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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK: TRIAL TERM PART 47

JASON KOWALSKY,

Plaintiff,

-against-

INDEX NO.
41227/2009

SUFFOLK COUNTY, SUFFOLK COUNTY
DEPARTMENT OF PARKS, RECREATION &
CONSERVATION and RAYMOND M. RANCOURT,

JURY TRIAL

Defendants.

July 30, 2014
Riverhead, New York

BEFORE:

HON. JERRY GARGUILO,
SUPREME COURT JUSTICE

And a Jury

APPEARANCES:

WILLIAM RICIGLIANO, ESQ.
JOEL H. ROBINSON, ESQ.
Attorneys for Plaintiff
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SUFFOLK COUNTY DEPARTMENT OF LAW
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BY: CHRISTOPHER A. JEFFREYS, ESQ.
Assistant County Attorney

BY: ANNA M. LOPINTO
OFFICIAL COURT REPORTER

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THE CLERK: Part 47 is now in session. Case on trial, index number 41227 of 2009, calendar number 201002471MV, Jason Kowalsky, plaintiff, against Suffolk County, Suffolk County Department of Parks, Recreation & Conservation and Raymond M. Rancourt, defendants.

Counsel, for the plaintiff, your appearance for the record, please.

MR. RICIGLIANO: Good afternoon, Judge. William Ricigliano, for the plaintiff, Jason Kowalsky.

THE COURT: Good afternoon, Mr. Ricigliano.

MR. ROBINSON: Good afternoon, Your Honor. Joel Robinson, for the plaintiff, Jason Kowalsky.

THE COURT: Good afternoon, Mr. Robinson.

MR. JEFFREYS: Good afternoon, Your Honor. Christopher Jeffreys, from the Suffolk County Attorney's Office, 100 Veterans Memorial Highway, Hauppauge, New York, for the defendants.

1 THE COURT: Good afternoon, Mr.
2 Jeffreys.

3 MR. JEFFREYS: Good afternoon,
4 Judge.

5 THE COURT: Ready for the panel?

6 MR. RICIGLIANO: Yes.

7 MR. JEFFREYS: Actually, Your Honor,
8 before we bring up the panel --

9 THE COURT: The panel is up already.

10 Before we bring them in? Okay.

11 MR. JEFFREYS: Yes. Just because I
12 have never tried a case with Your Honor
13 where there are two plaintiff's counsel, I
14 just want to make sure we have the rules
15 concerning two plaintiff's counsel. If one
16 attorney is doing one issue, they handle
17 that issue all the way through? The other
18 person is to be silent?

19 THE COURT: Can you live with that?

20 MR. RICIGLIANO: I certainly can.

21 MR. ROBINSON: Sure.

22 THE COURT: All right.

23 MR. JEFFREYS: And scheduling, you
24 want to do that after? We're just doing
25 openings today, Judge?

1 THE COURT: Yes. I'll give them
2 their instructions. We'll do the openings.
3 We'll start testimony tomorrow morning.
4 First witness is available how early?

5 MR. RICIGLIANO: Ten.

6 THE COURT: I'll bring the jury in
7 about 15 minutes early, because apparently,
8 we have somebody who tends to run tardy,
9 all right?

10 Nick, bring them in. Thank you.

11 Was everybody present during voir
12 dire, all three of you?

13 MR. RICIGLIANO: Yes.

14 MR. JEFFREYS: Yes.

15 MR. ROBINSON: Yes.

16 THE COURT OFFICER: Jury entering.

17 (The jury entered the courtroom)

18 THE CLERK: Please be seated. Good
19 afternoon, jurors. When you hear your name
20 called, please respond in a loud clear
21 voice for the Court and for the record that
22 you're present. And if I do pronounce your
23 name wrong, please correct me.

24 (Whereupon, roll call of the jury
25 was taken by the clerk of the court)

1 THE CLERK: Is the jury as seated
2 acceptable to counsel? Plaintiff?

3 MR. RICIGLIANO: Acceptable to
4 plaintiff.

5 THE CLERK: Defendant?

6 MR. JEFFREYS: Yes, Your Honor.

7 THE CLERK: Your Honor, the jurors
8 were previously sworn on one of the
9 following three dates, July 23rd, July
10 24th, or July 25th. Ready to proceed.

11 THE COURT: Thank you, Mr. Russo.
12 Good afternoon, everybody. Let me
13 introduce myself. I'm Judge Garguilo.
14 I'll be presiding over this case.

15 You've already had an opportunity.
16 I'll reintroduce you to Mr. Ricigliano and
17 Mr. Robinson, who are here on behalf of
18 plaintiff, Jason Kowalsky. And, of course,
19 you remember Mr. Jeffreys, who represents
20 the defendants in the case, Suffolk County,
21 Suffolk County Department of Parks,
22 Recreation & Conservation, as well as
23 Raymond M. Rancourt.

24 In a moment, I'm going to give you
25 what's called your opening instructions.

1 Essentially, what it is is the do's and
2 don'ts and pretty much the protocol of the
3 trial.

4 But before I do that, I'll mention a
5 couple of things to you. You'll notice
6 every time you enter and leave the
7 courtroom, everybody stands up. There's
8 reasons for that. One, of course, is
9 appreciation and gratitude for your service

10 as jurors, and the second one is respect.
11 Respect for the lofty office you hold. I
12 called it a lofty office, because as the
13 finder of facts, the jurors, you play a
14 very, very, very important role, if not the
15 most important role in this trial.

16 A preliminary matter. I often
17 wondered if I was a juror and had no
18 experience with this system, a question
19 that would come to mind. You know you're
20 going to sit through a trial. The question
21 is, there will come a time that we're asked
22 to render a verdict. How is that done? I
23 go over that much later, but I'll give you
24 a clue right now. Eventually, there's a
25 collaborative effort between the Court and

1 the attorneys, and in that collaborative
2 effort, we produce and manufacture a
3 document that's called-- it's generally
4 called a verdict sheet, and it consists of
5 a series of questions that call for either
6 a yes or no answer, or sometimes a number.
7 Your answers to those questions at the end
8 of this trial will be your verdict. Okay?

9 So pay careful attention, as I know
10 you will. I'm going to give you your
11 opening instructions. If I forgot these
12 glasses, we'd be in trouble today.

13 Members of the jury, we're about to
14 start the trial of this case about which
15 you have heard some details during jury
16 selection. Before the trial begins,
17 however, there are certain instructions you
18 should have in order to understand what you
19 will hear and see and how you should
20 conduct yourselves during the trial.

21 The party who brings a lawsuit, as
22 you probably know already, is called the
23 plaintiff. In this action, the plaintiff
24 is Jason Kowalsky, who sues to recover for
25 injuries and losses he claims were caused

1 by the neglect of the defendants. The
2 parties against whom the lawsuit is brought
3 are called the defendants. And as I just
4 told you, the defendants in this case are
5 Suffolk County, Suffolk County Department
6 of Parks, Recreation & Conservation, and
7 Raymond M. Rancourt.

8 In this case, you will decide only
9 the question of damages, that is, what
10 amount of money will fairly and justly
11 compensate the plaintiff for all losses
12 sustained and the injuries he sustained --
13 all losses resulting from the injuries he
14 sustained.

15 Since the question of liability or
16 fault has already been decided, any
17 evidence concerning how the accident
18 happened will be received only as it
19 relates to the question of damages. When I
20 have completed these opening instructions
21 to you, the attorneys will make opening
22 statements to you in which each will
23 outline for you what he expects to prove.
24 The purpose of such opening statements is
25 to tell you about each party's claims so

1 that you will have a better understanding
2 of the evidence as it is introduced.

3 What is said in such opening
4 statements is not evidence. The evidence
5 upon which you will base your decision will
6 come from the testimony of witnesses here
7 in court, or in examinations before
8 trial -- and some time during the trial
9 I'll give you an instruction on what an
10 examination before trial is -- or in the
11 form of photographs, documents or other
12 exhibits introduced into evidence.

13 Plaintiff makes an opening statement
14 first and is followed by the defendant.
15 After the opening statements, the plaintiff
16 will introduce evidence in support of his
17 claim. Normally, a plaintiff must produce
18 all of his witnesses and complete his
19 entire case before the defendant introduces
20 any evidence, although exceptions are
21 sometimes made to that rule in order to
22 accommodate a witness.

23 After plaintiff has completed the
24 introduction of all of his evidence, the
25 defendant may present witnesses and

1 exhibits. If they do so, plaintiff may be
2 permitted to offer additional evidence for
3 the purpose of rebutting defendant's
4 evidence.

5 Each witness is first examined or
6 questioned by the party who calls that
7 witness to testify. That's called direct
8 examination, which I suspect you all knew
9 already, and then the opposing party is
10 permitted to question the witness. That's
11 called cross-examination.

12 At times during the trial, an
13 attorney may object to a question or to the
14 introduction of an exhibit or make what we
15 call motions concerning legal questions
16 that apply to this case. Arguments in
17 connection with such objections or motions
18 are sometimes made out of the presence of
19 the jury. What you'll see is, I'll call
20 the attorneys to a sidebar. Any ruling
21 upon such objections or motions will be
22 based solely upon the law, and, therefore,
23 you must not conclude from any such ruling
24 or from anything I say during the course of
25 the trial that I favor any party to this

1 lawsuit.

2 After such a ruling, you may hear one
3 of the attorneys taking what we call an
4 exception to it. Exceptions have nothing
5 to do with your role in this case, and I
6 mention the procedure and the word to you
7 so that you will not be confused if you
8 hear the word exception during the course
9 of the trial.

10 Upon completion of evidence, the
11 attorneys will again speak to you in a
12 closing statement or summation. In summing
13 up, the lawyers will point out what they
14 believe the evidence has shown, what
15 inferences or conclusions they believe you
16 should draw from the evidence, and what
17 conclusions they believe you should reach
18 as your verdict. What is said by the
19 attorneys in summation, like what is said
20 by them in their opening statements, or in
21 the making of objections or motions during
22 the trial is not evidence. Summations are
23 intended to present the arguments of the
24 parties based upon the evidence. Under our
25 system, the defendant sums up first,

1 followed by the plaintiff. Just in reverse
2 order as opening statements.

3 After the summations, I will
4 instruct you on the rules of law applicable
5 to the case, and you will then retire for
6 your deliberations.

7 Your function as jurors is to decide
8 what has or has not been proved and apply
9 the rules of law that I give you to the
10 facts as you find them to be. The decision
11 you reach will be your verdict. The
12 decision will be based on the testimony
13 that you hear, and the exhibits that will
14 be received in evidence during the trial.

15 You are the sole and exclusive
16 judges of the facts, and nothing I say or
17 do should be taken by you as any indication
18 of my opinion as to the facts. As to the
19 facts, neither I nor anyone else may invade
20 your province. I will preside impartially
21 and not express any opinion concerning the
22 facts. Any opinions of mine on the facts
23 would, in any event, be totally irrelevant,
24 because the facts are for you to decide.
25 On the other hand and with equal emphasis,

1 I instruct you in accordance with the oath
2 you took as jurors, you are required to
3 accept the rules of law that I give you,
4 whether you agree with them or not. You
5 are not to ask anyone else about the law.
6 You should not consider or accept any
7 advice about the law from anyone else but
8 me.

9 As the sole judges of the facts, you
10 must decide which of the witnesses you
11 believe, what portion of their testimony
12 you accept, and what weight you give to it.
13 At times during the trial, I may sustain
14 objections to questions and you may hear no
15 answer or, where an answer has been made, I
16 may instruct that it be stricken or removed
17 from the record, and that you disregard it
18 and dismiss it from your minds. You may
19 not draw any inference or conclusions from
20 an unanswered question, nor may you
21 consider testimony which has been stricken
22 or removed from the record in reaching your
23 decision. The law requires that your
24 decision be made solely upon the evidence
25 before you. Such items as I exclude from

1 your consideration will be excluded because
2 they are not legally admissible.

3 The law does not, however, require
4 you to accept all of the evidence I shall
5 admit. In deciding what evidence you will
6 accept, you must make your own evaluation
7 of the testimony given by each of the
8 witnesses and decide how much weight you
9 choose to give to that testimony.

10 The testimony of a witness may not
11 conform to the facts as they occurred
12 because he or she is intentionally lying,
13 because the witness did not accurately see
14 or hear what he or she is testifying about,
15 because the witness's testimony is faulty,
16 or because the witness has not expressed
17 himself or herself clearly in testifying.

18 There's no magical formula by which
19 you evaluate testimony. All of you bring
20 with you to this courtroom all of the
21 experience and background of your lives.
22 In your everyday affairs, you decide for
23 yourselves the reliability or unreliability
24 of things people tell you. The same tests
25 that you use in your everyday dealings are

1 the tests which you apply in your
2 deliberations. For instance, the interest
3 or lack of interest of any witness in the
4 outcome of the case; the bias or prejudice
5 of the witness, if there be any; the
6 appearance, the manner in which the witness
7 gives testimony on the stand; the
8 opportunity that the witness had to observe
9 the facts about which he or she testifies;

10 the probability or improbability of the
11 witness's testimony when considered in the
12 light of all of the other evidence in the
13 case are all items to be considered by you
14 in deciding how much weight, if any, you
15 will give to that witness's testimony.

16 If it appears that there's a
17 discrepancy in the evidence, you will have
18 to consider whether the apparent
19 discrepancy can be reconciled by fitting
20 the two historical accounts or stories
21 together. If, however, that is not
22 possible, you will then have to decide
23 which of the conflicting stories you will
24 accept.

25 The purpose of the rules I have

1 outlined for you is to make sure that a
2 just result is reached when you decide the
3 case. For the same purpose, you should
4 keep in mind several rules governing your
5 own conduct during any recess. What's a
6 recess? A recess is any time you're not in
7 the courtroom.

8 In fairness to the parties to this
9 lawsuit, it is very important that you keep
10 an open mind throughout the trial. Then
11 after you have heard both sides fully, you
12 will reach your verdict only on the
13 evidence as it is presented to you in this
14 courtroom, and only in this courtroom, and
15 then only after you have heard the
16 summations of each of the attorneys and my
17 instructions to you on the law. You will
18 then have an opportunity to exchange views
19 with each member of the jury during your
20 deliberations to reach your verdict.

21 Please do not discuss this case
22 either among yourselves or with anyone else
23 during the course of the trial. Do not do
24 any independent research on any topic you
25 might hear about in the testimony or see in

1 the exhibits, whether by consulting others,
2 reading books or magazines, or conducting
3 an internet search of any kind. All
4 electronic devices, including cell phones,
5 BlackBerrys, iPhones, laptops or any other
6 personal electronic device must be turned
7 off while you are in the courtroom and
8 while you are deliberating after I have
9 given you the law applicable to this case.

10 It is important to remember that you
11 may not use any internet services such as
12 Google, Facebook, Twitter or any others to
13 individually or collectively research
14 topics concerning the trial, which includes
15 the law, information about any of the
16 issues in contention, the parties, the
17 lawyers or the Court. After you have
18 rendered your verdict and have been
19 discharged, you will be free to do any
20 research you choose or to share your
21 experiences, either directly or through
22 your favorite electronic means. For now,
23 be careful to remember these rules whenever
24 you use a computer or other personal device
25 during the time you are serving as a juror

1 and you are not in the courtroom.

2 While this instruction may seem
3 unduly restrictive, it is vital that you
4 carefully follow these directions. The
5 reason is simple. The law requires that
6 you consider only the testimony and
7 evidence you hear in this courtroom. Not
8 only does our law mandate it, but the
9 parties depend on you to fairly and
10 impartially consider only the admitted
11 evidence. To do otherwise by allowing
12 outside information to affect your judgment
13 is unfair and prejudicial to the parties
14 and could lead to this case having to be
15 retried. Accordingly, I expect that you
16 will seriously and faithfully abide by this
17 instruction.

18 Please do not permit any person who
19 is not a juror to discuss this case in your
20 presence. And if anyone does so, despite
21 your telling the person not to, report that
22 to me as soon as you are able. You should
23 not, however, discuss with your fellow
24 jurors either that fact or any other fact
25 you feel necessary to bring to my

1 attention.

2 Although it is a normal human
3 tendency to talk to people with whom one
4 comes in contact, please do not, during the
5 time you serve on this jury, talk whether
6 in or out of the courtroom with any of the
7 parties or their attorneys or any
8 witnesses. By this I mean, not only do not
9 talk about the case, but do not talk to

10 them at all, even to pass the time of day.
11 In no other way can all parties be assured
12 of the absolute impartiality they are
13 entitled to expect from you as jurors.

14 So the point being, if you run
15 into-- if you pass in the hallways one of
16 the parties or the lawyers and they just
17 walk right by you, don't be offended, all
18 right? They're doing it pursuant to my
19 instruction to avoid even the appearance of
20 an impropriety, okay?

21 Under the law, only six jurors will
22 deliberate on this case when it is
23 submitted for consideration. We have
24 selected additional jurors. Alternate
25 jurors are selected to serve because a

1 regular juror may be prevented from
2 continuing to serve by some emergency, such
3 as a serious illness or death. Although
4 this seldom happens during a trial, there
5 are cases where we do call on the services
6 of alternates. Alternates are required to
7 pay the same careful attention to the trial
8 as the regular jurors, so that if needed,
9 they will be fully familiar with the case.

10 The fact that there are alternate jurors
11 does not mean that any regular juror is
12 free to excuse himself or herself from the
13 case. As a duly chosen juror, it is your
14 obligation to be available throughout the
15 trial.

16 Now, the question often comes up as
17 to whether or not jurors may take notes.
18 The answer is yes, you may take notes if
19 you want. Whether you take notes or not,
20 you should be aware that the court reporter
21 records everything stated in the courtroom,
22 and any portion of the transcript, at your
23 request, will be read back to you during
24 your deliberations. If you do take notes
25 during the trial, you should not allow your

1 note taking to become a distraction in the
2 proceedings. If any of you do take notes
3 during the trial, those notes are only for
4 your personal use and simply an aid to your
5 memory. Because the notes may be
6 inaccurate or incomplete, they may not be
7 given any greater weight than your
8 independent recollection. Because the
9 notes may be inaccurate or incomplete, they
10 may not be given any greater weight or
11 influence than the recollection of other
12 jurors about the facts or the conclusions
13 to be drawn from the facts in determining
14 the outcome of this case. Those of you who
15 do not take notes should rely on your
16 independent recollection of the evidence,
17 not be influenced by the fact that another
18 juror has taken notes.

19 Any difference between a juror's
20 recollection and a juror's notes should
21 always be settled by asking to have the
22 court reporter's transcript on that point
23 read back to you. The court transcript
24 should govern your determination, rather
25 than a juror's notes. A juror's notes are

1 not a substitute for the official record or
2 for the governing principles of law that I
3 will give you.

4 The description of trial procedure,
5 the rules governing your conduct, and the
6 legal principles I have discussed with you
7 will, I believe, make it easier for you to
8 understand the trial as it goes on and to
9 reach a just verdict at its conclusion.

10 Gentlemen, did I miss anything?

11 MR. JEFFREYS: No, Your Honor.

12 MR. RICIGLIANO: No, Your Honor.

13 THE COURT: Off to a good start.

14 Sidebar?

15 (Sidebar discussion held off the
16 record)

17 THE COURT: Opening statements?

18 MR. RICIGLIANO: Yes, Judge.

19 THE COURT: You may.

20 MR. RICIGLIANO: Thank you. Your
21 Honor, counsel, ladies and gentlemen of the
22 jury. Nice to see all of you again.

23 When a driver's negligence causes
24 harm to a pedestrian, that pedestrian is
25 entitled to an amount of money equal to the

1 level of the harm caused. Now, let me tell
2 you the story of the harm that was caused
3 in this case.

4 It's June 12th, 2009. It's
5 approximately 11:30 in the morning. And a
6 sign painter for the parks department by
7 the name of Raymond Rancourt is leaving his
8 home base at Cathedral Pines Park, and he's
9 driving a pickup truck that's owned by the
10 parks department.

11 Mr. Rancourt leaves the access road
12 to Cathedral Pines Park-- I'm sorry --
13 leaves the maintenance lot and enters the
14 access road and drives down the access
15 road, which will eventually lead him to
16 Yaphank-Middle Island Road.

17 At approximately the same time,
18 there's a Verizon field tech, who was just
19 finished-- finishing performing a test on
20 a utility pole located on Yaphank-Middle
21 Island Road. That Verizon tech is starting
22 to collect the cones that he's placed
23 around his Verizon truck while he was
24 performing the tests, just like he was
25 taught to do. He's wearing a hard hat,

1 he's wearing a reflective vest.

2 Mr. Rancourt drives up that access
3 road, and when he reaches Yaphank-Middle
4 Island Road, he turns his wheel to the
5 right, he looks to the left, and he
6 accelerates that pickup truck. And as he
7 does, he collides with that Verizon field
8 tech, who is located at the back of his
9 Verizon van, which is parked on the

10 shoulder of the roadway collecting those
11 cones.

12 The Verizon tech does not know that
13 the impact is about to occur. His back is
14 to the pickup truck. He doesn't hear a
15 horn blow. He doesn't hear the screeching
16 of brakes. So he's not prepared for the
17 collision that is about to occur. He's not
18 braced for it; he's not ready for it.

19 The pickup truck collides with the
20 back or the rear of that Verizon tech's
21 right knee. And afterward, the Verizon
22 tech (indicating) sustains bruising to the
23 back of his knee where the collision
24 occurs. The force of the impact is so
25 severe that when it occurs both with the

1 Verizon tech and with the Verizon van, Mr.
2 Rancourt, even though he's wearing a
3 seatbelt, strikes his face on the steering
4 wheel.

5 The collision is so severe that when
6 the pickup truck collides with the Verizon
7 van, it pushes the Verizon van forward.
8 And afterwards, the doors to the Verizon
9 van will not be able to be fully closed
10 because of the damage that's caused by the
11 collision. And the impact is so severe,
12 that it causes the Verizon tech to be
13 propelled into Yaphank-Middle Island
14 Roadway. And when he does, he sustains
15 abrasions to various parts of his body. To
16 his elbow (indicating), to his hands, to
17 his stomach, and most specifically and most
18 importantly, an abrasion to his right knee.
19 So there are two impacts that occur.
20 The first impact is the impact between the
21 Verizon-- I'm sorry -- between the pickup
22 truck and the Verizon field tech, when the
23 collision occurs. The other impact is when
24 the Verizon field tech lands in the
25 roadway.

1 After the tech sort of comes to, he
2 looks and he sees that the pickup truck is
3 now in the location where his van
4 previously was on the side of the road.
5 And the Verizon van has been pushed
6 forward.

7 The Verizon tech tries to crawl
8 toward his van in order to get out of the
9 roadway, but doesn't quite make it there.

10 And the tech remains in the roadway,
11 injured, hurt, waiting for help. And Mr.
12 Rancourt, rather than waiting with the tech
13 while help arrives, returns to the pickup
14 truck and sits in the pickup truck.

15 That Verizon field tech, who is in
16 the roadway, in pain, with those abrasions
17 on his body, waiting for help, who did
18 absolutely nothing to have caused this
19 collision, is my client, Jason Kowalsky.
20 And Jason is sitting there, in the striped
21 shirt with his dad Kerry. His mom was in
22 the courtroom earlier, but she's going to
23 be testifying here, so she was asked to
24 step outside.

25 We have sued the County of Suffolk

1 and the parks department because, as the
2 owner and the employer of Mr. Rancourt,
3 they're responsible for his negligent
4 conduct. And we have sued Mr. Rancourt
5 because he violated rules of the road that
6 directly led to that collision that has
7 caused all of Jason's harms and losses.

8 During this trial, my job is to
9 explain to you and present to you all of
10 the evidence relating to Jason's harms and
11 losses, as we discussed in jury selection.
12 Like we talked about, everything else is
13 outside the box. And at the end of this
14 case, you're going to be asked to return a
15 verdict, an amount of money, and the only
16 thing you can base that verdict on is the
17 level of Jason's harms and losses.

18 So I will be explaining that to you
19 during the entirety of this trial. You're
20 going to need to know about the severity of
21 his harms and losses in order to arrive at
22 the decisions that you need to make at the
23 end of this trial.

24 Let me take you back to June 12th,
25 2009. Eventually, help does come to Jason.

1 There's a woman who will testify at the
2 trial by the name of Linda Peterson, who
3 comes to his assistance and calls 911.
4 You'll not only hear from Ms. Peterson, but
5 you'll also hear the 911 call. And Ms.
6 Peterson will tell you and you'll hear on
7 the 911 call that when she saw the
8 collision, she saw Jason--

9 MR. JEFFREYS: Objection.

10 MR. RICIGLIANO: --flying.

11 THE COURT: Objection, right?

12 MR. JEFFREYS: Yes.

13 THE COURT: As I told you in opening
14 statements, what a lawyer says-- what any
15 lawyer says during an opening statement or
16 summation is not evidence. It's an outline
17 of what the lawyer intends to prove on
18 behalf of his or her client. You got that?

19 So this opening statement, as with
20 Mr. Jeffreys also, is not evidence. It's
21 an outline of what the lawyer intends to
22 prove. Whether it's proven or not, whether
23 it's admissible or not, whether there's an
24 objection during the trial or not, this is
25 the outline. Okay? So just keep that in

1 mind.

2 MR. JEFFREYS: Thank you, Your
3 Honor.

4 MR. RICIGLIANO: You'll hear
5 Ms. Peterson tell you, and you'll hear on
6 the 911 tape, that she saw Jason when he's
7 struck by the pickup truck, that he flew
8 into the air and landed in the roadway.

9 An ambulance comes and they brace
10 Jason's knee. They put a collar on his
11 neck and they place him on a back board.
12 They immobilize him, and they place him
13 into an ambulance, and he's taken
14 immediately and directly from the scene
15 straight to Brookhaven Hospital. And when
16 he arrives at Brookhaven Hospital, Jason
17 complains to them and they treat the most
18 obvious and evident injury that he has,
19 which is that deformity, that abrasion,
20 that swelling to the right knee that you
21 just saw in that photograph that I just
22 showed you.

23 They perform x-rays of Jason's knee
24 and his pelvis. They provide him with a
25 knee immobilizer and crutches, and they

1 discharge him from the hospital. He leaves
2 the hospital and returns to his home also
3 by ambulance. And he wakes up at about
4 four o'clock in the morning, less than 48
5 hours after this collision occurs, and
6 Jason can't move. He can't sit up; he
7 can't get out of bed.

8 In addition to his right knee, now
9 his neck is bothering him, and now he's
10 having excruciating pain to his lower back.
11 So much so, that Jason once again calls an
12 ambulance, and now the ambulance comes to
13 his home. They remove him from his home
14 with a stair chair, and they put him on a
15 stretcher, and they load him into the
16 ambulance, and now the ambulance takes him
17 directly from his home straight to, this
18 time, John T. Mather Hospital.

19 And when Jason Kowalsky arrives at
20 John T. Mather Hospital, he's now
21 complaining -- in addition to his right
22 knee, he's complaining about his neck and
23 his lower back. He receives x-rays at John
24 T. Mather of his right knee, his neck, and
25 his lower back. And he is discharged from

1 the hospital with those injuries. Injuries
2 to the right knee, the neck, and the lower
3 back.

4 So within less than 48 hours of this
5 collision occurring, within less than 48
6 hours of being hit by that pickup truck on
7 Yaphank-Middle Island Roadway, before any
8 lawyers were hired, before there was any
9 discussion about a lawsuit or litigation or
10 money or judges or juries or trials, the
11 only thing on Jason Kowalsky's mind was
12 letting medical personnel know what was
13 bothering him. When he was at his most
14 vulnerable, Jason Kowalsky told medical
15 personnel that he had complaints, pain,
16 injury to his right knee, his neck, and his
17 lower back.

18 Now, what do we expect that the
19 medical evidence will be related to these
20 injuries? You heard me say during jury
21 selection that Jason's injuries and
22 conditions are really three-fold. He has
23 an injury to his right knee, his lower
24 back, and he suffers from chronic pain. So
25 let me tell you what we expect the evidence

1 will be with respect to these injuries,
2 these conditions. And let me start first
3 with the right knee.

4 Jason visited a board certified
5 orthopedic surgeon three days after this
6 collision occurred, a gentleman by the name
7 of Nestor Blyznak, Dr. Nestor Blyznak, who
8 will testify at this trial. And Dr.
9 Blyznak will tell you and the evidence will
10 show that he felt that Jason needed surgery
11 right from the beginning, very early on in
12 his treatment of Jason.

13 However, Jason had some issues that
14 he had to contend with before Dr. Blyznak
15 could really consider surgery. One was the
16 swelling to his knee, which had gotten
17 worse after the collision. So Dr. Blyznak
18 wanted to wait until the swelling went
19 down.

20 Dr. Blyznak also wanted Jason to
21 regain mobility to his knee before he
22 performed surgery. So he sent Jason for
23 physical therapy, and Dr. Blyznak waited
24 for that swelling to go down, to reduce.

25 The other problem that Jason was

1 having around that time is, the pain in his
2 knee was getting so bad, that in Jason's
3 own words, he felt as though his knee was
4 going to explode. And he was sent to the
5 hospital to undergo ultrasound because they
6 suspected that he might have a DVT, or deep
7 vein thrombosis, which essentially is a
8 clot, which if left untreated and
9 undiagnosed, could really cause some
10 problems for someone.

11 Fortunately, that resolved and the
12 swelling went down, and Jason regained some
13 movements and mobility to his knee. In
14 December of 2009, Dr. Blyznak did perform
15 surgery to Jason's knee.

16 Now, one of the things that you'll
17 hear during this trial is the way in which
18 doctors diagnose and treat injuries. And
19 doctors have many different tools that they
20 use in order to do that. One of those
21 tools is clinical examination, seeing the
22 patient in the office and examining them,
23 asking what's wrong, putting them through a
24 series of tests so they can see what is
25 bothering the patient, which Jason's

1 treating doctors will tell you is the gold
2 standard when diagnosing a patient. That's
3 one tool.

4 The other tool that doctors will
5 sometimes use is diagnostic testing, MRI's,
6 x-rays, CAT scans, things like that. And
7 in fact, Jason's doctor, Dr. Blyznak, sent
8 him for an MRI of the right knee
9 approximately June 20th, just about a
10 little over a week after the collision
11 occurred.

12 You're going to hear that
13 radiologists sometimes differ when they
14 read films. Treating doctors sometimes
15 differ with what the radiologists say when
16 they read films. But when Dr. Blyznak saw
17 the film and he read the radiology report,
18 he suspected that Jason had a complete tear
19 of the ACL, or the anterior cruciate
20 ligament, and he had a complete tear of the
21 meniscus to his knee. And when Dr. Blyznak
22 was going to perform a surgery on Jason, he
23 anticipated doing an ACL reconstruction and
24 meniscal repair.

25 Now, Dr. Blyznak will tell you what

1 these parts of the body, parts of the knee,
2 the functions that they perform. He'll
3 describe that for you. But he fully
4 thought that he was going to do an ACL
5 reconstruction and a meniscal repair.

6 All the doctors in this case will
7 agree that the only true way to determine
8 what the true nature of someone's injury
9 is, despite all the tools that doctors
10 have, is to actually open up the patient
11 and take a look inside their body. It's
12 the only certain way to know what exactly
13 is going on inside someone's body. Beyond
14 clinical examination, beyond diagnostic
15 testing.

16 The only two doctors that you will
17 ever hear from in this case who actually
18 had the opportunity to look inside Jason's
19 body are Dr. Nestor Blyznak, who performed
20 the knee surgery, and Dr. Andrew Merola,
21 who performed his back surgery. And the
22 reason why I say this is because when Dr.
23 Blyznak went inside Jason's body, he did
24 not see exactly what was on the film. It
25 was different. What he saw was a partial

1 tear of the ACL and a complete tear of the
2 meniscus. So even though he was ready to
3 do a complete ACL reconstruction, he did
4 not do it. Nonetheless, as Dr. Blyznak
5 will tell you, the ACL during this
6 collision was stretched. And the function
7 of that ACL will never be the same.

8 Dr. Blyznak, as the evidence will
9 show, will also tell us that because of the
10 injury to the ACL and because of the injury
11 to the meniscus, Jason is at risk of fully
12 tearing the ACL, and he's at risk of having
13 or suffering from arthritis in the knee in
14 the future. And as a result, will need
15 future surgeries, which I'll talk about in
16 just a moment.

17 Dr. Blyznak also kept Jason out of
18 work, medically kept him out of work as a
19 result of this injury to his knee.

20 You're also going to hear evidence
21 of Jason's back injury, and the doctor that
22 you're going to hear from is Dr. Andrew
23 Merola. Dr. Merola is the only doctor
24 you're going to hear from during this trial
25 who currently performs surgery to the back.

1 No other doctor who testifies at this trial
2 currently performs back surgery. And it's
3 not something that Dr. Merola does once in
4 a while. It's something that he does every
5 single day. He diagnoses, he treats, and
6 he performs surgery to the spine. That is
7 his specialty. And I want you to remember
8 that when you listen to the quality of the
9 testimony between Jason's treating doctors
10 and the other doctors that you're going to
11 hear from during this trial.

12 Jason saw Dr. Merola in August of
13 2011, and Dr. Merola was able to do those
14 clinical examinations of Jason over a
15 period of time. Dr. Merola suspected that
16 Jason had some injury to the nerves in his
17 spine, the nerves in his back. And Dr.
18 Merola eventually recommended to Jason and
19 Jason had spinal surgery in June of 2012.
20 Dr. Merola will describe what that surgery
21 was. But when Dr. Merola went inside
22 Jason's body, what he saw was-- This is
23 our spine (indicating). These are bones in
24 the spine, and in between them are the
25 discs.

1 The outer portion of the disc is a
2 material that is sort of-- made of a
3 material like cartilage, called the
4 annulus. Dr. Merola, when he performed
5 surgery on Jason, saw that this annulus was
6 completely torn across. And the material
7 that is inside of the disc, known as the
8 nucleus pulposus, leaked out or came out.
9 And when it did, it was compressing or

10 impinging on Jason's nerve. And that
11 coincided with what Dr. Merola observed
12 when he did his physical examination of
13 Jason in his office and Jason described
14 pain to his lower back and pain radiating
15 into his legs.

16 Now, before we ever came to trial,
17 one of the things that we needed to
18 determine was whether this collision caused
19 the injuries to Jason's back. When you
20 hear the evidence in this case, one of the
21 things that you'll learn is that causation,
22 or whether or how an injury is caused, is
23 really a legal term, not a medical term.
24 Doctors don't necessarily care what causes
25 an injury. They just care about diagnosing

1 and treating injury.

2 But we're in a legal setting, so we
3 wanted to determine whether this collision
4 caused Jason's back injury and the surgery.

5 So we spoke to Dr. Merola. And one
6 of the reasons why we were concerned is
7 because, as you'll hear and Jason will tell
8 you and the doctors will tell you, Jason
9 had some back problems before this

10 collision happened. He went for some
11 treatment, and he'll describe that for you.
12 And before this collision ever happened,
13 Jason had an MRI. And Dr. Merola compared
14 that MRI before this collision to
15 diagnostic testing that was taken of Jason
16 after the collision. And he also compared
17 the prior film to what he saw when he
18 opened up Jason's body. And Dr. Merola
19 will tell you that although there was that
20 annular tear that he observed during that
21 surgical procedure, that that annular tear
22 did not exist before the collision. It's
23 not on that prior film.

24 The other concern that we had was
25 that Jason was born with a condition known

1 as sacralization of the spine. This is
2 your sacrum (indicating), and there's a
3 percentage of the population that is born
4 where their spine-- their sacrum is
5 naturally fused to their spine.

6 So he wanted to know whether or not
7 Jason's prior back issues or the
8 sacralization of the spine in any way
9 contributed to what happened after the
10 collision. And one of the clues that we
11 came upon, and what the evidence will show
12 in this case, is as a Verizon field tech,
13 Jason Kowalsky has a very physically
14 demanding job. And you're going to hear
15 from his supervisor by the name of Brad
16 French. He's going to testify in this
17 case. And Mr. French and Jason will tell
18 you that his job requires heavy lifting,
19 climbing, pulling, crawling. It's a
20 physically intensive job. And it's not
21 just once in a while during the course of
22 the day. It's many times during the course
23 of the day.

24 And Dr. Merola will testify and he
25 advised us that had Jason had any prior

1 problems, whether it was a prior back issue
2 or whether it was sacralization of the
3 spine, because of the nature of his job,
4 what he would have expected to have seen
5 was symptoms over time that would have
6 progressed to the point where Jason would
7 have needed extensive treatment or possibly
8 surgery before this collision ever
9 occurred. Jason would not have been able
10 to do that job. But that's not what
11 happened.

12 Before this collision occurred,
13 Jason Kowalsky did not only do that job,
14 that heavy intensive job well, he did it
15 with excellence. And that's how we were
16 able to determine before we ever came to
17 trial that this collision was what caused
18 Jason's back injury and the surgery.

19 Now, the reason that this is going
20 to become important to all of you during
21 this trial, and I'm going to ruin some of
22 the suspense for you, is, Mr. Jeffreys is
23 going to tell you that there were other
24 things that caused this injury to the spine
25 and the surgery. In fact, he's going to

1 tell you-- He's going to throw the
2 kitchen sink at you. He's going to tell
3 you there's all kinds of things that caused
4 it. Everything else other than the
5 collision. Now, he doesn't want you to
6 believe that the collision could have
7 caused this back injury or the surgery
8 because he knows if you believe that,
9 you're going to have to allow money for
10 each component of Jason's losses.

11 But I want you to listen to the
12 testimony and I want you to pay attention
13 to the medical evidence and the quality of
14 the medical evidence on both sides.
15 Because what the evidence will show is that
16 it was this collision that caused both
17 Jason's back injury and his knee injury.

18 And lastly, Jason has a claim of
19 chronic pain. He suffers from chronic
20 pain. The doctor who will discuss this
21 with you is a doctor by the name of
22 Dr. Shafi Wani. Dr. Wani is a board
23 certified neurologist and he's also an
24 expert in pain management.

25 Dr. Wani will tell you that when

1 this collision occurred, there was an
2 irritation to the nerve root in Jason's
3 lower back. There was a stretching, a
4 swelling to that nerve root. That's an
5 injury, an irritation that can't
6 necessarily be picked up by films, by
7 diagnostic testing. You can't see it.
8 When that occurs, there typically is a
9 normal way that the body responds to pain.

10 Pain sensations are sent to the brain, the
11 brain processes it, and then handles the
12 pain or manages the pain. But sometimes
13 the brain becomes hypersensitive and
14 becomes overloaded with the pain impulses,
15 and the brain doesn't manage pain the
16 proper way, the normal way. And Dr. Wani
17 will explain the process by which that
18 occurs. And what Dr. Wani will tell us and
19 what the evidence will show is that the way
20 in which Jason manages pain has forever
21 been altered, not at the location where it
22 happened, but in his brain.

23 And we discussed during jury
24 selection that we were going to bring this
25 evidence to you, and we asked that all of

1 you be open to listening to how that occurs
2 in the human body.

3 Dr. Wani has been treating Jason
4 with both injections and medication to try
5 to alleviate the pain, alleviate the pain
6 both at the location where the injury
7 occurred and also to block those pain
8 receptors in the brain that are not
9 managing the pain properly.

10 So what are we going to ask you,
11 members of the jury, to do about these
12 harms and these losses? We're going to ask
13 you to fix those things that can be fixed,
14 help with those things that can be helped,
15 and make up for those things that can be
16 neither fixed nor helped.

17 So how are we going to ask you to
18 fix and to help Jason? As I said, both Dr.
19 Blyznak and Dr. Merola will provide the
20 opinion that Jason is going to require
21 future surgeries, surgeries in the future
22 related to the injuries that he sustained.
23 And they will explain why they have that
24 opinion and they will explain what those
25 surgeries are. We're going to ask the jury

1 to allow money to others for Jason's future
2 medical care related to those surgeries.

3 We're also going to ask the jury to
4 allow money so that Jason can continue his
5 pain medication regimen that Dr. Wani has
6 prescribed, the pain regimen that Dr. Wani
7 feels is necessary into the future.

8 We're also going to ask you, the
9 members of the jury, to replace Jason's
10 lost earnings and his benefit that he's no
11 longer entitled to, money that he would
12 have received had this collision never
13 occurred. You will hear from an economist
14 by the name of Dr. Thomas Fitzgerald, and
15 Dr. Fitzgerald will tell you about the
16 calculations he did related to Jason's lost
17 earnings, past, present and future, and the
18 benefit that he has lost as a result of
19 being involved in this collision.

20 The doctors have-- will provide
21 their opinion that Jason is not going to be
22 able to go back to work and, therefore,
23 we're going to be asking the jury to
24 replace those lost earnings, those lost
25 benefits.

1 And lastly, we're going to be asking
2 you, the members of the jury, to make up
3 for those things that can't be fixed or
4 helped. And that's the largest component
5 of Jason's losses, how this has affected
6 his life, his inability to work. How it's
7 affected him and his family, and Jason will
8 describe all of that to you.

9 From the beginning and end, my job
10 again will be to show you all of Jason's
11 harms and losses and how you can fix, help,
12 and make up for them.

13 You will see why the evidence in
14 this case requires an amount of money that
15 I will have to come back and ask you for at
16 the end of the case, which right now may
17 seem like a high amount, but you will
18 understand is the proper amount for this
19 kind of case. And I'm certain, ladies and
20 gentlemen, that once all of you have heard
21 the testimony in this case, listened to the
22 evidence, maintain your focus in that box,
23 like we talked about in jury selection, and
24 weighed the quality of the evidence, that
25 that is exactly what each and every single

1 one of you will do.

2 So on behalf of Jason and his
3 family, I want to thank all of you for the
4 time and attention that you've given to
5 this case so far and the time and attention
6 that I know all of you will give throughout
7 the remainder of this trial. Thank you.

8 THE COURT: Thank you, Mr.
9 Ricigliano. Mr. Jeffreys, whenever you're
10 ready.

11 MR. JEFFREYS: May it please the
12 Court, Counsel, Mr. Kowalsky, ladies and
13 gentlemen. First I want to say thank you
14 on behalf of the County of Suffolk, its
15 agencies and employees, for the time that
16 you're going to be spending on this case.

17 It is a daunting task when you're
18 asked as lay folks to evaluate medical
19 care. And that's what we're going to ask
20 you to do in this case, evaluate Jason's
21 injuries. That's what this is about.

22 And an opening statement is a road
23 map. Hopefully, it will tell you a little
24 bit about what the evidence will show in
25 this case. Both myself and the plaintiff's

1 counsel are a little bit ahead of you.
2 We've been working on this case for four
3 years. We know what everybody is going to
4 say. We know what all the evidence is
5 going to be. So, in this opening
6 statement, I'll try to bring you up to
7 speed a little bit, so you can understand
8 what's going on.

9 Now, you saw some electronics in
10 this room. Don't be distracted by
11 electronics. Electronics are nice things
12 and they serve a purpose. But the folks
13 who are going to testify, the exhibits that
14 you're going to see, they're important.
15 Not the manner or the glitz with which
16 somebody presents it to you.

17 This little spine, which shows the
18 base of somebody's lumbar spine, is as
19 impressive as a \$5,000 TV set standing in
20 front of you to program one photograph
21 after another. As you can tell, I don't
22 use electronic gizmos.

23 In this portion of the case, you'll
24 consider only whether the plaintiff has
25 sustained a compensable injury as a result

1 of this accident, and whether the plaintiff
2 is entitled to a recovery. That is your
3 charge in this case.

4 The Court will explain to you at the
5 end of the testimony in this case the law
6 of damages in the State of New York. What
7 we say as attorneys advocating on behalf of
8 our clients is not the law. In fact, what
9 we say is not even evidence. Our role as

10 attorneys is simply to be the means by
11 which facts are presented to you. As I
12 told you all in jury selection, I'm not the
13 star of this case. Whoever is sitting in
14 that witness stand is the star. They're
15 the ones that you should listen to.

16 Now, I don't throw a kitchen sink at
17 you ever. That's not the way I try my
18 cases. I will present witnesses who will
19 establish facts. That's what my job is as
20 an attorney. Facts from doctors, facts
21 from experts. All of those facts that I
22 believe you will need in order to render a
23 verdict.

24 We will present the witnesses to you
25 for your consideration, and hopefully, we

1 will ask all of the questions that you
2 sitting in the jury box would want to know
3 from each of the witnesses who come on the
4 stand. It's only that way that you can
5 fully and justly try the issues that are
6 presented to you, and that's your charge.

7 As I told you in jury selection,
8 there are certain finite number of facts
9 concerning Mr. Kowalsky's claim. And both
10 myself and plaintiff's counsel know all
11 those facts. There are not going to be any
12 surprises in this case. We know everything
13 that is going to be presented here. We
14 have a significant dispute concerning
15 whether there are compensable injuries for
16 Mr. Kowalsky.

17 Over the next week or so, we will
18 present to you witnesses to establish those
19 limited set of facts that you will apply in
20 this case. Take those facts, apply the
21 law, and you will reach your verdict.
22 Facts plus law, equals verdict, just like
23 we told you in jury selection. And when
24 you apply that formula, I think you'll
25 understand all of the issues that I just

1 discussed with you in jury selection. This
2 is not fill a box with little pieces of
3 papers of harms and losses. This is,
4 listen to all of the evidence, assess the
5 credibility of everybody who takes the
6 stand. Take all of your common sense and
7 bring that to your deliberations. Harms
8 and losses are, don't look at the other
9 stuff. Look at all of it. That's what
10 makes up each witness and their
11 credibility.

12 But one thing you will not decide in
13 this case is who was at fault for this
14 accident. That's already been resolved
15 between the parties.

16 You may hear a little bit about this
17 accident so you can understand some of the
18 issues in this case. But the testimony
19 will be limited to those items that Justice
20 Garguilo determines are admissible for your
21 consideration.

22 Now, that doesn't mean that you
23 won't have to decide issues concerning the
24 cause of the plaintiff's alleged injuries.
25 As both attorneys told you in jury

1 selection, you will be called upon in this
2 case to consider the cause of the
3 plaintiff's medical conditions. We will
4 present evidence on that issue, and you'll
5 use your own common sense in making your
6 final determination.

7 And as I told you in jury selection,
8 based upon the law that is potentially
9 applicable to this case, it is the county's
10 belief that many of the plaintiff's claims
11 in this case are simply not compensable
12 claims in this lawsuit.

13 But as both attorneys told you in
14 jury selection, the attorneys don't tell
15 you the law. Justice Garguilo tells you
16 the law at the end of the case.

17 But let me switch from some general
18 propositions to talk about general
19 information about this case, generally
20 things that are not disputed.

21 On June 12th, 2009, Jason Kowalsky
22 was working as a Verizon field technician
23 trying to restore telephone service to
24 Cathedral Pines County Park. We'll hear a
25 little bit about the accident during this

1 case. But remember, this case has nothing
2 to do with fault for the accident. But
3 there is a very significant question
4 concerning the damages that were caused by
5 the accident, and that's what you're going
6 to decide.

7 To help you understand the issues in
8 this case, you'll be presented with a lot
9 of medical testimony from the plaintiff's
10 own treating doctors and experts who have
11 seen the plaintiff in consultation. On
12 behalf of the county, an orthopedic surgeon
13 and a neurologist have examined the
14 plaintiff in accordance with the rules of
15 civil litigation. And they will testify in
16 this case. But the county has also issued
17 subpoenas on some of the plaintiff's own
18 physicians so you can hear their accounts
19 of the plaintiff's claimed injuries as
20 well. It presents a balance to you of what
21 the county's physicians say and what the
22 plaintiff's doctors say.

23 The 37-year-old plaintiff will have
24 us believe that he was a completely healthy
25 person with no problems prior to this

1 incident. Well, the evidence will
2 establish that the plaintiff's medical
3 history tells a significantly different
4 story.

5 The plaintiff will have us believe
6 that he had a completely healthy back prior
7 to this accident. Again, the medical
8 history tells a significantly different
9 story.

10 Most often, it's easier to
11 understand a claim like this when the
12 medical history is presented in a
13 chronological order. And during trial,
14 because of the order of the witnesses, it
15 may be difficult to keep things in a
16 chronological order.

17 So, let me take a few minutes and
18 I'll go through with you the chronology of
19 the medical care in this case. And you'll
20 see, as we present the different witnesses,
21 how it fits into the chronology.

22 Let's go back five years before this
23 accident. The evidence will show that the
24 plaintiff began treatment with Dr. Daniel
25 Stern and Dr. Christine Stern at Longwood

1 Foot Care. You may ask yourself, What do
2 podiatrists have to do with this case?
3 Longwood Foot Care? What do they have to
4 do with this case?

5 Well, first, the evidence will show
6 that the plaintiff treated with his
7 podiatrist in reference to this accident.
8 But more importantly, the evidence will
9 show that the plaintiff's first complaints

10 of back problems and arthritis are
11 registered with his podiatrist on September
12 28th, 2005, four years before this accident
13 occurred. And the evidence will show that
14 the plaintiff was already taking
15 prescription Vicodin for pain relief as
16 early as August 9th, 2004, and possibly
17 earlier. Some of the prescriptions are
18 dated into 2003.

19 Let's also look three years back
20 before this accident happened, when the
21 plaintiff came under the care of a
22 rheumatologist from Rheumatology Associates
23 of Long Island named Dr. Howard Blumenthal.

24 Now, rheumatology is a branch of
25 medicine that concerns itself with

1 rheumatic diseases. It is not generally
2 involved in traumatic issues. The evidence
3 will show that the plaintiff made numerous
4 complaints to his rheumatologist, Dr.
5 Blumenthal, all before this accident ever
6 occurred. Pain in his hands and feet that
7 resulted in trigger finger surgery that
8 provided no relief.

9 Evidence will show that the
10 plaintiff was diagnosed with a condition
11 known as Raynaud's disease and inflammatory
12 arthritis. Realize that these diagnoses
13 are being made years before we ever would
14 have suspected an accident was going to
15 happen.

16 The evidence will show that the
17 plaintiff's joint problems first
18 materialized when he was 28 years old, in a
19 trigger finger diagnosis that required
20 surgery at John T. Mather Memorial Hospital
21 on February 4th, 2005. He underwent a
22 surgical release of the trigger finger on
23 his right middle finger.

24 In just a few minutes, though, I'm
25 going to outline for you the most

1 significant evidence of prior medical care
2 rendered to the plaintiff before this
3 accident that you will hear. His prior
4 hospitalization for excruciating back pain.
5 But all of this prior medical treatment is
6 just the tip of the iceberg when it comes
7 to Mr. Kowalsky's prior medical conditions.

8 Various medical professionals in
9 this case will assist us all in
10 understanding the makeup of the spine, the
11 cervical spine-- and I think we both have
12 our versions of the spines. I use the
13 little one, because we're focused on the
14 lumbar spine. Well, we both brought spines
15 so that you can understand what they're
16 about.

17 The cervical spine is in the neck,
18 and it's composed of seven vertebrae,
19 numbered C1 through C7. The thoracic spine
20 is in the mid back, T1 to T12, and the
21 lumbar spine is the lower back. That's the
22 five lower vertebrae, numbered L1 through
23 L5. And this little model here, this is
24 the lumbar spine.

25 At the base of the lumbar spine, all

1 the way down at the bottom, is the sacrum.
2 And for our purpose in this case, we'll
3 only be talking about the S1 vertebrae, the
4 sacrum one vertebrae.

5 So, at the top we have the head, and
6 then we have the cervical spine from C1 to
7 C7 (indicating), and we have the thoracic,
8 or sometimes called the dorsal spine, from
9 T1 to T12, and then we'll have the lumbar
10 spine, L1 through L5, and then the sacrum
11 at S1. And that's the important one that
12 we'll be dealing with in this case.

13 In between each vertebrae, each two
14 vertebrae, is something called a disc, and
15 a disc is given the number of the vertebrae
16 that are around it. I'll give you an
17 example. The disc between vertebrae L4 and
18 L5, if you count from the top, L1, L2, L3,
19 L4, L5 (indicating). The disc between,
20 that gelatinous material between is called
21 the L4-5 vertebral disc. They take the two
22 vertebrae above and below, and that's its
23 name. So, as you hear testimony in this
24 case about L4-5 and L5-S1, you'll know what
25 we're talking about.

1 And to give you another example and
2 just to make sure we all have the language
3 down on this, the disc between the C4
4 vertebrae and the C5 vertebrae, that disc,
5 same formula. It's the C4-5 vertebral
6 disc. Okay? So, when you hear a letter
7 and a number, we're talking about a
8 vertebra. L1 is a vertebra. L1 dash 2 is
9 the disc. And then you're going to go to
10 L2. Okay?

11 And all the medical professionals
12 will describe for us and show us what a
13 healthy spine looks like. But then they'll
14 contrast that with what the plaintiff's
15 spine looked like before this accident ever
16 occurred.

17 The evidence will show that
18 vertebrae are interlocking bones that
19 surround and protect the spinal cord.
20 That's the purpose of the vertebrae. The
21 vertebral bones are meant to be able to
22 move freely, so that we can bend side to
23 side (indicating), we can bend forward and
24 back. That's the glory of a spine. The
25 way that they interlock, you can move

1 (indicating). That's why our spines are so
2 fantastic with the way that they are
3 constructed. It helps our mobility.

4 And the evidence will show that
5 between each, as I told you, is a vertebral
6 disc. And I have on my finger the one
7 thing that I use in a case most often.
8 It's a washer. Just an old soft washer
9 that you'd have on a garden hose. This is
10 what a vertebral disc is like. It's
11 between two hard bones to make certain that
12 the bones don't crush together. You have
13 the disc, the shock absorber. The disc
14 material is fibrous and it's sort of like a
15 steel belted radial tire. Well, in a
16 normal back, there's a disc between each of
17 the vertebrae. And that makes certain that
18 the back can move and twist without the two
19 vertebrae hitting on top of each other.

20 But the evidence will show that in
21 some people, including Jason Kowalsky, the
22 bottom two vertebrae in his spine, L5 down
23 to the S1, are sacralized. Now, all of the
24 medical professionals will define a
25 sacralized vertebrae for you.

1 The evidence will show that
2 Mr. Kowalsky's L5-S1 vertebrae are fused to
3 a bone in his body called the sacrum. So
4 two of Mr. Kowalsky's vertebrae are fused
5 to the sacrum (indicating). Naturally
6 fused. Nothing to do with this car
7 accident.

8 The evidence will show that
9 Mr. Kowalsky's sacralized vertebrae are not
10 from trauma. It's a congenital condition,
11 and it's not one that comes about by a car
12 accident.

13 The evidence will also show that
14 when the L5-S1 vertebrae are fused to the
15 sacrum, there is no development of that
16 disc in between the two vertebrae. And
17 that's a condition known as hypoplasia,
18 which the evidence will establish is one of
19 the plaintiff's diagnoses. He has
20 hypoplasia. After all, what use is there
21 for a washer between two vertebrae if the
22 vertebrae can't move at all? The vertebrae
23 are already fused. There's no need for the
24 disc when they're permanently fused
25 together.

1 And here's where the rub comes in,
2 folks. The plaintiff's orthopedic surgeon,
3 Dr. Andrew Merola, decides he was going to
4 do surgery to fuse L5 and S1 together. But
5 here's the problem with that, folks. The
6 evidence will show that every diagnostic
7 film and every one of the plaintiff's
8 radiologists knew that the vertebrae at L5
9 and S1 were already fused. They were
10 already sacralized together from when
11 Mr. Kowalsky was a small child. So, why
12 was Dr. Merola going to open up Jason's
13 Kowalsky's back and fuse two vertebrae
14 together that were already naturally fused?
15 That's a question that will have to be
16 answered in this case by Dr. Merola.

17 Once Dr. Merola starts his surgery
18 on the plaintiff, the evidence will show
19 that he finally sees what every other
20 doctor has seen in this case. What every
21 other doctor who has looked at the
22 diagnostic films has seen in this case.
23 There was already a congenital fusion at
24 L5-S1 from the sacralization.

25 So instead, Dr. Merola decides to do

1 surgery at the level above L5-S1
2 (indicating). He does surgery at L4-L5.
3 And he fused that level. The problem with
4 that, folks, is that the evidence will show
5 that L4-L5 and that vertebrae was not
6 causing any pain whatsoever to Jason
7 Kowalsky. And how do we know this? The
8 evidence will show that one month before
9 this back surgery ever took place--

10 MR. RICIGLIANO: Judge, objection.

11 THE COURT: Okay. That's the second
12 objection we've heard during opening
13 statements. I'll repeat myself: You can
14 assume every comment made by a lawyer--
15 every sentence made by a lawyer during
16 opening statement is prefaced by the
17 phrase, the evidence will show. Whether or
18 not the evidence actually shows that
19 ultimately will be your determination. I
20 anticipate objections during the trial in
21 the areas that have been objected to by
22 both sides, all right?

23 Once again, keep in mind, this is
24 not evidence. Whatever a lawyer says
25 during their opening statement or closing

1 statement, not evidence. It's an outline
2 of what they anticipate they will prove and
3 can prove.

4 At the end of the day -- What I
5 mean, at the end of the trial, that's what
6 I mean by the end of the day -- you will
7 determine whether or not these things,
8 these representations made by both sides
9 have been met, okay? Go ahead.

10 MR. RICIGLIANO: Judge, may we have
11 a sidebar?

12 THE COURT: Sure.

13 (Sidebar discussion held off the
14 record)

15 THE COURT: Go ahead.

16 MR. JEFFREYS: Thank you, Your
17 Honor.

18 The evidence will show that one
19 month before his back surgery, Mr. Kowalsky
20 underwent a test called a discogram to
21 check each level of his back, to make
22 certain that there was no pain being caused
23 by any of the vertebral discs. And L4-L5
24 was just fine. The discogram was normal at
25 L4-L5. It did not cause pain.

1 The county has subpoenaed the
2 plaintiff's three radiologists who
3 performed all of the diagnostic tests on
4 the plaintiff's back in this case. And
5 they're going to tell you what the results
6 of their tests were. But the one thing
7 that's clear across each of the plaintiff's
8 own radiologists' analyses, the disc at
9 L5-S1 was already sacralized, so no surgery
10 was needed from this car accident. And the
11 disc at L4-L5 was not provoking any pain to
12 any part of Jason's body. Quite simply,
13 Mr. Kowalsky had a normal back for
14 Mr. Kowalsky. This car accident changed
15 nothing and caused no injury in the
16 plaintiff's spine to give rise to what the
17 evidence will show was an unnecessary
18 surgical procedure.

19 But let's look a little more at what
20 the evidence will show concerning
21 Mr. Kowalsky's prior back condition. The
22 evidence will show that nine months before
23 this accident, the plaintiff was
24 hospitalized at Brookhaven Memorial
25 Hospital for pain in his low back down near

1 that sacralized vertebrae (indicating) that
2 we've been talking about. He rated his
3 pain as excruciating, and it was nine out
4 of ten on the pain severity scale.

5 The evidence will show that the
6 plaintiff has a history of MRI films in the
7 low back prior to the accident that showed
8 arthritis in the low back. Nine months
9 prior to this accident, the plaintiff had
10 already been referred to pain management to
11 deal with issues that are related to his
12 particular back conditions.

13 But let's move on in my last five
14 minutes or so. The plaintiff is initially
15 seen for this accident at Brookhaven
16 Memorial Hospital where his only complaint
17 is about his right knee. And you may find
18 that the problem with the plaintiff's right
19 knee was from this car accident. You may
20 find that. And that's okay. If that's
21 your finding of the truth, that's okay.

22 Mr. Kowalsky then begins treatment
23 with an orthopedic surgeon named Nestor
24 Blyznak. The plaintiff complains to Dr.
25 Blyznak about his right knee. But he also

1 complains about pain that he's having in
2 his back.

3 The evidence will show that the
4 plaintiff's orthopedic surgeon, Dr. Nestor
5 Blyznak, sends him for an MRI of his lumbar
6 spine six weeks after this accident. The
7 plaintiff has the MRI completed by Dr.
8 Robert Goodman of Medical Arts Radiology,
9 and the evidence will show that the lumbar
10 MRI conducted six weeks after this accident
11 was completely unremarkable, with the
12 exception of that narrow disc at L5-S1,
13 which was where the sacralized vertebrae
14 was located.

15 The plaintiff had a follow-up MRI
16 more than a year after this accident, which
17 showed nothing that would cause pain.

18 Finally, the plaintiff had what is
19 the gold standard of tests for the lumbar
20 spine to see if there was anything wrong
21 with it. The evidence will show that the
22 plaintiff had a discogram on October 10th
23 and 11, 2011, conducted by Dr. Norman
24 Schoenberg.

25 The evidence will show that a

1 discogram is a test designed to elicit
2 painful responses from a patient if there's
3 anything wrong with any level of the spine
4 that's tested. I will tell you the
5 description of a discogram will make you
6 wince a little bit, because it's designed
7 to provoke pain.

8 And here's the important thing.
9 When a patient is having a discogram, he
10 can't fake the results. A discogram is
11 called a provocative test. If the patient
12 truly has something wrong with their spine,
13 a discogram will elicit a very painful
14 response. It is a surgical procedure where
15 the patient is awake to have it done. It's
16 a local anesthetic only, as the needle is
17 being injected into each level of the
18 spine. And in this case, the evidence will
19 show that there was not a single painful
20 response at any level of the plaintiff's
21 lumbar spine when his discogram was
22 conducted. And when there is no pain,
23 ladies and gentlemen, there is no valid
24 claim for pain and suffering.

25 The evidence will show that the

1 discogram confirms what every diagnostic
2 test has revealed. The plaintiff has a
3 sacralized vertebrae at L5-S1 that has
4 nothing to do with this car accident. And
5 because the vertebrae are sacralized or
6 fused together, the disc between L5-S1
7 suffers from underdevelopment or incomplete
8 development known as hypoplasia. The
9 evidence will show that the plaintiff has
10 that condition in his lower spine.

11 Yes, the plaintiff had back surgery
12 three years after this car accident. And
13 you'll hear a lot of evidence and medical
14 testimony leading up to that surgery.

15 The evidence will establish that
16 many of the medical professionals in this
17 case are in agreement concerning the lack
18 of causation of the plaintiff's back
19 surgery to this accident.

20 I don't downplay the importance of
21 back surgery. Back surgery is a big deal,
22 ladies and gentlemen. But I submit that
23 the evidence will demonstrate to you that
24 the plaintiff's back surgery and the
25 subsequent disability from that back

1 surgery has nothing to do with the car
2 accident that brings us here to court.

3 All I can ask of you is that you
4 listen to the medical professionals'
5 testimony concerning the cause of the
6 plaintiff's back surgery, and come to the
7 conclusions that you believe are proper
8 based upon the factual pattern that makes
9 the most common sense to you.

10 In hearing this case, I ask that you
11 apply your common sense. Quite simply, is
12 the presentation on behalf of the plaintiff
13 completely candid about the plaintiff's
14 medical conditions and the claimed causes
15 of his medical injuries? That's for you to
16 decide. But I'll present the proof so that
17 you can make your decision.

18 In that regard, you are the sole
19 finders of fact, and you are the sole
20 finders of the truth in this case. And the
21 county appreciates your anticipated
22 service.

23 So, ladies and gentlemen, on behalf
24 of the County of Suffolk, its agencies and
25 employees and the people of the County of

1 Suffolk, I thank you in advance for your
2 attentive jury service and for your kind
3 verdict. Thank you, folks.

4 THE COURT: Thank you, Mr. Jeffreys.
5 Ladies and gentlemen, you've heard two
6 comprehensive opening statements by
7 counsel. But as of yet, you haven't heard
8 any evidence. Evidence will come from
9 people sitting in this chair over here,
10 testifying under oath, and exhibits that I
11 anticipate will be introduced throughout
12 the course of the trial.

13 We're going to recess now until
14 tomorrow morning. We anticipate the first
15 witness at around 9:45. I'd like you to be
16 here by 9:45.

17 You know, as an aside, court time
18 has a bad rap. Some people think it's very
19 similar to Friday night pizzeria time.
20 Here's what I mean by that: Six o'clock on
21 a Friday night you order a pizza. The guy
22 tells you it's going to be 15 minutes. You
23 know it's not going to be 15 minutes
24 because it's Friday night and the line is
25 out the door. Well, court time isn't like

1 that. Any time you are here, but you're
2 not present in the courtroom, I assure you,
3 the Court and counsel are taking steps to
4 expedite this trial, whether it's rulings
5 that have to be made, evidence that has to
6 be authenticated or whatever. We all
7 appreciate the fact that you've taken time
8 out of your lives to be here, and we'll
9 move this case expeditiously and

10 professionally. I assure you of that.

11 Now, something else. Every time we
12 recess, and we're about to recess until
13 tomorrow morning, I have to give you an
14 instruction. The instruction I have to
15 give you is: Do not discuss the case among
16 yourselves or anyone else. The time to
17 discuss this case will be at the end.
18 That's after both sides have rested,
19 meaning they put in all their evidence and
20 their exhibits, both sides have given
21 summations and the Court, myself, have
22 given you the law applicable to the case.
23 When that's all done, then you are provided
24 with that piece of paper I told you about
25 early on, the verdict sheet. I will direct

1 you at that time to commence your
2 deliberations. At that time, you'll
3 discuss the case, but not sooner.

4 Leave here with an open mind. The
5 case is just getting under way. Have a
6 safe trip home. We'll see you tomorrow
7 morning at 9:45.

8 THE COURT OFFICER: Just leave your
9 books on the chair and follow me.

10 THE COURT: By the way, if any of
11 you don't want to take notes, and you find
12 it burdensome keeping that thing on your
13 lap, the court officer will take them
14 tomorrow, and you can have them back, if
15 you want or whatever.

16 (The jury exited the courtroom)

17 THE COURT: This is something I'll
18 mention to all of you. Dan Stern and
19 Christine Stern were friends of my wife and
20 I. Friends of my wife and I-- As you get
21 older, your friends become the parents of
22 the kids your kids go to school with,
23 right? I probably-- As a matter of fact,
24 I'm certain, I did represent Dan Stern in a
25 civil matter some time in the past. Has to

1 be more than a decade ago. I don't know if
2 they'll remember me, but I'll mention that
3 to all of you. It doesn't impact-- I'll
4 tell you all of you now, it doesn't impact
5 my ability to sit as an impartial arbiter
6 here. And Dr. Wani, since I practiced law
7 for 30 some odd years in Smithtown, I'm
8 certain I've paid him for reports over the
9 years. But to say I would recognize him if
10 he came in is something else. I don't
11 think he ever testified on any case I
12 prosecuted or defended.

13 That aside, gentlemen, I'll see you
14 tomorrow morning. Thank you for your
15 openings.

16 MR. RICIGLIANO: Thank you, Your
17 Honor.

18 MR. JEFFREYS: Thank you, Your
19 Honor.

20 THE COURT OFFICER: Your Honor?

21 (Discussion held off the record)

22 THE COURT: Which juror?

23 THE COURT OFFICER: I'll you give
24 you the number. Her name is Tracey Saleeb
25 (phonetic).

1 MR. ROBINSON: Juror six.

2 THE COURT: You know about this?

3 MR. ROBINSON: No. When he said her
4 name, I remember her.

5 THE COURT: Juror number six
6 apparently knows the plaintiff, went to
7 school with him. I'm sure you gave the
8 name during voir dire. Probably gave a
9 little bit of background, where he grew up.

10 MR. RICIGLIANO: Not much.

11 THE COURT: Where is the plaintiff?
12 Go get him.

13 THE COURT OFFICER: And one other
14 issue is, on Friday, one of the jurors
15 cannot make it in until ten o'clock.

16 THE COURT: That's okay. We may as
17 well-- Nick, I'm probably going to bring
18 her in. Hold on.

19 Mr. Kowalsky, I just told your
20 lawyers, apparently one of the witnesses
21 went to school with you. Do you recognize
22 juror number six?

23 MR. KOWALSKY: No.

24 THE COURT: What's her name?

25 MR. ROBINSON: Tracy Saleeb

1 (phonetic).

2 THE COURT: Gentlemen, normally, I
3 would just bring her in for a brief voir
4 dire. Bring her in. She lives in Babylon,
5 was born in Port Jeff.

6 MR. JEFFREYS: She's just about the
7 same age.

8 MR. ROBINSON: He'll be 38 next
9 month, in September.

10 THE COURT OFFICER: Juror entering.
11 (Juror number six entered the
12 courtroom).

13 THE COURT OFFICER: Have a seat
14 right here.

15 THE COURT: Please be seated,
16 everybody. Ms. Saleeb (phonetic)?

17 JUROR: Yes.

18 THE COURT: How are you?

19 JUROR: Good. How are you?

20 THE COURT: Nick, our court officer,
21 has indicated that after you came out here,
22 you recognized the plaintiff?

23 JUROR: Yes, I did.

24 THE COURT: You went to school with
25 him?

1 JUROR: Yes, I did.

2 THE COURT: What school was that?

3 JUROR: Longwood High School.

4 THE COURT: Okay. I'm going to
5 allow the attorneys to ask you a few
6 questions.

7 JUROR: Okay.

8 THE COURT: And the bottom line of
9 this questioning is whether or not you can
10 remain fair and impartial, fair and
11 impartial. You know what that means?

12 JUROR: Yes.

13 THE COURT: That means reserve
14 judgment until the end of the case and
15 decide the case on the evidence and not
16 anything outside the case, okay?

17 JUROR: Huh-hum.

18 MR. RICIGLIANO: Good afternoon, Ms.
19 Saleeb (phonetic). So we mentioned Jason's
20 name in jury selection. You didn't recall
21 him?

22 JUROR: No, I did not.

23 MR. RICIGLIANO: Were you friends
24 with him in high school?

25 JUROR: Yes, we were with the same

1 group of friends.

2 MR. RICIGLIANO: Okay. Close
3 friends?

4 JUROR: We knew each other.

5 MR. RICIGLIANO: Okay. When was the
6 last time you spoke to him?

7 JUROR: Probably in high school, 20
8 years ago.

9 MR. RICIGLIANO: So quite a while.

10 Can you separate the fact that you once
11 knew him 20 years ago from decisions that
12 you're going to make in this case?

13 JUROR: I would say no.

14 MR. RICIGLIANO: Can you be-- Can
15 you give a fair shake, then, to the county?

16 JUROR: No, only because I do know
17 him.

18 THE COURT: Mr. Jeffreys?

19 MR. JEFFREYS: I have nothing else,
20 Your Honor.

21 THE COURT: Okay. Would you just
22 step out for a moment and we'll let you
23 know?

24 JUROR: Sure.

25 (The juror exited the courtroom).

1 THE COURT: Okay, I'll take an
2 application.

3 MR. JEFFREYS: Your Honor, on behalf
4 of the county, I move that juror number six
5 be discharged for cause, and that an
6 alternate be substituted in her place.

7 MR. RICIGLIANO: No objection.

8 THE COURT: You'll excuse her, Nick.
9 Tell her she's excused. If you want, I'll
10 tell you tell her.

11 (Juror number six re-entered the
12 courtroom)

13 THE COURT: The base line is whether
14 or not a juror can be fair and impartial.
15 And we do appreciate your candor, your
16 honesty, and bringing it up as quickly as
17 possible. We're going to excuse you, okay?
18 Thank you for your service.

19 JUROR: Thank you.

20 MR. RICIGLIANO: Thank you.

21 MR. JEFFREYS: Thank you.

22 (Juror exited the courtroom)

23 THE COURT: Tomorrow, we'll randomly
24 pick one of the alternates?

25 MR. RICIGLIANO: Yes.

1 THE COURT: How many alternates do
2 you have?

3 MR. JEFFREYS: We have three, Your
4 Honor.

5 THE COURT: Okay, good. Mr.
6 Jeffreys, the doctor at Mather, you
7 mentioned? In the opening, you mentioned a
8 doctor. Was it John T. Mather or the other
9 one?

10 MR. JEFFREYS: Nestor Blyznak?

11 THE COURT: No, you mentioned a
12 doctor. You didn't give the doctor's name.
13 You mentioned treatment prior to the
14 accident, at Mather?

15 MR. JEFFREYS: Yes.

16 THE COURT: Was that doctor
17 subpoenaed?

18 MR. JEFFREYS: No.

19 THE COURT: Okay, good. All right.

20 MR. RICIGLIANO: Thank you, Judge.

21 (Whereupon, the trial was adjourned
22 for the day)

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I N D E X

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C E R T I F I C A T I O N

I, Anna M. Lopinto, an Official Court
Reporter, do hereby certify that the foregoing is a
true and accurate transcription of the stenographic
notes taken herein.

Anna M. Lopinto
Official Court Reporter

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