

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 17, 2017

BEFORE:

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

TRANSCRIPT ORDERED BY:

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

APPEARANCES:

GERALD H. CLARK, ESQ.  
LAZARO BERENGUER, ESQ.  
(Clark Law Firm)  
Attorneys for the Plaintiff

JOSEPH J. GULINO, ESQ.  
(Nicoletti Gonson Spinner LLP)  
Attorney for the Defendant

Transcriber, Sherry M. Bachmann  
G&L TRANSCRIPTION OF NJ  
40 Evans Place  
Pompton Plains, New Jersey 07444

Sound Recorded  
Recording Operator,

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I N D E X

<u>PROCEEDING</u>	<u>PAGE</u>
Trial	3
Summations	
By Mr. Gulino	49
By Mr. Clark	77

I N D E X    O F    W I T N E S S E S

<u>NAME</u>	<u>VOIR</u>	<u>DIRE</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
(On Rebuttal)						
Catherine Miksic						
By Mr. Clark			23			
By Mr. Gulino				28		

1 (Jury not present in courtroom)

2 THE COURT: You may be seated.

3 MR. GULINO: Good morning, Your Honor.

4 THE COURT: Good morning. Are you all set up  
5 to go?

6 MR. GULINO: We're all set, Judge.

7 THE COURT: Okay.

8 MR. GULINO: All you've got to do is press  
9 on.

10 (Recording paused - Recording resumed)

11 COURT OFFICER: Jury entering.

12 (Jury present in courtroom)

13 THE COURT: All right. Thank you. Please be  
14 seated. Good morning.

15 MR. CLARK: Good morning.

16 JURORS: Good morning.

17 MR. GULINO: Good morning, Your Honor.

18 THE COURT: Counsel, good morning.

19 MR. GULINO: At this time, the defendants  
20 would like to play the videotaped de bene esse  
21 deposition in lieu of trial testimony of the  
22 defendant's expert orthopedist, Edward Decter, --

23 THE COURT: Okay.

24 MR. GULINO: -- which took place on March  
25 1st, 2017.

1 THE COURT: Okay.

2 MR. GULINO: And I have a gentleman right  
3 here who is going to give us an assist to turn this on  
4 for us.

5 THE COURT: Okay. Great.

6 MR. GULINO: If it's too loud or too soft,  
7 please let us know. Okay?

8 (Videotaped deposition testimony of  
9 Edward M. Decter, M.D., played for the jury.)

10 THE COURT: All right. Members of the jury,  
11 we'll take a 15-minute recess at this time. Please  
12 don't talk about the case. We'll see you back in about  
13 15 minutes.

14 (Jury excused for break)

15 THE COURT: Let's take 15 minutes.

16 MR. CLARK: Judge, I just had a couple of  
17 issues, just to talk to --

18 (Break)

19 (Jury not present in courtroom)

20 THE COURT: All right. So we are back on the  
21 record.

22 MR. GULINO: I am going to rest, Your Honor.

23 THE COURT: Okay.

24 MR. GULINO: I do have -- Mr. Clark told me  
25 that he's going to put on a rebuttal witness and it

1 happened to be the nurse mentioned by the doctor in his  
2 testimony, Dr. Decter. She, evidently, accompanied Mr.  
3 Munoz to the examination and what I was going to  
4 respectfully request was some kind of an offer of proof  
5 as to what he's going to testify about -- or she is  
6 going to testify about, whether is she really truly a  
7 rebuttal witness to go against anything he said or not.

8 THE COURT: And, presumably, that was not  
9 discussed between the two --

10 MR. GULINO: I'm sorry?

11 THE COURT: Presumably, that's not been  
12 discussed between the two of you?

13 MR. GULINO: Well, I -- yeah. I -- you know,  
14 generally, we try to at least tell the other side what  
15 they're going to -- what your witnesses are going to  
16 say.

17 THE COURT: Well, I -- well, that's what I'm  
18 asking.

19 MR. GULINO: Yes.

20 THE COURT: Has there been a discussion?

21 MR. GULINO: No. No. I just --

22 THE COURT: Oh, okay.

23 MR. GULINO: Well, there was a discussion and  
24 I did ask Mr. Clark what is she going to testify about  
25 and she says, she's a fact witness. That doesn't tell

1 me anything.

2 THE COURT: Okay. So the answer is, no.  
3 There really wasn't a discussion that produced anything  
4 helpful. So, Mr. Clark, please respond.

5 MR. CLARK: Yes, Judge. Ms. Miksic is a  
6 nurse. She was disclosed in answers to  
7 interrogatories. She's mentioned in Dr. Decter's  
8 report and, as I discussed earlier in the trial, she is  
9 the nurse that accompanied the plaintiff to the exam  
10 and she's being offered as a fact witness to talk about  
11 what happened at the exam. And my expectation is her  
12 testimony will contradict Dr. Decter's testimony in  
13 certain areas and, as I discussed with defense Counsel  
14 during this past 15-minute break, she's a fact witness  
15 who was there and will address some of the things that  
16 Dr. Decter talked about from a fact standpoint.

17 THE COURT: I'm not sure that that's telling  
18 me a whole lot because, at the end of the day, this was  
19 on videotape, right? So everybody -- there's no  
20 surprise about what he was going to say. So then the  
21 question becomes whether or not having the ability to  
22 know what the doctor is going to say based upon what  
23 was already on this videotape, is this not a witness  
24 that could have been presented during your case?

25 So to what -- what specifically is it that

1 you say this witness is going to rebut?

2 MR. CLARK: She's going to rebut the doctor's  
3 testimony about what happened at the exam, in  
4 particular, about what happened at the physical exam.  
5 One, for example, is the doctor testified that whenever  
6 he touched the plaintiff, he complained of pain all  
7 over his body. I expect she will rebut that and those  
8 types of things.

9 With regard to whether or not we should have  
10 called her in our case in chief, defense, you know,  
11 Counsel's argument about that, I would disagree with  
12 that argument because we didn't even know if Dr.  
13 Decter, if they were going to play the video. We've  
14 had plenty of cases where they have a defense medical  
15 exam report and/or video and they determined based on  
16 how the trial turned out to not even play it. So I  
17 don't think it would be fair to argue that we should  
18 have called her as a -- she's -- in our case in chief.

19 THE COURT: Okay. So the rebuttal testimony  
20 is with respect to the physical examination itself and  
21 what else?

22 MR. CLARK: When they got there, the time of  
23 the exam, what happened at the exam, that sort of  
24 thing. Another one that jumps out at me is the doctor  
25 said that he did not complain of any pain in his foot

1 when they did some back exams. I expect the nurse will  
2 testify, he did, in fact, complain of sensory issue in  
3 his foot, that his foot was -- felt differently than  
4 the other foot, those kinds of things.

5 MR. GULINO: If I recall, Judge, I think what  
6 the doctor said was -- if I recall correctly, the  
7 doctor talked about dermatomes, you know, certain parts  
8 of the spine correspond with certain parts of the legs  
9 and that when he complained about pain in one thing, it  
10 just didn't make sense when he looked at his MRI and  
11 the claim, that was really what he was discussing. So  
12 I'm still going to fly by the seat of my pants. I've  
13 done that before, but I still don't see what -- what is  
14 going to be the probative value of her testimony.

15 THE COURT: All right. So we'll have the  
16 jury come up and, Counsel, I just want to make sure you  
17 are reminded because I know that you're an experienced  
18 trial lawyer, rebuttal is just that, rebuttal. It's  
19 not your opportunity to now bring in that which you  
20 could have brought in during your case in chief, right?  
21 Rebuttal is rebuttal. So her testimony should be very  
22 limited in terms of her rebutting whatever it is you  
23 claim she witnessed as part of this examination of the  
24 plaintiff.

25 MR. CLARK: Judge, I can -- do you want me to



1 go through more and just hit some more areas just  
2 because I prefer not to have to be on the side bar.

3 THE COURT: Well, that's the whole thing. So  
4 rebuttal is rebuttal. I mean, you know what your  
5 perimeters are and you don't need to go through  
6 everything that you anticipate coming from this  
7 witness. But be mindful that I anticipate that there  
8 will be an objection if, in fact, you're going beyond  
9 what is classic rebuttal and I think you know what that  
10 is. You know what rebuttal is.

11 MR. CLARK: Yes. It's responding. There's  
12 one other area, too, Judge, I do want to bring up right  
13 now, that this is not the first exam that she's gone to  
14 and observed Dr. Decter perform an exam, so --

15 THE COURT: Well, what does that mean? Yes.  
16 That's not rebuttal.

17 MR. CLARK: Okay. I'm glad I asked you.

18 THE COURT: Yes. That's not rebuttal. All  
19 right. Anything else?

20 MR. CLARK: That's it for this, Judge. I did  
21 -- I did apologize, you know, with the e-mails and  
22 stuff, but I did --

23 THE COURT: That's why I don't like giving  
24 out my e-mail.

25 MR. CLARK: Yes. I know. I know. I know.

1 I did want to be heard on -- there was the other  
2 rebuttal issue is -- and it's really all about the  
3 future wage claim. So I had sent an e-mail that dealt  
4 -- and I don't want to argue that in detail now, but I  
5 would just ask Your Honor to take a look at it.

6 As with regard to the future wage claim, I  
7 read the HAYNES (phonetic) case in detail and I --  
8 CALDWELL V. HAYNES and I did some research in detail  
9 yesterday. I found this case, WEBB V. TROY, and here's  
10 the bottom line on that future wage claim, if Your  
11 Honor would bear with me to just allow me to be briefly  
12 heard on that. I know Your Honor ruled.

13 THE COURT: Sure.

14 MR. CLARK: But if you can just give me a --  
15 What the case law is saying is that you have to prove  
16 future net earnings and with regard to future work life  
17 expectancy, I don't think that the case law supports  
18 that there's magic words that the plaintiff has to say,  
19 I would have worked to 65. I mean, that would be kind  
20 of self-serving testimony anyway. What if the  
21 plaintiff says, I would have worked till I die, you  
22 know? It's -- so that's number one.

23 Number two, what the case law talks about is  
24 that the jury is supposed to arrive at a reasonable  
25 work life expectancy, which most people think is 65, I

1 would proffer. And then, secondly, the case law also  
2 indicates that the law is allowed, it's well within the  
3 Court's discretion to take judicial notice of the work  
4 life expectancy tables. I attached -- I attached those  
5 in the submission to Your Honor about an hour ago.

6           There's one that the Bureau of Labor  
7 Statistics relies upon, and there's another  
8 authoritative article, and they all basically say the  
9 expected work expectancy of a 47-year-old without a  
10 high school diploma is about 13.1 years or something  
11 like that, which is actually under 65. And I did  
12 review the case law and there's no case law that says  
13 the plaintiff has to testify they would have worked to  
14 X date.

15           What that -- what that WEBB case, which I  
16 thought was pertinent, -- the tetter of plaintiff's  
17 testimony -- this is in the WEBB case where there was  
18 no testimony as to then he would have -- when he would  
19 have worked till. The Judge concluded, the tetter of  
20 plaintiff's testimony was such that he was a hard  
21 working family man who did what he needed to do to  
22 support his wife and five children. Plaintiff's  
23 youngest child is 9 years old. His next youngest are  
24 10 and 13. It's a little different in our case because  
25 the kids are older but, nevertheless, there was

1 testimony that he was supporting the kids.

2           Thus, it would not be inconceivable that  
3 plaintiff, based upon his testimony and family history,  
4 would have worked until at least 65 years old, the  
5 current age of retirement. Plaintiff did not offer any  
6 proof that he anticipated to work past that age and in  
7 the summary and stuff, I don't think the plaintiff  
8 talked at all about that he even intended to work till  
9 65. But based -- and then the Appellate Division --  
10 it's an unpublished case. It says, we agree with the  
11 Judge's analysis. There was sufficient evidence for  
12 the jury to conclude that plaintiff would have  
13 continued working until the age of retirement, which is  
14 65.

15           The jury heard testimony, plaintiff was a  
16 single parent with five children. It was reasonable  
17 for a jury to conclude based on the testimony and the  
18 instructions given that plaintiff would have continued  
19 to work until a reasonable retirement age of 65 to  
20 support his family. Without testimony that I will,  
21 yes, work till 65 and if we look at the work life  
22 expectancy tables that I have submitted to the Court  
23 and am requesting to take judicial notice, it's  
24 actually less than 65, so we -- it's like 13 years  
25 about.

1           And as -- and, also, on the jury charge, the  
2 jury charge also comments on that and it talks about  
3 how did -- it talks about the jury considering work  
4 life expectancy. The problem in CALDWELL V. HAYNES  
5 wasn't that the plaintiff did or did not testify when  
6 he would have stopped working. The problem was the  
7 jury was not charged about work life expectancy and I  
8 believe since then, they have changed the charge and  
9 put it in there.

10           Instead, the jury was simply charged life  
11 expectancy and then the jury calculated out to the end  
12 of his life and then they corrected the charge to  
13 address CALDWELL V. HAYNES. But I scoured the law and  
14 didn't find anything that says, the plaintiff has to  
15 raise his hand and say, I will work till X date the  
16 totality of the evidence.

17           And I would also just note, as a practical  
18 matter, I would re-request the Court reconsider the  
19 thing because the Court could always excise out a  
20 future wage claim for a verdict. They can excise out  
21 the number. They could remit the number without the  
22 need to retry the case, but this Court or another Court  
23 looking at it, it would potentially avoid an entire new  
24 trial.

25           It's also, you know, post-verdict, the Court

1 could hear motions as well on this to excise it out.  
2 So, perhaps, as a practical matter. So I appreciate  
3 Your Honor allowing me to be heard on it. Thank you.

4 THE COURT: Sure. Did you want to respond?

5 MR. GULINO: Not very long, Your Honor.  
6 You've already ruled on this. But they're basically  
7 asking to do a do over. He went through is direct  
8 examination. He put his case on in chief. He  
9 presented no evidence whatsoever, now, wants to come  
10 back after you ruled and said insufficient as a matter  
11 -- basically insufficient as a matter of law.

12 And it's not about -- nothing new has been  
13 presented here. Absolutely nothing. I got case law  
14 last night, I don't know what time it was, about this  
15 resubmission to the Court and, as I said, nothing new  
16 has been presented to you here. The plaintiffs did go  
17 through their direct case and they failed to present  
18 any evidence whatsoever that was sufficient for it to  
19 go to a jury. Thank you.

20 MR. CLARK: Just real briefly. The expert  
21 testimony they talk about is the medical testimony that  
22 says whether or not they'll be able to work in the  
23 future at their prior job, that kind of thing. And in  
24 this case, I think the record certainly reflects that  
25 Dr. Helbig testified about his future work, inability

1 to go back to his prior job. There's been testimony on  
2 cross-exam about the defense medical expert in their  
3 favor.

4           So my request right now is twofold. One, if  
5 the Court's ruling was, he needed to say magic words  
6 that I would have worked until age X, then I would  
7 simply request the opportunity to put the client back  
8 on the stand briefly on that. However, I don't think  
9 the law supports that and, secondly, if the Court is  
10 not going to permit that, my position is that there's  
11 sufficient evidence in the record at this time to  
12 permit the claim. That's all. Thank you.

13           THE COURT: Okay. So I actually, in  
14 anticipation, perhaps, of an attempt to revisit this  
15 issue, gave some further thought to the plaintiff's  
16 request for a future lost wage claim and I thought as I  
17 considered not only pertinent case law on the matter  
18 but I thought it was important for the Court to  
19 consider the request to present this claim in the  
20 context of the specific facts as they were presented  
21 here. And those facts have been outlined in the  
22 record.

23           But to the extent that this record will be  
24 reviewed at a later point in time, it's important for  
25 the record to reflect that the Court's consideration of

1 this issue was made in the context of the idea of  
2 fundamental fairness overall.

3           So when we look at the procedural history of  
4 this case as it relates to the wage loss claim, the  
5 Court was presented during the course of the argument  
6 made here with an order from Judge Happas. That order  
7 was filed with the Court on October 14th of 2016, and  
8 that order was as a result of a motion filed by the  
9 defendants and the motion addressed the issue of an  
10 extension of discovery, in addition to a request to bar  
11 certain claims of the plaintiff, including the wage  
12 loss claim.

13           So the proposed language in the order  
14 requests that the plaintiff be precluded from  
15 presenting a lost wage claim at trial based upon his  
16 refusal and failure to provide discovery. So the  
17 requested relief of the defense at that time clearly  
18 was concerned about what at that point had been a  
19 failure on the part of the plaintiff to produce  
20 evidence related to their claims of lost wages.  
21 Subsequent -- and although Judge Happas excised that  
22 language out of the order, she hand wrote into the  
23 order that a motion to be made in limine at the time of  
24 trial.

25           At the time the discovery was extended in



1 this case, there was a trial date and the trial date  
2 thereafter was adjourned to February 13 of 2017. So  
3 with a trial date now in this October order sometime in  
4 February at a Bar panel, it's represented that, at that  
5 time, the issue of lost wages comes up, at which point,  
6 the defense indicates that they had received  
7 correspondence from the plaintiff in response to Judge  
8 Happas' October order that there was no longer a wage  
9 claim, a lost wage claim in the case.

10           So the defense at that point relied upon the  
11 claim of the plaintiff's Counsel that there was no  
12 longer a lost wage claim. Discovery -- and --  
13 discovery end date came and went, and now, there is a  
14 bar panel where this issue surfaces to the surprise of  
15 the defendant.

16           Thereafter, sometime in March -- and  
17 plaintiff's Counsel indicated that in response to the  
18 discussion that was had at this bar panel, notations  
19 were made to address whether or not that wage -- lost  
20 wage claim had, in fact, been withdrawn. So sometime  
21 in March -- March 15th, I believe it was, 2017, the  
22 plaintiff then by way of letter indicates to the  
23 defense that, in fact, this lost wage claim continues  
24 to be in the case and, as a result, the previous  
25 withdrawal, for lack of a better word, of that lost

1 wage claim was something that was done in error and, in  
2 fact, this claim continued to be in the case.

3           Now, at this juncture, we're in March and the  
4 trial date, obviously, that was scheduled for February  
5 had been adjourned and, now, there's an April trial  
6 date. So we're after the discovery end date and we're  
7 with a trial date that's looming and for the first time  
8 now, there is definitive -- a definitive response from  
9 the plaintiff that, in fact, this lost wage claim  
10 continues to be in the case.

11           And so with that, the defense is at this  
12 point presumably expected to do what with that? The  
13 discovery end date has come and passed. The -- a trial  
14 date is looming, and there has been no exchange of  
15 discovery beyond what was a single pay stub that was  
16 presented by the plaintiff.

17           So in considering this issue on the issue,  
18 first, of past lost wages, this Court believed -- and  
19 even with one pay stub -- that the relief to simply bar  
20 a claim based upon the representation of the plaintiff  
21 was not a remedy that should be afforded to the defense  
22 to the extent that they were, in fact, in possession of  
23 at least this one pay stub and it was the Court's  
24 position that the defense could reasonably defend  
25 against the claims that the plaintiff had lost wages

1 previously.

2           So it's clear that given the defense's  
3 attempt to address this lost wage claim way back in  
4 October, that they wanted to defend against that claim,  
5 having requested discovery from the plaintiff and  
6 although perhaps some of the discovery that would have  
7 been requested, whether it be by tax returns or W-2's  
8 or what have you, some of it was, perhaps, not  
9 available to the plaintiff but, at the end of the day,  
10 now having listened to the testimony of the plaintiff,  
11 it's clear from this Court that -- this is from the  
12 plaintiff's own testimony, that he may very well have  
13 had W-2's available to him.

14           He -- this is not a situation, as was  
15 indicated in previous cases where there was a request,  
16 perhaps, for either tax returns or W-2's and you were  
17 dealing with a worker who did not have that type of  
18 evidence. The plaintiff himself testified that he was  
19 a Union worker and he also was given W-2's in  
20 connection with the work that he did and, in fact, that  
21 is evidence that, perhaps, was available to him. He  
22 wasn't sure -- I don't recall the exact testimony,  
23 whether he said he wasn't sure where it was or,  
24 perhaps, he could find it, but there was an indication  
25 that that is evidence that was available and that is

1 evidence that the defense went back in October when  
2 that order was entered with something that they were  
3 concerned about and was seeking from the plaintiff.

4           So, now, to -- at the 11th hour, which,  
5 again, there was a -- March is the first time it's  
6 confirmed and April was, at that time, the scheduled  
7 trial date. The defense should not be requested.

8           Now, even if they wanted to defend against a  
9 future lost wage claim, there really is no reasonable  
10 opportunity to defend against that. They had a -- one  
11 pay stub that was provided and no further evidence and  
12 to now ask that a future lost wage claim, knowing full  
13 well at the outset, first, that there had been at some  
14 point a representation that the claim was no longer in  
15 the case and then once it was confirmed that the claim  
16 was in the case, it's after the discovery end date with  
17 a trial date looming.

18           There's no opportunity virtually for the  
19 defense to present any sort of defense as it relates to  
20 that lost wage claim. And so to the extent that the  
21 Court is satisfied that the past lost wage claim is  
22 different from the future, the past, there was one pay  
23 stub that was provided and the defense certainly can  
24 attack the sufficiency of the evidence presented by the  
25 plaintiff at that time.

1           However, with respect to the future, there  
2 was virtually no opportunity if the defense were to so  
3 choose to, perhaps, present expert testimony as it  
4 relates to any future lost wage claim. So, for those  
5 reasons, even with what has now been presented to the  
6 Court at the late hour in terms of case law that would  
7 allow the wage claim to go forward, I'm satisfied given  
8 just fundamental fairness, this is not an issue that  
9 should be presented to this jury. All right?

10           MR. CLARK: Judge, may I just state  
11 something? I'm not arguing at all, but I would like to  
12 put something on the record, if I may. It's not  
13 rearguing.

14           THE COURT: Okay.

15           MR. CLARK: All right. I just want to  
16 supplement what Your Honor said. In chambers, I was  
17 asked, do we have the tax returned and I was candid  
18 with the Court. I said, yes, we have the tax returns  
19 but, no, I do not want to produce those tax returns  
20 because I did not feel it was in my client's best  
21 interest to produce those tax returns, and I just  
22 wanted the record to be -- to state that because, as  
23 Your Honor reflected with regard to Judge Happas'  
24 orders as to whether or not the tax returns and those  
25 sort of things would be turned over, and I had -- I had

1 a long -- we had a long discussion with my client  
2 months ago around the time these letters were swirling  
3 and, based upon that, we have taken the position and  
4 maintain the position that we cannot and will not  
5 produce the tax returns.

6 THE COURT: Okay.

7 MR. CLARK: So I just want to supplement the  
8 record in that regard.

9 THE COURT: Okay. All right.

10 MR. CLARK: Thank you.

11 THE COURT: Okay. So let's bring up the jury  
12 and hear the rebuttal witness and then you'll rest?

13 MR. GULINO: Yes. I will, Your Honor.

14 THE COURT: And then we'll hear the rebuttal  
15 witness and then we can send the jury to lunch and  
16 they're probably going to get a little bit longer of a  
17 lunch while we just sure up the charge and the verdict  
18 sheet, so all right. Bring them out.

19 (Recording paused - Recording resumed)

20 COURT OFFICER: Jury entering.

21 (Jury present in courtroom)

22 THE COURT: Thank you. Please be seated.

23 Mr. Gulino?

24 MR. GULINO: Your Honor, the defendants are  
25 finished with their evidence. We rest.

1 THE COURT: Okay. Mr. Clark?

2 MR. CLARK: Yes. We would like to call  
3 Catherine Miksic to the stand as a brief rebuttal  
4 witness.

5 THE COURT: Okay.

6 COURT OFFICER: Place your left hand on the  
7 Bible, lift your right. State your full name for the  
8 record.

9 MS. MIKSIC: Catherine Miksic.

10 COURT OFFICER: Spell your last.

11 MS. MIKSIC: M-i-k-s-i-c.

12 C A T H E R I N E M I K S I C, PLAINTIFF'S WITNESS,  
13 SWORN

14 COURT OFFICER: Thank you, ma'am. Please be  
15 seated and answer all questions.

16 THE WITNESS: Thank you.

17 REBUTTAL DIRECT EXAMINATION BY MR. CLARK:

18 Q Ms. Miksic, did you accompany Washington  
19 Munoz to the -- the exam with Dr. Decter?

20 A I did.

21 Q Okay. And just tell us briefly about your --  
22 where you went to college and what you studied there by  
23 way of nursing, very briefly.

24 A I went to Rutgers University and graduated with a  
25 B.S.N. in Nursing. I haven an R.N.

1 Q Okay. All right. And I want to just focus  
2 on just briefly, was there a time at the exam where  
3 Washington was sitting on an exam table --

4 A Yes.

5 Q -- and he had to change his position?

6 A Yes. There was.

7 Q Tell -- tell us about that.

8 A He changed his position. What do you -- what --

9 Q Did he get off the table?

10 A Yes. He did.

11 Q And why did he get off the table?

12 A He got off when we first entered the exam room.

13 He got off because he was uncomfortable. His back was  
14 hurting him.

15 Q All right. And what time did you enter the  
16 exam room with Dr. Decter?

17 A 8:36 a.m.

18 Q All right. And was there a time that Dr.  
19 Decter asked him about previous problems with his  
20 shoulder?

21 A He did. Yes.

22 Q What did Dr. Decter ask, and what was the  
23 answer?

24 A He said -- Dr. Decter said, did you ever -- did  
25 you have previous problems before the accident and Mr.



1 Nunez (sic) responded, no.

2 Q Okay. And how about with regard to the back?  
3 Did he ask him if he ever had problems -- prior  
4 problems with his back?

5 A Yes. He did. Prior to the accident and --

6 MR. GULINO: Objection. It's outside the  
7 scope of direct.

8 THE COURT: The objection is sustained to the  
9 extent that this is rebuttal, rebuttal testimony only.

10 MR. CLARK: All right.

11 BY MR. CLARK:

12 Q And was there a time that he asked him about  
13 problems with his shoulder?

14 A Yes. He did.

15 Q All right. Did he examine the -- tell us  
16 what happened when he examined the shoulder. Where did  
17 he examine it, and what did he say with regard to pain?

18 A Well, he did different exercises, asked him to do  
19 different exercises, raised his arms up. He wasn't  
20 able to raise his right arm up all the way because of  
21 the pain that he had and asked him to take his shirt  
22 off and he had only did it with the left arm. He  
23 couldn't use his right arm because of pain.

24 Q All right. And --

25 MR. GULINO: Objection. The same. This is

1 still out of the scope. This wasn't testified to.

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

3 (Discussion at side bar)

4 THE COURT: And one of the focuses of his  
5 testimony because it is rebuttal, perhaps, you can go  
6 to the specific area where you believe that the doctor  
7 testified to something different than what actually  
8 happened. So Dr. Decter testified as follows.

9 MR. CLARK: Okay. All right. Great.

10 THE COURT: All right?

11 (End of discussion at side bar)

12 BY MR. CLARK:

13 Q Dr. Decter testified that when he touched the  
14 shoulder, he complained of pain all over the shoulder.  
15 Did that actually happen at the exam?

16 A No. It did not.

17 Q Describe what happened at the exam. Where  
18 did he touch the shoulder and what actually happened on  
19 that?

20 A He touched it right on his deltoid area, and  
21 that's where it hurt. It wasn't all over. He  
22 specifically said the proximal area.

23 MR. GULINO: Can I just ask her to keep her  
24 voice up, please?

25 THE WITNESS: He said, the proximal area of

1 the deltoid. It was not all over the shoulder. It was  
2 just, he pointed specifically to one area.

3 Q And Dr. Decter also testified that wherever  
4 you touched him on the body, he said, oh, that hurts,  
5 pain here, pain there. Did that ever happen at the  
6 exam?

7 A No. It did not.

8 Q Okay. And did Washington Munoz ever complain  
9 of pain all over his body, diffuse pain?

10 A No. He did not.

11 Q You saw the -- how about when he did the  
12 walking test, where he walked on his tip toes, then his  
13 heels. Was pain noted there?

14 A Yes. It was.

15 Q Okay. And how about when he had --

16 MR. GULINO: Objection.

17 THE COURT: Again, this is rebuttal, so to  
18 the extent that she witnessed something that's  
19 different than what Dr. Decter testified to, that's the  
20 sole testimony that this witness should be -- should be  
21 giving, not just in general what she saw when she was  
22 present at the examination.

23 BY MR. CLARK:

24 Q Dr. Decter testified when he did the lower  
25 back test, that he had no pain radiating to his feet

1 and no difference in feel to his feet. Can you  
2 describe how that was different from what you saw?

3 A It -- he had more feeling in his left foot and leg  
4 area than he did in the right foot and leg area.

5 Q And how do you know that?

6 A He expressed that, Mr. Munoz.

7 Q Okay. And, also, when he did the heel to toe  
8 test, when you walk on the heel and walk on the toe,  
9 did he complain of pain anywhere else in his body?

10 A His back.

11 Q Okay. How about his buttocks?

12 A When he walked, yes, he complained of buttock  
13 pain.

14 MR. CLARK: That's all I have. Thank you,  
15 Your Honor. Thank you.

16 THE COURT: Cross?

17 MR. GULINO: Very quickly, Your Honor.

18 REBUTTAL CROSS-EXAMINATION BY MR. GULINO:

19 Q Is it Miksic?

20 A Miksic. Yes.

21 Q Do you have any notes with you?

22 A I do.

23 MR. GULINO: May I approach, Your Honor?

24 THE COURT: Sure.

25 BY MR. GULINO:

1 Q Very quickly, Ms. Miksic. You are a  
2 registered nurse. Are you not?

3 A I am.

4 Q And for how long?

5 A Twenty years, twenty--

6 Q Are you still working as a registered nurse  
7 or do you work for a company that witnesses for these  
8 examinations?

9 A I just have my own practice.

10 Q Like a freelancer, if you don't mind?

11 A Uh-huh. Yes.

12 Q And are you still practicing as a registered  
13 nurse at a hospital or a doctor's office or something  
14 like that?

15 A No. I'm not.

16 Q This is your sole means of income?

17 A Uh-huh. Yes. It is.

18 Q And would it be fair to say that you are  
19 retained by plaintiffs' attorneys to watch their  
20 clients being examined by doctors hired by defense  
21 attorneys?

22 A Yes.

23 Q And would it be fair to say that that is 100  
24 percent of your income as a -- right now?

25 A Yes.

1           MR. GULINO: Okay. Nothing further. Thank  
2 you, Your Honor.

3           THE COURT: You can step down.

4           MR. CLARK: Judge, just one brief redirect.

5 REBUTTAL REDIRECT EXAMINATION BY MR. CLARK:

6           Q     Is that 100 percent of your family income?

7           A     No. Not at all. No.

8           MR. CLARK: Thank you.

9           THE COURT: Thank you. You may step down.

10          THE WITNESS: Okay.

11          THE COURT: Anything further from either  
12 side? Both sides have now rested and that means you've  
13 heard all of the evidence that you're going to hear.  
14 So the next order of business will be the closing  
15 statements of both lawyers, my charge, and then the  
16 case is yours. So we're going to have you break now  
17 for lunch. There's some matters that we need to  
18 address outside of your presence, so let's say come  
19 back usually as you would at 1:30. All right? So  
20 enjoy your lunch. Please don't talk about the case.  
21 You're not there yet. You're almost there.

22                   (Jury excused for luncheon recess)

23          THE COURT: Be seated. Thank you. Before I  
24 forget, are we choosing alternates or are all eight  
25 jurors deliberation?

1 MR. GULINO: I'm sorry, Judge. What was  
2 that?

3 THE COURT: Are we choosing alternates or are  
4 all eight jurors deliberating?

5 MR. GULINO: I know we haven't discussed  
6 that.

7 THE COURT: You can give it some thought.

8 MR. GULINO: It is a -- please forgive my  
9 ignorance. Is it seven out of eight, six out of eight?

10 THE COURT: A verdict is eight to zero or  
11 seven to one.

12 MR. GULINO: And if it's six, is it five out  
13 of six?

14 THE COURT: Yes. Do you want to give it some  
15 thought?

16 MR. GULINO: I'll go with six. My preference  
17 is six, and we don't know who the other two are until  
18 they're ready to go into deliberate, correct?

19 THE COURT: Right.

20 MR. CLARK: Over lunch, if it's all right.

21 THE COURT: Sure. Sure. You want to give it  
22 some thought?

23 MR. CLARK: Well, I mean, he decides because  
24 if anyone objects, it has to be six, right? I mean,  
25 isn't that -- that's what the rule says?

1 THE COURT: Well, all right.

2 MR. CLARK: So --

3 THE COURT: Okay. So we left off Friday  
4 after a long day dealing with the jury charge and I  
5 know, Counsel, you wanted an opportunity to sort of  
6 digest what had been provided by the plaintiff.

7 MR. GULINO: Yes. I did. And I did look  
8 up --

9 THE COURT: FERNANDEZ?

10 MR. GULINO: And Mr. Clark also -- we  
11 discussed it a little bit the other day. I objected --  
12 I don't have any problems with the ones that are listed  
13 first, the standard jury charges, obviously.

14 THE COURT: Right.

15 MR. GULINO: On the medical expenses for  
16 April 11th, I have no objection. I do have an  
17 objection on Page 2 of Mr. Clark's submission  
18 concerning medical insurance, and I believe that  
19 happened in the testimony of Mr. Sociadad (phonetic).  
20 That was her testimony. That's what she said. It was  
21 one quick line and we were done. I think, if we  
22 mention any more of that, I think we just highlight it.  
23 I don't think the jury needs to discuss this,  
24 contemplate it, think about it during their  
25 deliberations.



1           THE COURT: All right. So we left off as  
2 well discussing the issue of whether or not the issue  
3 of plaintiff's negligence would be presented to the  
4 jury and Counsel was kind enough to provide me with the  
5 citation to the FERNANDEZ V. DAR DEVELOPMENT CORP. case  
6 that was decided in 2015 by the Supreme Court. And  
7 having read -- having read this case, it's clear that  
8 the issue of a worker's negligence in the case of a  
9 workplace accident is sufficiently an issue that should  
10 go before the jury to the extent the facts warrant --  
11 warrant that.

12           So, in this case, this isn't a construction  
13 accident case in the sense that the plaintiff was using  
14 any type of product or machinery such that the -- as  
15 the Court would put it, the Suter rule should be  
16 extended to bar any comparative negligence claim. This  
17 is a claim by the plaintiff that he was walking on a  
18 roof intending to do some plaster work and that his  
19 foot went into a -- he's characterizing it as a hole.  
20 The defense says it's not a hole.

21           But what it is that the plaintiff stepped in  
22 is something that is disputed and the defense is that  
23 this is an area that the plaintiff could see as he was  
24 walking by or at least should have seen it as he was  
25 walking by and he had some obligation to take some

1 reasonable care in terms of the way in which he walked  
2 and his failure to do so, assuming the jury believed  
3 that he, in fact, stepped into this depression, hole,  
4 whatever the jury determines it to be, the facts of  
5 this case sufficiently warrants a contributory  
6 negligence claim and I agree.

7           So -- and to cite from the FERNANDEZ case,  
8 the Supreme Court there said, we decline plaintiff's  
9 invitation to extend the Suter rule governing employee  
10 negligence to workplace accidents outside the product  
11 liability context. The principles of Suter remain  
12 sound as applied to the narrow realm of cases that fall  
13 under its umbrella. Cases in which an employee is  
14 injured when using a defective piece of equipment in a  
15 reasonable and foreseeable manner to complete his  
16 assigned task.

17           A rule barring jury consideration of an  
18 employee's negligence is inapplicable to suits arising  
19 out of injuries sustained while an employee on a  
20 construction work site is engaged in an assigned task.  
21 In so holding, we expressly affirm the rule announced  
22 in KEAN (phonetic) and disapprove the Appellate  
23 Division's analysis of the issue in this appeal to the  
24 extent it suggests the Suter rule should -- applies to  
25 bar the comparative negligence defense in all cases

1 arising out of injury sustained while employees -- is  
2 engaged in a task on his employer's behalf.

3           As noted in KEAN, employees bear some  
4 responsibility for their personal safety on a  
5 construction site. So in this case, the plaintiff  
6 bears some responsibility to look where he's walking  
7 and, to the extent that he did not exercise reasonable  
8 care and proceeded in the face of a potentially -- a  
9 hazard, if the jury were to find it a hazard, then that  
10 is something that the jury will have to be tasked with  
11 determining. So the issue of contributory negligence  
12 goes on not only the charge but in the verdict sheet as  
13 well.

14           MR. CLARK: Judge, with regard to that, I  
15 don't think the model charge sufficiently addresses the  
16 standards set forth in FERNANDEZ. I can work -- I have  
17 -- I have some template of that, but it's not updated  
18 with this case. I could work on that over lunch. I  
19 don't think reading the standard charge does it in a  
20 workplace case. I think it is different, so I can  
21 submit that over lunch or take a look at it.

22           THE COURT: All right. So if you --

23           MR. GULINO: I just -- I just thought 7.30  
24 sort of covers it and I don't know if we have different  
25 books.

1 THE COURT: The --

2 MR. GULINO: I have the printed copy, if you  
3 want, Judge.

4 THE COURT: Yes.

5 MR. GULINO: I had someone in my office copy  
6 and paste this whole thing, the charges from the court  
7 website and you know, it goes into the combined burden  
8 of proof on both sides. It just -- it goes into  
9 credible evidence, combined definition of negligence,  
10 proximate cause, and it talks about comparative  
11 negligence and I think -- I think it covers it pretty  
12 well. I would be more than happy to make a copy, if  
13 you don't have it, but --

14 THE COURT: Yes. No. I have 7.30 and I  
15 also --

16 MR. CLARK: I mean, I -- I think you have --  
17 you've got to tell the jury that you can only submit it  
18 to the jury when reasonably confronted a known risk and  
19 had no meaningful choice in the manner in which he  
20 completed the task. The plaintiff was completing a  
21 task. He was carrying his work tools up to the -- to a  
22 certain location. He was certainly on the clock. So I  
23 think it's important to put that language in there.

24 THE COURT: Well, I think it's disputed as to  
25 whether or not he had a meaningful choice, right, so --

1           MR. CLARK: Oh, right. So the jury has to  
2 decide that.

3           THE COURT: They have to make that  
4 determination as to whether or not he had a meaningful  
5 choice. In other words, could you look down and,  
6 perhaps, go to your right a little bit or go to your  
7 left a little bit.

8           MR. CLARK: Or take another route.

9           MR. GULINO: Or turn around.

10          THE COURT: Or --

11          MR. GULINO: Or turn around and go another  
12 way.

13          THE COURT: I suppose, if the jury finds that  
14 there was another way to get to it. I don't know. But  
15 so you'll work on that over lunch --

16          MR. CLARK: I'll submit it.

17          THE COURT: -- and I'll -- I'll take a look  
18 at what you give me. In terms of the request to  
19 include a -- sort of the concern about both workers'  
20 compensation benefits, as well as medical insurance, I  
21 have found -- you wanted to say something else?

22          MR. CLARK: Yes. I'm sorry.

23          THE COURT: Yes.

24          MR. CLARK: I just wanted to note that Dr.  
25 Decter in his direct examination also referred to a

1 workers' compensation claim petition having been filed  
2 and he reviewed it.

3 THE COURT: So in my experience, I have found  
4 that it's not unusual for a jury, even when it's not  
5 mentioned, for a jury to ask, well, doesn't the person  
6 have workers' compensation benefits or doesn't the  
7 worker have insurance and, sometimes, it's not medical  
8 insurance. Sometimes, if it's in the context of an  
9 automobile accident case, they'll ask, well, isn't the  
10 insurance covering all of this?

11 So I don't think it's far fetched to presume  
12 that a reasonable person might be wondering whether or  
13 not there is insurance that covers this issue and,  
14 quite frankly, that -- that could work to the benefit  
15 or to the deficit of either side and who knows which  
16 way it will go.

17 So I think that if -- if there is perhaps  
18 even just a little -- not to the extent that the  
19 plaintiff is requesting that the Court address the  
20 issue but even just a little blurb after the charge,  
21 something in terms of when they're considering the pain  
22 and suffering award, at the end of that charge, you are  
23 not -- you're not to consider or speculate about  
24 whether or not the worker her received any workers'  
25 compensation benefits and just leave it at that, rather

1 than going into a full blown explanation of how the  
2 workers' compensation benefits doesn't necessarily make  
3 the plaintiff whole.

4 I think -- and this would sort of be in line  
5 with what was recently a revision on the medical  
6 expenses charge in an automobile case and that was, I  
7 want to say, 20-- if not '17, it was '16. It was  
8 updated to say that -- to include as part of the charge  
9 that a jury should not speculate about any medical -- I  
10 don't remember the exact wording of it, but there's  
11 clear -- there's a -- I should probably get it. All  
12 right.

13 So in that case, in medical expenses in the  
14 automobile context, the charge merely says, you  
15 shouldn't speculate or include medical expenses as part  
16 of damages and it wasn't a full blown explanation of  
17 why that is. So I think this would express the concern  
18 of the defense that if you say too much about it, it  
19 sort of brings that to their attention more so than you  
20 necessarily need it to be brought to their attention,  
21 but it also addresses the plaintiff's concern that  
22 medical expenses would be covered by insurance or  
23 workers' compensation benefits.

24 So I think just a quick sentence, as I've  
25 indicated, that says, you shouldn't speculate about

1 whether or not the worker received workers'  
2 compensation benefits, resolve that issue. And  
3 likewise, with medical insurance, a similar -- you  
4 shouldn't consider or speculate about the possibility  
5 of medical insurance that may or may not have been  
6 provided to the plaintiff. So that would cover that  
7 concern as well.

8 MR. GULINO: If I may, Judge.

9 THE COURT: Yes.

10 MR. GULINO: If the Court is going to charge  
11 something like this, I -- New York actually has a  
12 charge on workers' comp., if the jury has heard it.  
13 But maybe we can fashion something out of it. And the  
14 part that, you know, I would want more than anything  
15 else -- and if I may, if you'll give me a second, I can  
16 try to read it to you and we can change this around.  
17 The fact that the plaintiff has received or --

18 MR. CLARK: Do you mind if I look over your  
19 shoulder?

20 MR. GULINO: No. No. Yes. Sure. Right  
21 here. This one right here, 165.1.

22 MR. CLARK: Okay.

23 MR. GULINO: The fact that the plaintiff has  
24 received, applied for workers' comp. benefits has no  
25 bearing on any other issue in the case than the weight



1 you will give to the plaintiff's testimony.  
2 Compensation benefits are payable or were paid on  
3 behalf of the plaintiff because he was an employee of,  
4 here, it would be Cooper Plaster at the time of the  
5 accident. These payments are made without determining  
6 fault with respect to the happening of the accident.  
7 That was the danger I was discussing the other day.

8 THE COURT: Well, yeah. I mean, so I think  
9 that -- so I think that that charge, as you aptly  
10 noted, is appropriate when, perhaps, there is more to  
11 -- I mean, there was literally a fleeting mention of  
12 it. So is there a need to go into that much of  
13 workers' compensation benefits? I mean, I don't know  
14 that there is but, again, --

15 MR. GULINO: In -- in those cases and the one  
16 that I had that used this, it was mentioned by the  
17 plaintiff himself and he brought it out.

18 THE COURT: Yes.

19 MR. GULINO: And so the Judge had no choice  
20 but to -- I shouldn't say she had no choice. She used  
21 it. So, now, here, as I said, I don't -- you know, it  
22 hasn't really been mentioned. This is sort of Mr.  
23 Clark saying they sort of probably know about it rather  
24 than it was mentioned -- it was mentioned. It's  
25 mentioned. But it's not the evidence here. So I would

1 really rather not include it.

2 MR. CLARK: Medical insurance was mentioned  
3 more than once in the case and with regard to workers'  
4 compensation, I would be repeating myself what I said,  
5 I believe, the other day. But Dr. Decter just referred  
6 to the workers' compensation claim petition. He didn't  
7 say the workers' compensation but he said, I reviewed a  
8 claim petition related to the incident and, like I  
9 said, I think most jurors would know or expect about  
10 workers' comp. or medical insurance. So I think it --  
11 I would be repeating myself.

12 THE COURT: Yes.

13 MR. CLARK: I mean, I think it should be --  
14 they should be instructed on it.

15 THE COURT: Okay.

16 MR. CLARK: The key -- I mean, the key with  
17 our concern is that the jury says, hey, he's going to  
18 double dip. You know, I don't want to have double  
19 dipping. If he's already getting medical, why are we  
20 awarding medical bills and that's where the collateral  
21 source rule comes in and that's why we had requested  
22 maybe an additional sentence to what Your Honor  
23 suggests, which is, you know, you should not concern --  
24 that's a matter for the Court to deal with after your  
25 service is done, something like that.

1           MR. GULINO:  If -- if there's another part of  
2 this charge, we're talking about the double dipping, I  
3 mean, I still don't want it in, but it says here as  
4 following.  These payments were made without  
5 determining fault with respect to the happening of the  
6 accident.  If, but only if, the plaintiff is successful  
7 in this action, the payments made by Cooper will have  
8 to be refunded by the plaintiff to Cooper.  There's no  
9 double dipping.  That takes care of his double dipping  
10 theory.  But, as I said, I'm really objecting to the  
11 inclusion of it.

12           THE COURT:  Okay.

13           MR. CLARK:  The charge as submitted squarely  
14 addresses the double dipping issue as well.

15           THE COURT:  And, Counsel, I will include as  
16 well -- and I don't think I heard an objection from you  
17 as far as the -- the charge pertaining to the violation  
18 or the asserted violation --

19           MR. GULINO:  Yes.

20           THE COURT:  -- of Musha (phonetic).

21           MR. GULINO:  Mr. Clark actually took out a  
22 couple, right, I think, two?

23           MR. CLARK:  I crossed it out  
24 (indiscernible) --

25           MR. GULINO:  Yes.  I mean, I want them,

1 obviously, all out. But we -- you crossed out a few of  
2 them.

3 MR. CLARK: I crossed out the reference to  
4 1910 because that's the general (indiscernible) --

5 MR. GULINO: Oh, just one?

6 MR. CLARK: It's not the construction.

7 MR. GULINO: Just one? Okay. All right.  
8 Judge, and before we forget, Mr. Clark did send me last  
9 night, I'm not sure, I'm assuming you sent it to the  
10 Court, the jury should be allowed to decide the issue  
11 on punitive damages, so I don't know if you got that.  
12 I assume you did. I got it last night.

13 THE COURT: I have not seen that.

14 MR. GULINO: Okay. But I don't want to  
15 forget that one. The only reason I'm objecting to  
16 the --

17 THE COURT: I didn't realize punitive damages  
18 was in the case. I think -- yes. I don't know that  
19 we're going to --

20 MR. GULINO: I'm objecting to the OSHA --

21 THE COURT: That means the jury is likely  
22 coming back tomorrow.

23 MR. GULINO: I'm sorry. Okay.

24 THE COURT: Because there's -- I don't know  
25 that they're finishing.

1           MR. GULINO: I have a feeling -- I think  
2 you're right.

3           THE COURT: What's that?

4           MR. GULINO: We might not be able to finish  
5 today.

6           THE COURT: I don't see how. I didn't --  
7 that was not brought to my attention as far as punitive  
8 damages being in this case, and I don't know what the  
9 evidence in the case was related to that either.

10          MR. GULINO: Do you want me to keep going or  
11 do you want to take a break for lunch?

12          THE COURT: What's the other issue?

13          MR. GULINO: Well, we were talking about the  
14 -- the OSHA regs and --

15          THE COURT: Right.

16          MR. GULINO: So on Mr. Clark's submission on  
17 Page 6, there were four at the end.

18          THE COURT: Okay.

19          MR. GULINO: Four at the end -- or three at  
20 the end. I'm sorry. Mr. Clark withdrew Section  
21 1910.22 and then he has three left. The first one is  
22 1926.500(a), and the definition of a hole means a gap  
23 or void to which is a more in its least dimension and a  
24 floor for other walking, working surface. And when we  
25 had talked about it, the evidence is contrary to that.

1 This is not a hole because there's not a gap and it's  
2 not a void. It doesn't go down to the second floor  
3 because the second section is 501 that I got Mr.  
4 Gallagher to admit to. That's all for six feet and  
5 higher. This is all to protect people from falling  
6 through something or objects coming down and striking  
7 the people who are working below you.

8 THE COURT: Okay. So let me -- let me just  
9 do this in terms of trying to move through this as  
10 quickly as I can. So it seems from the Court's  
11 perspective that there really isn't a need for the  
12 Court to provide all of these definitions other than to  
13 indicate that the plaintiff is alleging that the  
14 defendant committed certain violations or negligence to  
15 the extent that they violated provisions of OSHA. And  
16 so to the extent that the plaintiff wants to put up  
17 these definitions and say that these are what we're  
18 saying the defendants violated, then you're certainly  
19 free to do that.

20 But I don't think the jury charge is the  
21 place for the Court to now go into all of these  
22 different definitions but merely that in support of  
23 their claim of negligence, the plaintiff is asserting  
24 that the defendants violated certain provisions of OSHA  
25 and what violations they are specifically, I'll leave

1 for the plaintiff to do as part of their closing  
2 remarks, if they so choose. All right? So that will  
3 take care of that issue.

4 MR. GULINO: All right. And the only other  
5 one I had was the punitive damage claim, Your Honor.  
6 It isn't -- are you still going to pursue it because I  
7 don't think the Court got a copy of it.

8 MR. CLARK: Well, I think -- I think that  
9 would only come into play if there's a verdict anyway.  
10 So it can be dealt with later.

11 MR. GULINO: Okay.

12 MR. CLARK: I don't think --

13 MR. GULINO: Then I'll withdraw my objection,  
14 Your Honor. If he's not going to -- what do you mean,  
15 it's a subsequent hearing?

16 MR. CLARK: Correct.

17 MR. GULINO: Afterwards?

18 MR. CLARK: There's no need for the Court at  
19 this time to pass on that issue.

20 THE COURT: Oh, --

21 MR. GULINO: If that's okay with Your Honor,  
22 then I will withdraw it until such time.

23 THE COURT: Okay. Let me give you the -- I  
24 know you submitted a verdict sheet.

25 MR. GULINO: Yes. I did and one mistake I

1 really made, which I did the best I could but --

2 THE COURT: I try to -- I try to keep the  
3 verdict sheet to the extent possible because all of  
4 this is confusing --

5 MR. GULINO: Did you guys get one? I have  
6 another hard copy for you guys if you want it.

7 THE COURT: Yes.

8 MR. GULINO: I didn't e-mail it last night.  
9 Do you want it?

10 MR. CLARK: Yes.

11 MR. GULINO: You got it?

12 MR. CLARK: No. No. If you have it, --

13 MR. GULINO: Let me get it for you.

14 MR. CLARK: Thanks. Thank you.

15 MR. GULINO: Here's the charge.

16 MR. CLARK: Thanks.

17 THE COURT: All right. So we're going to  
18 break now for the lunch hour and then, whatever you  
19 have to submit to me, I guess, we'll talk about it  
20 after lunch. So let's break for the lunch hour. All  
21 right?

22 (Luncheon recess)

23 (Jury not present in courtroom)

24 MR. GULINO: So, perhaps, we just add past  
25 medical expenses, then future medical expenses in



1 separate line.

2 THE COURT: Okay.

3 (Recording paused - Recording resumed)

4 (Jury present in court)

5 THE COURT: Thank you. Please be seated.

6 All right. Members of the jury, as I indicated, you'll  
7 now hear the closing remarks of both lawyers. We do  
8 that in the reverse order that you heard the opening  
9 statements, so we'll start with defense attorney, Mr.  
10 Gulino.

11 MR. GULINO: Thank you, Your Honor. Mr.  
12 Clark, Mr. Berenguer, ma'am, Your Honor, ladies and  
13 gentlemen, good afternoon. The Judge said this is  
14 summation. Don't think it's going to be like  
15 television. It's not going to be three minutes long.

16 MR. CLARK: How did we know that?

17 MR. GULINO: What we try to do at the end is  
18 we try to bring all the evidence that came in and we  
19 tell you what it said and, at the end, you're going to  
20 be the ones who are going to say what, what's important  
21 and what's not important and we'll follow the law from  
22 the Judge. Okay?

23 So when I opened to you, I gave you somewhat  
24 of an outline and I think what I said was, if I recall  
25 correctly, I said that three or four things were going

1 to come out during the course of this case and I think  
2 that the evidence was going to support that, the  
3 defendant's position.

4 One, the work area was not dangerous, not  
5 dangerous. Referring to Exhibit 4 at the bottom, it's  
6 not dangerous. You're not going to find it to be a  
7 violation of any kind of rule. It's not going to be  
8 against industry standards. It's not dangerous.

9 Two, the accident didn't happen as the  
10 plaintiff claimed. Remember, -- remember, all the  
11 medical records and all of that about how the accident  
12 happened, it changed when the plaintiff got on the  
13 stand. Didn't it? I said that was going to happen and  
14 it did.

15 Number three, except, perhaps, for the biceps  
16 tear, which there was no treatment received, none of  
17 these injuries, these surgeries have anything to do  
18 with an accident on June 25th, 2015.

19 So it's a strong thing to say, but the case  
20 built on lies and you're probably saying, well, that's  
21 a pretty strong word there, Mr. Gulino. I want you to  
22 think and backtrack to what we've seen, how. Mr. Munoz  
23 had no physical issues before, volleyball, tennis. Dr.  
24 Helbig said, he had arthritis in his shoulder. He  
25 operated on him for arthritis, but he didn't know he

1 had arthritis? Of course he did because it hurts. One  
2 lie.

3 He said, he fell. Whole case, remember? I  
4 go to the Center for Occupational Health. I fell. I  
5 go to Dr. Helbig, I fell on my arm, my shoulder. We  
6 know he just stumbled, right?

7 Number three, he said the accident occurred  
8 at 3:20 in the afternoon. We know it didn't happen at  
9 3:20 in the afternoon and we know why. Because at 3:20  
10 in the afternoon, they were washing up. It happened at  
11 10 or 11 o'clock in the morning when Mr. Mella changed.  
12 Didn't he?

13 Number four, he said he couldn't find  
14 anybody. He wanted to talk to them, wanted to tell  
15 them about that. That's a lie, too. Mr. Mella was  
16 with him. He never went to go find somebody. Mr.  
17 Beardsley testified, nobody came to him. First in,  
18 first out. We'll come back to him later. He told his  
19 doctors that he fell. He told L.P. Ciminelli that he  
20 fell when he filled out the accident report, right? He  
21 fell on his arm and his shoulder.

22 No pay stubs. No proof of wages. But he's a  
23 Union member and he said that every month, they have  
24 his records. He doesn't have anything, W-2's, pay  
25 stubs. The Union didn't. The Union didn't.

1           Now, I'm going to go through his witnesses.  
2 I'm not going to go through them in order. That  
3 doesn't mean some is important more than others, but  
4 remember one thing, I ask you to do this. I believe  
5 firmly every witness that went up on that stand on  
6 behalf of the plaintiff, I challenged. I didn't accept  
7 what they said. I didn't pull in peripheral arguments  
8 for them. I challenged them about what they said, who  
9 they were, and how they were connected.

10           His ex-wife, she gets on the stand and  
11 testified from Florida. She's going to talk about his  
12 condition. She sees him maybe twice a year at a family  
13 function and doesn't communicate with him, only through  
14 her daughters. Is that testimony worth even  
15 considering on his mental state? Is she adequate  
16 enough? Is she connected enough to this case to give  
17 you guys her opinion on this? I don't think so.

18           His daughter, same thing, twice a year. Yes.  
19 I know she's his daughter and, yes, I know she loves  
20 him. She was very sympathetic, but does she really  
21 have the evidence? She really can come in here and  
22 tell you? I don't think so. She was put on that stand  
23 for a reason. The reason was, she was his daughter.

24           Mr. Gallagher. Now, Mr. Gallagher has  
25 testified hundreds of times. That's fine. It's not a

1 big deal. It's really not a big deal. And this is the  
2 guy, however, who wrote the book on safety. Do you  
3 remember? The first thing he thanked besides the woman  
4 who typed the manuscript for him were the lawyers.  
5 Yes. I know he talked later on, redirect, about how he  
6 thanked the workers, but they weren't the first people  
7 he thanked. Were they? The first guys he thought of.  
8 Lawyers.

9           And that's fine, too. It is what it is,  
10 right? It is what it is. He's 35 years away -- away  
11 from OSHA, 35 years, and what he does is this. He's  
12 very good. I couldn't get a yes or no out of him.  
13 That was impossible, but that's fine. That's also  
14 fine. He gave us testimony that basically said that he  
15 has testified hundreds of times, that he used OSHA  
16 regulations, and none of them even applied. A hole?  
17 Remember the hole definition, and you can ask for read  
18 backs on testimony. A hole definition was a gap or a  
19 void. Remember, it's got to go through to the next  
20 ground, next floor. It's got to go down to the next  
21 floor. That's what a hole is. This is a drain. He  
22 gives us condemnation, but he doesn't say what should  
23 have been done or practically what should have been  
24 done.

25           Now, Dr. Sociadad, she testified prior at a

1 de bene esse, very lovely person. I will say that.  
2 She is. She has an arrangement -- or I shouldn't say  
3 that. I misspoke. She has had past experiences with  
4 the plaintiff's attorneys. Okay?

5           They sent Mr. Munoz to her for an evaluation  
6 and an opinion, which she gave to you under oath. She  
7 received money for it. That's fine. She's supposed  
8 to. She's a professional. She saw him how many times?  
9 Three times. And when for the first time, this man who  
10 needed this health -- when for the -- help -- when for  
11 the first time did she see him? Three years after the  
12 accident, three. Not three months, three years, a  
13 lifetime.

14           And he had moderate depression. From this?  
15 Three years? She could not take him as a patient.  
16 Understood. Understood. She didn't refer him to  
17 anybody. I mean, really? You need help, you get  
18 referred to somebody. Otherwise, I'm just going to  
19 come into court and say, how much money is it going to  
20 cost for him to go see somebody for the rest of his  
21 life? And the defendants, you guys are going to have  
22 to pay for him. Really need it? You really think that  
23 there's something wrong and, if there is, do you really  
24 think it's from a trip over a depression at a  
25 construction site? I don't think so. I don't think

1 so.

2           And so considering Dr. Sociadad and her  
3 numbers, I submit to you that it also is not testimony  
4 worth considering. You don't put a number on that. He  
5 didn't need it before. He certainly doesn't need it  
6 now.

7           Mr. Munoz himself -- number four, he did a  
8 few things. He lied about the accident. Didn't he?  
9 He was persistent in the version that he gave everyone  
10 about how the accident happened, and it's very  
11 important about how the accident happened, especially  
12 here, very important. It's very important on the  
13 danger -- how dangerous this thing was and it's also  
14 very important on connecting the fall, which he didn't  
15 have.

16           So the injuries that he said he had, he lied  
17 about them. He lied about it to his employer on an  
18 accident report. He lied about it when the  
19 representative from L.P. Ciminelli, Bob Beardsley, sent  
20 him to get medical treatment. What's the first thing  
21 you're doing when you go to a doctor and you don't feel  
22 good? You tell the doctor what's wrong with you. Why?  
23 Because you want to get better.

24           You heard Dr. Helbig testify, should injuries  
25 hurt. You don't mistake them. Okay? They hurt. And

1 you don't tell the Center for Occupational Health at  
2 Hackensack Hospital, my shoulder, my shoulder. It's  
3 the basis of his entire case is his shoulder. He never  
4 told them, never. He went to see them twice, by the  
5 way. It's not only that he goes to see them on June  
6 26th, which is a day after the accident, but then he  
7 had two more days to think about it because he saw them  
8 on the 28th of June. By then, you would have figured  
9 he would have said, you know what, my shoulder is  
10 hurting me. No. Because he never landed on it.  
11 Remember?

12           He said the accident occurred at 3:20 in the  
13 afternoon, and that was his excuse for saying that,  
14 well, I couldn't find anybody to make my report  
15 because, remember, he knew he had to report this. That  
16 was the point that I made immediately in my order.  
17 Yes. He was fired. Not fired as Mr. Beardsley said,  
18 but he was not allowed to come back on the site. He  
19 could still work with Cooper but not at that site.  
20 That's what this is all about, not at that site.

21           And the reason we mentioned it and the reason  
22 maybe -- the reason we mentioned it is to show that  
23 it's not the reason he never went back to work was  
24 because of an injury and it's not the reason because he  
25 just stopped working. No. He was fired from that



1 project. He wasn't allowed to.

2           So he says at 3:20 in the afternoon, here  
3 they are, they get on a project at 7:00 in the morning  
4 and it's 3:20. You heard what Mr. Mella said. 3:20 is  
5 wash up time, man. We're out of here. We ain't  
6 starting to work. It didn't happen then. It was a  
7 good excuse for him to say, 3:20, that's why I couldn't  
8 find anybody. It was the end of the day, except he  
9 forgot to take into consideration that the person who  
10 they were going to, to report it to, Bob Beardsley,  
11 first in, last out. In before seven in the morning  
12 because that's when he taught his classes. Out at by  
13 five, if not after that. Five was the earliest night  
14 he ever had, so he was there and they knew it. They  
15 knew it and he knew it. He forgot about that.

16           He tells Dr. Helbig that he lands on his arm  
17 and his shoulder. This is the surgeon who is out there  
18 to help him. When you're injured and you go to a  
19 doctor, you tell them the truth because I want to get  
20 cured. I want to be fixed. He tells him, I fell on my  
21 arm and my shoulder. He lied to his own doctor. He  
22 couldn't even tell his own doctor about the truth  
23 because the doctor has got nothing to do with this  
24 case. He's got nothing to do with a lawsuit. He's  
25 here to fix him, and I think on cross-examination, I

1 got out of the doctor, don't you think it's important  
2 that when you're treating somebody, you want to find  
3 out if they're claiming they were injured, how it  
4 happened, right?

5           If you bump your knee against a wall, you're  
6 not going to worry about checking somebody's skull out  
7 for a brain injury, but if you fall down a bunch of  
8 steps, you would. That's why you tell your doctor  
9 everything that happened and he didn't. He told the  
10 Occupational Health Center he only had two issues on  
11 both of those days, no shoulder. He told them, upper  
12 back and elbow injuries.

13           And, by the way, I surmise to you that the  
14 reason he changed from falling and landing on his arm  
15 and shoulder was because for two-and-a-half days, you  
16 heard the testimony, Mr. Mella was sitting outside. He  
17 knew he was coming in to testify, and he knew Mr. Mella  
18 saw the entire thing. Right behind him, right? And he  
19 knew exactly what he was going to say and it's amazing  
20 -- amazing how their testimonies copied each other.  
21 Didn't they? So we know Mr. Mella was telling the  
22 truth and we know that Mr. Munoz, up until two days  
23 ago, maybe three, wasn't. Not at all.

24           Mr. Munoz was working on a construction site.  
25 He's got at least a year-and-a-half in with the Union.

1 He's experienced. He knows what a work site is,  
2 construction site. He knows that he has to keep his  
3 eyes out looking for everything.

4 He testified and I got him on cross because  
5 he had said about it before, testified about it before  
6 in a deposition that he was looking down. How do you  
7 miss this? How do you miss that unless you really  
8 weren't paying attention?

9 Now, their claim against us is that we are  
10 100 percent responsible. Mr. Munoz is responsible for  
11 his own accident. He doesn't step there. He watches  
12 where he's going. He's not going to stop. He's fine.  
13 He is more than half responsible for this. It's not  
14 some kind of a trap. It's not like somebody threw oil  
15 down and he's not watching. It's broad daylight, 10 to  
16 11 in the morning on a summer day and he doesn't pay  
17 attention, but he wants us to take care of his  
18 problems. He wants us to take the responsibility for  
19 what he did. He's more than 50 percent responsible for  
20 this accident, easily.

21 If you believe that we're negligent and I  
22 don't think you're going to get that far. I don't  
23 think the evidence shows that. I really truly don't.  
24 I don't think it shows for either L.P. Ciminelli nor  
25 for Paino, but if you do decide that, then he's got

1 over 50 percent responsibility for not watching where  
2 he's going.

3 Now, the damages, remember he said he was  
4 healthy before? Helbig said, he's got arthritis. Oh,  
5 I was playing tennis and volleyball. Yeah. Sure, you  
6 were. Sure, you were. You had arthritis in your  
7 shoulder. That's not healthy.

8 Now, is he sick? No. Can he still work?  
9 Yes. But it was so bad that he had surgery four months  
10 after the accident on arthritis, if you remember. So  
11 damages for that surgery are preexisting because you  
12 remember Dr. Helbig said, I don't have it, it was the -  
13 - we had the big blow up we were using as demonstrative  
14 evidence and you showed the burring or the shaving of  
15 the bone. And what did he say? It's arthritis. It  
16 was probably there before the accident. Of course, it  
17 was there before the accident, four months before, but  
18 they're making a claim for it.

19 They want the defendants to pay for that.  
20 No, not for that, not for the arthritis in his  
21 shoulder. It's a casualty of his job, upper --  
22 remember? Repetitive stress syndrome. Guys work a lot  
23 like he does, and he works hard. I don't have an issue  
24 with that, no issue. But that's where that condition  
25 came from.

1           Now, he's making a claim for lost wages,  
2 right? I've got one pay stub. One pay stub, 2013  
3 we're talking about, we got one pay stub and that's the  
4 only one he brings in and he brings in one that shows  
5 he made about, I don't know, 1,000 a week, around  
6 there, something like that. I'm ballparking it. You  
7 figure maybe that's the best pay stub he had in that  
8 year? Maybe it's the best pay stub he had in two  
9 years. We don't even know how many he had because he  
10 can't tell us.

11           What the pay stub does tell you is that, to  
12 the year to date, he made 4,500 bucks. It's June.  
13 June, he made 4,500 bucks. Maybe he wasn't working all  
14 those weeks before. It would make a little bit more  
15 sense. And don't you think had he wanted to prove it,  
16 he would have got the Union to come in? Show them my  
17 records. Show them my records.

18           Best disinfectant in the world is sunlight,  
19 we always say, right? Don't you want to see the  
20 records? Don't you want to see the record because if  
21 you firmly believed and you really wanted the jury to  
22 give you all of this money, wouldn't you give them all  
23 the documents that you could? Here you go. Here you  
24 go? And if you didn't have them, they had them and if  
25 he is a Union member with that Local 29, you don't

1 think they would have come in for him, a Union guy?  
2 Sure, they would come in for him. They would have come  
3 in for him and they would have brought their records  
4 for him in here for you to see and they didn't. It  
5 tells you a little bit of something because if he had  
6 them, he would have brought them. If they were good  
7 for you, he would have brought them.

8 Working two to three months here, he said,  
9 Ciminelli, right, or whatever, \$4,500 a year? That is  
10 all the proof that he has past damage. That's all he  
11 has. If he were going to hit a home run and if you  
12 believed him, 4,500 bucks, that's all he made. Even if  
13 you doubled it because, now, it's June, maybe it goes,  
14 what is that, \$9,000? Really? And for three years? I  
15 don't think so because, as I said, if he had the  
16 records, he would have brought them, if the records  
17 existed. I misspoke. If the records existed, they  
18 would have come in.

19 20,000 bucks for past, if you gave it to him,  
20 based on his one pay stub for four years, that's a gift  
21 to him. It's truly a gift because he doesn't prove it  
22 to anyone. Other than that, you're guessing. Aren't  
23 you? You're guessing. Your guess work doesn't work.

24 Now, Dr. Helbig, he was lied to as well.  
25 Wasn't he? He said, he thought he had landed on his

1 arm and his shoulder, and I cross-examined him about  
2 that. Do you remember, whether or not it's related.  
3 Well, that's what he told you. That's what he told  
4 you. And remember one other thing about Dr. Helbig. I  
5 challenged his medicine. Didn't I? I went toe to toe  
6 with him to talk about the medicine, to talk about the  
7 causality, to talk about the pre-existing conditions.  
8 I went toe to toe with him and I challenged him.

9 I'll get to the doctor later but remember in  
10 openings, I said to you, they would never challenge him  
11 on his medicine and they never did because they  
12 couldn't. Touching Dr. Decter under medicine is like  
13 Superman touching kryptonite. It's going to kill you.  
14 But I did challenge Dr. Helbig, who admitted that the  
15 arthritis that he took out of the shoulder on the first  
16 surgery was not related probably because it preexisted  
17 and he thought he fell.

18 I think we now know he didn't fall, right?  
19 So how is that related? He shaved the bone and he  
20 called it hyper-- I call it hypertrophy. It's  
21 hypertrophy, I believe. He did surgery, though. He  
22 did testing on it in the beginning. He's worried out  
23 -- because he suspected a rotator cuff tear. He did a  
24 drop test. Negative, negative, negative. Doesn't that  
25 mean, no rotator cuff tear? Well, drop test is

1 negative. You don't have a rotator cuff and you didn't  
2 have it at the beginning at all.

3 He used a burr, as I said. We know that.  
4 I'm not going to bore you with it. You saw him on the  
5 diagram. We discussed that. He got arthritis before  
6 and if there is no trauma -- if there was no trauma  
7 doc., then there's no connection, right? You need  
8 trauma to blame defendants. It has to be. He admitted  
9 to that.

10 He thought he had impingement syndrome.  
11 Remember that's where it sticks. Tendons go in there  
12 because the bones are too big. He did a preoperative  
13 report on the first operation and, guess what, that's  
14 what it said and on the second -- at the end of the  
15 first operation, he did a post-operative report,  
16 confirming.

17 But the most important thing, -- most  
18 important thing I found from Dr. Helbig, besides the  
19 fact that he did an acromioplasty, which is also  
20 cutting your bones out and that the man was suffering  
21 from tendonitis and arthritis as a first surgery, the  
22 one thing that I found so telling is that he said, I  
23 suspect a rotator cuff tear, right, and medical  
24 records, rotator cuff intact -- intact. He didn't say  
25 it was half split, full split, partial split. Intact,



1 four months post-accident.

2           And remember, there were three different ways  
3 we examine somebody. We do a clinical examination  
4 where we pull and twist and turn and then if we're not  
5 too satisfied, we go out and we get film studies, MRIs,  
6 and then if we're still not too satisfied, we go in  
7 with the camera and we go right into that shoulder, see  
8 what really is bothering this person and they look  
9 right at that shoulder, right at that rotator cuff.  
10 You can't get any better than that and he says, no  
11 rotator cuff, fully intact. That's after the first  
12 surgery.

13           So he's got arthritis. That's what they  
14 worked on. Biceps tear, nothing, no treatment. And I  
15 asked him about the function of the biceps tendon.  
16 Supination and Dr. Decter said the same thing,  
17 supination. If he's an electrician, you know what,  
18 he's probably got a problem because you have a tough  
19 time turning that screwdriver. You don't have a tough  
20 time now.

21           No treatment was recommended by Dr. Helbig.  
22 No surgeries were performed. No referrals were given  
23 to him to go see another doctor, who could help him out  
24 because there was nothing to be done, but there really  
25 was no effect on his day-to-day living.

1           Now, if you'll remember, Dr. Helbig talks  
2 about 110 physical therapy visits over the last four  
3 years, and it sure as heck ain't three times a week.  
4 Is it? It sure as heck ain't two times a week. Is it?  
5 Maybe it's every, I don't know, four years, 48. On an  
6 average, maybe every two weeks. And don't forget,  
7 there's got to be gaps, right. And what Dr. Helbig  
8 said was, he went back to work, remember? He went back  
9 to work and he worked a little bit. I don't know if  
10 you recall that testimony, but that's what Dr. Helbig  
11 said. He went back to work and just worked a little  
12 bit. Mr. Munoz even talked about it, but he worked.

13           And low and behold, he goes back to see the  
14 doctor. Now, he's got issues and he gets sent for a  
15 second MRI and that MRI shows trauma, edema, fluid,  
16 something happened. Film studies say something  
17 happened and it says, likely post-after traumatic. So,  
18 now, Dr. Helbig has to do surgery on him.

19           Before we get to the surgery, the one good  
20 thing about film studies, the radiologist will look at  
21 them and read them. They don't have a dog in the race.  
22 They don't know anything about a lawsuit. They don't  
23 know anything about a person asking for money. All  
24 they know is they read a film. It's incredibly  
25 objective. Yes. It is open to interpretation, no

1 question about that. But for the most part, it is, as  
2 we say, what it is and those radiologists looking at  
3 that second MRI said, likely post-traumatic.

4           How? It wasn't there the first time. When  
5 he had an MRI two something years before, nothing in  
6 there about post. Don't you think in the four-month  
7 gap between the first -- no -- between the three weeks  
8 after the accident, something would have shown that he  
9 had trauma in there like it was in the second time,  
10 post-traumatic? No. Not here.

11           So he goes in and what does he do? He does  
12 three things, mainly three things. This is the second  
13 surgery now. He does more of an acromioplasty.  
14 Remember? He had to take more bone out. Why? He's  
15 got arthritis. He's had it for years. It's still  
16 bothering him. He does a distal clavicle resection.  
17 Remember, Dr. Decter really talked about it this  
18 morning. You take a piece of bone out. Why? There's  
19 too much bone.

20           Basically, what he did the second surgery is  
21 what he did the first surgery. He just took bone out.  
22 Now, he sees a rotator cuff, right? He fixes it. The  
23 guy goes in, he's got rotator cuff. After the MRI, he  
24 says, post -- likely post-traumatic. He goes in, sews  
25 it up, we're done, right? And he's still trying to

1 say, well, I must have missed it. How do you miss it?  
2 You didn't miss it. It wasn't there. You can't argue  
3 and you can't talk about what you didn't see because it  
4 wasn't there, that's why. He didn't have a rotator  
5 cuff the second time, and so that surgery doesn't  
6 count.

7           Now, he went on the stand and he talked about  
8 the fact that there were \$104,000 in medicals on this  
9 case. He said, they were all related. Do you really  
10 believe so? I should have crossed him and I didn't.  
11 Well, if the first surgery is for arthritis, that's  
12 coming off the top, all right? If you have physical  
13 therapy after the first surgery, that's coming off the  
14 top, right?

15           If you have a second surgery that shows that  
16 he had a trauma and he had a rotator cuff that wasn't  
17 there the first time after the accident, that comes off  
18 the top, too, because they're not related. So the  
19 defendants should not be responsible for what they did  
20 not cause.

21           We can always argue about the value or agree  
22 as o the value of numbers on cost of things. That's  
23 fine. But to make someone pay for what they didn't  
24 cause or to make them pay for what was not related to  
25 maybe what they did cause, but it's not related. You

1 can't ask him to pay for it, and so that number that's  
2 on the verdict sheet is an imaginary number and if you  
3 find that my clients are responsible, any part of this  
4 case, that number comes way, way down, because you  
5 can't ask them to pay what they did not cause.

6 I'm almost done because, now, I'm going to  
7 talk about my side. Okay? The first guy up there,  
8 Joel Mella, all right? Joel was up there for two-and-  
9 a-half days, right? But we know now all of a sudden  
10 that the plaintiff changes his testimony because he  
11 knows Mr. Mella is sitting out there and he knows what  
12 he's going to say. He's going to say, I didn't fall.  
13 I can't get up there and say. He's going to say, I  
14 didn't fall. I can't get up there and say I fell  
15 because they're going to believe Joe Mella and I think  
16 they did.

17 He was with him when he fell and he said to  
18 him, look, we've got to go tell somebody. And you know  
19 what, Mr. Munoz, to his credit said, I'm going to try  
20 to work it out. Just what Mr. Mella said, he's going  
21 to try to work through it and he didn't, but he stayed  
22 the entire day and then the next morning, he realized,  
23 you know what, I had better tell somebody because I  
24 know that when I went to my orientation, they told me,  
25 I have to tell somebody and Joel told him that on the

1 day of the accident. He said, we've got to tell  
2 somebody. You've got to tell somebody within an hour,  
3 and he decided not to. And then later, he tried to  
4 cover it up by saying, well, it happened at 3:20 in the  
5 afternoon. There was no one around, putting Joel in  
6 danger. Really. He was going to throw Joel under the  
7 bus because Joel was with him.

8           Now, Joel wasn't challenged, was he, on what  
9 he saw? The only thing that Joel was challenged on  
10 was, well, you were the foreman. No. Not at the time.  
11 I'm a foreman now. I was a foreman in '14 but not at  
12 the time of the accident, and I corrected it on what we  
13 call redirect, okay? He was also challenged on --  
14 well, that's what it was. Okay?

15           The next person, so you believe Joel because  
16 he didn't have an axe to grind. Cooper is not in the  
17 case. He's a fellow Union member. He says, look, this  
18 is what I saw. The guy didn't fall down. I told him  
19 to go to report it and he didn't. Eventually, they  
20 did. The next day, Mr. Munoz did what he was supposed  
21 to do.

22           Now, Mr. Paino, Steve Paino, shaved head guy  
23 standing up there, sitting up there, he -- he's the  
24 head of Paino Roofing, okay? And he wasn't challenged,  
25 but they challenged him on it. I mean, you figure that

1 somebody would have said, what is this all about? No.  
2 Nobody said anything. Nobody asked him any questions  
3 at all. The only thing they asked him about was they  
4 talked about whether it was a depression.

5           Steve is the one who said -- and we talked  
6 about the top opening, four inches around or diameter.  
7 I was trying to remember math when I was a little kid.  
8 Four inches in diameter, it's across the circle, right?  
9 And how deep? An inch-and-a-half. That's all this is.  
10 This isn't a hole down to the next floor. It's a drain  
11 underneath. It's an inch-and-a-half by four. I submit  
12 to you, an inch-and-a-half down goes onto a drain on a  
13 membrane. It's Styrofoam. Not (indiscernible) --

14           And there was a slow ball around it. How do  
15 you not know -- going back to Mr. Munoz'  
16 responsibility, how do you not know you're walking  
17 towards something when the whole thing starts to tilt  
18 down because that's where a drain is? You had to have  
19 known. You had to have felt it. He just disregarded  
20 it. That's what he did.

21           One of my favorite witnesses, Bob Beardsley,  
22 a big bear of a man, right? A little rough and tumble,  
23 a little rough around the edges. Forty years in the  
24 business as a safety -- site safety manager, writes the  
25 safety book for the company, teaches OSHA classes and





1 orientation, a packet, but you fired him. That's all  
2 they -- that is all they went after him on, not you ran  
3 a lousy ship, not that you didn't do your inspections,  
4 not that you should have done this, not that this was a  
5 better idea, you fired him. That's what we call  
6 collateral. It's not to his testimony. He did not  
7 challenge his testimony whatsoever.

8 My final witness, Dr. Decter. Dr. Decter you  
9 saw on the stand. Remember, in the opening statement,  
10 I said to you, you're going to hear about Dr. Decter,  
11 that he makes decent money, okay? He should. He's a  
12 doctor. Okay. We would all be doctors otherwise.

13 So he comes in. He owns his company. He  
14 sells the company. Yeah, he does litigation, no  
15 different than Merst McKissick (phonetic), right, not  
16 different than Mr. Gallagher, right? Except same  
17 thing, Dr. Decter in his deposition -- and I remember  
18 saying to you, I hope you remember my request of you,  
19 never, ever was challenged on a medicine ever, not one  
20 question on the medicine, not one.

21 How much money do you make? Did you ever  
22 talk to the guy before? Did you talk to his physical  
23 therapist? Did you talk to Dr. Helbig? No. Did you  
24 talk to him again? Did you follow up on it to make  
25 sure he's okay? No. How about, your findings are this

1 and this and this and they're inconsistent with the  
2 accepted medical -- in the field of medicine, right?  
3 Never asked him that.

4           He did 3,000 or 4,000. I just want you to  
5 think about that. He did 3,000 or 4,000 shoulder  
6 surgeries. The man knows his shoulders. Okay? And he  
7 told you that the first time that he gave an opinion,  
8 he causally connected and said that this accident  
9 caused probably the need for the shoulder. He said  
10 that, shoulder surgery, the first one. And then when I  
11 said to him, wait a minute, your belief is that what,  
12 he fell. What if he didn't fall? Now? No. No. No.

13           How about the second surgery? He never  
14 connected the second surgery because he said, remember  
15 we talked about the rotator cuff and he said the  
16 rotator cuff wasn't there the first time. It can't be  
17 there the second time and say it's from the first  
18 accident, the accident.

19           The facts that he was given, as they changed,  
20 changed his opinion. He's entitled to do that. And  
21 weigh in his opinion and testimony given to you was  
22 based upon the medicine but, more importantly, logic.  
23 Okay? More importantly, logic. And I -- I -- I -- he  
24 and Dr. Helbig admit, arthritis existed the first time.  
25 He had arthritis, preexisting. They agreed on that.

1 The difference was that Helbig says that the rotator  
2 cuff was related. I don't know how because he couldn't  
3 find it on the first time.

4 Now, -- so I'm done with the witnesses, so  
5 I'm ready to close and I'm ready to finish up.  
6 Remember I said in the beginning, the work area was not  
7 dangerous. It's not dangerous or negligent. It's  
8 plain to see it's not a violation. He should have seen  
9 it, end of story. Wide open. It didn't happen the way  
10 he claimed it. We got that straight. No injuries from  
11 this accident except for his bicep tendon, which he  
12 never repaired.

13 So I believe it's not dangerous. It's not  
14 dangerous. It's not dangerous. It's open and obvious.  
15 It's not negligence. Paino was not negligent. L.P.  
16 Ciminelli is not negligent. They ran a good ship.  
17 They ran a good site, 2,000 people.

18 MR. CLARK: Judge, objection.

19 THE COURT: Let me hear the rest of it. The  
20 objection is noted.

21 MR. GULINO: Surgeries, he didn't fall.  
22 That's where the case collapses, right? He didn't  
23 fall. It was his entire claim. If he fell, the  
24 surgeries are connected. If he landed on his shoulder,  
25 he landed on his arm, it's connected. He didn't.

1           Third, the meds, past medicine, past medical  
2 history. The vast majority of what he had was a  
3 preexisting condition. Arthritis in the shoulder, it's  
4 not part of this accident. It's not part of this claim  
5 because it wasn't caused by anyone except nature and  
6 his work activities.

7           Finally, his wages, past wages. He's asking  
8 for past wages. With what? One pay stub. No. The  
9 Union didn't come in. The Union could have gave you  
10 the records. You could have (indiscernible). You  
11 would have been able to and say, you know what, here  
12 you go, Washington. This is the amount of money that  
13 you were making. This is the amount of money that you  
14 can't -- that you lost as a result of this accident and  
15 passed. We'll give it to you, but he doesn't and that  
16 tells you something. That tells you that the evidence  
17 wasn't there. He's making a claim, but he can't prove  
18 it and if he can't prove it by a preponderance of the  
19 evidence, more likely than not, he doesn't get  
20 anything.

21           So in conclusion, I do want to thank you for  
22 your attention. I know it's a little warm in here. I  
23 know some of the stuff gets a little technical, but it  
24 really doesn't because at the end of the day, the thing  
25 that we always look at, at the end of the day, the

1 thing that we need and we use more than anything else  
2 is common sense and everybody has got common sense.  
3 Thank you very much.

4 THE COURT: Thank you, Counsel. Mr. Clark?

5 MR. CLARK: Yes, Judge. Good afternoon,  
6 everyone. I, again, want to thank you guys for your  
7 time and your efforts. So what are we supposed to do,  
8 meaning what you guys supposed to do? When you go into  
9 that jury room, you're going to have three jobs to do.  
10 First is to decide the case. If everything that you  
11 heard here in this courtroom is okay with you, as  
12 citizens who represent the judiciary, that is what you  
13 have to decide.

14 So when you guys started out when you walked  
15 in for the first time, you were sort of like, you know,  
16 you were private citizens. But when you got sworn in  
17 to be jurors, you became something else. You became  
18 representatives of this community and the  
19 representatives of the judicial system for this time  
20 and in this case. You became much more. That's why we  
21 always stand when you guys walk in because of that. So  
22 you have an enormous responsibility here in this case.  
23 This case is very important.

24 The second thing that you have to do in the  
25 jury room is you have to follow the instructions that

1 Judge Carter gives to you about the case. That is  
2 critical. You have to decide the case. Judge Carter  
3 is going to give you a basic set of instructions and  
4 rules, and it's very important that you follow those  
5 and don't inject things in the outside to decide the  
6 case, and that's important because all cases are  
7 different. Injuries are different, the way people  
8 react to injuries and to hazards on job sites is all  
9 different. So it's important that you follow the  
10 instructions of the Court.

11           If any of the jurors are not following the  
12 instructions and bringing stuff in from the outside or  
13 stuff that's not supposed to be considered, you guys  
14 can report that to the Judge. We don't expect that  
15 will happen, but you should just know that you're able  
16 to do that.

17           And the third thing you guys are going to  
18 have to do in the jury room is you're going to have to  
19 explain the way you feel about your votes on the jury  
20 verdict sheet and everyone is going to get -- you know,  
21 everyone is going to have a voice and have a chance to  
22 be heard.

23           So what I'm going to do now is kind of point  
24 to some evidence in the case, some highlights of the  
25 evidence in the case to help you guys in your decision

1 making.

2           When you go into the jury room, -- why don't  
3 we go to the next one -- it's the vote on each of the  
4 questions has to be 6-0 or 5-1. If you have a juror  
5 that doesn't agree, you still go to the next question  
6 and that juror will still participate in the questions.  
7 You're going to have about nine questions or so that  
8 will be on the verdict sheet. All right?

9           There's a burden of proof in these cases, and  
10 you know, it's the criminal -- you can go to the next  
11 one. In TV, you know, criminal, it's beyond a  
12 reasonable doubt. But this is a civil case, so it's  
13 different. The burden of proof is preponderance of the  
14 evidence and, basically, what that means is more likely  
15 right than wrong. So, basically, on any issue, you put  
16 the -- you put all the issues on the scales of justice  
17 and if the one weighs ever slightly in favor, that's  
18 all -- that's the burden of proof.

19           So when you're going through the questions  
20 and talking about the things in the case, like did he  
21 injure his shoulder and if a juror says, you know, I'm  
22 just not sure, just remind him, so you guys can move  
23 through the process that we're not here to be sure.  
24 We're just here to be if it's more likely right than  
25 wrong, is that probably the case. So all those

1 questions you guys ask and things you talk about, it's  
2 probably is how you look at it.

3           And then just going to the next one, there's  
4 also going to be questions on the thing, was it a  
5 proximate cause meaning was it a substantial factor in  
6 causing what happened and it's a proximate cause, not  
7 the proximate cause. Basically, what that is, did one  
8 thing cause the other. So that's the other thing you  
9 should know about.

10           As I said, you know, no two cases are the  
11 same. That's why we don't want to bring in stuff from  
12 the outside. People respond to injuries different, you  
13 know, especially for some of the younger guys really on  
14 the jury. When you hit 40, things change in the way we  
15 respond to injuries and that's why you have to look at  
16 this case based on just this case, not everything from  
17 the outside.

18           So let's just -- let's just -- let's just  
19 start what this case has really been about from the  
20 overall. You heard from Vincent Gallagher in the case,  
21 and what this case -- he was most grateful to the  
22 hundreds of workers whose injuries and deaths he's  
23 investigating, which have taught him ways to prevent  
24 reoccurrences. He prays that he never forget the  
25 lessons learned from their tragedies and that this book



1 provide some insight for others who serve workers to do  
2 a better job.

3           Isn't that really the starting point for  
4 everything that we're doing here in this case? And you  
5 as representatives of the community get to decide  
6 whether it was proper what happened here. If this is  
7 the kind of thing that you think is acceptable to you,  
8 you can say that's fine with us and you can say so very  
9 simply by on those questions, saying the defendants  
10 were not negligent. But if it's not okay with you what  
11 happened here, then you move onto the jury sheet.

12           So we start with the basic safety rules that  
13 we talked about, basic safety rules to prevent needless  
14 injury to workers and Gallagher talked about these  
15 things. OSHA needs employers and contractor,  
16 subcontractors, and under OSHA, the prime contractor  
17 has all the responsibility of an employer on a job site  
18 that they run.

19           But what this really comes down to is, the  
20 purpose of OSHA and all the rules we've been talking  
21 about is to furnish employees a place of employment,  
22 which are free from recognized hazards that are likely  
23 to cause serious injury or death. That's really the  
24 starting point. You can go to the next.

25           And then we go to the specific rules, the

1 employer, which in this case means the general  
2 contractor, Ciminelli, and also, Paino Roofing, that  
3 the working and walking surfaces where they have to  
4 walk have to be strong enough to support the workers  
5 that are walking on it and that's an important basic  
6 rule. Then we go to the next one. Then they have to  
7 be protected from tripping in or stepping into holes,  
8 including skylights by covers.

9           Now, this is the thing on this case. You  
10 know, the OSHA rules are about hazards and preventing  
11 hazards. These type of basic safety rules are to  
12 prevent injuries from people stumbling, falling, some  
13 people that are older carrying a lot of materials,  
14 carrying a lot of heavy equipment on them, and it's  
15 also to prevent workers these same exact rules from  
16 falling through skylights.

17           That's why these rules are very, very  
18 important in these cases, and the covers have to be  
19 strong enough to support workers, their tools and  
20 materials, which is why throwing a piece of plastic  
21 material, that rubber over there, doesn't fit the rule.  
22 And a hole is a gap or a void two inches or more. It  
23 is lease dimension in a floor, roof, or other working  
24 surface. Let's go to the next rule.

25           So here's your first question in this case.

1 You're going to have the jury verdict sheet. The first  
2 question is going to be, was L.P. Ciminelli negligent  
3 for failing to properly manage safety on the job site?  
4 So let's go to the next one, for failing to follow the  
5 basic safety rules.

6           So we go to their safety manual and it echoes  
7 the responsibility. The corporate team is responsible  
8 for the safety, well being, and safe work conduct of  
9 individuals on the site, and the company will maintain  
10 safe and helpful working conditions. You're going to  
11 have all this evidence in the jury room, and I just  
12 want to walk through it with you for a bit. Let's go  
13 to the next one.

14           Safety and job rules that are mandatory for  
15 all. These safety and job rules are only minimum  
16 requirements. They're the minimum thing that has to be  
17 done to meet a basic safe workplace. Let's go to the  
18 next one.

19           The echoes, again, 1926, which is that the  
20 contractor is ultimately responsible for the safety of  
21 their own employees and any of their subcontractors on  
22 the site. It is the overall safety. Not only does  
23 Gallagher say it in his book but L.P. Ciminelli says it  
24 in their own safety manual.

25           Listen, I've got to warn you guys of

1 something. I did this PowerPoint slide. I worked  
2 yesterday with Lazaro. I think he got to the office at  
3 9 a.m. and we left about 11:00 last night, and he does,  
4 Jerry, don't make it death by PowerPoint and then  
5 Andrea this morning goes to me in the hall, she goes,  
6 Jerry, are you kidding me, you have 75 slides? I said,  
7 look, I'll go through them fast. I get it. So I'm  
8 warning you a little bit, I've got a lot of slides but  
9 I'm going to rip through them quick, okay, because this  
10 is very, very important. The questions that are here  
11 for you guys is very important, and this case is very  
12 important. It means a lot. So I'm going to try to rip  
13 through these quick but not talk too fast. Let's go to  
14 the next one.

15           Now, specific worker safety rules in their  
16 safety manual. It's everyone's responsibility to  
17 comply with them. Good housekeeping has to be  
18 maintained. They have to maintain all their areas  
19 safely. Let's go. Next. Good housekeeping prevents  
20 accidents, another basic safety rule in their manual,  
21 which is from the OSHA regulation right there. Next.

22           Look at this one, construction site safety  
23 appraisal checklist. You walk around the job. Okay.  
24 We're safe here, we're safe here, we're safe here.  
25 Barricades or covers installed on holes two inches or

1 more. That's right in their own safety manual. Let's  
2 go to the next one.

3 Supervisor Beardsley. Question, again, how  
4 large, again, did you say that hole was on the roof?  
5 I'm going to say six inch diameter. Go back. Two  
6 inches is the threshold. Go to the next.

7 Now, do you think someone walking on a roof  
8 possibly carrying materials as workers do, do you think  
9 a six-inch hole that is covered by a rubber membrane,  
10 do you think that is a hazard as a safety site manager?  
11 It would not raise any overt concern to me. No. So on  
12 the question about whether or not they violated their  
13 basic safety rules, were they negligent, I think  
14 everything speaks for itself. Let's go to the next.

15 Let's talk about Paino Roofing. Were they  
16 negligent? That's going to be the next question on the  
17 verdict sheet. Were they negligent for either creating  
18 the dangerous condition or making it worse or failing  
19 to make it safe? When we say fail to make it safe,  
20 we're just saying, put a piece of plywood down, write  
21 the word whole on it, write the word danger on it, or  
22 at least put a piece of plywood down, put two cones  
23 down, for Pete's sake, just put some buckets down to  
24 warn these guys. You have to keep in mind, it was this  
25 worker's first time in this area. It was this worker's

1 first time on this roof. And this case is much bigger  
2 than any of us here and than any one worker because  
3 these rules are very important to be followed. Let's  
4 go to the next.

5           In their subcontract, okay, go to the next  
6 page in their contract. The Paino Roofing is solely  
7 responsible for the safety of its work to perform all  
8 the work in a safe and responsible manner. Let's go.  
9 In their own safety manual. Go to the next. You must  
10 work to make every workplace safe by detecting and  
11 correcting unsafe working conditions. Next.

12           They have a safety inspection form. They're  
13 supposed to make sure that walkways, floors, and work  
14 areas are properly maintained. Let's go to the next.  
15 We ask Paino Roofing, would your workmen leave this in  
16 this condition that you see here? The answer is, yes.  
17 Let's go to the next.

18           We know Paino Roofing was up there in the  
19 days before doing work. You're going to have these  
20 work forms. They were there on May 7. Keep going.  
21 They were there on May 3rd, Paino working on the roof,  
22 working on the roof on April 25th. The next one should  
23 say, April 26th. Keep going. Good.

24           So we get to the day of the incident. It's  
25 the worker's first time on the roof. Now, the big

1 thing in this case is you guys heard from Vince  
2 Gallagher, former OSHA official and all the things he  
3 talked about. You didn't hear anything from any  
4 defense expert. They didn't bring in any engineer.  
5 They didn't bring in anyone to say that they didn't do  
6 anything wrong and, really, also, they didn't bring  
7 anyone into say the worker in this case did anything  
8 wrong.

9           But then they come here and they're trying to  
10 argue, oh, it's his fault, it's his fault, but they  
11 didn't bring anything in about that and if you remember  
12 from Mr. Gallagher's testimony, he was saying he was  
13 relying on what Beardsley said where he was  
14 specifically asked, did the worker here violate any  
15 safety regulations and the answer was, no.

16           So the question on the verdict sheet about  
17 whether or not the worker did anything wrong, you know,  
18 isn't it convenient in a case like this to blame the  
19 worker, to blame the guy that really has got no choice  
20 but to carry his buckets, bring his tools as best he  
21 can and go to the job site. So I think the question on  
22 there as to whether or not the worker was negligent  
23 should be answered, no. Which number are we up to?  
24 32? Okay.

25           The other question, too, is did he know about

1 the hazard? Did he unreasonably proceed in the face of  
2 a known danger? No. Because he didn't know about the  
3 hazard. And did he have a meaningful choice? He  
4 didn't really have a meaningful choice because he's got  
5 to go and walk to his job site with the tools he's  
6 given. He's got to go this path, if you remember the  
7 testimony, so he's walking right past the area. You  
8 know, maybe he can go a little bit to the left here,  
9 but the area was in the condition it was in. So let's  
10 go to the next one.

11           And, again, he doesn't think that there's any  
12 problem with that six-inch hole, that it doesn't --  
13 isn't a safety hazard. Let's go to the next. Of  
14 course, you're going to have that in there as well.  
15 And, again, Paino Roofing, would your work men leave it  
16 like that and they say, yes, we would leave it like  
17 that. And then we have this broader picture, too, from  
18 the incident scene, which is the next one and, you  
19 know, you question yourself, does this whole thing  
20 comply with their housekeeping rules and the way  
21 they're supposed to keep a job site.

22           Now, going to the next, after -- after they  
23 cut the roof, what's the next step? They're supposed  
24 to put the bonnets on and this testimony was read into  
25 the record, the strainers, the bonnets that cover it,



1 but they weren't on at the time to warn the worker so  
2 that he could see it, and they're supposed to put those  
3 on. So why not put down cones, why not put down  
4 plywood, why not just put down something? If you're  
5 not going to get your bonnets on there yet, why not put  
6 down some buckets. Let's go to the next.

7           Let's talk about this three strikes thing.  
8 Let's go back. Let's talk about the three strikes  
9 issue. Actually, I was sitting the other day and I  
10 read this and this is how I did this. You think about  
11 the irony of this. And we don't have to go through  
12 them right now, but they have an orientation from the  
13 new workers. They give them a set of rules everyone on  
14 the job is supposed to follow. Some of those  
15 orientation rules are work safety rules, some are not.  
16 The safety rules include making sure that holes are  
17 properly covered, making sure there's proper  
18 housekeeping is maintained with the clean as you go  
19 policy. There's also rules about the (indiscernible)  
20 language and reporting to your supervisor foreman  
21 within an hour.

22           It's the worker's first time on the roof. He  
23 gets hurt from a hidden hazard because L.P. Ciminelli  
24 allowed the roofer to leave it in that condition and  
25 they don't guard against it like you just talked about.

1 Joe Mella has the most seniority of the two on the  
2 site. I guess, he wasn't a foreman at the time, but  
3 he's clearly got it with the seniority and, thereafter,  
4 he became an actual foreman.

5 He attempts to report it to L.P. Ciminelli  
6 that day, but no one is around and we made a big to do  
7 about this, which is why we had read this of Mella.

8 Q "Were there any supervisors there?

9 A No."

10 Q "Was there anyone he could have reported the  
11 accident to there?

12 A No."

13 So I thought that testimony was pretty clear.  
14 He said, oh, yeah, but I meant on the roof but like  
15 that doesn't make any sense. Like you thought we were  
16 only asking like in that roof? You know, obviously,  
17 you meant the whole place.

18 So the worker goes back the next day and  
19 reports it to the L.P. Ciminelli supervisor. The  
20 supervisor uses vulgar language about the roofer for  
21 leaving it in that condition. Remember, oh, those  
22 effing roofers.

23 He fires the worker for not reporting it  
24 within one hour because he says, facts get distorted  
25 over time and then he waits two or three days to do any

1 fact finding. Wasn't that kind of whacky? So, you  
2 know, we'll leave it up to you to conclude why the  
3 worker was really fired. And if this whole thing is  
4 okay with you guys as representatives of the community  
5 and representatives of the justice system, you know,  
6 then you can say so by saying, defendants didn't do  
7 anything wrong. But if it's not okay with you and  
8 workers should be treated fairly, then you should --

9 MR. GULINO: Objection. On evidence before  
10 the jury or is this philosophical argument?

11 THE COURT: Be careful.

12 MR. CLARK: Okay. Let's go through these a  
13 bit. So we remember that. Keep going. Look at this  
14 thing in the one list, and this is in the evidence.  
15 Violation of the following is grounds for immediate  
16 dismissal. Consumption of alcoholic beverages or the  
17 use of illegal drugs during work hours, don't have  
18 that. Reporting for work under the influence of drugs  
19 or alcohol, don't have that. You can be fired right  
20 away if there's horseplay or fighting. Don't have  
21 that. Or if you bring a gun to work, we can fire you  
22 right away. Nothing in there about the -- not  
23 reporting it to your supervisor or foreman within the  
24 hour.

25 Let's go to the next one. And then remember

1 this disciplinary procedure that three strikes are out.  
2 First is a written warning, second is the suspension,  
3 and third is termination. It's right in L.P.  
4 Ciminelli's safety manual. It's just in your book.  
5 How come the worker didn't get the benefit of any of  
6 that here? Let's go to the next. Those are the  
7 things. We can keep going there. I already talked  
8 about this stuff. Keep going.

9           Now, here's the thing on this and this is why  
10 it's important and this is why this case is important  
11 and these kinds of cases are important and the thing  
12 that happens here. There's another basic safety rule  
13 you're supposed to follow and it's said right in Paino  
14 Roofing's manual. Go ahead to the next one. Each  
15 supervisor should encourage their employees to  
16 participate in the reporting of any unsafe -- any  
17 safety and health problems without fear of reprisal.

18           Think about that rule. The rule says, you  
19 have to report it to your supervisor or foreman. It  
20 doesn't say, you have to report it to L.P. Ciminelli.  
21 His senior co-worker is right behind him and reports  
22 it. So if, now, they're going to establish a rule that  
23 says, if you get hurt and you don't report it within  
24 one hour, whether you try to or not, you may be fired,  
25 then workers aren't going to report things when they

1 happen for fear of being fired, and that's set out  
2 right in Paino's safety manual.

3           So let's go moving forward in time here.  
4 Workers deserve fair treatment, as we talk about.  
5 Workers should not have to fear reporting issues. So  
6 -- so what is this case about? So you're going to go  
7 through there and you're going to have those questions  
8 and we submit that you should find that L.P. Ciminelli  
9 was negligent, you should find Paino Roofing was  
10 negligent, that it was a cause of the incident.

11           So what's this case really about? Let's go  
12 to the next slide where you talk about damages and  
13 injuries and we start -- and we start right back at  
14 L.P. Ciminelli's safety manual again. It's your  
15 finger, your eye, and your life that we are concerned  
16 about. They are irreplaceable. Your means of  
17 livelihood is diminished, at worst destroyed when you  
18 are disabled. You and your family are the people to  
19 suffer the most. Safety rules help protect you. And  
20 it was the violation of those basic safety rules that  
21 we walked through that they offer no expert testimony  
22 to say, no, that's not true, that's not what the rules  
23 say, and that's not what happened. It's the violation  
24 of those basic safety rules that caused the injury and  
25 damage to the worker here.

1           So -- and the thing is, if they can do this  
2 to Washington Munoz, what happened here, they can do it  
3 to anyone. And you remember the testimony that was  
4 read in from Joe Mella.

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

8           A       No."

9           Q       "This could have happened to anyone?"

10          A       Yes. It could happen to anyone."

11                   And that's why it's important for these basic  
12 safety rules to be followed. So we go into it, into  
13 the injuries and the damage because the next thing  
14 you're going to be asked after you get down to the  
15 parties in the case is about making up for the harms  
16 and losses and an analogy like, you know, when we were  
17 kids, maybe if you played stickball or something, you  
18 know, and you shot to the next yard or something and  
19 you broke a window, you know, your parents might have  
20 marched you right over there and made you, you know,  
21 admit you did something wrong, apologize for it, and  
22 then say, I'm going to make up for it. I'm going to  
23 pay for the window.

24                   And that's the part of the case of my closing  
25 we're now in. We don't have any of that here.

1 Obviously, we have no admission. We don't have any  
2 remorse and you saw that when you heard from Mr.  
3 Beardsley and some of the others, and they don't want  
4 to pay for it, so that's why you guys are here because  
5 we're asking you to make up for the harms and losses  
6 that happened here.

7           So we start with, there was nothing in this  
8 case about any history of shoulder or back injury, and  
9 that's very important in the case. Now, was  
10 defendant's negligence a proximate cause of  
11 Washington's injuries, and let's hear briefly, we got a  
12 clip from Dr. Helbig on that. Why don't you play that,  
13 Lazaro.

14                       (Helbig testimony played for jury)

15           MR. CLARK: Okay. So we go to the MRI film.  
16 That's important because there's no history. There's  
17 no prior back, there's no prior shoulder, and that's  
18 very important and we also know how he was before in  
19 terms of playing sports, tennis, traveling, working was  
20 the big thing that made him, you know, feel proud,  
21 visiting his family in Florida, his daughter playing  
22 soccer and the pride he had with his daughter having  
23 served in the U.S. Army and going back to be an  
24 officer. He had a happy disposition before. He was  
25 energetic and friendly.

1           We look at the first MRI film. Let's play  
2 the clip because, now, hold on one second, on that with  
3 regard to the tear. Go ahead.

4                           (Audiotape played for jury)

5           MR. CLARK: And, you know, -- you know,  
6 Winston -- I don't write this stuff down, by the way.  
7 Winston Churchill, he said something like democracy is  
8 a really kind of -- it's not a great system, but it's  
9 the best that we have and that's what's great about it  
10 because, you know, you can have one side can get up  
11 here and say, even he said, he didn't see the tear the  
12 first time because it wasn't there and then he saw it  
13 the next time and, you know, they can do all these  
14 things.

15                       Like what's great about it is we don't need  
16 like some government board, some guy that's like a guy  
17 in medicine and then they decide cases and important  
18 issues like this. What's great about democracy is you  
19 get everyday people to come in and for a few days or,  
20 you know, represent the judicial system and you guys  
21 get to make those decisions as to who is right. Is it  
22 Dr. Helbig who treated him for like 39 times? We  
23 didn't ask him to go there to Helbig. It's something  
24 he did on his own. So like are you going to -- are you  
25 going to believe Dr. Helbig?



1           Can you fast forward to the exhibit with  
2 regard to Dr. Decter? Are you able to go to that like  
3 real quick? Or are you going to believe someone like  
4 Dr. Decter? I mean, you think about this.

5           So he makes like 900,000 a year, between  
6 800,000 and 900,000 mostly for the defense industry.  
7 He sees the patient for seven minutes. He comes to  
8 conclusions in the beginning without even having seen  
9 all the MRI films. He gets -- he likes doing the  
10 defense stuff so much he actually starts a business,  
11 which he then sells to another big defense industry  
12 business called Exam Works for \$14 million just doing  
13 like this kind of stuff in these kind of cases.

14           So like remember the whole thing we said, you  
15 know, what's probably right? You know, is Decter  
16 probably right or is Helbig probably right? And I'm  
17 just not sure. You know, Decter, he gave a good  
18 appearance. Listen, we're not here to be sure. But  
19 really, I mean, 39 visits, all the treatment he did,  
20 the surgeries. Are we going to -- are we going to  
21 believe the guy who is still very much in that defense  
22 industry, testifies 20, 22 times a year in court for  
23 the defense.

24           So, you know, that's what's great about  
25 democracy, you know? We don't need boards to make

1 these -- these simple decisions, so let's -- let's jump  
2 back.

3           And then he -- yes. That's the one we want  
4 to be on. So, you know, -- and that's what's great,  
5 too. Well, you know, pitchers get this and, hey, you  
6 can get this and then Dr. Decter is like, oh, yeah,  
7 he's a painter. He can't paint anymore. Like it's not  
8 painting. Like, you know, you guys remember the  
9 evidence in the case. He's like, well, yeah, you can  
10 get it from doing a mouse on a computer, all these like  
11 kind of things to take your guy's eye off the ball.  
12 It's almost like they release rabbits in the courtroom.  
13 They want you to chase the rabbit because they want you  
14 to like -- they want you to take your eyes off the  
15 simple stuff.

16           So what he said on there, why that clip is  
17 important because like he's trying to get back to work,  
18 you know? He's going to his physical therapy. He's  
19 doing a work hardening session, so he can get back to  
20 work because that's what he loves to do and that's what  
21 made the progression more and that's what that clip was  
22 just about there in the shoulder. There was no other  
23 trauma. If there was, believe me, they would have  
24 found it.

25           So we go to the next MRI and you recall the

1 testimony about that. Now, oh, but you know, he didn't  
2 fall to the ground. He went here. He went there. You  
3 know, did he go to the right, left, other side. It's  
4 like another -- it's like another rabbit in the  
5 courtroom and there was the argument about, well, he  
6 didn't fall and Helbig said he didn't fall, so  
7 therefore, there's no trauma. So why don't you play  
8 that clip on that, if you can.

9 (Audiotape played for the jury)

10 MR. CLARK: Okay. Then we go to the next.  
11 He had the preoperative condition. I'm not going to  
12 work through it, but this -- this is, he says, accurate  
13 with regard to the medical illustration and the MRIs  
14 and you heard a lot about that and how this was related  
15 to the incident.

16 Go to the next. He has the first surgery.  
17 He tries to treat it conservatively. As he just  
18 explained, that didn't work. Go to the next. He does  
19 an extensive open shoulder surgery with the extensive  
20 incision, puts the screw in there as it shows on the  
21 medical illustration, but it doesn't fix the problem.  
22 Go to the next and he's left with a scar as well.  
23 We're going through this because I want to finish and  
24 go to the next. And then he talked about the back MRI  
25 and, once again, there was no prior history of trauma.

1 He talked about how there's disk bulges and disk  
2 herniations in the lower back, which is pressing on the  
3 thecal sac as shown there, and another thing, too, and  
4 it's important, you know, when you go back -- can we go  
5 back to the Dr. Decter page? The other thing real  
6 quick because I don't want to go through it all, but we  
7 brought in the nurse who was there, you know, and you  
8 remember that thing about, oh, yeah, he didn't have any  
9 feeling and his feet were all fine and then, you know,  
10 you touch it and he says, ow, everywhere, like that, so  
11 you have to weigh the testimony on that.

12           Let's go back. Bring up the next. And then,  
13 you know, one thing they said in the case is they said,  
14 well, you know, you never challenged the medicine. You  
15 never challenged the medicine. Dr. Helbig absolutely  
16 challenged the medicine and we absolutely presented  
17 that on Helbig. But if we're going to have -- you  
18 didn't challenge the stuff, well, certainly, nothing  
19 that Dr. Sociadad had to say in this case was  
20 challenged.

21           And, you know, we're going to talk about --  
22 we're going to talk about the medical bills briefly.  
23 We're going to talk about the wage issue briefly. But  
24 you know what, the thing is like, what the -- the  
25 largest harm in this case is being less of a person,

1 how it changes the person and it changes the person  
2 permanently and here's the thing, you guys. You're  
3 going to be done today or tomorrow, whatever it is,  
4 okay, and this worker in this case, this is the only  
5 eight people or only six people that are going to hear  
6 his case. This is the only chance he gets.

7           From the testimony in this case and  
8 everything you heard, I think it's rather safe to say  
9 that he's not the same guy he was and this is the only  
10 chance that's made here to make this right. He was a  
11 hardworking, active man. Even the defendants admit it.  
12 They said, yeah, he went back to work. He tried to go  
13 back to work even with that and that's commendable.  
14 Well, of course, it's commendable. It's in his blood.  
15 That's who he is. It's his identity. And not being  
16 able to do that is probably the worst harm in this  
17 case, you know, depression, anxiety.

18           And here's the thing -- here's the thing  
19 because I said, oh, he was never fired. I'm like wait.  
20 I'm not saying he was never fired. I'm like, I could  
21 have sworn I heard in this case several times he wasn't  
22 fired. So I went back and I ready the -- because we  
23 have the transcript from -- from -- this is Page 57,  
24 this transcript that you heard of Dr. Sociadad.

25           Q       "Did he tell you he was fired as a result of

1 the accident?"

2           That was the cross-examination. And then the  
3 big question. And would you agree with me that a  
4 person who was fired from a job is less likely to find  
5 another job as a result of being fired? Okay? So like  
6 here's the funny thing about this. It's not funny  
7 because, actually, none of this is funny, particularly,  
8 when we talk about the safety rules. But think about  
9 this for a second. Okay.

10           They fired him. They say, he's depressed and  
11 she says it's because he can't work, the whole thing,  
12 and then on cross-examination, they try to make a point  
13 that, yeah, but isn't he depressed because he can't  
14 find another job because he was fired when we're the  
15 ones that fired him? So like if he's depressed and he  
16 needs this and he needs this treatment here to get him  
17 back to work, to get him functioning, --

18           MR. GULINO: Objection. Objection.  
19 Depression is not related to the firing, Your Honor.  
20 That's not a claim in this case.

21           THE COURT: Objection is sustained.

22           MR. GULINO: I would ask that the jury be  
23 instructed to disregard the comments by Mr. Clark in  
24 that regard.

25           THE COURT: The jury is so instructed. All

1 right?

2 MR. CLARK: So -- so here's the thing about  
3 making up for the harms and losses. This kind of stuff  
4 can give him the chance of going back to work, of  
5 getting better, these future medical-- these future  
6 medicals that she talked about and she explained all  
7 that well and that harm. So we talked about this one,  
8 so let's go to the next one.

9 Now, with regard to the medical bills, do you  
10 remember -- do you remember that Dr. Helbig, who  
11 largely relied on these bills and said these bills are  
12 a fantasy. You know, that's just a made up thing.  
13 Well, they're all here and Dr. Helbig testified that  
14 they're all related for this and Dr. Decter never  
15 commented on these bills at all. But you're going to  
16 have them in the jury room so, if you care to, you can  
17 go through them.

18 Now, one thing about medical bills. It was  
19 mentioned in this case from time to time about, you  
20 know, medical insurance or maybe you're thinking, wait,  
21 isn't this stuff covered by medical insurance. You're  
22 going to hear an instruction from Judge Carter that,  
23 when deciding whether or not to award past medical  
24 bills or future medical bills, you're not allowed to  
25 consider whether or not there was medical insurance and

1 that kind of thing. That's for the Court to deal with  
2 afterwards, and there's mechanisms of law, so that they  
3 can't double dip. There's no double dipping allowed,  
4 so you should not when you guys go back there talk  
5 about medical bills, speculate about that. Double  
6 dipping will not be permitted, and the Judge will take  
7 care of that after your service is done.

8           So we just summed them up for you. The past  
9 medical bills are 104,671.14. And real quick, just on  
10 the future medical bills with regard to the orthopedic,  
11 Dr. Helbig issued this report some time ago, I think it  
12 was about a year ago or so, if I remember, and he said  
13 at that time, it's going to be about 25,000 more to  
14 treat the back injury and if you recall his testimony,  
15 he saw him in June, he saw him in July, and he's going  
16 back, so he's actually starting to dip into this  
17 already in terms of the future medical bills.

18           So the past is 104,671. The future medical  
19 bills, which will help him and potentially help to  
20 treat the harms and losses he sustained in this case  
21 and the total is just under 5-- it's about 520 there,  
22 as you can see. And there's going to be lines on the  
23 jury verdict sheet to make up for those harms and  
24 losses, no different than the mom marching the kid over  
25 to next door and saying, how much does that window



1 cost?

2           Let's talk about the income loss a little  
3 bit, and you're going to have this. It's on there.  
4 The net -- the net is in there, and I believe the  
5 amount comes to about -- the net amount comes to about  
6 1,200 a week after taxes.

7           Now, it's true that it's one pay stub. It's  
8 true it's one pay stub but if you look at it, it goes  
9 to the year to date and as a Union employee, it gives  
10 is. But if you recall the difficulty, you know,  
11 Counsel in his closing statement, you know, we've got  
12 this pay stub, we've got one pay stub and then the  
13 argument is, well, they should have brought in more  
14 papers and they should have brought someone from the  
15 Union to get all those papers in. Could you imagine, I  
16 mean, you saw this trial. You saw how things went with  
17 the evidence and things. Can you imagine if we had to  
18 try to get in more paper and bring in another witness,  
19 how much longer we would be here?

20           And as we talked about, defendants accept no  
21 responsibility, which is why you're here, and we have  
22 Plaintiff's Exhibit 20, which is in evidence in the  
23 case and not only do they not accept the responsibility  
24 here, but it's actually in their -- it's actually in  
25 their booklet, if we can go to that page.

1           When there's a third-party claim, do not make  
2 any comments on negligence or fault. Do not express  
3 any opinion regarding the incident to anyone or offer  
4 to pay for anything, and that kind of policy has really  
5 carried over into this case in the sense that they  
6 don't accept any responsibility, which is why we have  
7 you here as representatives of the community and the  
8 justice system in this case based on the facts that  
9 you've seen should they be required to pay, based on  
10 everything that you've heard in this case.

11           So -- so what's your job? Your job is to  
12 compensate, basically, to balance the scales. You  
13 know, Washington Munoz, this worker was one person  
14 before this all happened, before he went through this  
15 -- this like incredible ordeal and, now, he's different  
16 and your job as jurors is to like balance that back as  
17 best as money can do.

18           Lazaro asked me to put this in here. It  
19 says, the book of proverbs says, speak up for those who  
20 cannot speak for themselves for the rights of all who  
21 are destitute. Speak up and judge fairly, defend the  
22 rights of the needy, and I think that's appropriate  
23 when we talk about balancing the scales of justice in  
24 this case.

25           Now, if we could go back in time to June 24th

1 and you guys have the power to wave a wand and say,  
2 look, this will never happened, he would accept that in  
3 a heartbeat. We would all accept that in a heartbeat,  
4 but we can't go back in time, so we have to deal with  
5 what we have now. We have to deal with the harms and  
6 losses that we have now.

7           So how do you do this? It's a really  
8 important task, okay? So when you're asked -- when  
9 you're asked to give an -- to allow for an award to  
10 make up for the permanent life changes that someone  
11 suffers, like how do you do that? So let me -- I'm  
12 going to give a suggestion to you. It's kind of like  
13 saying, here's a blank piece of paper. Draw a forest.  
14 Well, like how do you do that? I would suggest you  
15 start with one tree. And there is a thing we have in  
16 the law, which is called a time unit analysis, and how  
17 do you get this right. So here's the thing what you  
18 can do.

19           There's a formula. It's not a rule or a law.  
20 It's just a suggestion to you. You do not have to use  
21 it. It's a suggestion that can be made for you as one  
22 way to fill in the blank at the paper about how do you  
23 make up for the permanent harms and losses, the -- the  
24 pain, the suffering, the changing, the different person  
25 he is now, the depression being less in person, the

1 pride. So here's what you can do. You can take -- you  
2 can take it for one hour, okay, you know, the change in  
3 him and what's a fair amount -- what's a fair amount  
4 for one hour to make up for everything that's happened  
5 here?

6           And then you guys go around the horn in the  
7 jury room and you come up with an amount, you know.  
8 What is a fair amount for one hour? And then what you  
9 can do is, you just fill it in right there for one  
10 hour. What's a dollar amount?

11           Now, I'm not allowed to suggest a number to  
12 you. You can only do that. But then once you come up  
13 with that one hour, you can multiply it by 24 hours in  
14 a day and then take that number and multiply it by 365  
15 days in a year and then you have your permanent life  
16 changes verdict for one year and then you can multiply  
17 that by 39 years.

18           Judge Carter is going to in her instructions  
19 talk about a life expectancy. This worker here,  
20 Washington Munoz, is expected to live another 35 years  
21 under government statistic tables and he's already had  
22 another four years. So you take the 35 years and you  
23 take those 4 years and you come up with 39 years for  
24 those permanent life changes, the ones in the past and  
25 the ones going in the future. And once you reach that

1 number, you multiply it by those 39 years and, now,  
2 you've reached -- you've found your verdict for the  
3 permanent life changes, the pain and suffering,  
4 disability, loss of enjoyment of life thing.

5           Now, if you choose to use this suggestion,  
6 after you do that, you might go around the table and  
7 someone might say, well, darn, that's a high number.  
8 I'm just not sure about that. You should remind them,  
9 look, we already agreed at that. Let's not go back.

10           Now, when you do this, there's no discounts.  
11 We talked about, you know, like some people don't like  
12 activist Judges, an activist Judge, he did this, he  
13 didn't follow the law. Well, the other thing we don't  
14 want is we don't want activist jurors. So we don't  
15 want you guys bringing in like, well, I think we should  
16 cap it at that. No discounts. No half measures. No  
17 artificial caps. You're required -- if you find they  
18 were negligent, you're required under the instructions  
19 to fully and fairly compensate for what happened,  
20 nothing more, nothing less. The scales have to be  
21 balanced, no artificial caps.

22           Now, when you do that, you know, some --  
23 let's go back. Some may be high. Some may be low.  
24 But after not too much time, you guys will reach a  
25 consensus, all right, and you can do that and you

1 should all go around the table and take a vote on that.  
2 We don't need the government to put that stuff in  
3 there. That's stuff that you can do.

4           You know, and how does the verdict help?  
5 Because what we're here for is we're here to fix things  
6 that can be fixed, to help things that can be helped,  
7 so fix things that can be fixed is kind of like when  
8 you go back to the medical bills issue, the past and  
9 the future to help things that can be helped. You  
10 know, maybe with that money, he can get some other job  
11 training, so that he can get back to work to what he  
12 loved to do. Maybe he can hire someone to help him do  
13 the things he couldn't do before, you know, to help him  
14 with that, to get the treatment that you've heard  
15 about, to retrain for another career. The verdict can  
16 help those things.

17           But mostly what it needs to do, like we said  
18 here, is to make up for the things that can't be fixed  
19 or helped for the past four years and the next 35  
20 years. So you can look at this and you can say to  
21 yourself, like what's the worst harm in this case? You  
22 know, is it the social isolation? Is it not being able  
23 to go see his daughter that he's so proud of as much?  
24 Is it when he goes to see his daughter, it's not like  
25 it used to be. He's depressed. He doesn't know what's

1 wrong. He feels like less of a man. He feels upset  
2 that he can't help them like he used to.

3           Is it the pain that he goes through? Is it  
4 having to, you know, have difficulty doing a simple  
5 thing like taking his shirt off? Is it having worked  
6 so hard to become a U.S. citizen and get the privilege  
7 of becoming a member of a trade Union, you know, the  
8 AFL CIO, the plasterers affiliated with that, to work  
9 that hard to like be taken away? Like it doesn't  
10 matter now because I can't do that. So what is the  
11 worst harm in the case, and these are the types of  
12 things that you should consider.

13           And as I said, you guys are the only jurors  
14 he's got. You're the only -- you're the only people  
15 that are going to pass on the issues you've seen in  
16 this case about the safety rules, about these hazards,  
17 about the attitudes about them and the non-- you know,  
18 the admission of it all.

19           So next week at 7 a.m. is something you have  
20 to consider. How is he going to be there? We need to  
21 make up for that time. What's going to happen ten  
22 years from now? On July 17, 2027, how is he going to  
23 be because these are the things we ask you to consider  
24 when you're talking about these permanent life changes.  
25 How is he going to be 20 years from now because, at

1 that time, you know, he can't say, you know, I've  
2 raised my hand, it's gotten a lot worse, I've got to  
3 come back now. It doesn't happen. This is his only  
4 shot. This is our only chance and your only chance to  
5 get this right.

6           The verdict has to make up for those moments,  
7 next week, next ten years, next 20 years. So, in  
8 essence, you are making up and you're making up for --  
9 compensating for two lives, the life he has to live  
10 now, which is a life he has not chosen, and it's really  
11 -- it's really -- it's a life that he has not chosen.

12           So, you know, this worker in this case based  
13 on everything you've seen, Washington and his family  
14 will never forget you. You're the only jury that will  
15 ever hear this case. You are the only juror that --  
16 jurors that will attempt to balance the scales of  
17 justice to look at these very, very important safety  
18 rules that were decidedly, you know, violated in this  
19 case. We can't keep your phone numbers and call back.  
20 This is the only chance we get that we have, that  
21 really you have to deliver justice at this moment in  
22 time. I want to thank you, again, for all your time  
23 and wish you the best of luck in your deliberations.  
24 Thank you. Thank you, Your Honor.

25           THE COURT: Thank you, Counsel. So members



1 of the jury, I have about 40 minutes or so worth of  
2 instructions to read to you, and it doesn't really make  
3 sense to try to start it now and then give you time to  
4 deliberate. So that means, you will be asked to return  
5 tomorrow. First thing tomorrow morning, we'll begin  
6 with my charge and then the case is yours.

7 I know that I said we would be done today,  
8 but sometimes, things happen and it's beyond our  
9 control at this point. So get home safely. Please  
10 don't talk about the case. I know I said you were  
11 almost there earlier today, but you're still almost  
12 there. We'll charge in the morning, and then the case  
13 is yours. All right? So have a good evening. We'll  
14 see you tomorrow morning at 8:30.

15 MR. CLARK: Thank you.

16 (Jury excused for the day)

17 THE COURT: You can be seated. Thank you.  
18 Just one -- on the -- on Question Number -- after  
19 Question Number 4, I thought that what was a less  
20 confusing way of addressing your issue was, I just  
21 noticed I had another correction to make, but if you  
22 answer yes to either or both Questions 2 and 4 and 2  
23 and 4 are both the proximate cause questions, proceed  
24 to 5. Otherwise, cease your deliberations and advise  
25 the court officer you have reached a verdict. So I

1 think that addresses the issue.

2 MR. CLARK: Is it 2 and 4 or 2 or 4? It  
3 should be or, right?

4 THE COURT: Right.

5 MR. CLARK: Because 1 could be out and the  
6 other --

7 THE COURT: Right. I said, to either both --

8 MR. GULINO: No. No. It's --

9 THE COURT: Yes. To either --

10 MR. GULINO: They have to say no to both.

11 THE COURT: -- either or both.

12 MR. GULINO: And.

13 THE COURT: No. It's either one of them. If  
14 they've answered yes to either questions or both, 2 and  
15 4, so 2 and 4 are the proximate cause questions related  
16 to Ciminelli and Paino. So if they have answered yes  
17 to either one or both of those in those -- in that  
18 scenario, they would be moving to 5.

19 MR. GULINO: Okay. All right.

20 THE COURT: Make sense?

21 MR. GULINO: Okay.

22 THE COURT: So I think that -- because I read  
23 the way you phrased it and I think it was a little bit  
24 confusing.

25 MR. GULINO: Okay.

1           THE COURT: I thought this was an easier way  
2 to address that issue. So I'll make that correction  
3 and then have the verdict sheet for you in the morning.  
4 Get home safely.

5           MR. CLARK: Judge, I'm going to sit here for  
6 as long as you'll let me. I need about 15, 20 minutes  
7 and then I'm going to e-mail off that comparative  
8 negligence charge.

9           THE COURT: Okay. Okay. All right. So see  
10 you tomorrow morning then.

11           MR. CLARK: Okay. Have a good night.

12                   (Day's proceedings concluded)

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## CERTIFICATION

I, SHERRY M. BACHMANN, the assigned transcriber, do hereby certify the foregoing transcript of proceedings, time from 9:12:37 a.m. to 9:12:52 a.m., from 9:16 a.m. to 9:18 a.m., from 11:11 a.m. to 11:12 a.m., from 11:32 a.m. to 11:58 a.m., from 12:04 p.m. to 12:42 p.m., from 1:57 p.m. to 2:36 p.m., and from 3:22 p.m. to 4:23 p.m., is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

*Sherry Bachmann*

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SHERRY M. BACHMANN AOC #454  
G&L TRANSCRIPTION OF NJ

Date: July 29, 2017