the question where
16 there's an objection.

17 MR. GULINO: Thank you.

18 MR. CLARK: Judge, I'm just a little -- we
19 sent these read ins to defense Counsel two days ago.

20 THE COURT: Okay.

21 MR. CLARK: We haven't received any
22 objections.

23 THE COURT: But there is an objection in the
24 record, right?

25 MR. CLARK: Yeah. But the way I usually see

1 it is we send it to defense Counsel. If they have
2 objections, they go through the read ins and we try to
3 work it out and if the Court -- and then we read the
4 testimony in.

5 THE COURT: Okay.

6 MS. CLARK: That's usually -- he's got no
7 objections. Now, he's objecting.

8 MR. GULINO: Objection is stated. That's all
9 I need to do.

10 THE COURT: The objection is -- the objection
11 is clear, and so to the extent there's an objection, --
12 what was the objection?

13 MR. GULINO: I think there was
14 (indiscernible) --

15 MR. CLARK: What I just read is here.
16 There's no objection.

17 MR. GULINO: Okay.

18 MR. CLARK: There's no objection to that.

19 MR. GULINO: We didn't know. I'm sorry. I
20 withdraw my objection, and I apologize.

21 THE COURT: Okay.

22 (End of discussion at side bar)

23 MR. CLARK: Q "Anyone could -- could have
24 fallen?

25 A Yeah. Anyone could have walked through the hole,

1 you know."

2 Page 31.

3 MR. GULINO: I'm sorry. What (indiscernible)
4 -- did you finish at Line 22?

5 MR. CLARK: I'm on Page 29, Line 24 to the
6 third line --

7 MR. GULINO: I understand that, but you read
8 the first question up here and there was an objection.
9 Are you going to continue all the way down?

10 MR. CLARK: I -- Lazaro, you gave him the
11 page and lines two days ago, right?

12 MR. BERENGUER: Yes.

13 MR. CLARK: Okay. Do you have another copy?

14 THE COURT: There's an objection that -- let
15 me see -- you know what, let's take the jury out of the
16 room, all right? Don't talk about the case. We'll see
17 you back momentarily.

18 COURT OFFICER: Please stand.

19 (Jury not present in courtroom)

20 THE COURT: Okay. So I want to make sure
21 that this is not something that's going to continue to
22 happen. The repeated side bar is very disruptive. The
23 jury doesn't like it. It doesn't look good for the two
24 of you.

25 There's no -- if there are objections in the

1 proposed read ins and those objections could not be
2 resolved between the two of you, then I need to have
3 been made aware of those objections, so that we can
4 address them and I'm going to put it out here again.
5 If this witness is here and there are -- which -- which
6 I don't understand why this wasn't even brought to my
7 attention because to the extent that -- that there was
8 an intention to do these read ins and you knew that you
9 were being asked to have this witness available here
10 today, there -- it's one thing, which I don't condone
11 either, to waste my time and each other's time. But
12 it's quite another to waste these folks' time, right?

13 So their compensation of whatever it is, five
14 bucks a day, whatever it is that they're getting to be
15 here and take time out of their busy schedules to help
16 you folks resolve this dispute is something that we
17 have to be respectful of.

18 So, now, we have a situation where there are
19 read ins being done, there is repeated objections and
20 I'm not saying your objections aren't legitimate, but
21 why weren't they brought to my attention and why is it
22 that we're conducting in this trial in a manner that's
23 going to ultimately result in a waste of time when if
24 the witness is here live and if there's testimony in
25 the record by way of a deposition, typically, that

1 happens when the witness isn't available or, perhaps,
2 there's portions of the testimony that's sort of, you
3 don't want to waste time to call a witness, but this
4 seems to be a pretty significant witness in the case,
5 right?

6 So but you're choosing -- and if that's the
7 way you want to try your case, that's the way you want
8 to try your case, but you're choosing to present this
9 testimony by way of these read ins where there were
10 clear repeated objections and, from what I've seen,
11 some of the objections appear to be legitimate and,
12 yet, because there was no -- nobody addressed those
13 objections, we're dealing with these objections in this
14 way and the witness is right outside. So have you
15 spoken to the witness in --

16 MR. GULINO: Yes. I have.

17 THE COURT: -- determining what his
18 availability is, whether or not he can come back on
19 another day?

20 MR. GULINO: He really said that he --

21 THE COURT: Go ahead.

22 MR. GULINO: I talked to him this morning. I
23 said, you need to go today. He said, yes, I do. I'm
24 missing work.

25 THE COURT: So -- so --

1 MR. GULINO: And if I may, I asked Mr. Clark
2 yesterday, if you don't think you're going to get to
3 him, I'll bring him in Thursday.

4 THE COURT: Well, aside from that, so you
5 have these readings of a witness that's available live.
6 Like -- okay. So --

7 MR. CLARK: Judge, I -- I --

8 MR. GULINO: He had to have known this
9 yesterday. He had to have known he wasn't going to
10 call him. You can't tell me he just thought about it
11 now.

12 MR. CLARK: Judge, I told -- I told defense
13 Counsel yesterday when he was asking me this, I said, I
14 cannot predict how this is going to go. Frankly, I was
15 going to call Mr. Gallagher as my first witness. But
16 when defense Counsel opened to the jury and told them
17 that he was not a foreman, I said, I think I should
18 read those dep. readings in now where he clearly
19 testifies twice he's a foreman in charge. So that's
20 sort of the dynamics of a trial and had that not
21 happened, I may have asked to call him live or not call
22 him at all. It's the fluency of a trial.

23 But I told Mr. -- defense Counsel, I said, I
24 will -- I don't want to needlessly keep people hanging
25 around.

1 THE COURT: All right.

2 MR. CLARK: And it's -- it's -- I wasn't
3 going to do the read in until he opened and said two
4 things that starkly contradicted and so I said, I'll do
5 those -- why don't I do those read ins now that were
6 sent to defense Counsel two days ago that we received
7 no objections like how it's normally done.

8 MR. GULINO: The first one is that he was a
9 foreman and not a foreman. I'm assuming you read the
10 entire transcript, so you would know on Page 15, Your
11 Honor, Line 7, question to Mr. Mella at his deposition.

12 Q "In what year did you become a foreman at
13 Cooper?

14 A Two-and-a-half years ago, about, what, 2014,
15 around there."

16 After the accident. He misquoted it or he
17 misspoke and he knew it.

18 THE COURT: So what's going to end up
19 happening is, so you're going to do these read ins
20 because you don't want to call the witness live and
21 maybe it is that there's certain things that you're
22 concerned that the witness might say that you don't
23 necessarily want in your case, so you don't want to
24 make it your witness, you're going to do your read ins
25 and that's your strategy, you're entitled to it. But

1 at the end of the day, we're going to hear from this
2 witness through his deposition read ins and then the
3 defense is going to turn around and call the very same
4 witness and then it's going to be direct and cross-
5 examination of that witness when a discussion -- a
6 legitimate discussion, a reasonable discussion about
7 how this case is going to proceed could have
8 potentially resolved this entire issue with direct and
9 cross and the witness appearing once.

10 But this is -- you have a right to choose to
11 proceed in the manner in which you feel is best for
12 your case. But I also want both of you to be mindful
13 that we have folks that are here giving of their time,
14 hoping to help you resolve this dispute, and I don't
15 think it does any of you good when half of our time is
16 spent whispering and they're sitting there sort of
17 wondering what's happening. Right? So I don't know
18 how much more you have and whether or not there are
19 further objections that we need to address, so that
20 this not -- the back and forth is not happening.

21 So are there other objections given what you
22 have in front of you that you were provided with, so
23 that we don't have to --

24 MR. GULINO: I don't know what else he's
25 going to read, Judge. If you'll give me one second.

1 THE COURT: Sure.

2 MR. GULINO: How much more do you have,
3 Jerry? What page were you up to?

4 MR. CLARK: Four -- four to five minutes --
5 three to five minutes.

6 MR. GULINO: What page were you up to? What
7 was your last page?

8 MR. CLARK: I think I stopped at Page 30, the
9 quote on -- the line, Page 30. Now, the next one is on
10 31. Judge, perhaps, we can take a few minutes and just
11 try to work this out with Counsel. If he has that, I
12 don't want to waste time.

13 THE COURT: All right. Let's give the jury
14 15 minutes at this point. All right?

15 COURT OFFICER: Yes, ma'am.

16 (Break)

17 THE COURT: Okay. So before we bring in the
18 jury, what, if anything, were you able to resolve?

19 MR. GULINO: I do have some objections to
20 what he's going to read.

21 THE COURT: Okay.

22 MR. GULINO: I did call Mr. Mella. He's on
23 his way. He put more money in the machine, and he's
24 going to say it's a hardship for him to come back
25 another day. I have Mr. Paino, who is a party, --

1 THE COURT: Why is it -- why is it -- why is
2 it a hardship for him to come back another day?

3 MR. GULINO: He's working on a job, and he
4 had to get out of that job today because he's a
5 foreman.

6 THE COURT: Okay.

7 MR. GULINO: Now, he's a foreman. He wasn't
8 at the time.

9 THE COURT: Okay. Is he being paid for his
10 time?

11 MR. GULINO: Yes. And he'll come in and
12 testify to that, if you want, Judge, and we'll hold a
13 hearing.

14 THE COURT: Okay. I don't want to hold a
15 hearing. Again, this is an incredible waste of this
16 jury's time. Here's my concern. Here's my concern.
17 This, from the Court's perspective, is a critical
18 witness in this case that clearly, for whatever reason,
19 the plaintiff is choosing not to call. And so maybe it
20 is that there are things that were said either in the
21 deposition, whatever, that the plaintiff does not want
22 in the case.

23 The problem with simply reading portions of a
24 deposition transcript of a witness -- a witness to the
25 actual incident in this case is that -- and one of the

1 questions you might recall I asked at side bar was, is
2 the entire transcript being read because, at the end of
3 the day, there is an argument to be made that, in order
4 to have the complete picture, there needs to be direct
5 and cross and we're not talking about a very limited
6 issue that the jury is being asked to consider by way
7 of a deposition reading. This is -- this is
8 significant testimony about the way in which this
9 accident occurred from this witness' perspective.

10 And so I'm concerned that continuing to
11 simply read from the deposition transcript, picking out
12 those portions that are helpful to the plaintiff is not
13 entire-- it's not entirely fair to the defense nor is
14 it presenting to this jury, more importantly, the
15 entire picture. And so when we do deposition read ins,
16 it has to be such that the jury is being presented with
17 the entire picture, so that if the deposition -- part
18 of the deposition that's read actually leaves the jury
19 with a misimpression because there's another part of it
20 that sort of makes it whole, the jury has to hear that
21 as well.

22 And so -- so there needs to be direct and
23 there needs to be cross, so that the jury gets the
24 entire picture. This is not a proper way to present
25 the testimony of this witness, but that's not the

1 objection I got from you, right? The objections that
2 you're placing are that there are objections in the
3 record that Counsel is proceeding to read and you had
4 all those read ins and, quite frankly, all of the stuff
5 that we were doing yesterday, this is a significant
6 issue. If you knew that there was this intention to do
7 deposition readings from a witness who was clearly
8 available. This witness is key from the Court's
9 perspective, and so how is it that we didn't deal with
10 this issue?

11 MR. GULINO: He is a non-party, first of all,
12 now. He is a non-party witness.

13 THE COURT: No. I'm talking about --

14 MR. GULINO: I know.

15 THE COURT: Listen, he --

16 MR. GULINO: I know.

17 THE COURT: Is this guy not the person that
18 saw what happened?

19 MR. GULINO: Yes. He's still a non-party
20 now. He's out of the case.

21 THE COURT: Okay. Okay. But what I'm saying
22 is that, at the end of the day, there's direct and
23 cross-examination in that deposition transcript and,
24 you know, when we do deposition read ins, the jury has
25 to get a complete picture. You can't do one little

1 section of it that helps you out when another section,
2 if you read it in the -- in its entirety presents the
3 full picture. And so the concern of the Court is that
4 this jury is not being given the full picture just by
5 the plaintiff's read ins. But that's not the objection
6 you gave me, right?

7 MR. GULINO: If that were the objection, --
8 I'm not the one who is doing the reading. He is. He's
9 the one who decided to do it this way.

10 THE COURT: Right. So -- and you should be
11 objecting to them to the extent that they don't present
12 the entire picture, is what I'm saying to you.

13 MR. GULINO: That it's out of context?

14 THE COURT: And that -- correct. That should
15 have been brought to me yesterday and, now, we're
16 dealing with --

17 MR. GULINO: No. He's --

18 THE COURT: -- this -- this can't continue.

19 MR. GULINO: I'm sorry.

20 THE COURT: It can't continue.

21 MR. GULINO: Judge, --

22 THE COURT: So you're asking me now to put
23 this -- in terms of whether or not you're objecting to
24 the continued reading of it, which that's in part what
25 I'm hearing from you, I'm going to sustain that

1 objection. However, if the witness is being paid for
2 his time and he's on call and you want to put him in on
3 your case, then you're entitled to do that. But we
4 can't continue to read in from the deposition when we
5 have an available witness. That's -- we can't have
6 that.

7 MR. GULINO: We have an available witness.
8 He's outside.

9 THE COURT: Correct. But -- but we're on the
10 plaintiff's case.

11 MR. GULINO: I under-- he told me to bring
12 him in, Judge. I'm not the bad guy here. He told me
13 to bring him in.

14 THE COURT: I'm not -- I'm not saying that
15 you are. I'm not saying anybody is the bad -- but if
16 the witness is subpoenaed to be here, -- is he
17 subpoenaed to be here?

18 MR. GULINO: He was subpoenaed to be here and
19 he said, bring him here and I said, if you're not going
20 to get to him, I'll bring him in Thursday and he said,
21 no, bring him in tomorrow and so, now, I brought him in
22 today and he's not going to use him.

23 MR. CLARK: Judge, that --

24 MR. GULINO: And you know that's the truth.

25 MR. CLARK: I don't want to -- we talked

1 about this yesterday. I said, it's an on call
2 subpoena. He should be on call. I don't want to
3 needlessly have people wait around. I may need him
4 tomorrow. If not, I may need him the next day. I
5 said, I may read in his stuff and not call him at all.
6 I can't say for certain. I didn't say, bring him in
7 tomorrow, I'm calling him. That's not what happened.

8 MR. GULINO: What about Mr. Paino who is
9 behind me? You subpoenaed him for today. What are we
10 doing with him?

11 MR. CLARK: Sorry, but it was an on call
12 subpoena. It wasn't a subpoena for today. It was a
13 subpoena for Monday, which was the trial call day.

14 MR. GULINO: On call subpoena means, you call
15 me and say, look, Joe, I need him then. You got him.
16 That's an on call subpoena. You subpoenaed him for
17 trial today. You wanted him here today, not on call,
18 today. Are you going to call him?

19 THE COURT: Listen, I don't -- I don't know,
20 but ultimately, if you intend to call this witness to
21 testify, then make the arrangements, so that he needs
22 to be back here on whatever day you think you'll have
23 him to testify. I am sustaining the objection as far
24 as reading in anything else because it seems to me that
25 if you want this in, you've got to call this witness,

1 put him on, so that he's subjected to direct and cross.
2 So you've got to make a choice. He's here. Call him
3 and proceed that way or else wait and then the defense
4 will put him on.

5 MR. CLARK: All right. I'm going to wait.
6 I'm going to get my expert on the stand.

7 THE COURT: Okay.

8 COURT OFFICER: How are you, ma'am? He went
9 down to go grab --

10 MR. GULINO: I'm sorry. You're not going to
11 call him or you are?

12 MR. CLARK: The next witness is going to be
13 Gallagher.

14 MR. GULINO: You're going to call Mr.
15 Gallagher now?

16 MR. CLARK: Yes.

17 MR. GULINO: Are you going to call Mr. Mella
18 today? That was the question.

19 THE COURT: Is the jury on the --

20 (Recording paused - Recording resumed)

21 MR. GULINO: So you're not going to call him?
22 You're not going to call him today?

23 MR. CLARK: Your Honor, is it okay if I go
24 get Mr. Gallagher, --

25 THE COURT: Yes.

1 MR. CLARK: -- so he can be set up?

2 MR. GULINO: He is not calling Mr. Mella
3 today then, I assume?

4 THE COURT: I assume not.

5 MR. GULINO: He didn't answer the question,
6 Judge.

7 THE COURT: Okay. I assume that he's not
8 calling him then.

9 MR. GULINO: I need a few moments to speak
10 with Mr. Paino because I don't know if he's going to
11 have to be here all day.

12 THE COURT: Sure.

13 MR. CLARK: Judge, --

14 THE COURT: Yes?

15 MR. CLARK: -- as I -- as I stand here, I do
16 not know if I'm going to call Joe Mella or not today or
17 in my case. I have to think about everything that
18 happened. I want to put my expert on the stand now.
19 That's -- that's my answer. I'm doing the best I can.
20 I cannot choreograph the trial. I had expected because
21 I got no objections to the read ins that we would be
22 done and I would be onto my guy now. But now that I've
23 had 75 percent of it read in and, now, they're saying
24 they don't want that anymore, I have to like process
25 that.

1 MR. GULINO: But you knew the witness was
2 coming in. You could have told me, don't bring him in.
3 You wasted time, and you were dishonest about it, and
4 you know it.

5 THE COURT: Okay. Let's bring in this jury.

6 MR. GULINO: We're putting Mr. Gallagher on?
7 I'm going to send Mr. Mella home. I'm going to send
8 Mr. Paino home. They're not going to testify today
9 because you're not going to call them. Are you? Let
10 me know, please.

11 THE COURT: They're available for Thursday?

12 MR. GULINO: I'm sorry?

13 THE COURT: They're available for Thursday?

14 MR. GULINO: I have to talk to Mr. Paino and
15 I have to talk to Mr. Mella.

16 THE COURT: Okay.

17 COURT OFFICER: I'll check to see if
18 (indiscernible) --

19 THE COURT: Thank you.

20 MR. GULINO: And I'm going to do -- objecting
21 but am I waiving any readings in return? He made some
22 -- he read some parts of it that I would like to
23 respond to. I'm allowed to do that, I believe. It's
24 like recross or redirect on a case. So he read parts
25 of the deposition transcript. I now in response to him

1 want to read three or four parts of the transcript. It
2 will take me five minutes.

3 THE COURT: You can do that in your case.
4 You can do that --

5 MR. GULINO: I'm sorry.

6 THE COURT: You can do that in your case.

7 MR. GULINO: Your Honor, if he called him to
8 the stand --

9 THE COURT: Sir, you're doing it again. We
10 are going it again, right?

11 MR. GULINO: I -- I have an objection. Thank
12 you, Your Honor. I'm sorry. I apologize.

13 THE COURT: Just so we make a record, right,
14 I should have received any objections that you had to
15 the read ins because I sit here, you have the -- you've
16 lived with this case for two, three, however many years
17 it is. I literally, aside from whatever motions I
18 might have done and, as you know, the Court has many
19 motions every motion cycle, right? So there's very
20 limited contact that I've had with this file and then I
21 get it literally moments before you appeared in my
22 courtroom and you know your case like nobody else knows
23 this case.

24 And so if there is a proposed set of read ins
25 that you are objecting to or that you feel that there

1 is a need to have the entire --

2 COURT OFFICER: The jury is on its way in.

3 No?

4 THE COURT: -- the entire record read --

5 COURT OFFICER: Hold.

6 THE COURT: You've got to be kidding me.

7 That -- I should have been made aware of that, and I'm
8 not saying that you are wrong. You have a right to
9 have a transcript or a deposition read in be presented
10 to the jury in a manner in -- that allows the complete
11 picture to be presented, not portions of it. None of
12 this should have happened, but that's not the objection
13 that I got from you. So I don't -- you can't now try
14 to undo it when you never objected to it. That was
15 never your objection, and it should have been, quite
16 frankly.

17 I sit here and I think that this is just the
18 deposition that the two of you are fine with. Okay.
19 But little do I know that it's literally a key witness
20 in the case, and we're not talking about a few portions
21 of the witness' testimony. We're talking about a bulk
22 of the testimony dealing with how this accident
23 happened.

24 Should you be allowed to now present your
25 version in terms of the questions that were asked by

1 way of cross-examination? Sure. You can do that in
2 your case. Have you given proposed read ins to the
3 other side?

4 MR. GULINO: I have no intention of reading
5 anyone's. I have live witnesses.

6 THE COURT: Exactly. So, now, -- so do you
7 want some time to now present to Counsel those portions
8 that you think are responsive to the ones that he might
9 have read in out of context? This is --

10 MR. GULINO: The one -- I have -- I have
11 three or four of them.

12 THE COURT: Yes. Did you give them to the
13 other side?

14 MR. GULINO: No.

15 THE COURT: There you go. So -- so --

16 MR. GULINO: How would I know until he read
17 them to me?

18 THE COURT: You wouldn't. You wouldn't. My
19 point exactly, which is why when you got those
20 deposition read ins, you should have brought it to the
21 Court's attention that, listen, Judge, you can't read
22 this portion and not read this portion. That is what
23 you should have brought to me. Did you ever bring that
24 to me? Did you?

25 MR. GULINO: No.

1 THE COURT: Judge, he's proposing to read
2 this, this, this, and this but you should understand --
3 because you have the transcript. I don't. You should
4 understand that, if he reads this, this doesn't present
5 the whole picture. The whole picture is to turn to
6 this page and read all of this, but that's not what you
7 did. You never did that, right?

8 So, now, you're saying, listen, Judge, he put
9 in this part of this and, in response, I want to put in
10 this part of this and I understand, you have a right to
11 do -- none of this should have happened, none of it.
12 But that wasn't brought to me.

13 So in order to cure that, you then give to
14 the other side whatever portions you believe contradict
15 what he read and say, listen, I think, in terms of
16 completing the picture, the jury should hear this. Do
17 that and then we'll deal with your ability to then go
18 back and read to the jury your portion.

19 MR. GULINO: Sure.

20 THE COURT: Okay? All right.

21 MR. CLARK: Ready? Judge, is it okay if Mr.
22 Gallagher comes and sits --

23 THE COURT: Sure.

24 MR. CLARK: -- he sets up?

25 THE COURT: He needs to set up?

1 MR. CLARK: Well, at least, get up there and
2 then we have a cord that we're going to plug in after
3 the jury sits, so that no one trips, if that's all
4 right.

5 THE COURT: Okay.

6 MR. CLARK: Is that all right, Your Honor?

7 THE COURT: Well, how long is it going to
8 take you to do what you need to do?

9 MR. BERENGUER: Three minutes. I've got four
10 of them.

11 THE COURT: Okay. Just hold on a few
12 minutes.

13 MR. CLARK: Okay.

14 THE COURT: Give those -- and let's get this
15 going.

16 MR. GULINO: Here you go, Page 15. Page 15,
17 Line 4. Line 4 to Line 10. Prior to being a foreman
18 at Cooper Plastering, what was your job title? Regular
19 worker. And what year did you become a foreman at
20 Cooper? Two-and-a-half years ago. About what? 2014,
21 around there. That, I want to read. I want to read
22 from Page 19, Line 20, to Page 20, Line 17. I want to
23 read from Page 22, Line 25, to Line -- Page 23, Line 8.

24 MR. CLARK: Page 19, --

25 MR. GULINO: I'm sorry. Okay. So you want

1 -- 19 is -- Page -- Line 20.

2 MR. CLARK: Page 19? I think it should start
3 at Line --

4 MR. GULINO: Until -- on Page -- till Page
5 20, Line 24.

6 MR. CLARK: Okay. I think it should start at
7 Line 17, if you're going to do that.

8 MR. GULINO: Oh, okay. I'm sorry. You're
9 right. Line 17.

10 MR. CLARK: So 20, Line 24?

11 MR. GULINO: And then Page 22, Line 25 --
12 Page 22.

13 MR. CLARK: Okay. Now, what page?

14 MR. GULINO: Page 22, down here, Line 25, to
15 Page 23, Line 8. And then Page 29, Line 4 to Line 10.

16 MR. CLARK: That's Page 22, Line 25.

17 MR. GULINO: Page 29, Line 4 to Line 10.

18 MR. CLARK: I'm sorry, on Page 22?

19 MR. GULINO: Page 22, Line 25, to the next
20 page, Page 23, Line 8. And then the last one is Page
21 29 --

22 MR. CLARK: The last one is what?

23 MR. GULINO: Page 29.

24 MR. CLARK: Yes.

25 MR. GULINO: Line 4 to 10.

1 MR. CLARK: Yes. I don't agree with that.

2 MR. GULINO: I'm sorry?

3 MR. CLARK: I don't agree with that.

4 MR. GULINO: Okay. We can talk about it with
5 the Judge. Okay. Your Honor, if I may. We have, I
6 think, just one disagreement.

7 MR. CLARK: I would like to read the balance
8 of my sections.

9 MR. GULINO: Well, I want to read 29, so we
10 have a disagreement on 29.

11 MR. CLARK: I would like to read the balance
12 of my sections because they relate to what you want to
13 read in.

14 MR. GULINO: You just said you have an issue,
15 and the Judge wants us to work it out. I thought we
16 were going to talk about this one. That's all --
17 that's the last thing I'm going to read, so --

18 MR. CLARK: I would like to read the balance
19 of the sections I have because they relate to what you
20 want to read.

21 THE COURT: This is the problem. This is why
22 you don't do this this way. This is why you put the
23 witness here and you have the witness direct and cross,
24 end of story, not read ins where there's no way to get
25 the entire picture through select read ins. It's just

1 -- it's -- what is there not an objection to?

2 MR. GULINO: It was my call. I wasn't doing
3 it this way. He said, he was putting the witness on.

4 THE COURT: Yes. But -- but, again, your --

5 MR. GULINO: So can we just --

6 THE COURT: Go ahead.

7 MR. GULINO: The question is as follows,
8 Judge. This is a question by Mr. Berenguer.

9 Q "Do you think that the condition on the roof,
10 the black tar covering the hole, do you think it was
11 dangerous?"

12 My partner objected. The witness answered,
13 no. I will withdraw the objection.

14 MR. CLARK: I'm sorry. It's over my
15 objection to form. It calls for expert opinion.

16 MR. GULINO: I'll let you answer.

17 MR. CLARK: Yes. So --

18 MR. GULINO: Their question to my witness. I
19 waive the objection. I will read that part in.

20 MR. CLARK: So that's a deposition. We
21 object to that. It doesn't -- just because we asked at
22 deposition doesn't mean it's admissible evidence at
23 trial.

24 THE COURT: Yes. Yes. That's -- that --

25 MR. GULINO: Are you going to say it was an

1 improper question?

2 MR. CLARK: No. My objection is --

3 MR. GULINO: It was your question.

4 THE COURT: Yes.

5 MR. CLARK: My objection is it calls for
6 expert opinion as articulated --

7 MR. GULINO: It was your question to my
8 witness.

9 THE COURT: Okay.

10 MR. GULINO: You can't object to your
11 question.

12 THE COURT: It's not -- it's not coming in.
13 It's not coming in. Read those portions that you think
14 directly relate to those portions of the transcript
15 that were read in by the plaintiff that puts that
16 testimony in context.

17 MR. GULINO: Yes.

18 THE COURT: Beyond that, no --

19 MR. GULINO: That's it. That was just the
20 four questions.

21 THE COURT: Yes.

22 MR. GULINO: I believe that puts everything
23 in context.

24 THE COURT: That very last question is not
25 coming in where there was an objection to it. Okay?

1 MR. GULINO: It was their question, Judge.

2 THE COURT: I heard that about five times
3 already. I heard it about five times. I heard you say
4 that about five times. I'm reminding you, I heard you
5 say that about five times already. That's my ruling.

6 MR. GULINO: I have to send the two witnesses
7 home. When we take a break, I'll send them home.

8 THE COURT: No. The jury is waiting.

9 MR. GULINO: No. No. I said, when we take a
10 break, Judge. Just when we're putting on Mr. Gallagher
11 because you have to set him up, right?

12 MR. CLARK: If you're now objecting to the
13 read ins of those witnesses that are in the hall that I
14 sent two days ago, I may need to call them today. If I
15 don't get to them today, I may need to call him
16 tomorrow or I may wait until your case. I have to see
17 how the testimony in the trial develops.

18 MR. GULINO: So they're both going to have to
19 stay here today? I'm going to tell them that they both
20 stay here today? May I go out and tell them, Judge, or
21 do you want me to wait? I'll wait.

22 COURT OFFICER: Jury entering.

23 (Jury present in courtroom)

24 THE COURT: Be seated. Thank you. So
25 members of the jury, when -- when -- when matters come

1 to trial, it's the job of the Court to sort of ensure
2 that you are provided with the information that you're
3 entitled to have in order to decide the case. And so
4 there was some deposition read ins that were done by
5 the plaintiff and, often times, in order to allow a
6 complete picture to be presented, there should be other
7 portions that the defense may want to have read in as
8 well.

9 And so to the extent that that was not
10 addressed previously, I will now allow Counsel the
11 opportunity to read only those portions of the
12 deposition that relate to the portions read in by the
13 plaintiff in order to put that testimony in context.
14 All right?

15 MR. GULINO: Thank you, Your Honor. For the
16 record, I'm reading from Mr. Mella's deposition
17 testimony, Page 15, Line 4.

18 Q "Prior to being a foreman at Cooper
19 Plastering, what was your job title?

20 A Regular worker."

21 Q "In what year did you become a foreman at
22 Cooper?

23 A Two-and-a-half years ago, about 2014, around
24 there."

25 I am reading from Page 19, Line 17.

1 Q "And you said he had mud. What was he
2 carrying?

3 A Base coat."

4 Q "Where was he carrying his tools? Do you
5 remember?

6 A Don't remember."

7 Q "You said, he --

8 A He was carrying his tools, but I don't remember
9 where he was carrying his tools."

10 Q "Was it across his shoulders?

11 A I don't remember."

12 Q "And you said he had some buckets?

13 A Yes. Materials, base coat."

14 Q "Do you remember how many buckets?

15 A One or two. I don't remember. I think it was one
16 or two."

17 Q "How far away were you from him when you saw
18 him?

19 A I was like a couple of feet away, like about less
20 than about two, three feet away, like from here to that
21 -- from here to that door, basically."

22 Q "I would estimate with defense Counsel, here
23 maybe that's four-and-a-half to five feet?

24 A About five feet."

25 Q "On Page 22, Line 25, do you know what time

1 the accident happened, about?

2 A It was in the morning time. I don't know the
3 time, but it was in the morning."

4 Q "More or less, can you give me --

5 A About 10 o'clock, 11 o'clock."

6 Q "Did you -- did you or him call anyone?

7 A No. Because he was going to work. He was going
8 to see if the pain goes away."

9 Thank you, Your Honor.

10 THE COURT: Thank you. Mr. Clark, call your
11 next witness.

12 MR. CLARK: Thank you, Judge. I would like
13 -- at this time, I would like to call Vincent
14 Gallagher.

15 THE COURT: Good morning.

16 MR. GALLAGHER: Good morning, Your Honor.

17 COURT OFFICER: Please left hand on the
18 Bible, lift your right, state your full name for the
19 record.

20 MR. GALLAGHER: Vincent A. Gallagher.

21 COURT OFFICER: Spell your last.

22 MR. GALLAGHER: G-a, double l, a-g-h-e-r.

23 V I N C E N T A. G A L L A G H E R, PLAINTIFF'S
24 WITNESS, SWORN

25 COURT OFFICER: Thank you, sir. Please be

1 seated and (indiscernible) --

2 MR. CLARK: Your Honor, is it okay if I sit
3 and ask questions and go back and forth a little bit?

4 THE COURT: Sure.

5 MR. CLARK: Is that all right? All right.

6 VOIR DIRE DIRECT EXAMINATION BY MR. CLARK:

7 Q Mr. Gallagher, what is your educational
8 background?

9 A I have an undergraduate degree in Liberal Arts,
10 Major in Economics from LaSalle University and a
11 Master's Degree from New York University in the field
12 of Occupational Safety and Health.

13 Q What did you do after graduating from
14 LaSalle?

15 A I served in the Peace Corp in Venezuela for two
16 years and then, after that, served in the Army for two
17 years, '66 to '68.

18 Q What experience do you have in the field of
19 occupational safety and health?

20 A Out of the Army, the first job I had was working
21 for Liberty Mutual Insurance Company as a workers'
22 comp. rep. and I investigated construction accident and
23 manufacturing facility accidents to determine
24 compensability under Pennsylvania workers' comp. laws.
25 The next job I had related to worker injury was working

1 as a safety inspector for the U.S. Department of Labor,
2 Occupational Safety and Health Administration. That's
3 OSHA, O-S-H-A, and I was a safety inspector for them
4 for -- from '72 to '85 with two leaves of absence.

5 I got a year off, a fellowship from OSHA to
6 go to NYU to get my Master's degree, '78 to '79, and
7 then from 1980 to '82, I was the regional advisor -- I
8 was transferred by OSHA to be the regional advisor in
9 occupational safety and health for the Organization of
10 American States in Lima, Peru, for two years.

11 The Organization of American States is an
12 international organization comprised of United States,
13 Caribbean nations, and Latin American Nations, and I
14 provided safety and health services to governments and
15 to labor unions in Latin America for two years, came
16 back in '82 to my old job, in OSHA, stayed until '85,
17 and then started my own consulting business and I've
18 consulted for major corporations, major Unions,
19 international organizations, the World Bank, the Pan
20 American Health Organization, the State Department, and
21 others in seven or eight countries in Latin America and
22 then I started to do expert work some years ago and,
23 now, about 100 percent of what I do is expert work like
24 this and litigation, providing consultation about
25 injury prevention.

1 Q Explain to the jury in more detail what OSHA
2 is and what you did for them.

3 A In 1970, Congress passed the Occupational Safety
4 and Health Act, the law that said workers have a right
5 to a workplace free of recognized hazards and they
6 promulgated standards and then they hired inspectors to
7 be law enforcement officers, as well as safety
8 professionals. So I made inspections, about 200 in the
9 construction industry, about 500 in the manufacturing
10 industries, and enforced the law, looked for
11 violations, looked for hazards that could cause injury,
12 and then would recommend penalties and then, if there
13 was an objection by the employer, I would go before the
14 Occupational Safety and Health Review Commission in
15 order to prove that there was a violation. I would
16 show the pictures and the measurements and witness
17 statements an all that to show that there was, indeed,
18 a violation of the standard.

19 Q When you worked for OSHA, did you ever have
20 the responsibility to evaluate a general contractor's
21 occupational safety and health program?

22 A Yes, sir. On each of the inspections, the -- the
23 procedure was to evaluate the general contractor's
24 safety program.

25 Q And what is a general contractor?

1 A A general contractor is the entity that the owner
2 hires to run the job. The general contractor hires the
3 contractors, coordinates schedules, controls the work.
4 They're the boss. As an OSHA inspector, I couldn't get
5 on the site without first going to the superintendent
6 of the general contractor to say that I'm there for an
7 inspection and ask permission. I have legal authority
8 to do it, but I needed still to get the permission of
9 the boss because he wouldn't allow transfer --
10 trespassers. The superintendent, the GC, is the boss.
11 They run the job. They get the work done.

12 Q Very briefly, tell the jury what an occ--
13 well, let me just step back for a second. In opening
14 statements, defense Counsel said that L.P. Ciminelli
15 was not a general contractor. They were a construction
16 manager. Is there a significant difference between the
17 label that's put on in that regard?

18 A No. There's two different ways that you could
19 work. Sometimes, the general contractor's
20 superintendent runs the job. Sometimes, the owner
21 hires a construction manager who runs the job. The
22 general contractor manages safety -- or excuse me --
23 manages the job and safety is part of what they should
24 do.

25 The general contractor is a construction

1 manager, but the difference is, usually, the general
2 contractor hires the contractor, where the construction
3 manager is asked by the owner to run the job, but the
4 contractors are hired directly by the owner. But in
5 any case, both entities are -- manage the job site,
6 whether it's the construction manager or the
7 superintendent of the general contractor.

8 Q Just very briefly, in this case, who hired
9 the subcontractors?

10 A I believe it was Ciminelli.

11 Q Okay. And very briefly, tell the jury what
12 an occupational safety and health program is.

13 A It's a document that assigns responsibility for
14 safety. The three primary functions are hazard
15 identification, hazard evaluation, and hazard control
16 and it assigns the training requirements, it assigns
17 monitoring responsibilities for general contractors,
18 superintendent, and it's the document that says, this
19 is what we're supposed to do to implement a safety
20 program and, that is, have safety meetings, pre-job
21 safety meetings, weekly safety meetings, safety
22 inspections and making sure people are trained and what
23 have you.

24 THE COURT: I'm sorry, just because I want to
25 make sure the jury has full view, if you could just

1 sort of wait. If you need to move over, you can later.

2 MR. CLARK: Judge, just real briefly.

3 THE COURT: Sure.

4 (Discussion at side bar)

5 MR. CLARK: The defense witness is sitting in
6 here, and I would ask for a sequestration order of
7 witnesses.

8 THE COURT: Okay. So he's going to have to
9 step out.

10 MR. GULINO: He's a party. That's Mr. Paino.
11 He owns the company.

12 THE COURT: Oh, okay.

13 MR. CLARK: Oh, I'm sorry. I thought that
14 was Mr. Beardsley.

15 THE COURT: No. Mr. Paino.

16 (End of discussion at side bar)

17 BY MR. CLARK:

18 Q Have you ever trained construction managers,
19 have the design, and implement safety and health
20 programs in the workplace?

21 A Yes, sir. I had a contract with the Bureau of
22 Workers' Comp. in the State of Ohio to train about 300
23 to 400 managers how to design and implement safety
24 program, and many of them were from the construction
25 industry.

1 Q Have you ever been trained to identify and
2 control fall hazards?

3 A Yes, sir. I've been trained in all the OSHA fall
4 hazards -- fall standards a long time ago.

5 Q Okay. And have you ever had the
6 responsibility to identify all hazards in the
7 construction industry?

8 A I have as an OSHA inspector more than 200 times
9 and, since then, I had assignments to evaluate hazards
10 in the construction industry.

11 Q Have you ever trained construction personnel
12 how to identify and to control fall hazards?

13 A Yes, sir.

14 Q Have you ever investigated accidents
15 involving falls from elevation?

16 A I have well over 500 in the 44 years in the
17 business.

18 Q And have you ever done any research related
19 to fall hazards on job sites?

20 A I did for the United Auto Workers General Motors
21 Health and Safety Center. It's a labor management
22 organization that has money for research, and the UAW
23 workers were falling to the deaths, so many that they
24 hired me to do research to determine the places and
25 height where they were exposed to fall hazards and in

1 an assembly plant or a boundary, you have all the same
2 crafts as on a construction site, carpenters and
3 electricians and painters and to mill rights and what
4 have you and they're exposed to fall hazards. That led
5 to designing the General Motors Fall Hazard Control
6 program, which now is being implemented throughout the
7 United States.

8 Q And have you ever published on any other
9 safety subjects?

10 A I had articles published in the Journal of
11 American Site of Safety Engineers on safety subjects,
12 including fall hazards about ten times.

13 Q And have you ever done any research related
14 to accident investigation and causation?

15 A I did for the UAWGN Health and Safety Center to
16 provide documents for Union reps and management reps to
17 know how to gather the proper information, so they
18 could make evaluations to come up with the most
19 reliable remedies.

20 Q And how about training in that area, too?
21 Have you ever done that?

22 A I trained safety professionals at the Governor's
23 conference in Pennsylvania, how to perform accident
24 investigation and causation analysis.

25 Q Have you ever held any certifications in the

1 field of industrial safety?

2 A I filed certifications as a certified health and
3 safety manager and occupational health and safety
4 manager.

5 Q Have you ever taught in any colleges or
6 universities?

7 A I taught a course at the Burlington County
8 Community College in safety, as well as assistant
9 adjunct in six universities in the Philadelphia area.
10 Assistant adjunct means you just come in one day during
11 -- to lecture for an hour or two and, usually, it was
12 about OSHA.

13 Q Are you a member of any safety societies?

14 A I'm a member of the American Society of Safety
15 Engineers, the National Safety Management Society, the
16 National Safety Council, the International Fall
17 Protection Society. That's about it.

18 Q And how about awards in the field of
19 occupational safety and health to speak of?

20 A I got an award from the United Nations for working
21 Latin America. I got an award from the New Jersey Lung
22 Association for work on behalf of asbestos victims in
23 New Jersey and about ten awards from OSHA when I worked
24 for them and, also, from the Philadelphia Project on
25 occupational safety and health, which is a labor

1 organization of 200 labor unions in the Delaware
2 Valley, and I've been doing volunteer work for them
3 since 1974, and I got an award for a long-term
4 volunteer work for them.

5 Q And are you still doing volunteer work these
6 days?

7 A In the last year or two, I haven't done anything.

8 MR. CLARK: Okay. All right. Your Honor, at
9 this time, I would like to ask the Court to qualify
10 Vincent Gallagher as an expert in OSHA's policies and
11 procedures, OSHA standards, the principles and
12 practices of construction safety management, and the
13 principles and practices with regard to fall hazard
14 control.

15 THE COURT: Any voir dire?

16 MR. GULINO: May I voir dire?

17 THE COURT: Sure.

18 VOIR DIRE CROSS-EXAMINATION BY MR. GULINO:

19 Q Good morning, Mr. Gallagher.

20 A Good morning.

21 Q We haven't met before today. Have we?

22 A No.

23 Q Do you have a license from OSHA that allows
24 you to do inspections or a certification?

25 A I don't understand the question. I don't do

1 inspections for OSHA. When I worked for them, I had
2 a --

3 Q So you don't? Yes or no? You don't have an
4 inspection or a certification?

5 A Nobody does except OSHA employees.

6 Q Okay. And you had one at one point. Did you
7 not?

8 A I worked for OSHA at one point.

9 Q Did you have a certification?

10 A No. I didn't have an OSHA certification. What I
11 had was an identification, which gave me the legal
12 authority to make an inspection.

13 Q And the last time you did an inspection for
14 OSHA was 1985?

15 A That's probably right.

16 Q And certifications now, do you have any
17 certifications as a safety inspector?

18 A Well, I --

19 Q Yes or no, sir? Do you have a certification
20 as a safety inspector?

21 A The certifications that I mentioned include safety
22 inspections.

23 Q And do you still have them?

24 A No. I didn't keep them up the last couple of
25 years.

1 Q Okay. And why don't you tell this jury, when
2 was the last time you were certified as such an
3 inspector.

4 A I was certified as a hazard control manager -- I'm
5 trying to answer your question, sir.

6 Q I'm asking you when.

7 A If you'll let me answer, --

8 Q I'm asking --

9 A -- I'll answer your question.

10 THE COURT: Stop. Stop.

11 BY MR. GULINO:

12 Q It's very simple. When?

13 THE COURT: Stop. Stop. Stop talking. You
14 both can't talk at the same time. We're being recorded
15 and stop trying to talk over each other. Wait for the
16 question. You wait for the answer.

17 BY MR. GULINO:

18 Q When was the last time you had that
19 certification?

20 A What certification?

21 Q The most recent one.

22 A I had the two certifications that I mentioned --

23 Q When did you have them?

24 A Sir, I'm not done with my answer. I'm not done.

25 I was just about to say, I had them up until about two

1 years ago and if you would please wait when I'm
2 speaking, I'll continue sometimes even though there's a
3 short gap.

4 Q The two that you had, what were they in?

5 A One was certified health and safety manager. The
6 other was a certified safety and health manager.
7 They're two organizations, two separate organizations
8 that give a similar certification.

9 Q None of them -- and neither one of them have
10 anything to do with construction site. Do they?

11 A They have to do with hazards all together,
12 regardless of industry, whether it's construction or
13 manufacturing. It's safety management. It's
14 management of the hazards in both -- in any industry.

15 Q It's more manufacturing. Isn't it? It is
16 more manufacturing?

17 A No. It's not. Some of the people who hold those
18 certifications work only in the construction industry.

19 MR. GULINO: Okay. I still object, Your
20 Honor.

21 THE COURT: Let me hear you at side bar,
22 please.

23 (Discussion at side bar)

24 THE COURT: You're objecting to this witness
25 testifying?

1 MR. GULINO: I'm objecting to his
2 qualifications as a test-- person who is going to
3 testify on behalf of OSHA standards.

4 THE COURT: So you're objecting to the --
5 because that's what he's being offered?

6 MR. GULINO: Yes. I am. I'm objecting to
7 his qualifications.

8 THE COURT: And why wasn't this brought to my
9 attention beforehand when you knew that the witness was
10 being called?

11 MR. GULINO: I can object whenever I want to.
12 I'm objecting now.

13 THE COURT: Okay.

14 MR. GULINO: That's what it is.

15 (End of discussion at side bar)

16 THE COURT: Members of the jury, this witness
17 is being offered to you as an expert in the field as
18 indicated by Counsel. I'm satisfied that the witness
19 is qualified to offer you an expert opinion. You
20 should understand that, generally, witnesses are not
21 allowed to offer you opinions. They are only able to
22 talk about facts. But there is an exception to the
23 rule in the case of an expert witness. So where a
24 witness possess the necessary skill, education,
25 experience, and training to offer you an opinion in the

1 field that would be helpful to you in your role as fact
2 finders, the Courts allow that type of testimony.

3 So I'm satisfied the witness is able to offer
4 you an opinion in the field as described. However,
5 what weight ultimately you choose to give this expert's
6 testimony will still be left to you. All right? Your
7 witness.

8 MR. CLARK: Thank you, Your Honor.

9 DIRECT EXAMINATION BY MR. CLARK:

10 Q Mr. Gallagher, did I give you an assignment
11 in this case?

12 A Yes, sir.

13 Q Okay. And what was that assignment?

14 A To consider the conduct of Ciminelli and Paino
15 Roofing relative to the injury suffered by Mr. Munoz.

16 Q And what did you do to prepare for that
17 assignment?

18 A I read the documents that you sent me, which
19 included depositions and discovery responses from the
20 parties and contracts and the Ciminelli weekly activity
21 report and the safety program of Countryside Plumbing
22 and the accident report.

23 Q And did you determine who the general
24 contractor was at this site?

25 A Yes, sir.

1 Q And what is a general contractor and, again,
2 mindful just on opening, defense Counsel had said
3 they're not a general contractor, they are a
4 construction manager. So what is a general contractor?

5 A A general contractor is a construction manager.
6 They manage the project. They're the ones who
7 coordinate schedule control, make sure the work is done
8 properly according to specs, make sure the people get
9 paid when it's done properly. They're the boss. They
10 run the job. Whether they're called construction
11 manager or general contractor, they do the exact same
12 thing.

13 Q Now, you prepared some PowerPoint
14 presentation slides. Will they assist you in kind of
15 outlining your testimony?

16 A Yes, sir.

17 Q Okay. How did you perform your evaluation of
18 L.P. Ciminelli?

19 A I considered four things, the industry standard
20 and the next thing is the OSHA -- there's an industry
21 standard. Then there's OSHA standards. Then there's
22 the contract that Ciminelli had with Meadowlands
23 Racetrack. So I considered whether Ciminelli complied
24 with those three factors.

25 Q Okay. And what do you mean by the standard

1 of care for industry standard?

2 A The standard of care is comprised of the industry
3 standard, plus, the OSHA standard. The industry
4 standard is comprised of what industry -- construction
5 industry safety authority say that a general contractor
6 should do, what the reasonable steps are that a general
7 contractor should take to prevent contractor and
8 subcontractor worker injury.

9 And the different authorities that I relied
10 on in my evaluation are four, and there's another slide
11 there. And the first is the American National
12 standard, a 10.33, which defines what a construction
13 safety program is and it defines the role of the
14 general contractor and it basically says they should
15 implement a safety program. That's the industry
16 standard.

17 The next authority is the Associated General
18 -- Association of General Contractors of America.
19 That's an association of thousands, more than 40,000
20 general contractors, and they have published an
21 accident prevention manual that defines the steps that
22 a general contractor should take to prevent contractor
23 worker injury. The National Safety --

24 Q Just real quick, on the accident construction
25 manual, -- and I'm just going to show you this here --

1 what do you recognize that to be?

2 A That's the ninth edition of the safety manual of
3 the Associated General Contractors of America.

4 Q Okay.

5 A And they've been publishing them since 1929.

6 Q Okay. And what's the next standard or the
7 next authority that you relied upon?

8 A The National Safety Council, which is a
9 combination or an association of about 40,000 major
10 companies, midsize companies, including construction
11 companies, and they also establish safety manuals for
12 the construction industry to give guidance to general
13 contractors.

14 Q All right. And I just put another
15 publication up there. What is that publication and
16 does that contain the standards that you talked about?

17 A It's entitled, Protecting Workers' Lives, Safety
18 and Health Guide for Unions and it's published by the
19 National Safety Council.

20 Q And this contains the types of standards,
21 generally, that you're speaking about?

22 A Yes, sir.

23 Q Okay. Go ahead. You can continue.

24 A And the last one is the Construction Management
25 Association of America, and that's an association of

1 construction managers and they have -- they publish
2 documents that give guidance to the construction
3 manager on what they should do about reasonable steps
4 to prevent construction worker injury.

5 Q Okay. And what is the American National
6 Standards Institute?

7 A That's an association of different organizations
8 that have an interest in the standards. So they come
9 from industry, the construction industry primarily but,
10 also, the insurance industry, government, academia, and
11 consultants, and they get together and establish what
12 the minimum is that everybody can agree upon that the
13 general contractor should do to prevent worker --
14 construction worker injury.

15 Q And what is the Associated General
16 Contractors of America?

17 A I just explained that. They're an association of
18 more than 35,000 general contractors.

19 Q And the National Safety Council?

20 A That's an association of more than 40,000
21 companies, many from the construction industry.

22 Q Okay. And just looking at your -- when was
23 that founded?

24 A National Safety Council, about 1916, maybe a
25 little earlier.

1 Q All right. And what's that about, chartered
2 by Congress?

3 A Yes. It was -- National Safety Council was
4 chartered by Congress in 1917 -- no, actually, it was
5 '53. It was founded in 1917 and chartered by Congress
6 in about 1953.

7 Q And the Construction Management Association
8 of America, what is that?

9 A It's the leading association in construction
10 management and they have publications related to the
11 role of a construction manager to prevent construction
12 worker injury.

13 Q And do all these industry worker safety
14 authorities essentially say the same thing about the
15 role of the general contractor regarding worker injury
16 prevention on a job site?

17 A Yes. They do. They all essentially say the same
18 thing, and it's as simple as you should plan before
19 work begins to foresee hazards. You should plan,
20 monitor, and insure. So -- and you should perform
21 inspections to identify hazards, evaluate the hazards,
22 and make sure controls are implemented. But,
23 essentially, it comes down to plan, monitor, ensure
24 that the work is done as planned, that hazards are
25 controlled.

1 Q And is that to controlling the hazards and
2 planning the work, is that also in accordance -- it's
3 supposed to be in accordance with the OSHA safety
4 rules?

5 A Oh, sure. They all say as a minimum, to comply
6 with OSHA.

7 Q Were there facts that were important for your
8 evaluation of whether or not L.P. Ciminelli complied
9 with the industry workers' safety standard?

10 A Yes, sir.

11 Q And what facts were important to you and why?

12 A The deposition testimony of Mr. Beardsley, who is
13 the corporate safety manager of Ciminelli, was
14 important because he was a safety guy. He knows the
15 responsibility of a general contractor and he had that
16 responsibility at this job site and he said he was
17 familiar with the roof installation process and he
18 inspected the roof area where this incident occurred
19 and he testified it would not of a concern to him for
20 somebody to say that there is going to have to be a
21 drain hole there.

22 It was his understanding that workers would
23 be walking on the roof as part of their job, both
24 construction workers and employees from the hotel and
25 he figures someone walking on the roof, carrying

1 materials in an area where a hole is covered by a
2 membrane would not raise any concerns to him as the
3 site and safety manager.

4 He recognizes that a hole greater than two
5 inches in diameter has to be covered. He doesn't think
6 that this hole should be covered. He didn't think Mr.
7 Munoz violated any OSHA standards, and he thinks that
8 it would be fine for there to be a hole like this, a
9 drain hole without a cover on it and that was important
10 testimony because he is, apparently, saying that he
11 accepts the hazard of the membrane going over the hole
12 -- drain hole as being okay, and I think it's a hazard.

13 Q And I just want to put up, just so we have it
14 for your testimony, Plaintiff's Exhibit 4, just so we
15 have it for illustration. So if you need to refer to
16 it, it's here. And what are your opinions or -- and
17 conclusions within a reasonable degree of probability
18 as a safety professional?

19 A With regard to?

20 Q The L.P. Ciminelli.

21 A With regard to the industry.

22 MR. GULINO: Objection. No foundation.

23 MR. CLARK: I'm sorry. I withdraw the
24 question.

25 THE COURT: Okay.

1 BY MR. CLARK:

2 Q Did you form an opinion about whether or not
3 L.P. Ciminelli complied with the industry standard?

4 A I did. Yes, sir.

5 Q And what is that opinion?

6 A That they did --

7 MR. GULINO: Objection. No foundation.

8 THE COURT: Do you want to be heard?

9 (Discussion at side bar)

10 MR. CLARK: There is a foundation. He
11 discussed everything he relied upon, the standards, the
12 documents, he reviewed the photographs, et cetera.

13 MR. GULINO: He has to lay that out before he
14 gives his opinion. He has to say what was done wrong,
15 what was done right, and how it affects his opinion.
16 Then he gives his opinion. That's the basis of his
17 opinion. He hasn't done that yet. He's just asking
18 him an end question.

19 MR. CLARK: The question is what is your
20 opinion about whether or not they complied with the
21 industry standard. The objection is, there's no basis.
22 The expert has laid out the documents he reviewed. He
23 just basically summarized the most important part of
24 the testimony from their safety professional and he
25 spent a lot of time laying out the industry standard

1 and, now, he's being asked to prepare the conduct of
2 the defendant against the industry standard and I think
3 the question is proper.

4 MR. GULINO: He's making an allegation that
5 there were OSHA violations. He hasn't talked about
6 those at all.

7 THE COURT: Do you anticipate that that's
8 going to be his opinion, that there were violations of
9 OSHA standards?

10 MR. CLARK: Yes. And that those -- we have
11 those questions shortly after this question.

12 THE COURT: Okay. So what he's expected to
13 testify now to does not entail that specifically with
14 respect to the OSHA violations? That's coming after is
15 what you're saying?

16 MR. CLARK: Yes. Yes. Shortly after.

17 THE COURT: Okay.

18 MR. CLARK: This is really a -- I mean,
19 there's -- there's -- I can make a representation and
20 proffer and, of course, it's in the expert report as to
21 that (indiscernible) --

22 THE COURT: Okay. Okay.

23 (End of discussion at side bar)

24 THE COURT: You can continue.

25 BY MR. CLARK:

1 Q So what -- what is your opinion about whether
2 or not L.P. Ciminelli complied with the industry
3 standard?

4 A That they did not comply with the industry
5 standard.

6 Q And what is the basis of that? Describe
7 that.

8 A The basis is that the industry safety authority
9 say that Ciminelli should take reasonable steps to
10 plan, monitor, and ensure the work site is reasonably
11 safe. Mr. Ciminelli did make inspections, but he
12 figured that this hazard -- excuse me -- this hole with
13 a cover over it --

14 Q I'm sorry. You said, Mr. Ciminelli?

15 A I'm sorry. Mr. Beardsley.

16 Q Okay. Go ahead. I'm sorry.

17 A Mr. Beardsley was the safety manager to make sure
18 that the job site program was implemented, and he
19 inspected the roof, he inspected the drains. He knew
20 what was there and he made an accident investigation,
21 and it's his opinion that there was no problem, that
22 it's acceptable to have membrane over a hole like this.
23 And it's my opinion that this violated OSHA standards.
24 That will be my next opinion. And the basis of my
25 opinion that Mr. Ciminelli violated the industry

1 standards is the facts in his deposition testimony that
2 I had mentioned to you that the drain hole is about six
3 inches in diameter and he thinks a person walking on
4 that, carrying material wouldn't be of any concern to
5 him, that is after investigating an accident where
6 somebody stepped on it, it went down, and it caused
7 injury. It caused him to lose balance carrying two
8 heavy objects, the membrane, not strong enough, not
9 meeting the OSHA standards as you'll see in a second,
10 that was not strong enough to withstand the weight that
11 was put on it and caused injury.

12 Q We also have another photo from an inspection
13 that was done after the incident, Plaintiff's Exhibit
14 5. You reviewed this?

15 A Yes, sir.

16 Q And this assisted you informing your opinions
17 and conclusions?

18 A Yes, sir.

19 MR. GULINO: I'm just objecting that it's a
20 post-accident photo.

21 THE COURT: Let me see you at side bar.

22 (Discussion at side bar)

23 THE COURT: (Indiscernible) --

24 MR. GULINO: I assumed that I asked him if
25 the (indiscernible) would the accident have occurred.

1 MR. CLARK: Judge, just we went over all the
2 exhibits yesterday, marked them, and there was -- he
3 said there was no objection. There's three there is an
4 objection to, and this is definitely not one of them.

5 THE COURT: Okay.

6 MR. CLARK: So this is the first I'm hearing
7 the objection. I thought there was an initial --

8 MR. GULINO: I'll withdraw the objection.

9 THE COURT: Okay.

10 (End of discussion at side bar)

11 BY MR. CLARK:

12 Q So, Mr. Gallagher, I'm just going to put up
13 Plaintiff's Exhibit 5 and is it your understanding that
14 this is -- that this is a photo that was taken after
15 the incident when an inspection was done?

16 A Yes, sir.

17 Q Okay. Just one more easel. I also have
18 Plaintiff's Exhibit 7. Is that among the photos that
19 you reviewed?

20 A I don't remember reviewing this photo.

21 Q Okay. In any event, is your understanding
22 that that shows --

23 MR. GULINO: Objection.

24 THE COURT: Sustained.

25 MR. CLARK: Strike that.

1 THE COURT: Sustained.

2 MR. CLARK: Yes. That's fine.

3 BY MR. CLARK:

4 Q I show you plaintiff's Exhibit 6.

5 A I remember seeing what's shown in that photo from
6 a different angle, but not that particular photo.

7 Q All right. What is your understanding of
8 what area that photo shows?

9 MR. GULINO: Objection. No foundation.

10 THE COURT: The objection is sustained as to
11 that photo. Do you have another one?

12 MR. CLARK: Sure.

13 BY MR. CLARK:

14 Q I'm going to show you Plaintiff's Exhibit 8.

15 A Yes, sir.

16 Q All right. Is that among the photos that you
17 reviewed in your review?

18 A Yes, sir.

19 Q Okay. So I would like to show this one,
20 Plaintiff's Exhibit 8.

21 THE COURT: Have you seen that one?

22 MR. GULINO: What was the question posed?

23 I'm sorry.

24 MR. CLARK: This one and this one were talked
25 about yesterday. These are the photos we talked about

1 yesterday, and I want --

2 MR. GULINO: And I didn't want the second
3 one.

4 THE COURT: Okay. So --

5 MR. GULINO: Okay? Even the first one.

6 THE COURT: There's a question with respect
7 to P-8.

8 MR. CLARK: P-8, correct.

9 THE COURT: Okay. Ask your question.

10 MR. CLARK: Okay.

11 BY MR. CLARK:

12 Q Will this assist you in your testimony --
13 explaining your testimony to the jury?

14 A Likely.

15 MR. CLARK: Okay. So I would like to now use
16 P-8 and show it to the jury.

17 MR. GULINO: To show what?

18 THE COURT: Well, ask your question. What is
19 the question that you have for the witness related to
20 the photo and then --

21 BY MR. CLARK:

22 Q Well, the question simply is, is this your
23 understanding that these are the drain holes after the
24 incident after -- further down in construction, just
25 like -- essentially, like P-5?

1 MR. GULINO: Objection. No foundation. He
2 never inspected it. He was never there.

3 (Discussion at side bar)

4 MR. GULINO: Does it fairly and accurately
5 depict what? That's what -- that's a foundational
6 question. How can he answer that? It's not what he
7 thinks it is. He has to say what it is.

8 MR. CLARK: May I respond?

9 THE COURT: Yes.

10 MR. CLARK: Okay. This is, -- again, all the
11 photos I've shown so far are the ones we talked about
12 yesterday and Counsel told me he has no objection.
13 Now, there's an objection, which goes back to the
14 dynamics of a trial. But the purpose of this photo is
15 that it is among the documents he reviewed, which
16 formed his opinions and conclusions in the case, and it
17 will assist him in explaining his testimony to the
18 trier of the fact.

19 THE COURT: Okay.

20 MR. CLARK: There's no requirement in the
21 rules that the expert had to have actually taken the
22 photo and actually done an inspection. He had to --

23 THE COURT: But this is one of the ones that
24 he reviewed and this is one of the ones that he used in
25 ultimately formulating his opinion.

1 MR. CLARK: Yes.

2 THE COURT: Okay. The objection is
3 overruled.

4 (End of discussion at side bar)

5 MR. CLARK: Judge, if I could now --

6 THE COURT: Yes.

7 BY MR. CLARK:

8 Q Mr. Gallagher, did you form an opinion as to
9 whether or not L.P. Ciminelli's failure to comply with
10 the industry standard was a cause of Mr. Munoz'
11 injuries?

12 A Yes, sir.

13 Q And what is that opinion?

14 A That their failure to comply with the industry
15 standard was a cause of Mr. Munoz' injuries.

16 Q Were there OSHA standards that were important
17 for your evaluation?

18 A Yes, sir.

19 Q Okay. And which OSHA standards?

20 THE COURT: Do we need to have these up at
21 this time? You're done with these because we can move
22 them.

23 MR. CLARK: Do you want me to move them out
24 of the way? Just I think that I would sort of be
25 referring to them throughout --

1 THE COURT: Okay. So I just want to make
2 sure that they're not just up there randomly. You have
3 questions related to the photos for this witness?

4 MR. CLARK: There will be further ones.

5 THE COURT: Yes. So once we get to them, you
6 can certainly put them up.

7 MR. CLARK: Okay.

8 THE COURT: But there's no reason that they
9 should be in the jury's view --

10 MR. CLARK: Okay.

11 THE COURT: -- at this time.

12 MR. CLARK: All right.

13 THE COURT: Okay.

14 MR. CLARK: It's more of like a demonstrative
15 nature, so --

16 THE COURT: Sure. And when the -- when
17 you're ready for them, you can put them up.

18 MR. CLARK: Okay. Great, Judge.

19 THE COURT: Okay?

20 MR. CLARK: Thank you, Judge.

21 MR. GULINO: Thank you, Your Honor.

22 BY MR. CLARK:

23 Q Okay. And so you were explaining which OSHA
24 standards were important to your evaluation.

25 A The first one that's on the board there, I'll

1 read. It says, it shall be the responsibility of the
2 employer to initiate and maintain accident prevention
3 programs as may be necessary to comply with this part
4 and, actually, that hasn't been -- that's no violated
5 because Ciminelli did have an accident prevention
6 program. So I'm sorry that that is there to waste up
7 your time me talking about it.

8 The next one is relevant and it says,
9 accident prevention program shall be provided for
10 frequent and regular inspections of the job sites,
11 materials, and equipment to be made by competent
12 persons designated by the employer. And that standard
13 was important for my evaluation.

14 Q Okay.

15 A Do you want me to explain?

16 Q Yes.

17 A That Mr. Beardsley made inspections and he's
18 competent, he's been trained, but he was making
19 inspections and didn't recognize the hazard, didn't
20 recognize that this cover didn't meet the
21 specifications for covers that OSHA has to be able to
22 withstand twice the amount of weight that's put on it.

23 MR. GULINO: Objection. No foundation. What
24 are the standards for the cover?

25 THE COURT: Overruled.

1 BY MR. CLARK:

2 Q Mr. Gallagher, -- Your Honor, if I may,
3 referring to Plaintiff's Exhibit 4, when you say the
4 cover that didn't comply with the standard, what are
5 you referring to with regard to this photograph?

6 A Well, that --

7 Q And here's a -- here's a laser pointer, if
8 that helps you.

9 A I understand that there's two holes here and they
10 were -- one of them was covered with the tarp or the
11 roofing material, the flexible roofing material, and
12 that's the lower one, this one here, and that looks
13 like it might be open and I understand it was open at
14 the time of the incident. But this was -- the one I'm
15 pointing to now is the incident hole that had the
16 roofing tarp or membrane over it that wasn't strong
17 enough. It was spongy and flexible.

18 MR. GULINO: Objection. We still don't know
19 what the standard is.

20 THE COURT: The objection is noted.

21 BY MR. CLARK:

22 Q Okay. So, Mr. Gallagher, you were explaining
23 the OSHA standards that were important to your
24 evaluation, and I think you left off at -- you can just
25 continue.

1 A The next one is a definition. It's not a standard
2 that was violated, but it's just a definition,
3 1926.500A of what a hole is and that is, it means a gap
4 or a void two inches or more in at least dimension in a
5 floor, roof, or other walking/working surface. And
6 then the next standard is 1926.501A2 that talks about
7 roof surfaces having the structural integrity to
8 support employees safely and that would normally be
9 that you walk across the roof. You don't just fall
10 through the roof. That has happened, but that's not
11 what happened here.

12 But it says, it should have the required
13 strength to safely -- to support employees safely and
14 this cover didn't have the required strength to
15 employee -- to support employees safely because the
16 OSHA standard referenced in my report says that it
17 should withstand twice the amount of weight that can be
18 put on it and this couldn't withstand the weight of a
19 worker. It sunk and caused him to lose balance.

20 The next standard is 1926.501B4II that says,
21 each employee on a walking working surfaces shall be
22 protected from tripping or stepping into or through
23 holes by covers and then the other standard that I
24 mentioned in my report gives the specifications for
25 those covers. So it's my opinion that this was a hole

1 as defined by OSHA and it didn't have -- the surface
2 didn't comply with this standard because the cover was
3 a soft membrane that could cause a worker, especially
4 one carrying two buckets weighing 60 to 70 pounds each,
5 to lose his balance and suffer a muscular skeletal type
6 injury.

7 Q Now, I show you Plaintiff's Exhibit 37. What
8 is that? What is that document?

9 A It's -- it says it's technical information to
10 specify fall protection in the construction industry.

11 Q And who is that put out by?

12 A OSHA.

13 Q Right. And does that essentially state the
14 standard that you've just referred to?

15 A Yes, sir.

16 Q Okay. And you described in your standard
17 that open holes have to be -- have to be covered to
18 support twice the weight. Do you recall that
19 testimony?

20 A Yes, sir.

21 Q Okay. And this publication, 37, on Pages 8
22 and -- on Pages 8 and 9, does that -- are those the
23 pages that have the standards that you were just
24 referring to?

25 MR. GULINO: Objection. I don't believe this

1 was in his report.

2 (Discussion at side bar)

3 MR. GULINO: I don't think it was referenced
4 in his report at all, not this. Other things were, but
5 not this.

6 MR. CLARK: That is -- that is an OSHA
7 publication that sets forth the standards he just spoke
8 about. So it's true that the entire publication was
9 not in his report. However, the publication is,
10 essentially, setting forth the standard he spoke about
11 and that's it. I don't intend to introduce the
12 document into evidence, but I think it will just assist
13 him in his testimony.

14 MR. GULINO: I thought the standards for what
15 is up on the TV right now, those are the five that
16 you're alleging, those five and nothing else.

17 THE COURT: Are the -- the -- does his report
18 reference this particular -- that the publications
19 offer the standards that are contained within the
20 publication?

21 MR. CLARK: Yes. It does.

22 THE COURT: Is that what you're saying?

23 MR. CLARK: Yes. Yes. It's an OSHA
24 technical publication that gives the standards and
25 discusses them and helps people to comply with the

1 standard.

2 THE COURT: That's where you got it from? Is
3 that what you're saying? So you can establish that
4 that's where -- I mean, I don't know where you're going
5 with your line of questions. It's difficult to -- your
6 objection is that it wasn't in his report.

7 MR. GULINO: Correct. That's one. Yes.
8 Correct.

9 THE COURT: But you're saying that it was,
10 except he just never named a publication? Is that it?

11 MR. CLARK: That's correct. The full
12 publication, it's an OSHA technical manual. It sets
13 forth the standard and helps people comply with the
14 standard, and that publication was not identified in
15 his report, but the standards in Pages 7 and 8 are the
16 standards that we're discussing here today and those
17 standards were in the report.

18 THE COURT: Okay.

19 MR. CLARK: And the pending question is, do
20 you recognize this document.

21 THE COURT: Okay.

22 MR. GULINO: My second objection is he has
23 not defined what fall is.

24 THE COURT: Yes.

25 MR. GULINO: He keeps talking about fall

1 protection.

2 THE COURT: Yes. Okay.

3 MR. GULINO: That's a foundational question.

4 THE COURT: All right. Your objection is
5 noted. The objection is overruled.

6 (End of discussion at side bar)

7 THE COURT: The objection is overruled.

8 BY MR. CLARK:

9 Q Mr. Gallagher, the -- the publication there,
10 what is that document?

11 A It says, OSHA notice and it's -- it's from their
12 technical manual about fall protection and
13 construction.

14 Q And does that include the standards that you
15 just spoke about on Pages 7 and 8?

16 A Yes, sir.

17 Q Okay. And you said that the standard
18 requires that holes be covered with a hard thing like
19 plywood and marked out?

20 A The standard, as referenced in my report on Page
21 10, says that the cover shall be capable of
22 withstanding twice the weight of employees that could -
23 - twice the weight that could be expected to be imposed
24 upon it and it should be marked with the word "hole" or
25 the word "cover." That might sound a little stupid

1 but, sometimes, there's a piece of plywood. The
2 employee picks it up not realizing there's a hole under
3 it and steps into the hole. But anyway, it says, all
4 covers should have the word "hole" or "cover" on them
5 and they should be able to stand twice the weight and
6 they should be fixed.

7 Q I have here plaintiff's Exhibit 28, a
8 demonstrative exhibit. Will that assist you in showing
9 the jury a demonstrative example of how a hole should
10 be covered?

11 A Yes, sir.

12 MR. GULINO: Objection. Objection.

13 (Discussion at side bar)

14 MR. GULINO: Show me where you exchanged
15 that.

16 MR. CLARK: Um --

17 MR. GULINO: Show me where you mention it in
18 your report. Show me where you exchanged it before
19 today. Show me where you even showed me before that
20 you were going to use this.

21 MR. CLARK: Judge, I would just prefer to
22 respond to the Court.

23 THE COURT: Yes. (Indiscernible) --

24 MR. CLARK: Okay. Your Honor, the photo,
25 this photo, it's true, was not exchanged in discovery.

1 THE COURT: Yes.

2 MR. CLARK: This photo is not being offered
3 into evidence as substantive evidence. This is a
4 demonstrative exhibit to assist the expert in
5 explaining his testimony. It's akin to a doctor
6 bringing in a spine model, that sort of thing. So it's
7 demonstrative evidence. It's not being offered as
8 substantive evidence and the case law is clear that
9 demonstrative exhibits, which will assist because, for
10 example, if the objection were to be sustained, the
11 alternative is for the expert to now go to the board
12 and draw, essentially, what's shown in the picture.

13 MR. GULINO: What's underneath this hole?
14 How big is the hole? Is it the same size? Is it a
15 depression like we have here? What is under the hole?
16 Highly prejudicial.

17 THE COURT: The objection is sustained. If
18 the witness can demonstrate otherwise, if there's a
19 need for the jury to understand what it means for --
20 put holes on -- but if you feel the need to do that,
21 you can.

22 (End of discussion at side bar)

23 THE COURT: The objection is sustained.

24 BY MR. CLARK:

25 Q Okay. And did you -- did you form an opinion

1 as to whether these OSHA standards were violated by
2 L.P. Ciminelli on the job?

3 A Yes, sir.

4 Q Okay. And what is that opinion?

5 A That Ciminelli as controlling employer violated
6 those standards. Those standards say, the employer
7 should do what I had mentioned, but that includes
8 Ciminelli as general contractor. OSHA can give a
9 citation to the employer of the employee exposed to the
10 hazard if there's a factual basis to support that.
11 They can also give a violation and should give a
12 violation to the general contractor, who would be
13 considered a controlling employer.

14 Here, Ciminelli would be considered a
15 controlling employer because they had a safety manager
16 on the job. They had the authority to control safety
17 and Ciminelli permitted the violations of the
18 standards, so that they violated the OSHA standards.

19 Q All right. And in review of your testimony
20 and the documents in the case, is it your understanding
21 that L.P. Ciminelli, essentially, fired the worker from
22 the job after this incident for not reporting it within
23 an hour?

24 A I heard that. Yes, sir.

25 Q Okay. And the fact that the general

1 contractor fired the worker from the job, how did that
2 affect your opinions or conclusions with regard to them
3 being a controlling employer?

4 THE COURT: The objection is sustained.

5 MR. GULINO: Objection.

6 THE COURT: Sustained.

7 BY MR. CLARK:

8 Q And did you form an -- did you come to a
9 conclusion whether or not the violation of those OSHA
10 standards by L.P. Ciminelli was a cause of the worker's
11 injuries in this case?

12 A Yes, sir.

13 Q And what is that opinion?

14 A That had there been an OSHA compliant cover, this
15 incident would not have occurred and that was the
16 cause.

17 Q When the worker was exposed to a condition in
18 violation of those OSHA standards, was he exposed to a
19 hazard?

20 A Yes, sir.

21 Q And what is a hazard?

22 A A hazard generically is an unsafe condition or an
23 unsafe act that could cause injury. So there is unsafe
24 conditions, floor holes, guardrails, lack of guardrails
25 on scaffolds and machines unguarded and if you go on

1 with a lot of conditions that you would say that's a
2 dangerous condition that could cause injury. And then
3 there's dangerous acts, and that would be not wearing
4 your hard hat for fall protection or things like that.

5 The hazard is a dangerous condition that can
6 cause injury. It's as simple as that.

7 Q And were there portions of the contract
8 between the racetrack and L.P. Ciminelli that were
9 important for your review?

10 A Yes, sir.

11 Q And what were those provisions?

12 A They're on the board there. I could -- I could
13 read all that, but it's easy to summarize it, if you
14 would like me to summarize it.

15 Q Yes. I think it's much better to summarize
16 it. Thank you.

17 A It basically says, Ciminelli should initiate,
18 maintain, and supervise all safety precautions and
19 programs related to the contract and take all
20 reasonable questions for safety and coordinate them --
21 and comply with OSHA regulations and erect and maintain
22 the reasonable safeguards on the job site.

23 Q And (indiscernible) Plaintiff's 35, do you
24 recognize that to be the contract?

25 A Yes, sir.

1 MR. CLARK: Okay. So I would like to move in
2 -- well, I don't know if you want to move it in now,
3 but I intend to move this in. It was discussed the
4 other day.

5 THE COURT: We can address that at the end.

6 MR. GULINO: Just one -- I'm sorry, Judge.

7 THE COURT: Sure.

8 (Discussion at side bar)

9 MR. GULINO: Mr. Clark and I discussed this
10 yesterday. I don't have any problem with any of the
11 contracts being introduced. We served them on them. I
12 do have a problem with the price of the project on the
13 contract. I find that highly irrelevant, prejudicial,
14 et cetera. But as to any other parts of the contract,
15 you know, my duties this and that, no problem.

16 THE COURT: Okay.

17 MR. GULINO: We served them on them.

18 THE COURT: Okay.

19 MR. GULINO: So with that understanding, --

20 THE COURT: So let me address that in the
21 end, unless -- unless you're willing to redact it, so
22 that that's taken out.

23 MR. CLARK: Yeah. It's just -- it's really a
24 housekeeping thing. I have several documents that I
25 want to move into evidence and, you know, I'm just --

1 THE COURT: Which is why I said in chambers,
2 I prefer that you wait till the end, unless you've
3 resolved it. If you haven't, then wait.

4 MR. CLARK: Yes. We have resolved it, but I
5 think it's important that I put the resolution on the
6 record. All right. So thank you.

7 (End of discussion at side bar)

8 BY MR. CLARK:

9 Q And in the -- in the contract -- or strike
10 that. Did you form an opinion as to whether or not
11 L.P. Ciminelli violated its contract with the
12 Meadowlands Racetrack, that is, the safety things it
13 was supposed to do in the contract?

14 A Yes, sir.

15 Q Okay. And what is that opinion?

16 MR. GULINO: Objection. No foundation.

17 THE COURT: Is that withdrawn or there's an
18 objection?

19 MR. GULINO: He hasn't referred, first of
20 all, to what is the standard in the contract that he's
21 talking about. Is it a general standard or a specific
22 standard in the contract.

23 THE COURT: Rephrase your question.

24 BY MR. CLARK:

25 Q The standard that you're talking about,

1 that's the one up on the screen. Is that correct?

2 A Right. That's the standard that I'm talking
3 about, what's in the contract. The standard is what
4 you --

5 Q Which is a general standard?

6 A Sir, I don't understand your question.

7 THE COURT: You can -- you can cross. You
8 can cross.

9 BY MR. CLARK:

10 Q So it's the standard up on the screen?

11 A The contract language is up on the screen.

12 Q And you summarized it?

13 A Yes, sir.

14 Q And, basically, just because of the
15 objection, what does it say in summary? We don't want
16 to read the whole thing in, that sort of thing. Just
17 give us the sum-- the gist. What are they supposed to
18 do?

19 A It says that Ciminelli should initiate, maintain,
20 and supervise all safety precautions and it also says,
21 they -- Ciminelli shall erect, maintain reasonable
22 safeguards for safety at the job site, plus, everything
23 else that I said.

24 Q And it also says there, it says, the
25 contractor shall take all reasonable precautions for

1 safety of and provide reasonable protection to prevent
2 damage, injury, or loss to employees on the work and
3 other persons who may be affected thereby?

4 A Yes, sir.

5 MR. GULINO: Objection.

6 THE COURT: The objection?

7 MR. GULINO: Leading.

8 THE COURT: Sustained.

9 BY MR. CLARK:

10 Q Would you just -- just briefly, if you
11 wouldn't mind, would you just read in the pertinent
12 portions of 10.2.1, which is up on the screen?

13 A It's (indiscernible) my eyesight, but I've got it
14 here.

15 Q Here it is.

16 A I got it. It says, -- it says, the contractor,
17 Ciminelli, shall be responsible for initiating,
18 maintaining, and supervising all safety precautions and
19 programs in connection with the performance of the
20 contractor. The contractor, Ciminelli, shall take all
21 reasonable safeguards for safety and provide reasonable
22 protection to prevent damage, injury, and loss to
23 employees on the work and other persons who might be
24 affected and it says, they should comply with OSHA,
25 essentially, all applicable laws and it says, they

1 shall erect and maintain -- that that says they should
2 actually cover the hole or put up the guardrails.

3 MR. GULINO: Objection.

4 THE WITNESS: Now, that's what the language
5 says. It says, they shall erect and maintained as
6 required by existing conditions in the performance of
7 the contract, reasonable safeguards, and that include
8 OSHA compliance in the paragraph before that.

9 BY MR. CLARK:

10 Q Okay. And did you form an opinion as to
11 whether or not they violated those safety standards?

12 A Yes, sir.

13 Q And what is that opinion?

14 A That they violated those safety standards.

15 Q And what's the basis for that?

16 A Because Mr. Beardsley, who was the safety manager,
17 who was supposed to make sure the job site was safe
18 didn't consider this to be a hazard. Even after injury
19 occurred, because of this flexible surface, in my
20 opinion, in violation of OSHA standards, he still
21 didn't think it was anything that should be protected.

22 MR. GULINO: Objection.

23 THE COURT: What's your objection?

24 MR. GULINO: After.

25 THE COURT: As to that, it's sustained.

1 BY MR. CLARK:

2 Q Did you form --

3 MR. GULINO: Strike the statement?

4 THE COURT: The jury will disregard.

5 BY MR. CLARK:

6 Q Did you form an opinion whether or not the
7 violation of the contract by Ciminelli, the safety
8 standards in that document, did you -- was that a cause
9 of the injury?

10 A Yes, sir.

11 Q And what's that opinion?

12 A Had the environment been safe, had OSHA been
13 complied with, we wouldn't be here today.

14 Q And let's talk about Paino Roofing Company.
15 Explain to the jury how you performed your evaluation
16 of Paino Roofing Company.

17 A I considered whether or not they complied with
18 OSHA standards and whether or not they complied with
19 their contract with Ciminelli.

20 Q And were there port-- all right. And were
21 there portions of the contract that were important for
22 your evaluation with regard to safety standards, safety
23 rules?

24 A Yes, sir.

25 Q And what portions?

1 A I'm sorry. The question is were there OSHA
2 standards or portions of the contract?

3 Q The contract.

4 A Portions of the contract at 9.1 was important.

5 MR. GULINO: Objection. It's not in
6 evidence.

7 BY MR. CLARK:

8 Q We have -- we have the contract here,
9 Plaintiff's Exhibit 16.

10 A Yes. I reviewed it.

11 Q And that -- was that a basis of your opinion
12 in this case and your conclusion?

13 A Right. I expressed that when I excerpted the
14 contract language in my report and put in my conclusion
15 that it was violated, that it was in my report.

16 Q And what portions were important to you?

17 A 9.1 says that the contractor, Paino, its agents,
18 employees, material men, and subcontractors will
19 perform all the work on the project in a safe and
20 reasonable manner. In particular, the subcontractor
21 shall at its own expense strictly adhere to all
22 federal, including but not limited to OSHA state, local
23 safety environmental standards, rules, regulations
24 required or recommended by governmental and quasi-
25 governmental authorities that have jurisdiction.

1 It goes onto say, the subcontractor, Paino,
2 agrees to conduct its own frequent and regular
3 inspections of all work by or performed under the
4 subcontractor and the project site to verify compliance
5 with the subcontractor safety program and all
6 applicable safety standards, rules, and regulations.

7 Q So, in plain language, what does that mean to
8 you? What are they supposed to do?

9 A They're supposed to comply with OSHA.

10 Q Okay. And --

11 MR. GULINO: Objection. Does it say that,
12 that that is his opinion?

13 THE COURT: You can cross.

14 BY MR. CLARK:

15 Q And did Paino Roofing comply with the safety
16 rules in the document?

17 A In my opinion, no.

18 Q And what's -- why not? What's the basis of
19 the opinion?

20 A The deposition testimony of Mr. Paino, who
21 testified that he doesn't see anything unsafe here and
22 he's referred to the photo, Beardsley-2 and he says,
23 his workers would leave the work site in the condition
24 it is in Beardsley-2, which is a photo of the incident
25 hole and he says, he doesn't see anything unsafe there.

1 MR. CLARK: Just for the record, we're
2 putting up Beardsley-2. It was marked as Beardsley-2
3 that's now marked as Plaintiff's 4 at trial. Okay.

4 BY MR. CLARK:

5 Q And did you form an opinion as to whether or
6 not Paino Roofing complied with those safety rules?

7 A Yes, sir.

8 Q And what's that opinion?

9 A That they didn't. They didn't comply with the
10 safety standards that I had mentioned.

11 Q All right. And what stand-- what OSHA
12 standards were important to you with regard to Paino
13 Roofing?

14 A The same standards, one regarding inspection by a
15 competent person and protecting the hole. And
16 specifically, 1926.501A2 says, the employer shall
17 determine if the walking and working surface in which
18 the employees are able to work have the strength and
19 structural integrity to support employees safely.
20 Employees shall be allowed to work on those surfaces
21 only when the surfaces have the requisite strength and
22 structural integrity.

23 And then 501B4II says, each employee in a
24 walking and working surface shall be protected from
25 tripping or stepping into or through holes, and those

1 standards, I believe, were violated and, also, I
2 mentioned the other standard about cover strength as
3 indicated in my report, that this cover didn't meet
4 that strength.

5 Q Okay. And I'm looking at your report at Page
6 11. What is your understanding with regard to who
7 covered over the hole with that membrane?

8 A Paino.

9 Q And did that -- what did that do with regard
10 to the hazard? Did it increase the hazard or something
11 else? Please explain.

12 A That made it more dangerous because an open
13 hazard, you can see in your natural instincts that you
14 don't step in that. When you cover over a hole with
15 something that you can't see the hole at all, that's an
16 inconspicuous hazard. It's much more dangerous than
17 the hazards it's just open without a cover because you
18 can't -- easily mistakenly step on it.

19 Q And did you form an opinion as to whether or
20 not Paino violated the OSHA standard -- strike that.
21 Did you form an opinion as to whether or not violating
22 those safety rules was a cause of the injury to the
23 worker in this case?

24 A Yes, sir.

25 Q Okay. And what's that opinion?

1 A That it was a cause, that had it been covered
2 properly, this incident would not have occurred.

3 Q Now, with regard to blaming the worker, did
4 you address the question of whether or not the worker
5 should be blamed for what happened here?

6 A Yes, sir.

7 Q Okay. And how did you evaluate whether or
8 not the worker should be blamed for what happened?

9 A Basically, as I was trained by OSHA, the first you
10 say, did the worker violate any specific safety
11 instructions and, here, Mr. Munoz didn't violate any
12 safety instructions. Number two, what did he know
13 through training about the hazard and the risk? The
14 hazard is the hole. The risk is a separate thing
15 according to safety professionals. Risks are those
16 factors that make it more likely that the hazard will
17 result in injury. Workers should be trained about
18 hazard and risk. Here, the risk of falling was
19 inconspicuous. He didn't know that, so he didn't -- he
20 didn't know --

21 MR. GULINO: Objection.

22 THE COURT: What is your objection?

23 MR. GULINO: What he knew.

24 MR. CLARK: He read his deposition testimony
25 and reviewed the documents and the photographs, and I

1 think he can safely infer as a basis for his opinion,
2 for his conclusions.

3 THE COURT: Overruled.

4 THE WITNESS: According to Mr. Munoz'
5 deposition testimony, he didn't see the hole and he --
6 he wasn't trained about hazard and risk and the next
7 factors to consider, what was the environment in which
8 he was working and, here, you have what I consider to
9 be an unreasonably dangerous environment because there
10 was a boobie trap, so to speak. There was a place
11 where he could walk and suffer injury that he couldn't
12 see and the other factor is, what was the safety
13 management environment that he was in? He was in a
14 safety management environment where the safety manager,
15 even after the incident, said there's no reason to
16 cover the hole. So based on those factors, I wouldn't
17 blame him for causing his own injury.

18 MR. CLARK: Okay. No further questions at
19 this time, subject to the evidence issues we discussed.

20 THE COURT: Sure.

21 MR. CLARK: Thank you, Judge.

22 THE COURT: Okay. Cross-examination? Are
23 you going to use any of these pictures because we can
24 take them down.

25 MR. GULINO: We'll leave that on.

1 MR. CLARK: You want that up?

2 MR. GULINO: Yes. And then I might need the
3 other one with the contract.

4 CROSS-EXAMINATION BY MR. GULINO:

5 Q Mr. Gallagher, good afternoon.

6 A Good afternoon, sir.

7 Q You have testified before today. Have you
8 not?

9 A Yes, sir.

10 Q And would it be fair to say that you have
11 testified over 100 times?

12 A Yes, sir.

13 Q Would it might be almost 200 times?

14 A No. It's probably 160.

15 Q And would it be fair to say -- Your Honor,
16 may I use the podium, if you don't mind?

17 THE COURT: Sure.

18 BY MR. GULINO:

19 Q And would it be clear to say that what I am
20 going to do is what we call cross-examination?

21 A I'm familiar with that process. Yes, sir.

22 Q And you have been cross-examined probably 100
23 times almost?

24 A Probably 160 times or so.

25 Q So I'm going to ask you a series of questions

1 and most of them are going to require a yes or no
2 answer and if you can't answer me yes or no, you let me
3 know. Okay?

4 A Sure.

5 Q Thank you. Now, --

6 A Excuse me. Am I allowed to answer more than just
7 yes or no?

8 Q Excuse me?

9 A I said that I will answer yes or no if I can.

10 Q Yes. Yes.

11 A But my question is, can I answer more than just
12 yes or no, if I would like to?

13 Q I'll tell you what, you let me and then I'll
14 try to rephrase the question. How is that, if you
15 can't answer it in a yes or no.

16 A No. I might --

17 THE COURT: That's how it goes, right? If
18 he's asking for a yes or no response and you can't
19 answer yes or no, indicate to that and he either
20 rephrases or moves on. All right? If the witness --
21 the attorney for the plaintiff feels the need to go
22 back, that's why there's redirect. All right?

23 THE WITNESS: Okay.

24 THE COURT: Ask your question.

25 THE WITNESS: Yes, Your Honor.

1 BY MR. GULINO:

2 Q Now, you just made a statement to the jury
3 that Mr. Munoz didn't see this when he stepped into it,
4 correct?

5 A According to his deposition testimony, he didn't
6 see it before he stepped there.

7 Q So I'm assuming you did read his deposition
8 testimony before you prepared your report, correct?

9 A Yes, sir.

10 Q And you also reviewed your report before you
11 testified today?

12 A Yes, sir.

13 Q All right. I'm going to read from the same
14 deposition of Mr. Munoz that you reviewed.

15 A Can you tell me where?

16 MR. GULINO: And it is dated, Your Honor, May
17 10th, 2016.

18 MR. CLARK: What page?

19 BY MR. GULINO:

20 Q And it's Page 80. And I'm going to begin
21 with Line 10.

22 Q "When you left, you opened the door and you
23 were walking. How far did you walk before you had your
24 accident?

25 A An approximation, some 20 -- 20, 25 feet, more or

1 less."

2 Q "Did you walk in a straight line? Did you
3 turn in any way?

4 A No. Everything was straight."

5 Q "And where were you looking when you were
6 walking straight?

7 A To the floor."

8 Now, did you take that testimony into
9 consideration when you wrote your report?

10 A Sure.

11 Q And would it be fair to say that at the time
12 of his accident, he was looking at the floor?

13 A I don't know exactly where his eyes were at the
14 time of this incident.

15 Q Yes or no?

16 A I can't -- I can't answer yes or no.

17 Q Okay. Good enough. Fair enough. Fair
18 enough. Now, do you have a website, sir?

19 A Yes, sir.

20 Q And not only do you have a website, but would
21 it be fair to say that you advertise in the New York --
22 New Jersey Law Journal?

23 A Yes, sir.

24 Q And do you do it about every two weeks?

25 A Yes, sir.

1 Q And do you hold yourself out as an expert --
2 as a safety expert, correct?

3 A Yes, sir.

4 Q And you've been doing this more or less full-
5 time since 1985, '88, around there?

6 A No.

7 Q How about since 1988, '89, have you dedicated
8 about 100 percent of your time to litigation?

9 A No, sir.

10 Q Yes?

11 A No, sir.

12 Q No? Okay. When did that start?

13 A I did my first case about 1989.

14 Q And when did you start at 100 percent on
15 litigation?

16 A It's only been recently, I would say in the last
17 ten years, it's been --

18 Q Since about 1988, '89, right?

19 A No, sir. I just said the last ten years.

20 Q Oh, okay. Have you ever testified on behalf
21 of Mr. Clark?

22 A Yes, sir.

23 Q And have you ever testified on behalf of Mr.
24 Clark at a deposition?

25 A Yes, sir.

1 Q And did you testify for Mr. Clark on August
2 23rd, 2011, at his offices in a case by the name of
3 RUBEN, R-U-B-E-N, CORENEL, C-O-R-E-N-E-L, I believe,
4 and ZIETA C-A-R-A-N-G-U-I (phonetic)? it is a docket
5 number -- it's New Jersey Essex Court, Your Honor,
6 Superior Court, Essex Court. Docket number is XSX-L-
7 8031-08 (sic).

8 A I believe so.

9 Q Okay. And I'm going to read for you part of
10 that deposition transcript beginning on Page 7.

11 MR. CLARK: I don't have that. I'm sorry.

12 MR. GULINO: You must have back in the
13 office.

14 MR. CLARK: We asked for any documents they
15 were going to use and --

16 BY MR. GULINO:

17 Q Question, now, -- withdrawn.

18 THE COURT: Wait. Do you have another
19 question? You're withdrawing the question?

20 MR. GULINO: I'm going to read a statement to
21 him.

22 THE COURT: What statement is that, from
23 another deposition in another case or this deposition?

24 MR. GULINO: He just said that he has been
25 doing litigation only 100 percent the last two years.

1 THE COURT: Yes. I heard that.

2 MR. GULINO: This question refers to that.

3 THE WITNESS: No. I didn't say that.

4 THE COURT: All right.

5 BY MR. GULINO:

6 Q Since 1988, '89?

7 A No. I didn't say that either.

8 Q How long have you been doing 100 percent
9 litigation?

10 A I said, about the last ten years.

11 Q Ten years. Okay. I'm sorry. How about
12 1988, '89, no?

13 A The first one was in 1988 or '89.

14 Q Were you affiliated with a company called
15 Safe Research, Inc.?

16 A I am now, today.

17 Q All right. And on the date that I just
18 mentioned, did you -- I want you to listen to this
19 question and you give your answer on Page 7 and you
20 tell me if this is accurate or not.

21 THE COURT: Okay. Hold on. Let me see you
22 at side bar. You know what, why don't we break for
23 lunch, all right? Please don't talk about the case
24 over your lunch. We'll see you back in an hour. All
25 right? Watch your step.

1 (Jury dismissed for luncheon recess)

2 THE COURT: You can step down.

3 THE WITNESS: Thank you, Your Honor.

4 MR. GULINO: Your Honor, may I remind the
5 witness, he's subject to cross-examination, so he
6 doesn't speak to the attorneys during the lunch break?

7 THE COURT: Sure. Sure. Okay. So let's
8 just deal with this objection before we break.

9 MR. GULINO: Sure.

10 THE COURT: All right? You can be seated.
11 Mr. Clark?

12 MR. CLARK: I don't have that deposition
13 transcript. I had asked in limine because we got the
14 defendant's pretrial any exhibits or documents they
15 intend to use was a discovery request in the
16 litigation. There was also a disclosure on pretrial
17 and I had brought it up yesterday and when I asked
18 about this kind of thing, the answer was, no,
19 essentially, I don't have anything and I believe the
20 quote was, let me go get my hat because I had said, you
21 know, I don't want to be surprised at trial with things
22 being -- pull rabbits out of a hat, and they said they
23 didn't have anything. They said, let me go get my hat,
24 meaning they don't have anything to pull out and this
25 transcript, I do not have. It wasn't provided. So I

1 can't even follow along to see if it's accurate and,
2 also, there is no basis at this time to cross-examine
3 -- to impeach the witness because there's no basis that
4 any testimony that he's giving now was different from
5 then.

6 So the basis is, one, procedurally, I never
7 had -- I don't have this. I can't even follow along
8 with it and, secondly, it's substantively because
9 there's no -- they haven't established that the
10 testimony is different to now impeach him with a prior
11 deposition.

12 MR. GULINO: I have no obligation to hand
13 over cross-examination material on an expert witness
14 who has testified and has testimony recorded ad nauseam
15 all over the legal professional industry. I do not
16 have to hand that over. I do not have to tell him I'm
17 going to use it. That's what cross-examination it.

18 THE COURT: Well, I can appreciate that
19 response, but what -- I'm not following you in terms of
20 what it is you're impeaching. So there is --

21 MR. GULINO: May I ask the witness to leave
22 the room, --

23 THE COURT: Sure. Sure.

24 MR. GULINO: -- if we discuss this about him?

25 THE COURT: Yes. Yes.

1 MR. GULINO: I will read the question, Your
2 Honor.

3 THE COURT: Sure.

4 MR. GULINO: Because just remember, I asked
5 him about the 100 percent litigation. Ten years ago,
6 he said it. I left OSHA in -- and I'm just reading the
7 answer, Page 7. I left OSHA in '85 to start my own
8 business and when I started my own business, I called
9 it Occupational Safety Health Consultation, et cetera.
10 It was just me and a part-time secretary, and then I
11 started to provide safety consulting services of a wide
12 variety and gradually started to do litigation. The
13 first case where I served as an expert witness was '88
14 or '89 and it has grown to include more litigation
15 until now. Then the last years, it has been 100
16 percent. This last year -- this is from '05. It's
17 '06. You're right. I apologize.

18 THE COURT: I was going to say, I --

19 MR. GULINO: I did my -- I did my -- I did my
20 math wrong.

21 THE COURT: Okay.

22 MR. GULINO: I thought it was '88, '89.

23 THE COURT: Okay. Okay.

24 MR. GULINO: And I will apologize for
25 whatever I have to apologize.

1 THE COURT: Okay. So you're withdrawing that
2 question?

3 MR. GULINO: But I'm -- do you want a copy of
4 this?

5 MR. CLARK: Yeah. We had asked --

6 MR. GULINO: I don't have to. I really
7 don't --

8 THE COURT: If you're not asking -- if you're
9 not asking --

10 MR. GULINO: -- because I have other things
11 I'm going to ask him about.

12 THE COURT: You're not asking him -- are you
13 asking questions related to what's contained within
14 that?

15 MR. GULINO: Depending upon what he says on
16 my direct, I may bring other things up on this.

17 THE COURT: Well, then that's up to you. I
18 mean, --

19 MR. GULINO: Actually, I'm not going to hand
20 it over because I don't have an obligation to.

21 THE COURT: All right. So I will see you
22 back in an hour.

23 MR. GULINO: What time, Judge?

24 THE COURT: 1:30.

25 MR. GULINO: Okay.

1 (Luncheon recess)

2 THE COURT: Okay. Thank you. Please be
3 seated. All right. Bring in the jury.

4 COURT OFFICER: Yes, ma'am. Jury entering.

5 (Jury present in courtroom)

6 THE COURT: Thank you. Please be seated.

7 Mr. Gulino, cross-examine.

8 MR. GULINO: Thank you, Your Honor.

9 BY MR. GULINO:

10 Q Good afternoon, Mr. Gallagher.

11 A Good afternoon.

12 Q Let me apologize to you. Before, you were
13 correct. When I looked at the documents I had, right,
14 on 100 percent litigation --

15 A Oh, right.

16 Q -- ten years ago, you were correct. Would it
17 be fair to say that you are being, obviously, paid for
18 your services today?

19 A Yes, sir.

20 Q And would it be fair to say that it's an
21 hourly rate?

22 A Yes, sir.

23 Q And would it be fair to say that not only are
24 paid for your testimony, your time today?

25 A Right.

1 Q You're also paid for doing an inspection or
2 doing a report or something like that?

3 A Right. But I'm not paid for my testimony. I'm
4 paid for my time.

5 Q I didn't say you were. I said you were paid
6 for your time, right? You're paid for your time here
7 in court?

8 A Yes, sir.

9 Q Okay. All right. And are you compensated if
10 you prepare a report?

11 A Sure.

12 Q And are you compensated separately for the
13 amount of time it took you to prepare a report?

14 A No. They're the same thing.

15 Q All the same thing?

16 A No. The time to prepare the report and the time
17 to prepare the report are the same thing, as you
18 phrased it.

19 Q Okay. Now, back in 2011, the hourly rate was
20 about \$225 an hour?

21 A It sounds right.

22 Q What is it now?

23 A It's been changing over the years. It's 275 now.

24 Q 275 now? And how many hours a year do you
25 bill? Well, let's do it this way. How many hours a

1 week do you bill?

2 A It varies. Probably between 25 and 35.

3 Q 25 and 35. Would it be fair that it's about
4 100 hours a month?

5 A Yes.

6 Q Okay. At 275 an hour, right?

7 A Right.

8 Q Okay. So that's about 27,500 a month, right?

9 A I guess. Yeah.

10 Q Okay. And it would be about \$300,000 a year?

11 A That's probably right.

12 Q Okay. Now, --

13 A That's before all the expenses are taken out.

14 Q That's fine. But that's what you charge,
15 correct?

16 A Yes, sir.

17 Q All right. And you and your son are the
18 employees of your company or just you?

19 A Just me and my office manager.

20 Q Okay. And you work out of your house?

21 A No, sir.

22 Q You have an office?

23 A Yes, sir.

24 Q And you wrote a book back in 2005?

25 A Yes, sir.

1 Q I think, Mr. Clark referred to it, right?

2 A I didn't hear --

3 Q If I may --

4 A I didn't hear him refer to any book that I wrote.

5 Q The book that you wrote in 2005, is it still
6 published?

7 A I don't know which book you're referring to. I
8 wrote two books around that time, and I don't know the
9 exact year of either.

10 MR. GULINO: May I approach, Your Honor?

11 THE COURT: Sure.

12 BY MR. GULINO:

13 Q I have some Post-Its in here, but I just want
14 to make sure --

15 A Oh, that's --

16 Q -- if you don't mind. Is that it?

17 A That's the self-published book. That same book
18 has just come out, published by Berman Press.

19 Q Okay. But this was self-published by you,
20 correct?

21 A That was self-published and, now, it's published
22 by --

23 Q And when it was self-published by --

24 A Now, it's published by a publisher.

25 Q When it was self-published by you, --

1 withdrawn. What is peer reviewed?

2 A Articles that I have written for the Journal of
3 the American Society of Safety Engineers were peer
4 reviewed. That means the eight people, safety
5 professionals, look at the proposed article and
6 determine whether its content is accurate and whether
7 it's relevant and of interest to the about 40,000
8 members of the American Society of Safety Engineers.

9 Q And the book that I just showed you was not
10 peer reviewed. Was it?

11 A No, sir. It's self-published. It was published
12 by me.

13 Q Okay. I'm going to read just a part of it on
14 Page 5. It's acknowledgments. Thanks to the many
15 lawyers, especially Joe Borie and Marty Brigham, who
16 always had time and patience to help me understand the
17 broader picture, so I could see how a safety
18 professional can help lawyers. Is that accurate? You
19 put that in there?

20 A Absolutely.

21 Q Okay.

22 A That's why I wrote the book.

23 Q All right. And you have certain --

24 MR. CLARK: I'm sorry. Can we just -- can we
25 just read the balance? There's two more sentences in

1 that paragraph, and I think that was incomplete. Can
2 we just read the two additional sentences there?

3 MR. GULINO: Do we have redirect coming up
4 after cross?

5 THE COURT: There is redirect. If that's
6 your answer, that's your answer.

7 MR. GULINO: I thought we did.

8 THE COURT: All right? Next. Next question.

9 BY MR. GULINO:

10 Q In this book, referring to construction
11 injury litigation, you have certain recommendations in
12 that book?

13 A Yeah. Sure. It's full of recommendations.

14 Q For example, would it be fair to say that, if
15 you're looking at it to see whether or not something is
16 dangerous, do we worry about the exposure of time that
17 goes by when something is there?

18 A In order to -- for OSHA to sustain an allegation
19 of a violation, they have to prove knowledge, that is,
20 that the person who would get the citation knew or
21 should have known of the dangerous condition. So how
22 long it existed is important to -- in your evaluation
23 of whether somebody should have known what was there.

24 Q Now, you said that L.P. Ciminelli would be
25 responsible for what is depicted in Exhibit Plaintiff's

1 Number 4, correct?

2 A No. I didn't say that particularly.

3 Q Well, you said they violated OSHA
4 requirements on Number 4. Didn't you?

5 A Basically, I said, it should have had a safe cover
6 in compliance with OSHA and they didn't do that. They
7 didn't make sure it was done.

8 Q Let me ask you this then. When did -- when
9 did L.P. Ciminelli find out about them?

10 A Find out about what?

11 Q What was depicted in Exhibit Number 4.

12 A They -- when Mr. Beardsley was making his
13 inspections, he said he was familiar with the roofing
14 process and he saw the covering over the roof and he
15 knew that there were holes there and he testified that
16 he --

17 Q No. No. I'm --

18 A Excuse me. He testified that he didn't think that
19 was important to protect him.

20 Q I'm going to ask you this question again.
21 When did L.P. Ciminelli find out when what is depicted
22 in Number 4?

23 A I don't understand your question. They knew there
24 was a roof.

25 Q Objection.

1 A They knew there was a drain.

2 THE COURT: I think he's trying to answer
3 your question.

4 MR. GULINO: I'm asking him when. You either
5 know the answer or you don't.

6 MR. CLARK: Judge, just --

7 THE COURT: Do you know the answer to that?

8 THE WITNESS: Yes, Your Honor.

9 THE COURT: Okay.

10 BY MR. GULINO:

11 Q When did they find out what is depicted in
12 Number 4?

13 A They knew before roofing began, that there was
14 going to be a covering over the drain holes.

15 Q I'm going to ask you one more time because
16 it's not very complicated. When did they know about
17 the condition exactly as it existed and is depicted in
18 Number 4 on this particular hole?

19 A The hole there that's covered with the membrane
20 was known to Mr. Beardsley when he made his daily
21 inspections, which he said he made.

22 Q You can't answer the question?

23 A I just did answer your question.

24 THE COURT: That's the -- that's the best
25 answer --

1 BY MR. GULINO:

2 Q When?

3 THE COURT: He's answered the question to the
4 best of his --

5 BY MR. GULINO:

6 Q When was the inspection --

7 THE COURT: Sir, he's answered the question
8 to the best of his ability. Move onto the next one.
9 That's the answer.

10 BY MR. GULINO:

11 Q When was the inspection made?

12 A He said, he made inspections every day.

13 Q Do you know if he walked past that hole?

14 A He walked on the roof where there were holes all
15 over the place.

16 Q I'm going to ask you the question again. If
17 you don't understand the question, let me know. Do you
18 know if he walked past that hole?

19 A I don't know what holes he walked past, but I know
20 he walked past holes that were covered with the
21 membrane.

22 Q I'm assuming your answer is, no?

23 A Right. With the caveat that I explained.

24 Q You do not know?

25 A I explained my answer already.

1 THE COURT: Next question.

2 BY MR. GULINO:

3 Q Did you read the deposition of Paino Roofing?

4 A Yes, sir.

5 Q So I'm going to read back to you part of your
6 report dated September 9th, 2016. And the first one
7 where it says, by way of preparation, I reviewed the
8 following.

9 A Yes, sir.

10 Q Deposition transcripts and exhibits of
11 Washington Munoz, Joe Mella, Robert Beardsley.

12 A Pardon me?

13 Q Robert Beardsley.

14 A Right.

15 Q Okay. Does it say that you read Mr. Paino's
16 deposition in preparation of your report?

17 A No. I read his deposition after I prepared my
18 report.

19 Q I'm going to ask you it again. Does the
20 report say you read his deposition in preparation of
21 the report?

22 A No.

23 Q Yes or no?

24 A I read his deposition after I prepared my report.

25 Q So the report that you prepared was prepared

1 on incomplete evidence, for want of a better term,
2 because you came to a conclusion without reading
3 Paino's deposition. Didn't you?

4 A You said that I did it with incomplete
5 information. I did it with complete information,
6 enough to form the opinions that I formed based on the
7 facts in this case.

8 Q So you formed an opinion that Paino Roofing
9 did something wrong without reading their deposition.
10 Didn't you?

11 A I -- I --

12 Q Yes or no?

13 A Sir, I would have to review all the depositions to
14 see what there was comments about Paino by other
15 people.

16 Q I'm going to ask you again. This is not very
17 complicated. You came to an opinion that Paino did
18 something wrong and put it in your report without
19 reading their deposition. Yes or no?

20 A I wrote my report based on the opinion -- on the
21 information that I had as indicated in my report, which
22 was not --

23 Q What about my question --

24 A -- Mr. Paino's deposition.

25 Q What about my question is complicated to you?

1 What do you not understand?

2 A I understand your question completely, sir.

3 Q I'm going to ask you one more time. Okay?

4 Did you or did you not write a report blaming Paino
5 without reading the Paino deposition?

6 A Yes, sir.

7 Q Okay. Would you consider this a big job?

8 A That's a question I really don't understand. It's
9 as big as it was. There's jobs that are a thousand
10 times bigger than this and there's jobs that are very,
11 very much smaller than this.

12 Q How about in your experience? Would you
13 consider it a big job?

14 A I've been on nuclear power plant construction
15 jobs, which were big jobs. This was tiny compared to
16 that, but this is very big compared to some other jobs.

17 Q Would you say that a project -- withdrawn.
18 How many employees or workers, construction workers
19 worked at this site through its duration?

20 A I don't know.

21 Q Wouldn't that tell you whether or not a
22 project was a big project or a little project?

23 A It's irrelevant to me, the number of employees on
24 a job site. It really is. The question is whether
25 there are hazards that were uncontrolled, whether the

1 job is big or small, whether there's a lot of employees
2 or not.

3 Q On a big project, if you walk through the
4 site of the entire job site once every shift, that
5 would be sufficient. Wouldn't it?

6 A Generally speaking, the literature says and I
7 agree that the superintendent or the GC or their
8 representatives should make a daily safety inspection,
9 as was done at this site.

10 Q And based upon -- in your book on Page 17,
11 I'm going to quote you on Page 17. On some jobs at
12 some time, it is reasonable to expect the GC/CM to make
13 hour-by-hour inspections. Other jobs may be so large
14 that a walk through of the entire job site would be
15 expected only when it's issued, right?

16 A Right.

17 Q Okay. And, by the way, I think you were
18 shown a contract between Ciminelli and the Meadowlands
19 Racetrack?

20 A Right.

21 Q What are they referred to as in the contract?

22 A I forget.

23 Q You've been using the term, general
24 contractor. Haven't you?

25 A I've been also using the term construction manager

1 and, essentially, said they're synonymous to the jury
2 this morning.

3 Q I'll rephrase the question. I wasn't clear.
4 In your testimony today, you called them a GC. Didn't
5 you?

6 A I did. Yes, sir.

7 Q If I were to tell you they're a construction
8 manager and it's listed on the contract as a
9 construction manager, would you accept that?

10 A Certainly.

11 Q All right. Now, do you have your report in
12 front of you?

13 A Yes, sir.

14 Q Good. I'm going to ask you some questions
15 about it and if you feel you have the need to review
16 it, please do so. Okay?

17 A Sure.

18 Q You can refer to it.

19 A Thank you.

20 Q Now, -- oh, and you read Mr. Beardsley's
21 deposition testimony?

22 A Yes, sir.

23 Q Are you aware that Mr. Beardsley was the
24 safety manager or supervisor of this project?

25 A Yes, sir.

1 Q Are you aware that Mr. Beardsley has 40 years
2 in the construction business?

3 A I didn't know how many years he had in the
4 business. I understood he was a professional safety --

5 Q If I were to tell you that he had 40 years --

6 A I understood he was a professional safety
7 representative on the job.

8 Q And if I were to tell you he had 40 years in
9 the business, would you accept that?

10 A Sure.

11 Q Now, there are, I believe, five different
12 OSHA violations that you cited on Page 8 of your
13 report?

14 A Yes.

15 Q All right.

16 A And I had cited other OSHA violations in my
17 report.

18 Q And there in what's called CFR, which is the
19 Code of Federal Regulations. Are they not?

20 A Yes, sir.

21 Q And they're national, correct?

22 A Right.

23 Q And you look at the five and the first one,
24 I'm going to read it to you, was 29 CFR 1926.16(a). In
25 no case shall a prime contractor be relieved of overall

1 responsibility for compliance with the requirements of
2 this part for all work to be performed, right?

3 A Yes, sir.

4 Q You know what, I'm sorry. I read the wrong
5 one. I'm getting it here. Hold on. Yes. Let me --
6 let me rephrase it. Go back to Page 8 of your report
7 instead.

8 A Yes, sir.

9 Q And we have 1926.20(b)(1). All right? It
10 shall be the responsibility of the employer to initiate
11 and maintain accident prevention programs as may be
12 necessary to comply with this part. Are you aware that
13 every new worker who showed up at that site had to
14 undergo an indoctrination and/or a class talking about
15 safety at this particular project?

16 A I'm not sure that I read that. I can't swear that
17 I did.

18 Q If I were to tell you that Mr. Munoz went and
19 partook in one of those classes, would you accept that?

20 A Sure, if it's true, it's true.

21 Q And if I were to tell you that it was a
22 safety orientation meeting that he went to, would you
23 accept it?

24 A Sure.

25 Q And if I were to tell you that, during this

1 safety meeting, OSHA regulations are discussed, would
2 you accept that?

3 A Sure.

4 Q And if I were to tell you that if Mr. Munoz
5 had difficulty with the English language, translators
6 were present, would you accept that?

7 A If that's true, it's true. It's not a matter of
8 me accepting it. If it's true, it's true.

9 Q And if -- and I apologize. I used a wrong
10 term. It's not an indoctrination. It's orientation.
11 Okay, a safety orientation. Now, based upon that,
12 would you agree that the general contractor has
13 required or satisfied that they are to initiate
14 accident prevention programs?

15 A Right. And I told the jury this morning, I said
16 right. I said, yes.

17 Q I think you did. I think you did.

18 A And I said this morning that that standard was not
19 violated and I'm sorry I took their time reading it.

20 Q Good enough. Okay. So that one is good.
21 How about the second one there? That's 20B.2, accident
22 prevention programs. Did you also say that was okay?

23 A I don't understand your question.

24 Q Okay. I'll ask you again. I'll ask it a
25 different way. Was that violated?

1 A Yes, sir.

2 Q It was violated? Okay. So it was violated.
3 Accident prevention program shall provide for frequent
4 and regular inspections of the job sites, materials and
5 equipment to be made by competent persons designated by
6 the employees, which would mean that you knew exactly
7 how many and how often the inspections were done.
8 Didn't you?

9 A Because I read Mr. Beardsley's deposition, I knew
10 that he, the safety manager, made daily inspections.

11 Q Okay. He made daily inspections on a large
12 job, which is in your book set, once a shift is okay on
13 a big job.

14 A Right.

15 Q And that's -- this is a big job?

16 A Right.

17 Q So would you agree --

18 A Well, I -- I --

19 Q -- that they satisfied this requirement, that
20 this -- this was not violated?

21 A No. No. No. I said it was violated because it
22 says, the inspection should be done by a competent
23 person and although Mr. Beardsley has safety training,
24 he wasn't competent to recognize the hazard that led to
25 injury. Walking on a soft spot that has a cover that

1 -- over holes that he knew were going to be there,
2 drain holes on the roof, and he found that to be
3 acceptable. That was the problem.

4 Q Page --

5 A So he wasn't competent to identify this hazard,
6 even though he made the inspections and even though he
7 would be competent in other regards.

8 Q The answer is no, I guess?

9 A My answer is as I stated it.

10 Q Can we go back to the instructions this
11 morning because we can get out of here. I think we
12 have another witness after this. If you can answer it
13 in the yes or no, that would be great, if you can do
14 that. Okay?

15 A I think I just answered it.

16 Q All right. Because I asked you if it was
17 violated and you said yes and then you went on. All I
18 wanted to know was yes or no. Okay? So let's try it
19 again. Now, how about we do this. Photos, did you
20 review photos before you did the report?

21 A Did I read what?

22 Q Did you review photos?

23 A Yes, sir.

24 Q You did? Okay. And they're not listed in
25 the report. Are they?

1 A They are because it says, deposition transcripts
2 and exhibits and the photos were exhibits.

3 Q Do you recall specifically what photos you
4 reviewed?

5 A The ones here in front of me.

6 Q Huh?

7 A The ones here in front of me.

8 Q Okay. May I approach?

9 THE COURT: Sure.

10 BY MR. GULINO:

11 Q All right. Okay. Can I look at --

12 A They're in a particular order now. I don't mind
13 you taking one, but don't mess them up, please.

14 Q I've seen enough photos. I really don't need
15 them anymore. Okay. Can I have two marked, Your
16 Honor, if you don't mind? May I approach, Your Honor?

17 THE COURT: Yes.

18 BY MR. GULINO:

19 Q I'm going to show you what is marked
20 Defendant D-5 for identification and D-6 for
21 identification. I want you to look at those, please.

22 A Yes, sir.

23 Q And what are they? What do they depict?

24 A They're photos of the area where the incident took
25 place.

1 Q And --

2 A After the incident.

3 Q After the incident. Photo Number 4, when was
4 this taken?

5 A I believe that was after the incident, also.

6 Q Okay. And the ones that are in D-5 and D-6,
7 who were they taken by?

8 A I think, they were taken by Mr. Munoz.

9 Q And are you aware that he took them the day
10 after his accident?

11 A Yes, sir.

12 Q And are you aware that the condition that he
13 is claiming existed at the time of his fall shown in D-
14 5 and D-6?

15 A No. He said that it wasn't like that. There's
16 plywood there. He says, that was there after the
17 incident.

18 Q So he said it was like this one then, in 4?

19 A Right. He said that it was like -- it was these
20 shown here in D-8 and D-5 and Mella-4, which are
21 essentially all the same. This is the incident hole
22 with the drain cover over top, which are those same two
23 holes in the photo that he took.

24 Q Let's try this. This photo is dated 6/27/13,
25 correct?

1 A Yes, sir.

2 Q What date is the next one?

3 A The 25th.

4 Q Okay. Would you agree with me that what is
5 shown in Exhibit 4 is closer in time than what was
6 shown in the Exhibit that you just showed me, these
7 three photographs?

8 A Yes.

9 Q Okay. And would you agree with me that if
10 this condition existed at the time of the plaintiff's
11 accident, there's no debris around?

12 A I don't know what that shows there, but it looks
13 like it's some type of debris.

14 Q Well, do you see any wood?

15 A No. There's no wood.

16 Q Do you see any tar paper or anything like
17 that?

18 A I think it's all tar paper around the hole.

19 Q And these are -- this photo, though it's
20 blown up, would you agree with me that it's really not
21 to scale on this circle, which is supposed to be six
22 inches around? Would you agree with me on that?

23 A I don't know what you mean by not to scale. It's
24 a third --

25 Q Well, if it was six inches, --

1 A Excuse me.

2 Q -- wouldn't it be six inches on the photo?

3 A Pardon me?

4 Q This is taken away from the photo, correct, a
5 few feet?

6 A It's taken from a photo that was away from the
7 hole. Sure.

8 Q Okay. And there's a cover -- we talked about
9 this. This is the cover, right, on the bottom of this
10 photo? You call it a tarp or whatever it is?

11 A Yeah. It's what the covering was used over the
12 holes.

13 Q And the hole, let me ask you about that.
14 You're saying that there's a definition of a hole in
15 your report, right, on Page 8, and hole means a gap or
16 void two inches or more in its least dimension in a
17 floor, groove, or other walking facilities, correct?

18 A Yes, sir.

19 Q What was under what is depicted in Number 4,
20 either the hole on the top or the one that has the
21 cover?

22 A They're insulation that would vary at the --
23 according to Mr. Paino, it would vary from two to four
24 inches. Excuse me. Yes. There was insulation that
25 would vary from two to four inches and --

1 Q And -- and --

2 A -- and there was a slope in the drain.

3 Q Now, I'm going to ask you again because I
4 don't think I asked you correctly. Let's look at the
5 hole on top, all right? Do you see it on 4?

6 A I do. I do.

7 Q What's that for?

8 A I can't swear to it. I know what it's for. I
9 thought that the covers were over drains. The
10 deposition testimony is that the covers were over
11 drains. It may have been a vent. It's possible. It
12 wouldn't make any difference to my opinion if you
13 shouldn't put --

14 Q If you --

15 A It wouldn't make any difference to my opinion that
16 you shouldn't put membrane over it because if you step
17 on it, you can get hurt.

18 Q If I were to tell you that that hole,
19 underneath it is a drain hole, would you accept that?

20 A Yeah. That's what I figured.

21 Q All right. So would it be fair to say that
22 when we talk about holes in the construction field, we
23 are always concerned with the people below as much as
24 the people above, right?

25 A No.

1 Q Because you're worried about things falling
2 through holes and hitting people underneath you, right?

3 A No. We're not always concerned about one and not
4 the other. We're always concerned about workers
5 getting injured any way that they can get injured.
6 Sometimes, things can go through a hole and hit people
7 below. Sometimes, they can't.

8 Q You made reference to 1926.500A, correct?

9 A Yes, sir.

10 Q What's the next section, 501, also holes
11 incident?

12 A 500 is definitions and 501 is the standards for
13 fall -- where fall protection has to be in place.

14 Q It's the practical application of 500. Isn't
15 it?

16 A I wouldn't put it that way. It's the definitions
17 of the terms used in 501, 502, and 503.

18 Q 501 talks about duty to have fall protection
19 and it talks about holes and you make reference to that
20 as well, I think, in another part of your presentation
21 today, right?

22 A Yes. I covered a number of --

23 Q Okay. Fall protection. We're talking about
24 that now. Fall protection pertains to falls from
25 heights, correct?

1 A No. The OSHA standards doesn't limit it to fall
2 from heights. The standards that I cited are not
3 limited to falls from six feet or more.

4 Q Well, you read before to the jury, I believe,
5 1926.501A2, right?

6 A Yes, sir.

7 Q All right. And that's right above 501B,
8 right? And tell me or not, 501B talks about falls of
9 anything over six feet. That's what you're concerned
10 about when you're talking about the floor and its
11 integrity. Aren't you?

12 A Absolutely not. That standard --

13 Q They're together. Aren't they?

14 A Excuse me, sir.

15 Q Are they together?

16 THE COURT: Let him finish. Let him finish.

17 THE WITNESS: Excuse me. I would like to
18 answer your last question.

19 BY MR. GULINO:

20 Q Yes or no? You said, absolutely not. I'll
21 move onto the next question. Okay? Now, --

22 MR. CLARK: Your Honor, --

23 THE COURT: You can go back on redirect.

24 MR. CLARK: Okay.

25 BY MR. GULINO:

1 Q 501B1 falls for six. 501B2 falls of six.
2 501B2II, each employee on a walking working surface six
3 feet or more --

4 MR. CLARK: Judge, --

5 THE COURT: Is this a question?

6 MR. CLARK: I don't know what's going --

7 BY MR. GULINO:

8 Q Right?

9 THE COURT: Yes. Is this a question? Is
10 there a question?

11 MR. GULINO: Well, let me rephrase.

12 BY MR. GULINO:

13 Q We'll go back to 1926.501B4. Do you have
14 that one in front of you?

15 A I have II, the one that was important to me.
16 501B4II, not the other 501B4's.

17 Q II, what's the numbers, if you don't mind?

18 A 501B4II.

19 Q 501B4II. Okay. Now, this hole was covered,
20 correct?

21 A Which hole are you talking about?

22 Q The bottom one. I'm assuming the only one
23 that --

24 A It was -- it was covered with the membrane.

25 Q So we know that it was covered, right?

1 A Yes.

2 Q Now, drain holes on the roof are pitched.

3 Are they not?

4 A Yes.

5 Q Because this is a flat roof, right? And so
6 the water has to travel on a flat roof down towards the
7 drains, correct?

8 A Right.

9 Q So as Mr. Munoz is walking towards this
10 covered hole, the roof is pitched towards the drain,
11 correct?

12 A There's slopes around the drain that are pitched
13 and the roof itself would be pitched a little bit, so
14 the water would flow that way.

15 Q So that when you got within a few feet of the
16 hole in 8, you know it's pitched. Don't you?

17 A You can see that it slopes down in that area,
18 right.

19 Q Not only can you see it, would it be fair to
20 say you can feel it?

21 A That's the problem. You can feel it when you
22 stepped on it and it -- it would -- and --

23 Q Which warns you about the hole?

24 A It warns you -- yes. It warns you after you fell.
25 You can say, wow, what was that? That's a warning you

1 get a little too late.

2 Q Your report makes no reference to his
3 employer, Cooper, does it?

4 A It does not.

5 Q And the reason you didn't concern yourself
6 with that is because you were told not to. Weren't
7 you?

8 A There were two reasons.

9 Q Yes or no?

10 A I was asked to evaluate the conduct of the
11 defendants and I understand the employer was not a
12 defendant, so I didn't evaluate their conduct in my
13 report. However, I could not have --

14 Q And -- and --

15 A I could not have performed my evaluation of the
16 defendants without evaluating the conduct of the
17 employer, and I did, indeed, evaluate their conduct and
18 found that they didn't know about the hole. There was
19 nobody there that would be reasonably expected to know
20 that this hazard was there because it was
21 inconspicuous.

22 Q Where on your report is that?

23 A It's what I thought about when I was evaluating
24 their conduct.

25 Q You were thinking about, but you didn't

1 exchange that and you didn't put it in the report. Did
2 you?

3 MR. CLARK: Judge, objection. Relevance.
4 They're not -- they're not in this case.

5 THE COURT: What is the relevance of it?

6 BY MR. GULINO:

7 Q You were asked not to look at the employer's
8 responsibility. Weren't you?

9 A No.

10 Q Okay.

11 A No. I wasn't.

12 Q And --

13 A I had to --

14 Q And --

15 A -- consider their responsibility --

16 Q And --

17 A -- in order to do my evaluation.

18 Q -- you were also not asked -- or you were
19 also asked not to take into consideration --

20 MR. CLARK: Judge, -- Judge, objection. Can
21 we be heard at side bar?

22 (Discussion at side bar)

23 MR. CLARK: Under Rule 4:10-2, the
24 communications between an attorney and a --

25 MR. GULINO: They were a party to the case.

1 You made them a defendant. You sued them.

2 MR. CLARK: Judge, may I finish my objection?

3 THE COURT: Yes, please.

4 MR. CLARK: Under Rule 4:10-2, communications
5 between an expert and the attorney in connection with
6 writing a report is privileged. It's called a
7 collaborative process materials privilege. So I object
8 to this line -- continued line of questioning on two
9 bases. One, it's not relevant and, two, perhaps more
10 importantly, it's privileged. 4:10-2 is very clear in
11 this. They amended the rule five years ago, roughly,
12 to make that very clear.

13 MR. GULINO: Privileged?

14 THE COURT: I'm going to hear your response
15 as to what he's saying. I'm not sure how it's
16 relevant. I mean, --

17 MR. GULINO: He --

18 THE COURT: -- we don't even get to the
19 privilege in this.

20 MR. GULINO: -- sued Cooper. He made them a
21 defendant.

22 THE COURT: Okay. How is what you're -- the
23 question that you're asking relevant?

24 MR. GULINO: That he didn't because he was
25 asked not to ascertain their negligence. He was only

1 asked to go against the defendant, Judge.

2 THE COURT: Okay. And how is that relevant?

3 MR. GULINO: It was to bias the witness.

4 THE COURT: The objection is sustained.

5 (End of discussion at side bar)

6 THE COURT: The objection is sustained.

7 Counsel, move on.

8 BY MR. GULINO:

9 Q You were not asked to take into consideration
10 the plaintiff's negligence. Were you?

11 A I have to. That's the first thing I consider --

12 Q Yes or no, sir? It's not common?

13 A It's implied. Yes. The answer is, yes, it's
14 implied. When I'm asked to look at a case, I have to
15 consider the responsibility of the injured worker.

16 Q And your report doesn't anywhere indicate
17 that the plaintiff was free of negligence. Does it?

18 A I evaluated his conduct exactly as I expressed it
19 to the jury.

20 Q Let's try it again. I'm going to ask you the
21 question again. If you don't understand me, tell me
22 and I'll rephrase the question. Your report does not
23 reference the plaintiff at all, does it, on his fault
24 or no fault?

25 A It -- it does. On Page 12, there's a paragraph,

1 evaluation of the conduct of Washington Munoz.

2 Q Mr. Munoz was walking on the roof, looking
3 down at this and you don't consider that any -- any
4 evidence at all of negligence?

5 A I disagree with the assumption in your question
6 that he was looking down at this.

7 Q Sir, yes or no? Yes or no? We'll be here
8 all day.

9 A I don't understand your question because there is
10 an assumption in there that I don't think is part of
11 the facts in this case.

12 Q You get assumptions all the time as an expert
13 in the courtroom. Don't you?

14 A No. I get questions. I don't get assumptions.

15 Q Is walking towards a hole, which is in a
16 sloped part of the roof and he's looking down and you
17 didn't take that into consideration. Did you?

18 A Sir, he didn't say that what --

19 Q Yes or no?

20 A I took his deposition testimony --

21 Q Yes or no?

22 THE COURT: Can you -- can you answer yes or
23 no? If you can't, let him know that and he'll have to
24 move on.

25 THE WITNESS: I can't answer that question

1 the way you phrased it.

2 THE COURT: Okay. Next question. Either
3 rephrase it or ask a different question.

4 BY MR. GULINO:

5 Q You didn't go to the site, at least, right?
6 We know that?

7 A Correct.

8 Q And this hole that we're talking about, do
9 you know how deep it is?

10 A Yeah. The photos show how deep it is.

11 Q I'm --

12 A I can estimate three inches from the photos is a
13 reasonable estimate.

14 Q Not by the photos. Do you know there was
15 testimony by Mr. Paino in his deposition when he talks
16 about how deep it is?

17 A Right. In two places. I read it closely.

18 Q How deep does he say it is?

19 A He talked on Page 29 about the drain to the floor,
20 the floor to the drain being one-and-a-half to two
21 inches. He also talked about the insulation being --

22 MR. GULINO: Objection.

23 THE WITNESS: -- four inches to --

24 MR. GULINO: Objection.

25 THE COURT: Hold on. Just the hole, you want

1 to know?

2 MR. GULINO: I want to know how deep Mr.
3 Paino said in his deposition the hole was.

4 THE COURT: Okay. Can you answer that?

5 THE WITNESS: This is related to the hole.

6 THE COURT: Okay.

7 THE WITNESS: It's the distance between the
8 top of the roof, the membrane, the insulation, and the
9 distance from the floor to the drain and he said it was
10 one-and-a-half to two inches from the floor to the
11 drain and he said it was four to -- four to one-and-a-
12 half to two inches typically. But he also said the
13 insulation was two to four inches. So if you have the
14 main membrane and then you have two to four inches of
15 insulation and then you have the distance between the
16 roof and the drain, it comes up to at least three
17 inches.

18 Q Mr. Paino testified it was an inch-and-a-
19 half. Do you --

20 A He testified that the distance from the drain to
21 the floor was an inch-and-a-half to two inches on Page
22 29.

23 Q And the floor was covered with the membrane,
24 isn't it, and it's covered with --

25 A No. The insulation is covered with the membrane.

1 Q We're only talking about this much, aren't
2 we? We're really only talking about this much?

3 A Mr. Paino says it was four inches to one-and-a-
4 half to two inches.

5 Q I'm talking about this much.

6 A Right. You're talking about that much, plus, the
7 distance from the floor to the drain, which is at least
8 three inches.

9 Q Now, are you aware that there is testimony
10 Mr. Munoz did not fall? Are you aware of that?

11 A He didn't fall down to the ground. I could
12 explain how he said he was injured.

13 Q No. No. No. This morning, there was
14 deposition testimony read by Joel Mella -- of Joel
15 Mella, who was four to five feet behind him who said he
16 did not fall. Now, you read his transcript. Did you
17 not?

18 A I know he didn't fall to the ground. It's
19 fundamental. Both of them said that. That's not how
20 the injury occurred. He didn't fall down.

21 Q So he did not fall to the ground and he did
22 not land on his shoulder, correct?

23 A That's the way I understood it.

24 Q Okay.

25 A I'm not sure if his shoulder hit the ground

1 eventually.

2 Q So you read the transcript and you used his
3 transcript in coming to your opinion. Did you not?

4 A I did. Of course.

5 Q Okay. And if I were to tell you that the
6 testimony of Mr. Mella was read this morning, he did
7 not fall, would you accept that?

8 A I considered that to be true when I wrote my
9 evaluation and when I read his deposition --

10 Q All right.

11 A -- and Mr. Munoz' deposition. Neither said he
12 fell to the ground.

13 Q What Mr. Munoz stepped on, right, and I'm
14 referring to Exhibit 4, Your Honor, which is the lower
15 part, did you test this and see how much bounce it's
16 got or support it's got?

17 A No. I don't know how much bounce it had, except
18 it was described as a trampoline by somebody. I could
19 tell you here in a second.

20 Q Let's try it again. What I just showed you
21 in Exhibit Number 4, did you test or inspect?

22 A No. I didn't test or inspect it.

23 Q Okay. And so you don't know yourself how
24 much it goes down or how well it supports you for
25 anything except for his testimony, correct?

1 A No. It's not correct.

2 Q He testified about the fall. Did anybody
3 else go in there besides him? Did anybody else step
4 into that hole besides him?

5 A No.

6 Q Okay.

7 A Not that I know of.

8 Q So you don't know how far he went down in a
9 depression, except for his testimony?

10 A I would have to say that's true as far as a
11 specific number of inches, but --

12 Q Without -- without you surmising, just by
13 reading or learning facts, you have no idea how far he
14 went down into the depression, except for his
15 testimony?

16 A There's testimony by Mr. Ragusa (phonetic) of
17 Countryside, who talked about the membrane being like a
18 trampoline. So I don't know the distance the
19 trampoline went down, but there's evidence that it went
20 down some. But I don't know the exact number of inches
21 that it went down.

22 Q Mr. Ragusa an eyewitness to the accident?

23 A No. He was talking about the membrane. He's the
24 -- the --

25 Q He's talking about the membrane the entire --

1 A He's the plumber -- he's the plumber who was
2 talking --

3 Q He's talking about the membrane on the entire
4 roof. Isn't he?

5 A On Page 29, I can tell you exactly what he said
6 and what he was talking about.

7 Q We're going to go back to Mr. Munoz again.
8 Okay? We're going to go back to --

9 MR. CLARK: Judge, is the pending question
10 withdrawn or --

11 MR. GULINO: He's not answering the question,
12 Judge.

13 BY MR. GULINO:

14 Q I -- you know, it's simple stuff, Mr.
15 Gallagher. We don't want to be here any longer.
16 There's another witness waiting outside, so I'm going
17 to go back to this again. Except for the testimony of
18 Mr. Munoz, you have no other evidence as to how far he
19 stepped into a depression. Do you?

20 A I don't know the exact distance that he went down.

21 Q Yes or no, sir?

22 A I --

23 THE COURT: Can you answer it yes or no? If
24 you can't, say so, so we can move on.

25 THE WITNESS: I don't know.

1 MR. GULINO: I'm almost done.

2 BY MR. GULINO:

3 Q Go back to 501A2, if you don't mind. That's
4 the integrity.

5 A Right.

6 Q And it talks about in a general sense the
7 integrity of the floor, right, the surface of the floor
8 that people are walking on?

9 A Right.

10 Q And would it be fair to say that Mr. Munoz
11 did not fall through the floor?

12 A Right.

13 Q Thank you for the time being.

14 A You're very welcome.

15 THE COURT: Redirect?

16 MR. CLARK: Just give me a second here.

17 Thank you, Judge.

18 REDIRECT EXAMINATION BY MR. CLARK:

19 Q The first thing I want to go to, do you
20 remember the cross-examination about the book you
21 wrote?

22 A Yes, sir.

23 Q And that there was an question about the
24 acknowledgment section?

25 A Yes, sir.

1 Q I would just like to read the complete
2 section that you were cross-examined on. Okay? My
3 eyes are kind of bad, but can you read that all right,
4 Mr. Gallagher?

5 A Yes.

6 Q Can you just read that to the jury?

7 A The whole thing?

8 Q Yes.

9 A First of all, I would like to thank Michelle
10 Sakevich (phonetic) for all her work, which not only
11 made this book possible but for helping me in all my
12 work. It's a blessing to have such a good
13 administrative assistant. Thanks to the many lawyers,
14 especially Joe Lorie and Marty Brigham, who have always
15 had time and patience to help me understand the broader
16 picture, so that I could see how a safety professional
17 can help lawyers. Thanks, also, to the hundreds of
18 workers who taught me to identify and control hazards.
19 I learned much more from workers than from anything I
20 learned in graduate school. I'm also grateful to the
21 hundreds of workers whose injuries and deaths I have
22 investigated, which have taught me ways to prevent
23 recurrences. I pray that I never forget the lessons
24 from the tragedies, and this book provides some insight
25 for others who serve workers to do a better job.

1 Q You said, you had self-published that?

2 A Yes, sir.

3 Q Did you write that yourself?

4 A Yes, sir.

5 Q That wasn't something where you had some PR
6 guy to write that?

7 A No, sir. Not at all.

8 Q You really feel that way?

9 A That's my life, sir.

10 Q And just so we're clear, there was a section
11 in your report about evaluating the conduct of
12 Washington Munoz as well, right?

13 A Yes, sir.

14 Q All right. There was cross-examination about
15 whether or not the worker here was able to see the
16 hazard before he fell. Do you recall that cross-
17 examination?

18 A Yes, sir.

19 Q And just taking a look at Page 82 of his --

20 THE COURT: Are you finished with this? You
21 can take this down now.

22 MR. CLARK: Is that okay?

23 THE COURT: Yes. Thank you.

24 BY MR. CLARK:

25 Q I have it here. I would like you to read

1 exactly what was said. It's Page 82 and I have it in
2 blue, so it would just be 22 to 25.

3 MR. GULINO: Objection.

4 MR. CLARK: This is the issue dealing with
5 whether or not he was able to see it. It was cross-
6 examination on --

7 MR. GULINO: You can ask him the question.
8 It's redirect.

9 (Discussion at side bar)

10 THE COURT: Okay. What's your objection?

11 MR. GULINO: I asked him. He said, he was
12 looking down.

13 THE COURT: Uh-huh.

14 MR. GULINO: End of story. Okay? You don't
15 redirect the witness by referring to a deposition
16 transcript and getting it in through the back door,
17 which is what he's trying to do. He could have done
18 that on direct. He didn't. You can't do it on
19 redirect like that. That's what you're trying to do,
20 get it in through the back door.

21 THE COURT: This is Mr. -- this is the
22 plaintiff's testimony. Your response?

23 MR. CLARK: My response is, he was cross-
24 examined at length as to what Mr. Munoz said as to
25 whether or not he could see the hazard. He held it up.

1 He said, he could see and he could see and he said, he
2 could see it. So I think it's fair redirect to point
3 to the clear deposition testimony, which addresses that
4 issue.

5 THE COURT: The objection is sustained.

6 MR. CLARK: As far as him reading it?

7 THE COURT: Yes.

8 MR. CLARK: Okay.

9 (End of discussion at side bar)

10 BY MR. CLARK:

11 Q Mr. Gallagher, --

12 A Yes, sir?

13 Q -- we're not going to read that section of
14 the testimony, but having reviewed it yourself, again,
15 what did you conclude as to whether or not the worker
16 could see the hazard? What did you conclude?

17 A He said --

18 MR. GULINO: Judge, objection. You're asking
19 for his opinion of whether someone else can see
20 something.

21 MR. CLARK: That's -- that's what the cross-
22 examination was. He was arguing he was able to see it
23 and he was arguing based upon the deposition. So I
24 just want to ask what conclusion the expert came to as
25 to that issue.

1 MR. GULINO: This is speculation on what
2 someone else --

3 THE COURT: I actually think this has already
4 been covered by the cross-examination. So I don't -- I
5 don't -- you're asking him to restate what he already
6 said, which is that the plaintiff couldn't see, right?
7 So --

8 MR. CLARK: Yes.

9 THE COURT: I'm going to ask you to move on.
10 Move on.

11 BY MR. CLARK:

12 Q And why was he not able to see it? What did
13 you conclude in your review of the materials?

14 A Because there was -- the roofing material was over
15 the hole, so he couldn't see the hole.

16 Q Secondly, you also read the deposition of
17 Joel Mella as well, correct?

18 A Yes, sir.

19 Q And that's some of the stuff you relied upon
20 to come to the conclusion that it was a hazard that was
21 inconspicuous. Is that right?

22 A Yes, sir.

23 Q I think --

24 MR. GULINO: Objection. Out of the scope.

25 MR. CLARK: Judge, this deals with the same

1 issue about whether the worker can see it and the
2 visibility of the --

3 THE COURT: Overruled.

4 BY MR. CLARK:

5 Q And part of your conclusion that the hazard
6 was inconspicuous and I think you had kind of said a
7 boobie trap, in coming to that conclusion, did you also
8 rely upon the deposition of Joe Mella?

9 A Yes, sir.

10 Q Okay. And without going over it in detail,
11 what did you conclude in that regard? How did that
12 affect your opinion or your conclusion on that issue?

13 A That nobody could see the hole. It was covered
14 with material all over the roof -- that went over the
15 roof. It was black. Everywhere where there were
16 covers, it was black and no indication of a hole.

17 Q There was cross-examination about your rate
18 for testifying. Do you understand that?

19 A Yes, sir.

20 Q Or do you remember that?

21 A Yes, sir.

22 Q Okay. And you're familiar with the rates of
23 experts in the field of construction injury cases?

24 A I am.

25 Q All right. And are your rates, are they much

1 higher than the norm that you're under, more, are they
2 less or what's the thoughts about that?

3 A They're a little bit under the market rate. I
4 check what everybody else is doing, and I keep it a
5 little bit under.

6 Q And, also, in this case, was there any report
7 from L.P. Ciminelli refuting your conclusions?

8 A I didn't see any.

9 Q And is that -- is that ordinarily your
10 experience in these cases, that the contractor or
11 construction manager, that there's nothing for you to
12 respond to? Is that normal?

13 MR. GULINO: Objection.

14 THE COURT: The objection is sustained. The
15 objection is sustained.

16 BY MR. CLARK:

17 Q Now, do you remember the cross-examination
18 that said -- that was, essentially, that you concluded
19 Paino Roofing had covered over the hole and contributed
20 to the hazard and you concluded that kind of thing
21 without reading Paino's deposition in your report? Do
22 you remember that cross-examination?

23 A Yes, sir.

24 Q Okay. But you relied on other deposition
25 testimony. Is that right?

1 A Right.

2 Q And those were for people that were on the
3 job site and knew about it?

4 MR. GULINO: Objection.

5 THE COURT: Sustained. The objection is
6 sustained. Leading.

7 BY MR. CLARK:

8 Q Okay. And you relied on other testimony to
9 form an opinion about that when you wrote your first
10 report, correct?

11 MR. GULINO: Objection.

12 THE COURT: Sustained. It's still leading.
13 Open-ended question.

14 BY MR. CLARK:

15 Q So what types of things did you rely on to
16 form your opinion about Paino at the time you write
17 your report?

18 MR. GULINO: Objection. Gone on direct. He
19 did this already.

20 THE COURT: Overruled.

21 THE WITNESS: I relied on the deposition
22 testimony of the plaintiff and Mr. Mella that talked
23 about -- and everybody else agreed that there was a
24 membrane over the hole.

25 BY MR. CLARK:

1 Q All right. And you also relied upon the
2 deposition testimony of Mr. Beardsley, who commented on
3 the things Paino did or did not do on the job site?

4 A Yes, sir.

5 Q Okay. And then when you later read that
6 deposition from Paino, did that contradict or support
7 what the other witnesses had said about the things
8 Paino did or did not do on the job?

9 MR. GULINO: Objection. Hearsay.

10 THE COURT: Sustained. Sustained.

11 MR. CLARK: Um --

12 THE COURT: The objection is sustained.

13 MR. CLARK: Is it -- just the basis, just so
14 I can --

15 THE COURT: You're asking him to verify
16 whether or not other witnesses contradicted or were the
17 same as.

18 MR. CLARK: Got it. Got it, Judge.

19 BY MR. CLARK:

20 Q After you read that testimony, did your
21 opinions change? The testimony of Paino, did it change
22 your opinion?

23 A No, sir. It reinforced my opinion.

24 Q Based upon reading -- strike that. Take a
25 look, if you would, at Page 44 of Paino's deposition,

1 just the blue section there. If you would just read
2 that to yourself.

3 MR. GULINO: What page?

4 MR. CLARK: Page 44. You got it?

5 MR. GULINO: Yes, sir.

6 MR. CLARK: Okay.

7 BY MR. CLARK:

8 Q Now, how did that section of Paino's
9 deposition affect your opinions with regard to
10 Beardsley-2 and Plaintiff's Exhibit 4, with regard to
11 what Paino did or did not do and the hazard?

12 A He said that he would leave the condition as it is
13 in the photo.

14 MR. CLARK: All right. That's all I have.
15 Thank you, Your Honor. Thank you, Mr. Gallagher.

16 THE WITNESS: You're welcome.

17 THE COURT: Anything else?

18 MR. GULINO: Very quickly.

19 RECROSS-EXAMINATION BY MR. GULINO:

20 Q Mr. Clark put up your acknowledgement on your
21 book. You saw that just now, right?

22 A Yes, sir.

23 Q And the first person that you thanked was
24 Michelle and she's the one who put the book together
25 for you, correct?

1 A Right.

2 Q And then the first people after Michelle that
3 you thanked was?

4 A A whole bunch of lawyers and then especially two.

5 Q You didn't thank the workers first. You
6 thanked their lawyers first, correct?

7 A Yeah. You're right.

8 Q Okay. Now, -- that's all, Your Honor. Thank
9 you. Nothing further.

10 THE COURT: All right, sir.

11 MR. GULINO: Thank you.

12 THE COURT: You may step down.

13 THE WITNESS: Thank you, Your Honor.

14 MR. CLARK: Judge, I just have -- I'm sorry,
15 I just have a question.

16 THE WITNESS: Oh, I'm sorry.

17 MR. CLARK: Of course, that would be
18 redirect.

19 RE-REDIRECT EXAMINATION BY MR. CLARK:

20 Q What did -- you said, it wasn't the workers
21 that you thanked first, but --

22 MR. GULINO: Objection. Out of the scope.

23 THE COURT: That whole thing was up on the
24 board.

25 MR. CLARK: Yes.

1 THE COURT: They don't need to see it again.

2 MR. CLARK: You're right.

3 THE COURT: Sir, you're excused.

4 MR. CLARK: Thank you, Your Honor.

5 THE COURT: Let's take 15 minutes. Please
6 don't talk about the case. We'll see you back in about
7 15.

8 (Jury excused for break)

9 THE COURT: Let's take 15.

10 MR. GULINO: Your Honor? You have Dr. Helbig
11 coming today, right now, right?

12 MR. CLARK: Yes.

13 MR. GULINO: Okay. We have the doctor. It's
14 quarter to three. Can I have my lay witnesses leave?
15 They're here all day.

16 THE COURT: Talk to your adversary.

17 MR. GULINO: Come back tomorrow.

18 (Break)

19 (Jury not present in courtroom)

20 MR. CLARK: Judge?

21 THE COURT: Yes?

22 MR. CLARK: There's some issues with some of
23 the documents that we had on our pretrial exchange that
24 I now want to use with this witness.

25 THE COURT: All right. What are -- what are

1 the --

2 MR. GULINO: I have an issue with
3 demonstrative evidence -- well, do you want to talk
4 about which one first or the demonstrative evidence?

5 THE COURT: Which -- what are you objecting
6 to?

7 MR. GULINO: I'm objecting -- if I may, Your
8 Honor?

9 MR. CLARK: The jury is in the hallway.

10 THE COURT: You can put them back in the --

11 MR. GULINO: May I approach, Judge?

12 THE COURT: Yes.

13 MR. GULINO: These are two pieces of
14 demonstrative evidence that Mr. Clark said he wants to
15 use during the deposition -- testimony of Dr. Helbig.

16 THE COURT: Yes.

17 MR. GULINO: And he is -- I am objecting to
18 them because they do not adequately show what was shown
19 in the medical records. I've read the doctor's
20 operative report ad nauseam. I've read all of the
21 medical records, and this is his preoperative
22 condition, and you're saying it's a preoperative
23 condition of the first surgery, the October 13th
24 surgery? This one, Mr. Clark, --

25 MR. CLARK: Yes.

1 MR. GULINO: -- that I'm referring to?

2 MR. CLARK: Yes. I believe so, yes. The --
3 yes. The expert will --

4 MR. GULINO: No rotator cuff tear. No
5 rotator cuff tear. His post-operative report says, no
6 rotator cuff tear. That does not adequately show or
7 accurately show.

8 THE COURT: Okay.

9 MR. GULINO: Okay? So I'm objecting to that
10 one. This one is the 10/21/13 arthroscopic right
11 shoulder surgery. Post-operative view, his post-
12 operative diagnosis, rotator cuff fully intact. That
13 doesn't show that either.

14 THE COURT: Okay. So I'm assuming you'll lay
15 the foundation for these.

16 MR. CLARK: Correct.

17 THE COURT: Okay. So I'll have to wait to
18 see. I can't just take your word for it.

19 MR. GULINO: Okay. Okay.

20 THE COURT: I don't know that, but we'll see
21 whether the foundation is laid and if it is, --

22 MR. GULINO: Okay.

23 MR. CLARK: Just for the record, Judge, it's
24 Plaintiff's Exhibit 9 and Plaintiff's Exhibit 10.

25 THE COURT: Okay.

1 MR. GULINO: In addition, Mr. Clark wants to
2 post \$106,000 for medicals. Workers' comp. med. liens,
3 56,000, approximately. I had told him before and I may
4 have mentioned it to you, Your Honor, I don't know, I
5 don't have an issue with him posting \$56,000 in meds
6 because that's what he's "owed" and/or incurred by Mr.
7 Munoz on his behalf, not 106,000.

8 MR. CLARK: Judge, we have the medical bills
9 here, which were produced in discovery. I expect the
10 expert will testify that the bills are reasonable,
11 necessary, and related to the injury. Whether or not
12 there is a collateral source is something that is done
13 on a motion to mold the verdict under the collateral
14 source rule.

15 THE COURT: Right. And so --

16 MR. GULINO: Do we have a lien?

17 THE COURT: I think there was testimony that
18 there was a --

19 MR. GULINO: Well, we have a lien with the
20 other \$50,000 that workers' comp. didn't pay.

21 MR. CLARK: The -- he's trying to collect
22 twice on it.

23 THE COURT: Well, he's not allowed to collect
24 twice on it.

25 (End of Volume 1 of 2 - Continued in Volume 2 of 2)