

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MIDDLESEX COUNTY
DOCKET NO.: MID-L-3284-15
A.D.# _____

WASHINGTON MUNOZ,)
)
Plaintiff,) TRANSCRIPT
) OF
VS.) TRIAL
)
L.P. CIMINELLI, and)
PAINO ROOFING CO., INC.,)
)
Defendants.)

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

Date: July 18, 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 H. GULINO, ESQ.
(Nicoletti Gonson Spinner, LLP)
Attorney for the Defendant

Transcriber, Lauren A. Vollmin
G&L TRANSCRIPTION OF NJ
40 Evans Place
Pompton Plains, New Jersey 07444

Audio Recorded
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1 THE COURT: Everyone can be seated. You
2 should have updated verdict sheets on the table and I
3 did receive all of your emails. Thank you so much. I
4 love emails.

5 And I will be charging the comparative
6 negligence charge as requested by the defendant, but
7 also including some language from Fernandez as to the
8 requirement that the jury consider whether or not the
9 worker had a meaningful choice in proceeding with his
10 assigned task in light of a hazard.

11 All the other language as is proposed, that
12 will now be included by the plaintiff. Okay. Let's
13 bring in the jury.

14 MR. CLARK: Judge, I had a comment on the
15 jury verdict sheet.

16 THE COURT: Okay.

17 MR. CLARK: I showed it to defense counsel.

18 MR. GULINO: Yeah, I still didn't understand
19 what you wanted.

20 MR. CLARK: All right. Let's do it together
21 then. So on number three --

22 THE COURT: Okay.

23 MR. CLARK: -- the flow chart on number
24 three --

25 THE COURT: Uh-huh.

1 MR. CLARK: If the answer to question three
2 is no and this is my addition, but answer to two is
3 yes, proceed to question five because if they were to
4 answer two no and three no there would be no reason to
5 continue.

6 THE COURT: If answer to question three is
7 no --

8 MR. CLARK: But answer to two is yes then
9 they would move on to five.

10 THE COURT: Okay.

11 MR. CLARK: Then I had an addition after
12 that, I have an additional sentence that says, "If
13 answer to one or two and three are no stop your
14 deliberations and render your verdict for the
15 defendant."

16 THE COURT: Okay. Say that again. If
17 answer to question --

18 MR. CLARK: If answer to question one or two
19 and three are no stop your deliberations, you have
20 reached a verdict for the defendants.

21 THE COURT: And this is all after question
22 three --

23 MR. GULINO: I object to it obviously,
24 Judge.

25 THE COURT: After question three.

1 MR. GULINO: Yes. In the flow chart.
2 Forget about the machination of one and two and three
3 and four. We don't tell a jury that you have reached
4 a verdict for the defendant. We tell the jury to stop
5 deliberations.

6 THE COURT: Right. I mean, I wouldn't
7 include that language. Just cease your deliberations
8 and return your verdict. So that's the only part that
9 you would object to.

10 MR. GULINO: Yeah, "Stop deliberations."

11 THE COURT: I have to make another
12 correction.

13 MR. CLARK: Counsel, do you have D-37?

14 MR. GULINO: I'll get to it. Fine. She's
15 going to charge them.

16 MR. CLARK: Right.

17 MR. GULINO: They have to ask for the
18 exhibits, they don't get them. They want them, they
19 get them I'm assuming. Am I right, Judge?

20 THE COURT: What is the discussion?

21 MR. GULINO: Mr. Clark wants me -- I'm
22 looking for Exhibit Number 37.

23 THE COURT: Right.

24 MR. GULINO: But he's thinking that when
25 they go in the room, they get all of the stuff with

1 them when they ask for it. Am I wrong?

2 THE COURT: No, they get them. They're in
3 evidence so they go back. All of the exhibits --
4 everything that's in goes in.

5 MR. CLARK: And we're just working on
6 redacting the medical bills. We're penciling sections
7 before we black them out with regard to insurance and
8 --

9 MR. GULINO: Just let me do one thing at a
10 time.

11 MR. CLARK: Yeah, sure.

12 (Recording paused.)

13 (Recording resumes.)

14 THE COURT: All right. Thank you, be
15 seated. Good morning.

16 JURY: Good morning.

17 THE COURT: Members of the jury, now that
18 the evidence part of the trial is over, and you have
19 heard the closing arguments of counsel I am now going
20 to tell you about the principles of law governing this
21 case.

22 You are required to accept my instructions
23 as the law. You should consider these instructions as
24 a whole, and do not pick out any particular part of
25 the instructions and place undue emphasis upon it.

1 Any ideas that you might have about what the law is or
2 should be or any statements by the attorneys as to
3 what the law may be must be disregarded by you if they
4 are in conflict with my charge.

5 Now, as I told you at the beginning of this
6 trial, I sit here as the judge of the law, and as part
7 of this responsibility I have made various rulings and
8 statements throughout this trial.

9 Please do not view any of my rulings or any
10 statements that I have made as clues about how you
11 think I think this case should be decided; are not.

12 My rulings, any statements that I've made
13 are based upon my understanding of the law and the
14 rules of evidence, and they do not reflect any
15 opinions of mine about the merits of this case.

16 Even if you felt that they did, you must
17 disregard what you might perceive to be my perception
18 of this case because it's your role to decide the case
19 and not mine.

20 Now, the lawyers are here as advocates for
21 their clients and in their opening statements as well
22 as their summations they have given you their views
23 about the evidence and their arguments in favor of
24 their client's position. While you may consider their
25 comments, nothing that the attorneys say is evidence

1 and their comments are not binding on you. In
2 addition, you must not decide this case on what you
3 might perceive to be the performance of the attorneys.
4 You sit here as judges.

5 You are judges of the facts. You alone have
6 the responsibility to deciding the factual issues in
7 this case.

8 It is your recollection and your evaluation
9 of the evidence that controls. If the attorneys or I
10 say anything about the facts of this case that
11 disagrees with your recollection of the evidence, it's
12 your recollection that you should rely on.

13 Now, your decision in this case must be
14 based solely on the evidence presented and my
15 instructions on the law. The evidence in this case
16 consists of the testimony of the witnesses that you
17 heard appear both live as well as by way of videotape
18 and some witnesses appeared by Skype.

19 There was also some deposition readings and
20 there are also some exhibits that have been marked,
21 moved into evidence, and you will have them in the
22 jury room when you begin your deliberation.

23 Now, in this case, the plaintiff contends
24 that the defendants, L.P. Ciminelli, Inc., and Pano
25 Roofing Company were negligent in creating and

1 maintaining a dangerous condition in the workplace.
2 He asserts that their negligence caused his fall and
3 resulting injuries and other harms and losses.

4 The defendants have denied that they were
5 negligent. They assert that the injuries claimed by
6 the plaintiff are not as a result of his alleged fall
7 at the workplace. Now, the defendant when we started
8 this case, Countryside Plumbing was in this case.
9 They have been dismissed and therefore, you are to
10 give no consideration to any action or inaction that
11 was taken or not taken by Countryside Plumbing.

12 Now, the burden of proof is on each party to
13 establish their claim by a preponderance of the
14 evidence. In other words, if a person makes an
15 allegation, then that person must prove the
16 allegation.

17 In this action, the plaintiff, Washington
18 Munoz, has the burden of establishing by a
19 preponderance of the evidence all of the facts
20 necessary to prove the following issues; that the
21 defendant, L.P. Ciminelli and Pano Roofing Company
22 with regard to the incident of June 25th, 2013 were
23 negligent and that their negligence was a proximate
24 cause of the injuries, harms, and losses claimed.

25 The defendant, L.P. Ciminelli and Pano

1 Roofing have the burden of establishing by a
2 preponderance of the evidence all of the facts
3 necessary to prove the following; that the plaintiff
4 was negligent and that his negligence was a proximate
5 cause of the incident of June 25th, 2013.

6 We'll talk further about negligence
7 momentarily. Now, whereas here the plaintiff seeks to
8 prove liability as to the defendant, it is the
9 plaintiff's burden to prove that the negligence of the
10 defendant by a preponderance or greater weight of the
11 credible evidence.

12 He must prove not only that the defendant
13 was negligent, but that the negligence was a proximate
14 cause of the accident. The mere happening of an
15 accident provides no basis for liability. Liability
16 must be proven.

17 And because the defendants have charged the
18 plaintiff with negligence, it's their burden to prove
19 that the plaintiff was negligent and that such
20 negligence was a proximate cause of the incident.
21 Defendant must also prove their charge by a
22 preponderance or greater weight of the credible
23 evidence.

24 Now, when we use the term preponderance of
25 the evidence it means that amount of evidence the

1 causes you conclude that the allegation is probably
2 true. To prove an allegation by the preponderance of
3 the evidence a party must convince you that the
4 allegation is more likely true than not true.

5 If the evidence on a particular issue is
6 equally balanced that issue has not been proven by a
7 preponderance of the evidence and therefore, the party
8 having the burden of proving that issue has failed
9 with respect to that particular issue.

10 When I talk about weighing the evidence, I
11 am referring to its capacity to persuade you. I do
12 not mean that you are to count the number of witnesses
13 presented by each side, or measure the length of their
14 testimony.

15 The concept of weighing the evidence refers
16 to its quality and not to its quantity. In order to
17 decide whether the burden proof has been carried, you
18 are to sift through the believable evidence and
19 determine the persuasive weight which you feel should
20 be assigned to it.

21 The right of each party to have the other
22 party bear the required burden of proof is a
23 substantial one and not a mere matter of form. Proof
24 of possibility as distinguished from probability is
25 not enough. When we talk about credible evidence, it

1 means evidence in which in light of reason and common
2 sense is worthy of belief. In order to be believed,
3 testimony should not only proceed from the mouth of
4 credible witnesses, but it also must be credible in
5 and of itself.

6 It must be such that the common experience
7 of men and women can approve as probable in the
8 circumstances. It follows, therefore, that any
9 evidence that is equally balanced the burden of proof
10 has not been sustained.

11 Evidence may either be direct or it may be
12 circumstantial. Direct evidence is direct proof of a
13 fact such as the testimony of an eye witness.
14 Circumstantial evidence which we sometimes call
15 inferences consist of a chain of circumstances
16 pointing to the existence of certain facts.

17 Circumstantial evidence is based upon
18 deductions or logical conclusions that you reach from
19 the direct evidence. So I'll give you an example of
20 both direct and circumstantial evidence.

21 So if a witness were to come into the
22 courtroom, take the witness stand and testify that he
23 or she observed snow falling last night, that would be
24 an example of direct evidence. So the witness made
25 the direct observation of the snow actually falling.

1 On the other hand if that same witness were to come
2 into court, take the witness stand and testify that he
3 or she went to bed, there was no snow on the ground
4 when they went to bed, they woke up the following
5 morning and lo and behold the ground was snow-covered,
6 you could infer circumstantially from that evidence
7 that it had snowed during the night although the
8 witness didn't directly observe the snow falling
9 having gone to bed the night before with no snow,
10 waking up the following morning with snow, you could
11 infer circumstantially it had snowed during the night.

12 You may consider both direct and
13 circumstantial evidence when you're deciding this
14 case. The law permits you to give equal weight to
15 both but it's for you to decide how much weight to
16 give any evidence.

17 In deciding the facts of this case, you have
18 to decide which witnesses to believe and which
19 witnesses not to believe. You may believe everything
20 a witness says or only part of it or none of it.

21 In deciding what to believe you may want to
22 take into consideration the following, the witness'
23 interest, if any, in the outcome of this case; the
24 accuracy of the witness' recollection; the witness'
25 ability to know what he or she was talking about; how

1 reasonable was the witness' testimony; the demeanor of
2 the witness on the witness stand; was the witness
3 candid or were they evasive; was the witness willing
4 or reluctant to answer questions; the inherent
5 believability of the testimony and the presence of any
6 inconsistent or contradictory statements and any
7 explanation given for any inconsistency.

8 If you believe that any witness deliberately
9 lied to you in any fact significant to your decision
10 in this case, you have the right to reject all of the
11 witness' testimony. However, in your discretion, you
12 may believe some of the testimony and not believe
13 other parts of the testimony.

14 You heard from witnesses that were called as
15 experts. Generally, experts can testify only about
16 facts and they are not permitted to offer you their
17 opinion.

18 However, an exception to this rule exists in
19 the case of an expert witness. So where an expert
20 witness possesses the necessary skill, knowledge,
21 experience, or training to offer you an opinion that
22 would be helpful to you in your role as fact finders,
23 the court's allow that type of testimony.

24 An expert witness may be able to assist you
25 in understanding the evidence in this case. I want to

1 emphasize again to point out that the determination of the
2 facts in this case rests solely with you as jurors.

3 In this case you heard from several experts Drs.
4 Thomas Helbig, a Paula Sociedad, and Dr. Edward
5 Decter. They were all called as experts and --

6 MR. CLARK: Judge, Gallagher as well.

7 THE COURT: I'm sorry, and Vincent Gallagher
8 as well. I apologize. Thank you, Counsel.

9 In examining each expert's opinions you may
10 want to consider the person's reasons for testifying,
11 if any, you also want to consider the qualifications
12 and the believability of the expert including all of
13 the considerations that generally apply when you are
14 deciding whether or not to believe any witness'
15 testimony.

16 The weight of the expert's opinion depends
17 on the facts on which that expert bases their opinion.
18 You as jurors must decide whether or not the facts
19 that were relied upon by the expert actually exist.
20 You are not bound by the testimony of an expert.

21 You may give it whatever weight that you
22 deem is appropriate. You may accept or reject all or
23 part of an expert's opinion. It's for you the jury to
24 resolve any conflicts in the testimony of the experts
25 using the same guidelines in determining credibility

1 that I mentioned earlier. There was reference to the
2 expert witnesses perhaps being paid for their
3 services.

4 The fact that an expert is paid in a matter
5 may be something that you want to consider as possibly
6 affecting the believability of the expert; however
7 there is nothing improper in an expert witness being
8 paid a reasonable fee for their work and for their
9 time in attending to court matters.

10 In this case, you heard statements that were
11 contained within reports of experts and those experts
12 were not called as witnesses during the trial. I
13 instruct you as the jury in this case that you are not
14 to consider any such out-of-court statement by a non-
15 testifying expert as substantive proof of the content
16 of these statements.

17 Those statements that were contained within
18 the reports of non-testifying expert which were relied
19 upon by the experts that did testify, may be
20 considered by you for the limited purpose of the
21 witness explaining the basis of their opinion and in
22 your assessing the quality of their testimony and for
23 no other purpose.

24 Testifying experts may rely on out-of-court
25 statements contained in such reports in formulating

1 their opinions if they are of the type that are
2 reasonably relied upon by experts within a particular
3 field in forming opinions or inferences on the
4 subject.

5 Now, negligence may be defined as a failure
6 to exercise in the given circumstances that degree of
7 care for the safety of others which a --

8 (Cell phone rings.)

9 MR. GULINO: Guilty as charged. I'm going
10 to have a talk with her. It's my office. I really
11 apologize, Judge.

12 JUROR: Too late.

13 THE COURT: Okay.

14 MR. GULINO: I'm sorry.

15 THE COURT: All right. So negligence may be
16 defined as a failure to exercise in the given
17 circumstances that degree of care for the safety of
18 others which a person of ordinary prudence would
19 exercise under similar circumstances.

20 It may be the doing of an act which the
21 ordinary prudent person would not have done; or the
22 failure to do that which the ordinary prudent person
23 would have done under the circumstances then existing.

24 By reasonably prudent person, it's not meant
25 the most cautious person nor one who is unusually

1 bold; but rather one of reasonable vigilance, caution,
2 and prudence. In order to establish negligence, it's
3 not necessary that it be shown that the defendant had
4 an evil heart or an intent to do harm.

5 Every person is required to exercise the
6 foresight, prudence, and caution which a reasonably
7 prudent person would exercise under the same or
8 similar circumstances.

9 Negligence then would be a departure from
10 that standard of care. In determining whether
11 reasonable care has been exercised, you will consider
12 whether the defendants ought to have foreseen that
13 under the attending circumstances that the natural and
14 probable consequences of its act or omission to act
15 would have been some injury.

16 It's not necessary that the defendants have
17 anticipated the very occurrence which resulted from
18 its wrong doing, but it's sufficient that it's within
19 the realm of foreseeability that harm, some harm might
20 occur.

21 The test is the probable and foreseeable
22 consequences that may reasonably be anticipated from
23 the performance or the failure to perform a particular
24 act. If an ordinary person under similar
25 circumstances and by the use of ordinary care would

1 have seen the result; that is that some injury or
2 damage would probably result and either would have
3 acted or if it did act would have taken precaution to
4 avoid the result, then the performance of the act or
5 the failure to take such precautions would constitute
6 negligence.

7 So an invitee is one who is permitted to
8 enter or to remain on premises for the purposes of
9 either an owner or in this case an occupier. He
10 enters by invitation express or implied.

11 So the occupiers in this case, L.P.
12 Ciminelli as the general contractor or construction
13 manager and Pano Roofing of -- so the occupier of the
14 premises who by invitation express or implied induced
15 persons to come on to their premises is under a duty
16 to exercise ordinary care to render the premises
17 reasonably safe for purposes of the embraced
18 invitation.

19 Thus the occupier must exercise reasonable
20 care for the invitee's safety. Invitee, meaning the
21 plaintiff. An occupier must take such steps that are
22 reasonable and prudent to correct, or give warning of
23 hazardous conditions or defects actually known to the
24 occupier and of hazardous conditions of defects which
25 the owner by the exercise of reasonable care could

1 discover. So the duty of an occupier premises to make
2 the place reasonably safe for the proper use of
3 invitee requires the occupier to make reasonable
4 inspection of the premises to discover hazardous
5 condition.

6 So if you find that the premises were not in
7 a reasonable safe condition, then the plaintiff in
8 order to recover has to show either there was actual
9 notice for a period of time before the plaintiff's
10 injury to permit the exercise of reasonable care to
11 correct it or constructive notice when that -- or
12 constructive notice.

13 When we use the term actual notice, we mean
14 the occupier here actually knew about this unsafe
15 condition. When we use the term constructive notice
16 we mean that the particular condition existed for a
17 period of time such that the occupier of these
18 premises in the exercise of reasonable care should
19 have discovered its existence.

20 That is to say constructive notice means
21 that a person having a duty of care to another is
22 deemed to have notice if such unsafe conditions which
23 exist for such period of time that a person of
24 reasonable diligence would have discovered them.

1 Now, if you find that the premises was not
2 in a reasonably safe condition, and that the occupier
3 so in this case L.P. Ciminelli or Pano Roofing and or
4 Pano Roofing created the condition through either
5 their own act or omission then in order for the
6 plaintiff to recover, it's not necessary for you to
7 also find that the occupier had either actual or
8 constructive notice of the particular unsafe
9 condition.

10 Now, whether the defendant has furnished or
11 defendants have furnished an invitee, in this case the
12 plaintiff, with a reasonably safe for his use, may
13 depend upon the obviousness of the condition claimed
14 to be hazard and the likelihood that the invitee would
15 realize the hazard and protect against it.

16 So even though an unsafe condition may be
17 observable by an invitee, you may find that an
18 occupier premise is negligence; nevertheless in
19 maintaining said condition when the condition presents
20 an unreasonable hazard to invitees in the
21 circumstances of the particular case.

22 So if you find the defendants were negligent
23 in maintaining an unsafe condition, even though the
24 condition would be obvious to the invitee, the fact
25 that the condition was obvious should be considered by

1 you in determining whether the invitee was
2 contributorily or comparatively negligent.

3 In A proceeding in the face of a known
4 hazard or B, in the manner in which the plaintiff
5 proceeded in the face of a known hazard. So you
6 should consider whether or not the worker, in this
7 case the plaintiff, had a meaningful choice in
8 proceeding with his assigned tasks in light of the
9 hazard.

10 The duty of an occupier premises is to
11 provide a reasonably safe place for the use of its
12 invitee. So where the occupier and again when I use
13 that term I'm referring to L.P. Ciminelli and or Pano
14 Roofing knows of an unsafe condition he or she may
15 satisfy -- they may satisfy their duty by correcting
16 the condition or in those circumstances where it's
17 reasonable to do so by giving warning to the invitee
18 of the unsafe condition.

19 So in this case, there's been some evidence
20 produced as to the worker's safety standard of care in
21 the industry. Such evidence may be considered by you
22 in determining whether or not the defendant's
23 negligence has been established.

24 If you find that the defendants did not
25 comply with the standard, you may find that the

1 defendants have been negligent. However, the general
2 custom in the industry although evidential, as to what
3 is the reasonable standard in such industry does not
4 conclusively establish that the care the defendant was
5 required to exercise in the performance of its
6 operations.

7 Compliance with an industry standard is not
8 necessarily conclusive as to the issues of negligence
9 and does not in and of itself absolve the defendant
10 from liability. The defendant must still exercise,
11 defendants must still exercise reasonable care under
12 all of the circumstances and if you find that the
13 prevailing practices in the industry does not comply
14 with the standard, the defendant may be found to be
15 negligent, notwithstanding compliance with either
16 custom or standard in the industry.

17 So in this case, in support of its charge of
18 negligence it's asserted that the defendant, L.P.
19 Ciminelli and Pano Roofing are responsible for various
20 violations of the Federal Workplace Safety Law known
21 as OSHA.

22 OSHA requires in part that every employer
23 and in this case we're referring to L.P. Ciminelli and
24 Pano Roofing covered on the act to furnish its
25 employees a place of employment which are free from

1 recognized hazards that are causing or are likely to
2 cause death or serious physical harm to its employee.

3 So employer as referred to in the OSHA
4 regulatory provisions is defined as a subcontractor or
5 a contractor. In this case, defendant, L.P. Ciminelli
6 as the general contractor or construction manager and
7 Pano Roofing as a subcontractor for the roofing work,
8 have a joint and non-delegable duty to maintain a safe
9 workplace.

10 If you find the defendant did not comply
11 with these standards, you may either find -- you may
12 find either or both defendants to have been negligent.
13 So if you find that L.P. Ciminelli and or Pano Roofing
14 was negligent, you must find that L.P. Ciminelli and
15 or Pano Roofing's negligence was a proximate cause of
16 the incident before you can find either L.P. Ciminelli
17 or Pano Roofing was responsible for Washington Munoz's
18 claimed injury, losses or harms.

19 It is the duty of Washington Munoz to
20 establish by a preponderance of the evidence that the
21 negligence of L.P. Ciminelli and Pano Roofing was a
22 proximate cause of the incident and the injury, harm
23 or loss alleged to have resulted from their
24 negligence. And so the basic question for you to
25 resolve is whether Washington Munoz's injury, loss or

1 harm is so connected with the negligent actions or
2 inactions of L.P. Ciminelli and Pano Roofing that you
3 decide that it's reasonable in accordance with the
4 instructions I give you that L.P. Ciminelli and or
5 Pano Roofing should be held wholly or partially
6 responsible for the injury, loss, or harm claimed by
7 the plaintiff.

8 By proximate cause, I refer to a cause that
9 in a natural and continuous sequence produces the
10 incident and resulting injury, loss, or harm and
11 without which the resulting incident, injury, harm or
12 less would not have occurred.

13 A person who is negligent is held
14 responsible for any incident, injury, harm or loss
15 that results in the ordinary course from its
16 negligence. So this means that you must first find --
17 you must find that the resulting injury, harm, or loss
18 to Washington Munoz would not have occurred but for
19 the negligent conduct of L.P. Ciminelli and or Pano
20 Roofing.

21 If you find that but for L.P. Ciminelli and
22 or Pano Roofing's negligence, the incident, injury,
23 loss or harm would not have occurred, then you should
24 find L.P. Ciminelli and or Pano Roofing was a
25 proximate cause of Washington Munoz's injury, loss, or

1 harm. Now, if you find that the plaintiff and one or
2 both of the defendants were negligent and proximately
3 caused the injury harms, or losses, then you must
4 compare the negligent conduct or fault of those
5 parties in terms of percentages.

6 You will attribute to each of them that
7 percentage that you find describes or measures their
8 negligent contribution to the happening of the
9 accident. The percentages must add up to 100 percent.
10 You should not allocate any percentage to any party
11 who you have found was not both negligent or at fault
12 and a proximate cause of the accident.

13 I'll explained to you a fact of these
14 percentages. In order for the plaintiff to recover
15 against any defendant, the plaintiff's percentage of
16 negligent conduct or fault must be 50 percent or less.
17 If the plaintiff's percentage is more than 50 percent,
18 he will not recover damages at all and your
19 deliberations are concluded and you shouldn't make any
20 determination on damages.

21 A plaintiff whose percentage is 50 percent
22 or less will recover from any defendant whose
23 negligent conduct or fault you have found was -- whose
24 negligent conduct or fault you have found was a
25 proximate cause of the accident.

1 So I'll now instruct you on the law that
2 governs damages in the event that you decide the issue
3 of liability in favor of the plaintiff. The fact that
4 I give you instructions on damages should not be
5 considered any view of mine about which party is
6 entitled to prevail.

7 Instructions on damages are given for your
8 guidance in the event that you decide that the
9 plaintiff is entitled to a verdict. I am required to
10 provide instructions on damages in all cases where the
11 trial includes a claim for damages.

12 So if you find for the plaintiff, he's
13 entitled to recover fair and reasonable compensation
14 for the full extent of the harm caused, no more and no
15 less. Fair and reasonable compensation means to make
16 Washington Munoz whole for any permanent or temporary
17 injury and the consequences of that injury or injuries
18 caused by the defendant's negligence.

19 The law on compensation recognizes that a
20 plaintiff may recover for any disability or impairment
21 that he suffers as a result of his injuries.
22 Disability or impairment means worsening, weakening,
23 or loss of faculties, health, or ability to
24 participate in activities. The law also permits a
25 plaintiff to recover for the loss of enjoyment of

1 life, which means the inability to pursue one's normal
2 pleasure and enjoyment.

3 You must determine how the injury or
4 injuries has deprived the plaintiff of his customary
5 activities as a whole person. This measure of
6 compensation is what a reasonable person would
7 consider to be adequate and just under all of the
8 circumstances to compensate -- circumstances of the
9 case to make the plaintiff whole for his injury and
10 its consequent disability, impairment, and loss of
11 enjoyment of life.

12 The law also recognizes as proper items for
13 recovery the pain, physical and mental suffering,
14 discomfort and distress that a person may endure as a
15 natural consequence of the injury. Again, it is the -
16 - this item of recovery is what a reasonable person
17 would consider to be adequate and just under all of
18 the circumstances to compensate the plaintiff.

19 So here are some factors that you may want
20 to take into account when fixing the amount of your
21 verdict for disability, impairment, loss of enjoyment
22 of life pain and suffering.

23 You may consider the plaintiff's age, usual
24 activities, occupation, family responsibilities and
25 similar relevant facts in evaluating the probable

1 consequences of any injuries you find that he has
2 suffered. You are to consider the nature, character,
3 and seriousness of the injury, discomfort, or
4 distress. You must also consider their duration as
5 any verdict you make must cover the harms and losses
6 suffered by the plaintiff since the accident to the
7 present time and even into the future if you find the
8 plaintiff's injury and its consequence have continued
9 to the present time or can reasonably be expected to
10 continue into the future.

11 The law does not provide you with any table,
12 schedule or formula by which a person's pain and
13 suffering, disability, impairment and loss of
14 enjoyment of life may be measured in terms of money.

15 The amount is left to your sound discretion.
16 You are to use your sound discretion to attempt to
17 make the plaintiff whole so far as money can do so
18 based upon reason and sound judgment, without any
19 passion, prejudice, bias, or sympathy.

20 You each know from your common experience
21 the nature of pain and suffering, disability,
22 impairment, and loss of enjoyment of life and you also
23 know the nature and function of money.

24 The task of equating the two so as to arrive
25 at a fair and reasonable award of compensation

1 requires a high order of human judgment. And so for
2 this reason, the law can provide no better yardstick
3 for your guidance than your own impartial judgment and
4 experience. You are to exercise sound judgment as to
5 what is fair and just and reasonable under all of the
6 circumstances.

7 You should of course consider the testimony
8 of the plaintiff on the subject of his discomforts and
9 you should scrutinize all of the other evidence
10 presented by both parties on this subject including
11 the testimony of the doctors and after considering the
12 evidence, you shall award a lump sum of money that
13 will fairly and reasonably compensate the plaintiff
14 for his pain, suffering, disability, impairment, and
15 loss of enjoyment of life proximately caused by the
16 defendant's negligence.

17 Okay. Now, in this case when you are
18 considering an award of damages, you are not to
19 speculate, or consider whether or not the plaintiff
20 received either Workers' Compensation benefits. There
21 are mechanisms in place to prevent double recovery by
22 the plaintiff.

23 Now, a plaintiff who is awarded a verdict is
24 entitled to payment for medical expenses which were
25 reasonably required for the examination, treatment,

1 and care of injuries proximately caused by the
2 defendant's negligence.

3 Medical expenses are the cost of doctor's
4 services, hospital services, medicines, medical
5 supplies, and medicine tests and any other charges for
6 medical services.

7 The amount of payment is the fair and
8 reasonable value of such medical expenses. You've
9 heard testimony on whether these expenses were fair
10 and reasonable in amount and whether they were
11 reasonably necessary for the examination, care, and
12 treatment of Washington Munoz. If you determine that
13 any of these bills were not fair and reasonable to any
14 extent or that any of the services were not reasonably
15 necessary to any extent, you need not award the full
16 amount claimed.

17 In this case, Washington Munoz is seeking
18 the sum of \$104,671 in medical expenses and as a
19 result, the upper limit of the award which you may
20 make for past medical expenses is 104,671 since you
21 may not award Washington Munoz more than he's seeking
22 in past medical expenses.

23 In considering any award of medical
24 expenses, again, you are not to speculate about the
25 possibility of medical insurance. As I indicated to

1 you previously, there are mechanisms in place in order
2 to prevent double recovery by the plaintiff.

3 Now, the plaintiff also seeks to recover
4 future medical expenses. A plaintiff has a right to
5 be compensated for any future medical expenses
6 resulting from the injuries brought on by defendant's
7 negligence.

8 If it is reasonably probable that the
9 plaintiff will incur medical expenses in the future,
10 then you should include an amount to compensate the
11 plaintiff for those medical expenses.

12 In deciding how much to award for future
13 medical expenses, think about the factors mentioned in
14 discussing the nature, extent, and duration of the
15 plaintiff's injury. Also consider the plaintiff's
16 age, his general state of health and how long you
17 reasonably expect the medical expenses to continue.

18 Obviously, the time period covering
19 plaintiff's future medical expenses cannot go beyond
20 that point when it's expected that he may recover from
21 his injuries.

22 You should consider as well the life
23 expectancy of the plaintiff in assessing future
24 medical expenses. I'll give you the life expectancy
25 which in this case for the plaintiff is 35 years. You

1 should be aware that the figures you've been given on
2 life expectancy are only statistical averages. Do not
3 treat them as a necessary or fixed rule since it's a
4 general estimate. Use it with caution and use your
5 sound judgment in taking the life expectancy figure
6 into account.

7 For future medical expenses you must base
8 your decision on the probable amount that the
9 plaintiff will incur. It's the burden of a plaintiff
10 by a preponderance of the evidence to demonstrate the
11 probable need for future medical care and the
12 reasonableness of the charge for future medical care.

13 In deciding what the plaintiff's future
14 medical expenses are understand that the law does not
15 require of you mathematical exactness; rather you must
16 use sound judgment based upon reasonable probability.
17 Once you decided how much medical care the plaintiff
18 will need in the future, you must consider the effects
19 of inflation and interest. As to inflation, you're to
20 consider the effects it probably will have in reducing
21 the purchasing power of money.

22 Any award of future medical expenses should
23 be increased to account of losses due to inflation.
24 The consideration of interest requires that you should

1 not just award plaintiff the exact amount of medical
2 care that he will need in the future.

3 The reason for that is that the plaintiff
4 will have that money now even though he will not have
5 needed that money until some time in the future. That
6 means that the plaintiff will be able to invest the
7 money and earn interest on it now even though she
8 otherwise would not have had that money to invest
9 until a future date.

10 To make up for this, you must make an
11 adjustment for the award being available now even
12 though the expense will not be experienced until the
13 future.

14 This adjustment known as discounting and
15 what discounting does is it gives you the value of the
16 money that you get now instead of at some future time.
17 In other words, if you give the present value or
18 present worth in the single lump sum of money which
19 otherwise would be received over a number of years at
20 so much per year.

21 Your goal is to create a fund of money which
22 will be enough to provide the plaintiff future medical
23 care, and which will be used up at the total period of
24 need. In arriving at the amount of that fund, the
25 present value of future need, you should consider the

1 interest, the fund would earn, the probable amount by
2 which taxation on the interest would decrease the
3 money available to the plaintiff and the effect of
4 inflation on decreasing the purchasing power of money.

5 The plaintiff also has a right to be
6 compensated for any earnings lost as a result of
7 injuries caused by the defendant's negligence. Any
8 award for lost earnings must be based upon net take
9 home pay not on gross income.

10 This is because only take-home pay, the
11 amount that's left taking out taxes would have been
12 received by the plaintiff and the amount you award is
13 not subject to federal or New Jersey income taxes.

14 So you must first decide whether Washington
15 Munoz proved that he was disabled by his injuries
16 which in turn resulted in lost income. If so you must
17 then decide and fix the amount of lost earning.

18 Do this by considering the length of time
19 during the plaintiff was not able to work, what his
20 income was before the injuries, how much he earned
21 upon return to work, whether the injuries affect his
22 ability to do tasks required on the job and any
23 lessening or decrease in the income if he returned to
24 work. In your analysis, think about special skills
25 the plaintiff has and whether there were any other

1 jobs available that he was able to do to earn income.
2 The plaintiff must have tried to minimize the earnings
3 lost, but extraordinary or impractical efforts are not
4 necessary.

5 All that is required is reasonable effort
6 and ordinary care in trying to reduce the loss. All
7 right. So our rules of court permit counsel to argue
8 to the jury the appropriateness of applying a time
9 unit calculation in determining damages for pain,
10 suffering, disability, impairment, and loss of
11 enjoyment of life.

12 Counsel are not permitted to mention
13 specific amounts of money for the calculation of
14 damages. They are permitted, however, to argue that
15 you may employ a time unit calculation and that is to
16 say you can consider an amount of money in relation to
17 an amount of time when you're determining such
18 damages.

19 So I charge you that this is argument of
20 counsel with reference to the calculation of damages.
21 This argument of calculating damages on a time-unit
22 basis is argument only and it's not to be considered
23 by you as evidence.

24 Counsel's suggestion or statements, rather,
25 are a suggestion as to how you might determine damages

1 for pain, suffering, disability, impairment and loss
2 of enjoyment of life. You are free to either accept
3 or reject his argument as you deem appropriate.

4 I remind you that you are to make a
5 determination on the amount of damages based on the
6 evidence presented and the instructions that I've
7 given you on damages. So I've already given you life
8 expectancy, but I want to just say a little bit more
9 about that.

10 So if you make an award for future pain and
11 suffering, disability, impairment, and loss of
12 enjoyment of life, as I indicated the plaintiff's life
13 expectancy is 35 years. Again, this is an estimate
14 and it's an estimate based upon probable length of
15 life and it's based upon statistical data.

16 Since it's a general estimate, use it with
17 caution. The plaintiff may live longer or shorter
18 than this estimated figure. Use your sound judgment in
19 applying the life expectancy figure without treating
20 it as a necessary or fixed rule.

21 A personal injury damage award again is not
22 subject to federal or state income tax and so if you
23 decide to award the plaintiff damages for his injuries
24 or injury or injuries, you shouldn't add or subtract
25 tax in fixing the amount of the award.

1 Your oath as jurors requires that you decide
2 this case fairly and impartially without sympathy,
3 passion, bias, or prejudice. You are to decide this
4 case based solely on the evidence that you find
5 believable and in accordance with the rules of law
6 that I have given you.

7 Sympathy is an emotion which is normal for
8 human beings and no one would be critical of you if
9 you did feel some degree of sympathy. However,
10 sympathy must play no part in your thinking and in the
11 decision that you reach in the jury room.

12 Similarly, your decision must not be based
13 upon bias or prejudice that you might have developed
14 during the trial for or against any party. You are to
15 decide this case impartially and a decision that's
16 based on sympathy, passion, bias, or prejudice would
17 violate that duty.

18 You are not advocates for either party. You
19 are the judges. You are judges of the facts. You
20 alone have the responsibility of deciding the facts.
21 Your sole interest is to determine the truth from the
22 evidence. It is your duty as jurors to consult with
23 one another and to deliberate with a view towards
24 reaching an agreement if you can do so without
25 compromising your own individual judgment.

1 Each of you must decide the case for
2 yourself, but do so only after an impartial
3 consideration of the evidence with your fellow jurors.

4 So there are now eight of you in the jury
5 box. Six of you will make up the jury and deliberate
6 and decide this case. The others will be alternates
7 who will participate if one of the jurors is unable to
8 continue for some reason, then an alternate will serve
9 as a replacement for that juror.

10 So I'll pass out the verdict sheet and we'll
11 go over the verdict sheet. Okay. Since this is a
12 civil case, a verdict of five to one or six to zero is
13 a legal verdict. It's not necessary that all six of
14 you agree on the answer to each question.

15 An agreement of any five jurors is
16 sufficient. All six of you, however, must deliberate
17 fully and fairly on each and every question where it's
18 appropriate to do so and all six jurors must determine
19 and vote upon each question.

20 It's not necessary that the same five jurors
21 agree on the answers to all of the questions. When at
22 least five of you have agreed on an answer to a
23 particular question, that question has been decided
24 and you may move on to the remaining question if it is
25 appropriate to do so and I will -- you'll see what I

1 mean momentarily by that because the jury sheet has
2 very specific instructions as you move through the
3 verdict sheet.

4 All five jurors -- I'm sorry, all six jurors
5 must participate fully in deliberating on remaining
6 questions. A juror that has been outvoted on any
7 particular question must continue to deliberate with
8 your fellow jurors fairly, impartially, honestly, and
9 conscientiously to decide the remaining question.

10 Each juror must decide each question with or
11 consider rather each question with an open mind. When
12 at least five of you have agreed upon a verdict, you
13 will knock on the jury room door, indicate to the
14 attendant that you have reached a verdict and you will
15 say nothing more.

16 So let me -- let's go over the verdict sheet
17 together. So with all six of the deliberating jurors
18 deliberating, you're going to begin your deliberations
19 with question number one. Question number one reads,
20 "Has the plaintiff, Washington Munoz, proven by a
21 preponderance of the evidence that defendant, L.P.
22 Ciminelli, Inc. was negligent?"

23 There's a line for you to record a yes
24 answer and a line for you to record a no answer and
25 then a line for you to record your vote.

1 A legally recorded vote would read as five
2 to one or six to zero. So with all six of you
3 deliberating, when five of you say that is the answer
4 to that question, you're going to check the answer to
5 the question. You're going to check either yes or no
6 and then the vote should read as five to one or six to
7 zero.

8 Pay attention again to the instructions that
9 follow because those italicized printed instructions
10 will guide you through your verdict sheet. If the
11 answer to question number one is yes, proceed to
12 question two.

13 If the answer to question number one is no,
14 proceed to question three. So this is an example as I
15 indicated, move on to the next question where it's
16 appropriate to do so because in this case if you have
17 answered yes, you move to two, but if you have
18 answered no you're skipping two and then you're going
19 to go to three. Right?

20 So if you have answered yes to question
21 number one and you're moving to question number two,
22 question number two reads, "Was the negligence of
23 defendant L.P. Ciminelli a proximate cause of the
24 accident -- incident, rather, of June 25th, 2013?"
25 Again, with all six of you deliberating, when five of

1 you say that is the answer you check it. You check
2 either yes or no and then record your vote as five to
3 one or six to zero.

4 Proceed to question three. Question three
5 reads, "Has plaintiff, Washington Munoz, proven by a
6 preponderance of the evidence that defendant, Pano
7 Roofing Company, Inc. was negligent?"

8 All six of you deliberating when you have
9 the answer so it, when five of you have -- at least
10 five of you agree no the answer, record your answer by
11 checking either yes or no and then record your vote;
12 again, five to one, or six to zero.

13 If the answer to question number three is
14 yes, proceed to question four. If the answer to
15 question number three is no, but your answer to
16 question number two is yes, proceed to question five.
17 If the answer to question number one or number two and
18 three are no cease your deliberations and return your
19 verdict.

20 So if you have answered yes to question
21 number three as you are proceeding to question number
22 four, question number four reads, "Was the negligence
23 of defendant, Pano Roofing Company, Inc., a proximate
24 cause of the incident of June 25th, 2013?" When five
25 of you agree no the answer, record it as either a yes

1 or no and record that vote as being either five to one
2 or six to zero. Pay attention again to the
3 instructions that follow.

4 If you answered yes to either or both
5 questions two and four proceed to question number
6 five. Otherwise, cease your deliberations and advise
7 the court officer that you have reached a verdict. So
8 this is another example of move on to the remaining
9 question where it's appropriate to do so.

10 In this case, if you've answered yes to
11 either or both questions two and four, you're
12 proceeding to five, otherwise you will be proceeding -
13 - you will be ceasing your deliberations and not
14 addressing the rest, you have a verdict at that point.

15 So if you are moving to question number
16 five. Question number five reads, "Has the defendant,
17 L.P. Ciminelli, Inc., and or Pano Roofing Company,
18 Inc., proven by a preponderance of the evidence that
19 the plaintiff, Washington Munoz, was negligent?"

20 Again, when five of you agree on the answer
21 or six of you agree on the answer, that question is
22 answered. You check either yes or no and then record
23 your vote as five to one or six to zero.

24 If the answer to question five is yes,
25 proceed to question number six and if the answer to

1 question number five is no, proceed to question number
2 seven. So if you've answered question number five
3 yes, you are proceeding to six.

4 Again, if you've answered no, you proceed to
5 seven. So if you have answered yes and you're
6 proceeding to number six, number six reads, "Was the
7 negligence of plaintiff, Washington Munoz, a proximate
8 cause of the incident of June 25th, 2013, yes or no,"
9 and then the vote.

10 When at least five of you agree on the
11 answer, you check it by either checking yes or no and
12 then record the vote as five to one or six to zero.
13 And you're proceeding to question seven.

14 Question seven reads, "Apportion liability
15 among the parties you found to have been both
16 negligent and a proximate cause of the plaintiff's
17 incident of June 25th, 2013."

18 Your figures must add up to 100 percent. So
19 there's a line for you to record a percentage for L.P.
20 Ciminelli, Inc., assuming that you have found that
21 L.P. Ciminelli, Inc., was both negligent and a
22 proximate cause of the accident, then record whatever
23 the percentage is there. You consider Pano Roofing,
24 again, record your percentage there and then
25 Washington Munoz, record your percentage there. And

1 obviously, you can go back to how you answered the
2 previous questions to make sure that you are recording
3 your percentages appropriately because the question
4 requires that you apportion percentages only to those
5 parties that you found to have been both negligent and
6 a proximate cause of the incident.

7 So if you have attributed to plaintiff,
8 Washington Munoz, a percentage of negligence of 51
9 percent or greater, cease your deliberations and
10 return your verdict.

11 If you have attributed to the plaintiff
12 Washington Munoz a percentage of negligence which is
13 less than 51 percent, then please answer question
14 number eight.

15 So if you are moving to question number
16 eight, question number eight reads, "What amount of
17 money will reasonably compensate plaintiff, Washington
18 Munoz, for the pain, suffering, impairment,
19 disability, and loss of enjoyment of life he sustained
20 as a proximate result of the incident on June 15th,
21 2013. You will deliberate on the answer to this
22 question without regard to the percentages that you
23 have indicated above. You're to consider what is fair
24 and reasonable compensation to compensate the
25 plaintiff for the pain, suffering, disability,

1 impairment, and loss of enjoyment of life he sustained
2 as a proximate result of the incident on June 25th,
3 2013, again without regard to the percentages that you
4 have assigned above.

5 Once five of you agree on the response to
6 that question, you record it and then record your
7 vote; five to one, six to zero. Proceed to question
8 nine, "What amount of money will fairly and reasonably
9 compensate the plaintiff, Washington Munoz for past
10 medical expenses, not to exceed 104,671."

11 When five of you agree on an answer, record
12 the answer and then record your vote. Consider future
13 medical expenses. When five of you agree, record the
14 answer and then your vote and then past lost earnings.

15 When five of you agree, record the answer
16 and then your vote. Five to one on all of them or six
17 to zero. However, all six of you must deliberate on
18 the answer to that question assuming that you have
19 gotten to this part of the verdict sheet.

20 All right? So it's very important that you
21 pay attention to the italicized print as you move
22 through the verdict as again that will guide you
23 through your verdict sheet. Think of those days that
24 you were in school, right, and you were taking a test
25 and you read question number one and you go, "I'm not

1 too sure about that, I'll come back to that," and then
2 you go to the next question and you're like, "Oh I'm
3 not too sure about that either, I think I'll come back
4 to that."

5 You can't do that here, right? It's
6 important that you start at the top of the verdict
7 sheet and move through the verdict sheet in accordance
8 with the instructions that are given. You can't sort
9 of skip around on the verdict sheet unless that's what
10 the verdict sheet tells you to do, all right?

11 Okay. Once you have begun your
12 deliberations, any communications that you do -- or
13 you have with the Court has to be done by sending a
14 note through your foreperson and I'll tell you who the
15 foreperson is momentarily.

16 So if you have a question of any kind
17 whether it is maybe we need you to perhaps repeat a
18 certain part of the instruction or whatever the
19 question may be, you write your note out.

20 We'll give you not only the exhibits, but
21 we'll give you along with the verdict sheet and by the
22 way, only verdict sheet will need to be -- the verdict
23 sheet that's prepared by your foreperson.

24 Each of you will have your own verdict sheet
25 only for purposes of moving through the verdict sheet

1 together in the jury room, but your foreperson will be
2 responsible for making sure that the official verdict
3 sheet is completed. So if you have a note, you're
4 going to write your note on a sheet of paper. When
5 you write that note, you should not be indicating in
6 the note that you are -- how you stand in terms of
7 your deliberations on a particular question.

8 It shouldn't indicate in anyway anything
9 about your verdict necessarily. You write your note.
10 You knock on the jury room door. Outside of your door
11 will be the court officer who will knock back to make
12 sure that you are ready for him to enter the room.

13 He'll enter the room and collect your note.
14 Once your note is collected, I read it and then I
15 gather the lawyers. So today is -- this is actually a
16 motion week so the lawyers may have business elsewhere
17 in the courthouse.

18 Sometimes they're right here which is easy.
19 Other times they're out and about in the courthouse.
20 But I gather the lawyers. We discuss your note and
21 the response to your note, bring you back into the
22 jury and -- I'm sorry, back into the courtroom and
23 respond to your note on the record.

24 So I give you the benefit of that procedure
25 so that you don't write a note, send it out and say my

1 geez, it's been at least five minutes and nobody has
2 given us a response, right?

3 So there's a procedure that goes with it and
4 we are working on your -- whatever your question might
5 be. Let's see. So I indicated to you that we need to
6 choose two alternates and then we will choose the
7 foreperson.

8 THE CLERK: Juror Five, is the first
9 alternate.

10 THE COURT: Anthony Costello, you're
11 alternate number one.

12 THE CLERK: And Juror Six is the second
13 alternate.

14 THE COURT: Alternate number two. Okay. So
15 now the two alternates will be kept separately from
16 the deliberating jury. So for the two alternates you
17 can't together start deliberating and talking about
18 the case, right, because if for some reason the
19 deliberating jury, one of the jurors from that
20 deliberating jury or two of them are unable to
21 continue deliberating, we then replace that juror or
22 jurors with the alternate or alternates.

23 And so it's important that you deliberate
24 together as a group and so that's why you can't sort
25 of go off by yourself and deliberation in the event

1 that you would be needed to replace a juror. So if
2 you're talking to one another you can talk about the
3 weather or anything else, but you can't talk about the
4 case.

5 If there is a question or anything like
6 that, you are always brought in with the rest of the
7 jury to hear the question and the answer to the
8 question. So -- and again, you'll be kept separately
9 from the deliberating jury.

10 So with that at this point we will choose an
11 alternate which will be Mr. Bryce.

12 JUROR: Foreperson.

13 THE COURT: I'm sorry, the foreperson. Did
14 I say alternate? Yeah. I have been talking for a
15 while, all right? So you are our foreperson and he
16 sits there with folded arms and goes, "Okay." And so
17 you might be wondering why it is it's you.

18 You just happen to be seated in seat number
19 one. If we had chosen you as an alternate, then we
20 would move to seat number two. And so what does it
21 mean for you as the foreperson? It doesn't mean that
22 you're deliberations in the jury room carry any
23 greater weight than anybody else's in the jury room.

24 It just means that you are that person that
25 will again if there is a note that needs to be sent

1 out, you will write down the note and make sure that
2 it gets to the officer outside of the door.

3 And you're not doing this by yourself,
4 right, you have the rest of the jury to assist you in
5 this regard and so that's your responsibility as a
6 foreperson when you have reached a verdict and you
7 come back into the courtroom to announce your verdict.

8 Once we take a roll call, I'll then ask
9 whether or not the jury has reached a verdict and then
10 I'll ask you to stand up and I will move through the
11 verdict sheet with you, all right? So that's your
12 responsibility as the foreperson.

13 Let me see. Counsel, anything on the
14 charge?

15 MR. GULINO: No, Your Honor.

16 THE COURT: Okay. So let's swear in our
17 court officer that will be outside of your door.

18 THE COURT: Please state your full name and
19 spell your last.

20 MR. ATKINSON: Christopher Atkinson, A-T-K-
21 I-N-S-O-N.

22 C H R I S T O P H E R A T K I N S O N, PLAINTIFF'S
23 WITNESS, SWORN

24 THE COURT: So the lawyers, just make sure
25 the exhibits are all in order.

1 MR. GULINO: We're missing one.

2 THE COURT: All right. So I'll let you take
3 care of that. I'll let you take care of that and so
4 here is the moment that all of you have been so very
5 patiently waiting to hear me say. You can now start
6 talking about the case, except for the two alternates.

7 All right. Follow the court officer.

8 THE OFFICER: Ladies and gentlemen, please
9 stand.

10 (Jury exits courtroom.)

11 THE COURT: So there's one exhibit that's
12 missing?

13 MR. CLARK: Yes.

14 MR. GULINO: There's one exhibit. Four,
15 that's all.

16 MR. CLARK: Judge, we wanted to move in just
17 three exhibits as well.

18 MR. GULINO: No. Objection. That was
19 demonstrative. That doesn't go to the jury.

20 MR. CLARK: Actually, it's four exhibits so
21 we just want to be heard on that. We never moved, you
22 know, the exhibits that were subject to an objection
23 to move in so I just wanted to --

24 MR. GULINO: They used that -- may I?

25 THE COURT: Go ahead.

1 MR. GULINO: They used that in a
2 demonstrative fashion with their doctor, Dr. Helbig.
3 They pointed to it during testimony, they're entitled
4 to do that. The jury does not get demonstrative
5 evidence. I strongly object.

6 THE COURT: Just for the record, the exhibit
7 numbers, Counsel?

8 MR. CLARK: It's -- there are four exhibits
9 at issue nine, ten, eleven, and twelve and twelve
10 includes on it the actual MRI films of the spine.

11 THE COURT: Okay. Can we take a look at
12 them?

13 MR. GULINO: May I see that? Okay.

14 MR. CLARK: The gloves were used and those
15 are the small versions.

16 THE COURT: So nine, ten, eleven, and
17 twelve. These -- nine, ten -- ten, eleven are
18 demonstrative aids of first the preoperative condition
19 of plaintiff's right shoulder, arthroscopic right
20 shoulder surgery in D-10 and open right shoulder
21 surgery in D-11. These are all as counsel aptly noted
22 demonstrative aids and don't go back into the jury
23 room.

24 And D-12 contain the MRI. These are all I
25 find to not only be demonstrative but also to the

1 extent that they represent portions of the plaintiff's
2 spine in different views don't go into the jury.

3 MR. CLARK: Thank you, Your Honor.

4 (Recording paused.)

5 (Recording resumes.)

6 THE COURT: We have a question or a request
7 really. The note reads, "The jury requests a copy of
8 Washington Munoz's paystub," which I thought was in
9 evidence.

10 MR. GULINO: I thought that got in, Judge.

11 THE COURT: I thought it was as well. Which
12 -- which --

13 MR. CLARK: Isn't that in the jury room?

14 THE COURT: Whatever exhibits you --

15 MR. CLARK: What's the exhibit number?

16 MR. GULINO: It was an exhibit.

17 MR. CLARK: What's the exhibit number?

18 THE COURT: And all of the exhibits were
19 there. The only one that was missing was the one --

20 MR. GULINO: I'm sorry, Judge?

21 THE COURT: There was one that was missing,
22 but that wasn't the paystub was it?

23 MR. GULINO: No, no, no. The one that as
24 missing was a photo and we got that. We found it.

25 THE COURT: And you found it.

1 MR. GULINO: Yeah. We found that.

2 THE COURT: Okay. So then everything else
3 they should have already.

4 MR. GULINO: No, I don't have the paystub
5 and I know I don't have it here.

6 THE CLERK: 30. P-30.

7 MR. CLARK: Can the officer just check if P-
8 30 is in there? Do you want to show him the picture?

9 THE OFFICER: The paystub, right, that was
10 on a white card printed?

11 THE COURT: P-30.

12 THE OFFICER: Are you okay with me going in
13 there, Judge?

14 THE COURT: Sure. As long as you have no
15 objection to us doing it this way because typically we
16 would bring that out.

17 MR. GULINO: No, no. If it's admitted into
18 evidence, I have no objection, Your Honor.

19 THE COURT: P-30.

20 MR. GULINO: It's right. That's it.

21 THE COURT: Okay. Okay. All right.

22 THE CLERK: Off the record.

23 THE COURT: Okay.

24 (Recording paused.)

25 (Recording resumes.)

1 THE COURT: So counsel, the jury has
2 requested that they be permitted to go to lunch.
3 Ordinarily I would break --

4 MR. GULINO: They requested what?

5 THE COURT: They want to go to lunch, the
6 jury.

7 MR. GULINO: Oh.

8 THE COURT: So ordinarily I would bring them
9 in and on the record say remember don't talk about the
10 case over the lunch hour unless you don't have any
11 objection to my just saying to them go have lunch and
12 releasing them. If your preference is to bring them
13 in, we'll bring them in.

14 MR. CLARK: No objection to your suggestion,
15 Judge. Thank you.

16 THE COURT: Okay.

17 MR. GULINO: No, no objection.

18 THE COURT: Okay. Great. Thank you. All
19 right. So you are now released for the lunch hour and
20 be back at 1:30 unless you have other places to be and
21 then just let me know where you are?

22 MR. CLARK: They're free to go wherever they
23 want on the street and everything?

24 THE COURT: They are free to go wherever on
25 the street. I can actually just go by as they're

1 coming out and I'll just stand there and say,
2 "Remember not to talk about the case over the lunch
3 hour." But if you guys see them obviously, you know,
4 don't chat with them.

5 MR. GULINO: Do they get their lunch paid
6 for?

7 THE COURT: No.

8 MR. GULINO: Oh, that's -- I thought that's
9 what they want.

10 THE COURT: No, they just want lunch.
11 They're hungry.

12 MR. GULINO: Okay. I forgot to ask.
13 Officer, I guess 1:30?

14 (Recess)

15 THE COURT: All right. Thank you. Please
16 be seated. All right.

17 So the first order of business is to take a
18 roll call.

19 So as your name is called, please answer
20 either here or present.

21 THE CLERK: Jeffrey Bryce.

22 MR. BRYCE: Here.

23 THE CLERK: Akoo Singh (phonetic).

24 MR. SINGH: Here.

25 THE CLERK: Kyle Nagy.

1 MR. NAGY: Here.

2 THE CLERK: Christopher Hollash (phonetic).

3 MR. HOLLASH: Here.

4 THE CLERK: Lisa Chatlett (phonetic).

5 MS. CHATLETT: Here.

6 THE CLERK: Vanessa Paredes (phonetic).

7 MS. PAREDES: Here.

8 THE CLERK: And then the alternates, Anthony
9 Costello, Alternate One.

10 MR. COSTELLO: Here.

11 THE CLERK: Erin Casey, Alternate Two.

12 MS. CASEY: Here.

13 THE COURT: Okay. So our foreperson, I have
14 a note that says, "The jury has reached a verdict."
15 Has the jury, in fact, reached a verdict?

16 FOREPERSON: Yes, we have.

17 THE COURT: If you can stand up for us. All
18 right.

19 On question number one, has plaintiff,
20 Washington Munoz, proven by a preponderance of the
21 evidence that defendant, L.P. Ciminelli, Inc. was
22 negligent, yes or no?

23 FOREPERSON: Yes.

24 THE COURT: The vote?

25 FOREPERSON: Six-zero.

1 THE COURT: Was the negligence of defendant,
2 L.P. Ciminelli, Inc. a proximate cause of the incident
3 of June 25th, 2013 yes or no?

4 FOREPERSON: Yes.

5 THE COURT: The vote?

6 FOREPERSON: Six-zero.

7 THE COURT: Has plaintiff, Washington Munoz,
8 proven by a preponderance of the evidence that
9 defendant, Pano Roofing, Inc. was negligent, yes or
10 no?

11 FOREPERSON: Yes.

12 THE COURT: The vote?

13 FOREPERSON: Six-zero.

14 THE COURT: Was the negligence of defendant,
15 Pano Roofing, Inc. a proximate cause of the incident
16 of June 25th, 2013, yes or no?

17 FOREPERSON: Yes.

18 THE COURT: The vote.

19 FOREPERSON: Six-zero.

20 THE COURT: Has defendant, L.P. Ciminelli,
21 Inc. and or Pano Roofing Company, Inc., proven by a
22 preponderance of the evidence that plaintiff,
23 Washington Munoz, was negligent? Yes or no?

24 FOREPERSON: Yes.

25 THE COURT: The vote?

1 FOREPERSON: Six-zero.

2 THE COURT: Was the negligence of plaintiff,
3 Washington Munoz, a proximate cause of the incident of
4 June 25th, 2013, yes or no?

5 FOREPERSON: No.

6 THE COURT: The vote.

7 FOREPERSON: Six-zero.

8 THE COURT: Apportion liability among the
9 parties you found to have been both negligent and a
10 proximate cause of the plaintiff's incident of June
11 25th, 2013. Your figures must add up to 100 percent.

12 L.P. Ciminelli, Inc?

13 FOREPERSON: Seventy percent.

14 THE COURT: Pano Roofing Company, Inc?

15 FOREPERSON: Thirty percent.

16 THE COURT: And to the plaintiff?

17 FOREPERSON: Zero percent.

18 THE COURT: Okay. What amount of money will
19 reasonably compensate plaintiff, Washington Munoz, for
20 the pain, suffering, impairment, disability, and loss
21 of enjoyment of life he sustained as a proximate
22 result of the incident of June 25th, 2013?

23 FOREPERSON: \$2.4 million.

24 THE COURT: The vote?

25 FOREPERSON: Six-zero.

1 THE COURT: What amount of money will fairly
2 and reasonably compensate the plaintiff, Washington
3 Munoz, for past medical expenses not to exceed
4 104,671?

5 FOREPERSON: 104,671.

6 THE COURT: The vote?

7 FOREPERSON: Six-zero.

8 THE COURT: Future medical expenses?

9 FOREPERSON: One-hundred and fifty-thousand
10 dollars.

11 THE COURT: The vote?

12 FOREPERSON: Six-zero.

13 THE COURT: Past lost earnings?

14 FOREPERSON: Two-hundred and thirty-five-
15 thousand, two-hundred and forty-eight dollars.

16 THE COURT: The vote?

17 FOREPERSON: Six-zero.

18 THE COURT: Okay. You can be seated. Thank
19 you. All right. Members of the jury, with the return
20 of your verdict, your service has been completed. I
21 want to thank you again for your willingness to be a
22 part of this process.

23 As I said in the beginning, what we do here
24 does not work without you. So we hope that when you
25 get that notice in about three years or so you would

1 welcome the opportunity to join us again. So thank
2 you so very much for your service.

3 Get home safely. Try to stay cool. Enjoy
4 the rest of the summer. All right? Thank you.

5 JUROR: Thank you.

6 JUROR: Thank you, Judge.

7 (Jury exits courtroom.)

8 THE COURT: Mr. Clark, you'll submit an
9 order.

10 MR. CLARK: Thank you, Your Honor.

11 MR. GULINO: Your Honor?

12 THE COURT: Yes.

13 MR. GULINO: Post trial motions.

14 THE COURT: Yes.

15 MR. GULINO: I know that there's a certain
16 timeframe.

17 I was wondering if I can have an extension
18 because I'm going to need the transcript printed up in
19 order for me to make my post trial motion to set aside
20 the verdict either for a remittitur or to set it aside
21 in its entirety.

22 THE COURT: Yeah. I'm not going to make
23 that determination at this time. Make the motion and
24 do what you need to do in terms of -- do what you need
25 to do. But you've got to --

1 MR. GULINO: Well, it's due in 20 days I'm
2 pretty sure.

3 THE COURT: I understand that, so I'm just
4 saying do what you got to do and then -- do what you
5 got to do, okay?

6 I can't make a determination right now that
7 you're entitled to an extension.

8 Make the motion and whatever support you
9 have for making the motion include that in the motion
10 and we'll address whether or not there's a need to
11 extend it at that time.

12 MR. GULINO: Okay.

13 THE COURT: Okay? So that you're within the
14 time limit.

15 MR. GULINO: All right.

16 MR. BERENGUER: Thank you, Judge.

17 THE COURT: Thank you.

18 (Recording paused.)

19 (Recording resumes.)

20 MR. BERENGUER: Judge, Mr. Clark, he's on
21 his way up. He should be here momentarily.

22 THE CLERK: Do you want me to pause this,
23 Judge? Do you want to go off?

24 THE COURT: We're ready to go on. Okay.
25 We're on the record. What's the issue, Counsel?

1 MR. CLARK: Your Honor, at the charge
2 conference, we raised the issue of punitive damages.
3 Punitive damages is in our complaint and at this time
4 I'm requesting a punitive damages phase for the trial.
5 Basically the only additional information necessary
6 would be the financial records of the two defendants
7 and I believe I had submitted some briefing on the
8 question of punitive damages and focused on punitive
9 damages claims in OSHA workplace safety cases.

10 The Punitive Damages Act is N.J.S.A. 2A:15-
11 5.12. It sets forth the standard. The standard
12 includes recklessness and some of the prongs include
13 the conduct of the defendant upon learning that its
14 initial conduct would likely cause harm and the
15 duration of the conduct or any concealment of it by
16 the defendant.

17 And under subsection C of the statute the
18 relevant evidence includes the financial condition of
19 the defendant so my suggestion is that the defendant
20 produce financial records if they're a public company
21 or not.

22 It should be relatively easy to produce tax
23 returns from the relevant years and the only
24 additional evidence would be the financial condition
25 of the defendant and then the jury would be charged

1 the punitive damages. We would rely upon the facts in
2 the case. I assume the defendant will at some point
3 perhaps now based on prior discussions file an oral
4 motion to dismiss the punitive damages claim.

5 And with regard to that, we did submit the
6 case law, one particular case is a third circuit case
7 in a workplace safety case where a worker fell from
8 the roof. And it was third circuit. It happened in
9 the Virgin Islands, the U.S. Virgin Islands; and after
10 he fell, they poured rum into his injuries and sent
11 him on his way and he suffered severe injuries. And
12 that and the other case that we cited in our papers
13 which was the Arroyo case versus Scottie's
14 Professional Window Cleaning. It was a court of
15 appeals case from North Carolina.

16 In that case and the prior case I refer to
17 the prior case was Santillion (phonetic). It's a
18 third circuit opinion from 2008 28 Federal Fed APPX
19 491 a 2008 from the Third Circuit from the Virgin
20 Islands.

21 And the Arroyo case is 120 North Carolina
22 APP 154. It's a 1994 decision. In both those cases,
23 the defendants had no safety scheme whatsoever. They
24 didn't have a safety director. They did not have any
25 safety mechanism set up and the Courts in those cases

1 found that because they had no safety whatsoever, that
2 punitive damages was appropriate to present and charge
3 to the jury.

4 Under the Punitive Damages Act, only
5 evidence, you don't mix the punitive and the
6 compensatory evidence in the same trial. In the
7 punitive damages phase, it's just the evidence related
8 to punitive damages.

9 So my suggestion is if the Court denies
10 defendant's motion to dismiss the claim, is that we
11 just simply present the financial condition of the
12 defendants and then we have argument. It's basically
13 a closing argument. It's an additional closing which
14 points out the evidence related to punitive damages.

15 And the evidence that we would most rely
16 upon was the defendant's admission that they leave it
17 that upon learning of it. They didn't do anything and
18 then they instead they went ahead and dismissed the
19 employee.

20 They never accepted responsibility so those
21 are among the facts that we would rely upon with
22 regard to our punitive damages claim. Thank you.

23 THE COURT: Are you looking for this jury to
24 make that decision?

25 MR. CLARK: Yes.

1 THE COURT: Because the jury has been
2 released.

3 MR. CLARK: I assume we would have their
4 contact information.

5 THE COURT: Is there -- from what I'm
6 hearing there's further discovery that you would be
7 looking for from the defense.

8 MR. CLARK: Yes.

9 THE COURT: In terms of their records.

10 MR. CLARK: It would just be the tax records.
11 I don't know if L.P. Ciminelli is publicly traded or
12 not.

13 THE COURT: So --

14 MR. CLARK: The other thing too is perhaps
15 the jury could just be repaneled in a week or so.

16 My presentation on it would take probably
17 30 minutes or a half hour or less and then the jury
18 would be charged and we would then -- my presentation
19 being essentially a closing argument which would
20 identify the financial condition and then an argument
21 with regard to the evidence that was in the trial
22 relevant to the issue.

23 THE COURT: Usually in these types of
24 instances, there is some conference that you request
25 with the presiding judge in terms of the need to

1 exchange any further discovery. So let me hear from
2 you.

3 MR. GULINO: I had moved for a dismissal
4 beforehand and I know the Court said let's wait.
5 Without getting into what this jury just did and --

6 THE COURT: I don't --

7 MR. GULINO: And I understand that.

8 THE COURT: I want to say I don't recall --
9 I have to say I don't recall seeing any briefing on
10 the punitive damages issue.

11 MR. GULINO: Absolutely not. There was --
12 in order to prove punitive damages, you've got to have
13 reckless conduct --

14 THE COURT: No, I'm asking --

15 MR. GULINO: -- and prove it by clear and
16 convincing evidence.

17 THE COURT: I'm asking, did someone submit a
18 brief or this is just all oral?

19 MR. GULINO: I'm sorry, Judge, did what?

20 THE COURT: Do I have briefs on the punitive
21 damages issue?

22 MR. GULINO: No, absolutely not.

23 THE COURT: Okay. Go ahead.

24 MR. GULINO: The punitive damage claim is
25 only in the wherefore clause. It's not a separate

1 cause of action. Because generally it would really
2 put you in a position of notice that you're defending
3 us.

4 All they said that wherefore, so and so, so
5 and so, reckless conduct, we want negligent and
6 punitive damages, end of story. They never pursued it
7 as such. I think -- I'm not going to talk about why
8 he's doing this. That's the legal strategy.

9 But in order to get that far my
10 understanding is on punitive damages in this state is
11 reckless conduct which is not before the jury. They
12 needed to show that. They only showed negligence.
13 They didn't show any violations of any of the OSHA
14 codes.

15 It was negligence. Was I negligent. End of
16 story. That's really what they got. Yes, I know they
17 got 5.10 and we talked about construction and we
18 talked about standards, but there was nothing as if I
19 had violated a specific statute that caused this man's
20 accident.

21 That never came in. And if they were going
22 to show that, it would have to be by reckless conduct
23 and it would have to be by clear and convincing
24 evidence not just preponderance of the evidence. And
25 so those are the grounds that I was going to make my

1 motion to dismiss the punitive damage claim and I
2 still would.

3 I mean, to hold a hearing in a week is just
4 personally, I have somebody coming in next week, my
5 family member, I was going to take a couple of days
6 off and I have something else so -- but I would rather
7 if we don't mind since we're not going to have the
8 same panel, they've been disbanded.

9 You can't bring them back off the street,
10 that's not going to happen because too much has
11 happened between then and now.

12 We don't know where they are or who they've
13 talked to is to allow me to make my motion before you
14 and then at that point we can have a discussion later
15 about what Mr. Clark is intending to do.

16 THE COURT: So what I would request counsel
17 do is as I said submit a letter to the presiding judge
18 indicating a need to exchange discovery to address the
19 issue related to the punitive damage claim and
20 presumably in the interim, you'll make whatever motion
21 if that's not the motion that you're making right now.

22 MR. GULINO: Yes, I have to look to see what
23 it is, Judge.

24 I don't know if I'm going to make a motion
25 to set aside a remittitur with the dismissal of the

1 punitive. I can't tell you right now, Judge. I wish
2 I could, but I just can't.

3 THE COURT: Right. Well, you have time
4 constraints within which to do that so you'll --

5 MR. GULINO: Yeah, I think I've got 20 days
6 or whatever.

7 THE COURT: -- do that within -- yes.

8 MR. GULINO: And then I may in my papers
9 preliminarily ask for an extension because if I need
10 the transcripts, I don't know how long it's going to
11 take because we don't have a court reporter. We have
12 to send out for someone to type all of this up.

13 THE COURT: There's a way in which you can
14 get the --

15 MR. GULINO: Oh, the disk can almost be
16 momentarily --

17 THE COURT: Yes.

18 MR. GULINO: But I don't think the Court
19 would want me to submit to her --

20 THE COURT: No. I'm not asking for that.

21 MR. GULINO: Okay.

22 THE COURT: But I'm asking you can get that
23 and that forms the basis to file your motion is what
24 I'm saying. So --

25 MR. GULINO: You know what --

1 THE COURT: Listen, I'm not telling you what
2 to do. You do what you think you need to do to defend
3 your client.

4 MR. GULINO: Okay. All right.

5 THE COURT: Right?

6 MR. GULINO: Because I was going to say I
7 didn't think the Court would want to listen to the CDs
8 of the trial.

9 THE COURT: In the meantime, if you're
10 looking to pursue that claim, a letter needs to be
11 addressed to the presiding judge so that she can
12 schedule you to come in for a conference on discovery.

13 MR. CLARK: I did submit the brief to defense
14 counsel on July 16th of this year. See attached as to
15 our claim -- as to our punitive damages claim which is
16 essentially the brief. I've just forwarded to Your
17 Honor the punitive damages phase should be with the
18 same jury that heard the underlying evidence and the
19 only additional evidence would be the financial
20 information.

21 In my past experience in this situation, the
22 Court just told the defense counsel to get the
23 financial information, it's really just the tax
24 returns. That's all we're talking about and I have to
25 -- I just have to review my case law and I could get

1 the answer to the question within 15 minutes whether
2 it's the financial information at the time of the
3 incident or if it is the financial information at the
4 present time and so that would just determine the --
5 that would just determine the year of the tax returns.
6 But it should be the same jury.

7 It should be the same jury and it's not a
8 lot so in my experience, other judges have said just
9 get the stuff and we'll schedule it.

10 THE COURT: Let me reach out to the P.J. and
11 then I'll come back out. All right? So --

12 (Recording paused.)

13 (Recording resumes.)

14 THE COURT: Okay. So we're back on the
15 record. As I indicated, the jury -- the jury has
16 already been released.

17 However, in order to address the punitive
18 damages part of the case, we'll have to see whether or
19 not we can get the jury back.

20 I mean, we told them that they were going to
21 be done on Monday and I think, you know, if counsel
22 anticipated that they were going to move along in a
23 punitive damages phase of the case, we should have
24 been telling this jury that they were expected to be
25 here much longer than what we told them. So we're

1 already beyond -- we told them Monday, had to bring
2 them back on Tuesday and now potentially we're going
3 to have to inconvenience jurors who may be going on
4 vacation, we just don't know.

5 So it would require us to reach out or the
6 jurors and see what their availability is. My
7 thoughts are to -- because I think it's important that
8 there not be a long gap between the verdict and this
9 phase.

10 I mean, this is something that should have
11 been done quite frankly, before the jurors were
12 released but we'll reach out. In the meantime, how
13 long do you think that it will take you to get
14 whatever it is you are being requested to provide
15 namely tax --

16 MR. GULINO: You mean the transcript and all
17 of that or --

18 THE COURT: We're talking about --

19 MR. GULINO: Financial information?

20 THE COURT: We're talking now about this
21 punitive.

22 MR. CLARK: I checked the case. It's Tar
23 versus Bob Ciasulli. It's 194 N.J. 212 and it's the
24 financial condition of the defendant at the time of
25 the wrong doing which would be 2013. So the only

1 thing we would need from the two defendants is their
2 2013 corporate tax returns of each of the two.

3 THE COURT: How long is it going to take you
4 to --

5 MR. GULINO: I can't tell you tell how long
6 it would take me to get that, Judge, but in the
7 interim, the cause of action for punitive damages is
8 not automatic on a negligence case. Just because he
9 pled it in his wherefore clause which is what he did.

10 THE COURT: There is a threshold that he has
11 to pass to get that far.

12 MR. GULINO: Right.

13 THE COURT: So make the motion.

14 MR. GULINO: Okay.

15 THE COURT: Make the motion.

16 MR. GULINO: I understand. You mean to set
17 aside the verdict and to dismiss this or to dismiss
18 the punitive damage?

19 THE COURT: No, we --

20 MR. GULINO: I'm making a motion right now
21 set aside the verdict orally -- verbally if you don't
22 mind.

23 THE COURT: Okay.

24 MR. GULINO: And then I would like to renew
25 it on papers if I can afterwards. But let me do this.

1 We're going to make a motion to set aside the verdict
2 now, the jury's verdict. Is that okay or not?

3 THE COURT: No, no, no. That's not okay.

4 MR. GULINO: All right.

5 THE COURT: I'm asking you are you making
6 the motion to --

7 MR. GULINO: To dismiss the punitive now?

8 THE COURT: Correct.

9 MR. GULINO: Yes, I am.

10 THE COURT: Okay.

11 MR. GULINO: In order -- my understanding is
12 in order for a punitive damage claim to be sustained,
13 two things must be shown, one that the defendant acted
14 in reckless disregard for the safety of others and
15 that is in I believe -- I have this. It's right here.

16 This is the case that Mr. Clark gave me
17 yesterday I believe, right off the top of the bat.
18 Punitive damages may be awarded if plaintiff proves by
19 clear and convincing evidence that defendant's conduct
20 constitutes reckless indifference to the consequences
21 of harm to others. And that case is Smith against
22 Whitaker, 160 New Jersey 221, 241 1999 and it is
23 followed by a few other cases.

24 We're not -- part of the plaintiff's claim
25 here was that we had a checkered safety history and

1 knew about it. That's part of his punitive damage
2 claim. Nothing was brought out in this case at all.

3 As a matter of fact, we were forbidden from
4 bringing anything in that showed that we had no
5 violations at all on that project of 2000 employees.
6 And so how he says that we had a checkered past, I
7 don't know but this is the threshold that it is a
8 deliberate disregard in the interest of others and it
9 has to be proven by clear and convincing evidence.

10 I don't think so. The Court -- the jury
11 almost found the plaintiff negligent, all right?
12 They were questioning the proximate cause issue which
13 is another issue.

14 Whether they found him negligent and not a
15 proximate cause when all he was doing was walking
16 across the floor, I don't know. That was an
17 inconsistent verdict by far to me, but that's not what
18 we're talking about.

19 The clear and convincing evidence is a very,
20 very high standard and they didn't even get there. It
21 wasn't even close and as to the reckless indifference
22 to the lives of who?

23 We hold orientation meetings every day. We
24 have walk-a-thons every day -- not walk-a-thons, walk
25 abouts. We have inspections. All of these things

1 were done and it's not as if he fell 60 feet from
2 something where nobody wanted to pay any money to put
3 a safety rail up. This was a man who stumbled.

4 He admitted I stumbled. He lied through the
5 entire proceedings. He stumbled. That's what he did
6 on not even a whole, but a depression in the floor and
7 for that to go to punitive damages is against what
8 punitive damages are.

9 We're supposed to punish people from being
10 outrageous and reckless. And we're supposed to prove
11 it by clear and convincing evidence and I don't think
12 we get there at all. I don't really know -- I know
13 it's going to be considered by you. It should be.
14 Obviously, he's pleading it.

15 But that's standard. It's such a high
16 standard and punitives are really to protect the
17 general public at large, not just one person. I don't
18 see it here. This is a good company. They ran a good
19 site. We have one man who tripped and stumbled and
20 now we want to bring in a punitive damage claim.

21 The jury gave this man a good chunk of
22 change on his claim and to pile on with that same
23 jury, even -- I don't care if it's -- it doesn't make
24 a difference. They're jurors. It's supposed to be
25 fair.

1 But it just doesn't meet the threshold, Your
2 Honor, of punitive damage claim and we've heard all
3 the facts. Nothing is going to change now. There's
4 nothing that Mr. Clark is going to bring in that's
5 going to show that my client's conduct was worse than
6 it was.

7 There is nothing that he is going to bring
8 in that's going to show that he's got a stronger case
9 then he did when he went to the jury this morning.
10 It's the same case. He tripped. No one knew about
11 it.

12 There were no warnings to them, no
13 complaints to them. They've done their inspections.
14 There was nothing that anything was elicited from any
15 of the witnesses that indicated that this was a
16 dangerous condition that anybody -- first of all, in
17 their opinion it was a danger condition; second of
18 all, did anybody know about it.

19 The Court didn't even change OSHA
20 violations. They were general violations. The hole
21 violation which was the basis of their case didn't
22 even count in this case. This was a drain and so for
23 the jury to be able to -- to contemplate a punitive
24 damage claim would even be presented to the jury after
25 this lack of evidence on clear and convincing and

1 reckless conduct, I just think it shouldn't be done
2 and I'm going to dismiss it right now.

3 THE COURT: Okay. Do you want to respond?

4 MR. CLARK: Yes, Judge. In opposition to
5 the now motion to dismiss the punitive damages claim
6 the standard that we rely upon is reckless
7 indifference and it's true. It does have to be proven
8 by clear and convincing evidence and reckless
9 indifference.

10 The question for this Court right now on
11 this pending motion is did sufficient evidence -- was
12 there sufficient evidence in the case upon which a
13 reasonable juror could conclude that defendant's
14 conduct rises to the level of warning the jury to pass
15 on the question of punitive damages.

16 And we primarily rely upon what I had
17 already said on the record which is defendant's -- the
18 defendant's conduct in response to it which is in the
19 record and the response was to say it's not a problem,
20 we don't fix that.

21 We don't think it's a hazard, that sort of
22 thing.

23 It's true the response also included sending
24 the plaintiff to the hospital to get medical treatment
25 which is different than the Santillian case where they

1 poured rum on his injuries and sent him on his way.
2 But nevertheless, we feel that there is sufficient
3 evidence for the Court to permit the jury to determine
4 punitive damages.

5 THE COURT: Give me about five minutes and
6 I'll come back and give you my decision. All right?

7 (Recording paused.)

8 (Recording resumes.)

9 THE COURT: All right. So before the Court
10 now is a motion to dismiss the plaintiff's punitive
11 damages claim.

12 As was noted by counsel, punitive damages
13 are designed to require a wrongdoer to pay an amount
14 that's sufficient to punish the defendant and to deter
15 the defendant or defendants from future misconduct.

16 In order for a jury to find that punitive
17 damages are warranted, the plaintiff has to prove by
18 clear and convincing evidence that -- and I'm now
19 quoting from the actual model jury charge 8.60 the
20 plaintiff -- the plaintiff has to prove by clear and
21 convincing evidence that the injury, loss, or harm
22 suffered by the plaintiff was the result of
23 defendant's acts or omissions and again, this is all
24 be clear and convincing evidence and either
25 defendant's conduct was malicious or defendant acted

1 in wanton and willful disregard of the plaintiff's
2 rights.

3 Malicious conduct is intentional wrongdoing
4 in the sense of an evil minded act. Willful or wanton
5 is a deliberate act or omission with knowledge of a
6 high degree of probability of harm to another who
7 foreseeably might be harmed by the acts or omission in
8 reckless indifference to the consequence of the act or
9 omission.

10 So considering the testimony in this case,
11 the plaintiff as indicated relies primarily on the
12 conduct of the defendant after this incident occurred
13 and has characterized their response to the injury
14 which essentially presumably is sort of in line with
15 the testimony of Vincent Gallagher that the defendants
16 having seen the area where the plaintiff's incident
17 occurred did not feel that that was a dangerous
18 condition and that essentially that's -- their
19 response to the plaintiff's injury is in large part
20 what the plaintiff relies upon and what they allege to
21 be violations of OSHA. So from my -- the review of my
22 notes and the Court having listened to the testimony
23 of the witnesses presented the question becomes
24 whether or not a reasonable jury could find based upon
25 the facts that are presented in the case so far clear

1 and convincingly that these defendant's actions are
2 considered to be malicious or with an evil intent or
3 with reckless disregard for the -- what would be
4 foreseeable harm to others.

5 And I am satisfied based upon the evidence
6 that is presented here that a reasonable jury could
7 not make that finding and so for these reasons, I am
8 granting the motion to dismiss the punitive damages
9 claim.

10 MR. GULINO: Thank you, Your Honor.

11 * * * * *

12

CERTIFICATION

I, LAUREN A. VOLLMIN, the assigned transcriber,
do hereby certify the foregoing transcript of
proceedings recorded on July 18, 2017, Time from 9:02:51
to 9:08:05; Time from 9:16:05 to 10:27:04; Time from
11:51:10 to 11:53:00; Time from 12:26:25 to 12:27:59;
Time from 2:33:00 to 2:40:21; Time from 2:57:18 to
3:08;27; Time from 3:18:25 to 3:28:40; Time from 3:40:47
to 3:44:01 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 to the best of my ability.

Lauren Vollmin

LAUREN A. VOLLMIN AOC #469
G&L TRANSCRIPTION OF NJ

Date: July 31, 2017