

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

3 -----
4 JASON KOWALSKY,

5
6 Plaintiff,

7 -against-

INDEX NO.
41227/2009

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

JURY TRIAL

11 Defendants.

12 -----

13 August 14, 2014
14 Riverhead, New York

15
16
17 BEFORE:

18 HON. JERRY GARGUILO,
19 SUPREME COURT JUSTICE
20 And a Jury

21 APPEARANCES:

22 WILLIAM RICIGLIANO, ESQ.
23 JOEL H. ROBINSON, ESQ.
24 Attorneys for Plaintiff
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BY: ANNA M. LOPINTO
OFFICIAL COURT REPORTER

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THE CLERK: Part 47 held in and for the County of Suffolk is now in session. The Honorable Jerry Garguilo, Justice, presiding.

THE COURT: Good morning, everybody.

THE CLERK: Case on trial continues, Kowalsky versus Suffolk County. All parties present, absent the jury.

THE COURT: Mr. Ricigliano, you want to allocute your client?

MR. RICIGLIANO: Oh, yes, can I, Judge?

THE COURT: Yes, you can.

Mr. Kowalsky, just step up here, please. Mr. Kowalsky, I remind you that you're still under oath, okay.

THE WITNESS: Yes.

THE COURT: Go ahead.

EXAMINATION

BY MR. RICIGLIANO:

Q. Jason, I've advised you that the county has made an offer of \$250,000 to settle your case?

A. Yes.

Q. And you authorized me to reject that offer on

1 your behalf?

2 A. Yes.

3 Q. You're aware that we're going to be doing
4 closing arguments or summations today?

5 A. Yes.

6 Q. And the jury is thereafter going to get the
7 case to deliberate?

8 A. Yes.

9 Q. And by rejecting the offer, we're going to be
10 continuing with the trial, the jury will get the case and
11 deliberate, whereby they may return a verdict in the
12 amount of more than what's being offered, less than
13 what's being offered, and they could return a verdict of
14 zero. You understand that?

15 A. Yes.

16 Q. And I've explained that to you?

17 A. You did.

18 Q. And despite having me explain that to you, you
19 want to proceed with trial and have the jury decide this
20 case?

21 A. I do.

22 Q. You're making that decision voluntarily?

23 A. I am.

24 Q. No one is forcing you to do it?

25 A. No.

1 Q. And you're satisfied with the services of
2 myself and Robinson & Yablon thus far in the case?

3 A. I am.

4 THE COURT: You've come in with a
5 clear head, correct, sir?

6 THE WITNESS: Yes.

7 THE COURT: I know you take
8 medication. You would agree with me your
9 medication doesn't impact your judgment

10 today?

11 THE WITNESS: No, it doesn't.

12 THE COURT: I'm satisfied. You can
13 step down. Thank you very much.

14 Mr. Ricigliano, you have at least
15 one motion you want to make?

16 MR. RICIGLIANO: I do, Judge. We
17 submitted a motion to you which I believe
18 you marked as a court exhibit?

19 THE COURT: Yes.

20 MR. RICIGLIANO: The motion was to
21 exclude the questions relating to threshold
22 on the verdict sheet. The reason for that
23 is that there are no issues of fact
24 relating to the fact that Jason Kowalsky
25 was medically kept out of work for the

1 first 90 out of 180 days following this
2 collision. There's been no proof submitted
3 by the defense to rebut that testimony of
4 Dr. Blyznak.

5 For that reason, we made an
6 application to preclude the questions of
7 threshold on the verdict sheet.

8 We also indicated that causation is
9 not an issue either, inasmuch as Dr. Finkel
10 conceded that this collision caused both a
11 back injury and a knee injury to Jason.
12 And Dr. Finkel took no position either way
13 on those injuries.

14 THE COURT: So if I understand your
15 motion, remove from the verdict sheet,
16 which I'll mark as an exhibit now-- remove
17 from the verdict sheet the substantial
18 factor question.

19 MR. RICIGLIANO: Correct.

20 THE COURT: And all of the threshold
21 questions.

22 MR. RICIGLIANO: Correct.

23 THE COURT: And simply-- simply is
24 my word. It's a poor choice of words --
25 instruct the jury to proceed directly to

1 the damage questions, the amount questions,
2 the money questions.

3 MR. RICIGLIANO: Yes.

4 THE COURT: Mr. Jeffreys?

5 MR. JEFFREYS: Your Honor, the
6 county had previously submitted to you
7 information concerning the threshold
8 questions. I believe the Court received
9 that yesterday. While I haven't received
10 the plaintiff's written motion, we have
11 discussed this in chambers.

12 The county's position is that the--
13 if the jury makes a determination that the
14 back injury is not related to this
15 accident, then the plaintiff is left with a
16 knee injury, a torn meniscus-- a partial
17 tear of the medial meniscus that required
18 two safety fix sutures in order to be
19 repaired. Those issues are questions of
20 fact for the jury to resolve, whether that
21 torn meniscus and the resultant care
22 rendered after meets any of the definitions
23 of serious injury.

24 Although not provided to the Court,
25 we did discuss in chambers that there are

1 two decisions that I found last night that
2 do indicate that it is proper to submit the
3 issue to the jury and let them make the
4 determination. Even if it turns out to be
5 unfavorable to the defense, it is a
6 question for the jury. And those cases are
7 Smith verdict Vohrer, 62 AD 3d, 528, from
8 the First Department; and D'Amato versus
9 Stomboli, 264 AD 2d, 800, a Second
10 Department case from 1999.

11 On the 90 out of 180 day issue, it's
12 the county's position, based on the
13 precedent that we discussed in chambers and
14 what was provided to the Court, that being
15 out of work is simply not sufficient.
16 There has to be more than that to determine
17 a medically determined injury or damage to
18 prevent the plaintiff from performing
19 substantially all of his usual and
20 customary daily activities. And the
21 precedent is squarely in line that being
22 out of work doesn't meet that 90 out of 180
23 days by itself.

24 On the proximate cause issue, I
25 believe the jury question that the Court

1 has is absolutely appropriate. There's a
2 difference between causation and proximate
3 causation. The Court has the substantial
4 factor question as question number one. If
5 that were not there, the plaintiff is
6 arguing that this case should be an
7 inquest. And that's simply not what this
8 case was about.

9 The prime focus of this case
10 concerned whether the accident was a
11 substantial factor in causing the
12 plaintiff's injuries, in particular, the
13 back injury that we focused almost
14 exclusively on in this case.

15 So I would submit that plaintiff's
16 application should be denied on both
17 counts.

18 THE COURT: Thank you both. Mr.
19 Ricigliano, your application is denied.
20 Exception is duly noted.

21 Nick, bring them in.

22 MR. RICIGLIANO: So you are
23 reserving, Judge?

24 THE COURT: No, denying. I can't
25 reserve that one.

1 MR. RICIGLIANO: Can't reserve which
2 one? Causation or --

3 MR. JEFFREYS: The verdict sheet.

4 THE COURT: The verdict sheet. Your
5 application is essentially for a directed
6 verdict on the question of threshold,
7 correct?

8 MR. RICIGLIANO: Right.

9 THE COURT: And the second aspect of
10 it was to amend the verdict sheet?

11 MR. RICIGLIANO: Right.

12 THE COURT: I'm denying the one to
13 amend the verdict sheet, and I'll reserve
14 on the threshold issue -- I've reserved on
15 both of your essentially summary judgment
16 motions.

17 MR. RICIGLIANO: Judge, you're going
18 to break between summations?

19 THE COURT: Yes, of course I will.

20 THE COURT OFFICER: Jury entering.

21 (The jury entered the courtroom)

22 THE CLERK: Good morning, jurors.

23 Counsel waiving roll call?

24 MR. RICIGLIANO: Yes.

25 MR. JEFFREYS: Yes.

1 THE CLERK: Thank you. Please be
2 seated.

3 THE COURT: We've come to that
4 point-- First of all, good morning.
5 Welcome back. We've come do that point of
6 the trial where you will hear the
7 summations. As I told you in the opening
8 instructions, summations are in the reverse
9 order of openings. So you'll hear from Mr.

10 Jeffreys first on behalf of the County of
11 Suffolk, as well as Raymond Rancourt.

12 Gentlemen, there is a stipulation,
13 is there not?

14 MR. RICIGLIANO: Yes.

15 MR. JEFFREYS: Yes, there is, Your
16 Honor.

17 THE COURT: A stipulation means an
18 agreement. Mr. Jeffreys, would you place
19 the stipulation on the record?

20 MR. JEFFREYS: I'll place it, Your
21 Honor.

22 THE COURT: Thank you.

23 MR. JEFFREYS: It is hereby
24 stipulated and agreed by and between the
25 attorneys representing the parties in this

1 case that County of Suffolk owns the
2 vehicle that was being operated by Raymond
3 Rancourt on the day of this accident, that
4 it was being operated with the County of
5 Suffolk's permission, that Raymond Rancourt
6 was in the course and scope of his
7 employment with the County of Suffolk at
8 the time of this accident, and that the
9 County is responsible for any negligent
10 acts of Raymond Rancourt.

11 THE COURT: Sufficient?

12 MR. RICIGLIANO: Yes.

13 THE COURT: Okay, so stipulated.

14 Mr. Jeffreys.

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

17 THE COURT: Thank you, sir.

18 MR. JEFFREYS: May it please the
19 Court, counsel, Mr. Kowalsky, ladies and
20 gentlemen of the jury. I warn you in
21 advance that I'm going to talk for about 45
22 minutes, maybe a little bit longer, maybe a
23 little bit shorter. But first, before I
24 say anything, I want to extend my gratitude
25 to all of you. You stayed with us through

1 this trial when others would have given up,
2 especially after yesterday's weather
3 conditions. I have to give you all praise.
4 This has been a hard trial for all of the
5 parties involved, and it is only with your
6 help that we can resolve the issues that
7 brought us here to court. So thank you so
8 much.

9 It's both myself and Mr.

10 Ricigliano's duties as attorneys to
11 zealously represent our clients in this
12 case. That is our charge as an attorney.
13 We have different styles, clearly, but I
14 hope that my presentation of the
15 evidentiary facts in this case have
16 assisted you in understanding what this
17 case is all about. I also hope that you
18 found my representation of your county to
19 be appropriate for the case that was
20 presented to you.

21 As I warned you in jury selection, I
22 am not the star of this case. I prefer not
23 to be the star of anything. The only stars
24 in this trial are the witnesses who
25 testified in this case and the documents

1 that have been admitted into evidence.

2 I hope that we have asked all of the
3 questions that you would have wanted
4 answered if you were the ones asking the
5 questions. We asked a lot of questions
6 here, and I hope we got everything that you
7 need to help resolve this case.

8 As an attorney, it's my
9 responsibility to embrace the law. And I
10 do that every day. Because the law is the
11 one thing that sets everybody on an even
12 plane. Everybody is on an even keel when
13 they come into this courthouse. Even if
14 the final result is somewhat unappealing to
15 you, the law is the one true constant that
16 you, the members of our jury, have sworn to
17 apply.

18 Lady Liberty is the one that holds
19 the scales of justice, and she wears a
20 blindfold, because she is extraneous to all
21 outside issues. She focuses on the law,
22 and that's what I'm asking you to do in
23 this case.

24 In jury selection I told you all
25 that there would be a finite set of facts

1 that would be introduced at the trial of
2 this case. All of those facts were
3 presented to you. There were no surprises.

4 The facts were simply the facts, and
5 they were presented to you. You will
6 decide this case just like a math problem,
7 as we told you in jury selection. Laid out
8 to you very simply. Facts plus law equals
9 verdict.

10 You've heard all of the facts and
11 you will shortly hear the law. And I
12 believe you will understand why the county
13 had to have this case presented to you for
14 a verdict.

15 The county is not responsible for
16 every injury that its residents have. When
17 a car accident is presented, the county is
18 responsible for those injuries that are
19 causally related to the accident. The
20 county has never questioned that Jason
21 Kowalsky's knee injury and the resultant
22 arthroscopic surgery is causally related to
23 this accident. But the county can only pay
24 for those injuries that are causally
25 related to the accident.

1 Justice Garguilo will also tell you
2 the law about the plaintiff's obligation to
3 prove something known as a serious injury
4 under the law. Listen carefully as Justice
5 Garguilo outlines for you the potential
6 ways that the plaintiff can establish a
7 serious injury. It is for you to determine
8 whether the injuries that were actually
9 caused by this accident meets the statutory
10 definition of serious injury. That's your
11 charge.

12 For each injury claimed by the
13 plaintiff, I submit to you that you must
14 determine whether the accident was a
15 substantial factor in causing that injury.
16 I submit to you that the evidence
17 established that the car accident simply
18 was not a factor, a substantial factor in
19 causing the plaintiff's back problem and
20 back surgery.

21 In my opening statement, I told you
22 that we had issued subpoenas on three of
23 the plaintiff's radiologists in reference
24 to this matter. Fortunately, we didn't
25 have to waste time and energy to call each

1 of those radiologists to trial in this
2 case. And why is that? I was surprised,
3 and happily surprised, actually, that each
4 of the plaintiff's physicians reviewed with
5 us the radiological films and the radiology
6 reports prepared by the plaintiff's own
7 treating radiologists. That makes it so
8 much easier. It avoids additional
9 witnesses to come in to tell us what the
10 reports say.

11 It certainly did save the effort of
12 spending another two days with doctors
13 telling us again and again that the
14 plaintiff's back six weeks after the
15 accident was unremarkable, except for a
16 congenitally shrunken disc at L5-S1, and
17 that any condition that the plaintiff may
18 have had in his back was due to
19 degenerative disc disease. We heard that
20 over and over from every physician who
21 testified in this case.

22 The plaintiff's physicians had to
23 concede what the radiologists' reports
24 said, since the radiologists would have
25 been here to testify if they hadn't

1 conceded. Wherever there was a difference
2 of opinion, we asked the doctors, why is
3 your position different? But in the end,
4 all of the relevant evidence in this case
5 has been presented to you for your
6 consideration. This includes five sets of
7 hospital records, relevant pages of the
8 plaintiff's medical history, medical
9 diagrams and charts, diagnostic films,
10 audio recordings, and the testimony of
11 various witnesses who came before you to
12 tell you their individual piece of the
13 story that makes up this entire case.

14 As you know, this trial does not
15 involve fault for this accident. The
16 county conceded fault for this accident
17 years ago. But I suppose now you
18 understand why I told you in jury selection
19 that there is a significant dispute between
20 the parties concerning the injuries that
21 were actually caused by this accident. The
22 county has been forthright from the
23 beginning of this trial to make certain
24 that you knew that the right knee injury
25 and its accompanying arthroscopic procedure

1 was a result of this accident. As I told
2 you in my opening statement, you may find
3 that the knee injury was caused by this
4 accident. And that's okay. But the county
5 maintains that the plaintiff's back injury
6 and the resultant surgery have absolutely
7 nothing to do with this car accident.
8 That's why in jury selection, when the
9 plaintiff's counsel talked to you about

10 harms and losses, I made certain that you
11 knew that the harms and losses had to be
12 causally related to the car accident that
13 we're here about.

14 There is no doubt that Jason
15 Kowalsky had a bad back prior to this
16 accident. Now, he hid that information
17 from almost every medical care provider
18 that he had ever seen concerning this
19 accident. The only medical care provider
20 that he was forthright about concerning his
21 prior back condition was his podiatrist.
22 Perhaps he was under the belief that the
23 County Attorney's Office would not find his
24 podiatrist's records, and the medical forms
25 that he filled out where he put his prior

1 medical condition concerning his prior back
2 problems. But we really didn't even need
3 to search that far to determine that the
4 plaintiff had a preexisting back problem.
5 It's actually listed in the emergency room
6 records on the date of this accident.

7 The plaintiff and his mother wanted
8 to see Dr. Kleeman or his partner, Dr.
9 Manoff, while they were at Brookhaven

10 Memorial Hospital, because they had
11 previously seen him (indicating).

12 Now, the plaintiff and his mother
13 vehemently denied any prior contact with
14 Dr. Kleeman or his partner. But the people
15 at Brookhaven Memorial Hospital chart
16 everything that occurs in a hospital visit,
17 including patients' requests for specific
18 treatment from specific doctors. And you
19 have the entire record before you
20 (indicating). But here's the note from
21 June 12, 2009. The note reads as follows:
22 (Reading) Patient and mother state that
23 they have seen Dr. B. Kleeman in the past
24 and would like to speak with
25 Kleeman/partner. I spoke with Dr.

1 Kleeman's partner, Dr. Manoff. Dr. Manoff
2 reviewed x-rays and I discussed patient's
3 case with him. Dr. Manoff would like
4 patient discharged and will see in office.
5 Dr. Manoff spoke to patient's mother on the
6 phone in the emergency department about
7 plan.

8 These two physicians, Dr. Kleeman
9 and Dr. Manoff work at Brookhaven

10 Orthopedics. And plaintiff was
11 conveniently referred to Brookhaven
12 Orthopedics on his discharge from
13 Brookhaven Memorial Hospital.

14 Additional information was found
15 through the course of discovery concerning
16 the plaintiff's prior hospitalization for
17 low back pain. This hospitalization was on
18 September 5, 2008, when the plaintiff
19 injured his back while playing with his
20 children. It was at that point that we
21 learned that the plaintiff had a pain scale
22 in his low back of eight out of ten. Ten
23 being the worst, one being the least. And
24 plaintiff had been prescribed Vicodin and
25 other medication to control that pain.

1 It was at that point that we learned
2 that the plaintiff had a prior MRI of his
3 lower back. This is not merely an
4 insignificant visit to an emergency room.
5 As investigation went on in this case, we
6 learned that the plaintiff has a
7 longstanding history of back problems. One
8 does not go to a facility to get an MRI for
9 a fleeting backache that comes and goes
10 within a matter of 24 hours. It had to be
11 something more than that. And further
12 evidence established that fact.

13 Now, the county doesn't get access
14 to every medical record in every case. The
15 patient releases the records, and the
16 county secures the records. The county
17 issues subpoenas for records. We know that
18 the plaintiff had that prior MRI exam.
19 It's in the record from Brookhaven Hospital
20 from September, 2008.

21 We also know that Dr. Merola
22 testified that he reviewed that MRI film,
23 because he told us on his direct
24 examination that he reviewed that film.
25 But I suppose you heard what I did. Or

1 rather, what I didn't hear from Dr. Merola.

2 Dr. Merola, the only individual to
3 know the location of those films, did not
4 tell us the results of those prior films.
5 He didn't tell us where those prior films
6 were taken. It would appear that if there
7 were nothing to hide, Dr. Merola would have
8 been forthright in telling us what was on
9 those films.

10 Similarly, the plaintiff's counsel
11 would have been forthright in making
12 certain that Dr. Merola was questioned
13 concerning every aspect of those prior
14 films. But that wasn't done.

15 The plaintiff made available in this
16 case only records that are post-accident.
17 Fortunately, some of the plaintiff's
18 medical care providers who were not going
19 to be called as witnesses to this trial
20 remembered that complete patient histories
21 are important to finding the truth.

22 It was only through investigation
23 that prior records that were presented to
24 you were located. The medical histories
25 completed by the plaintiff for his

1 podiatrist years before this incident
2 occurred, the first history form four years
3 before the accident showed that the
4 plaintiff had back problems. And the
5 second history form showed that the
6 plaintiff not only had back problems, but
7 also had arthritis by that point.

8 And let's not forget the plaintiff's
9 testimony concerning those prior records
10 when they were first presented to him. On
11 the first day of his cross-examination,
12 Jason Kowalsky steadfastly denied that he
13 had ever had prior back problems, prior
14 inflammatory arthritis, prior MRI, or prior
15 hospitalization for back problems.

16 Then there was that gap in his
17 testimony when Jason had what I like to
18 call a V-8 moment. Oh, (indicating) I
19 should have had a V-8. Oh, those prior
20 medical records. Oh, those prior MRI
21 films. Those prior hospital records. I
22 didn't realize those were the ones you were
23 talking about, when he took the stand the
24 next time as his cross-examination was
25 completed.

1 It's up to you to determine whether
2 you believe that Jason Kowalsky was being
3 truthful and forthright when he testified
4 in this case. Would he not have disclosed
5 his prior back problems if they hadn't been
6 discovered? Would he have told us if they
7 hadn't been discovered? I think we know
8 the answer to that by looking at every
9 medical record and every medical history

10 that he gave to the physicians that treated
11 him in this case. He denied to every
12 medical care provider that he saw in
13 reference to this accident that he ever had
14 a prior back problem. And that is
15 extremely disturbing.

16 Dr. Wani was asked, Could it make a
17 difference in your finding of causation if
18 you knew the prior history of the
19 plaintiff? Dr. Blyznak was asked, Could it
20 make a difference in your finding of
21 causation if you knew the prior history of
22 the plaintiff? And both of those doctors
23 said that we knew-- what we knew must be
24 true. That if they had an accurate prior
25 medical history, it could change their

1 final diagnosis of causation.

2 Now, it would not affect the
3 treatment that they rendered, because Jason
4 has degenerative disc disease in his back.
5 But it would affect the cause of the
6 treatment that was being rendered. Because
7 lest we not forget, no surgical
8 intervention was done in this case until
9 three years post accident, when he went to
10 search for a doctor on the internet to find
11 someone who would do surgery.

12 The only physicians to testify in
13 this case that were provided with complete
14 copies of the plaintiff's medical records
15 and reports were the physicians retained by
16 the County of Suffolk to perform
17 independent medical examinations of the
18 plaintiff. Now, they are conducted
19 pursuant to the guidelines of court, and
20 they get one opportunity to see the
21 plaintiff. And they had that one
22 opportunity. And I submit to you that
23 their findings in this case are the sole
24 findings of causation that you should
25 adhere to.

1 The plaintiff's right knee injury is
2 related to this car accident. The
3 plaintiff's back injury has nothing to do
4 with this car accident.

5 And doesn't that conclusion make
6 sense, ladies and gentlemen? We learned
7 about how this accident occurred. The
8 plaintiff showed us the photographs that
9 his brother had taken after the accident,
10 and it shows a bruise on the back of his
11 leg (indicating), where he was hit by the
12 fender or some object on the date of this
13 accident. And he told us that his knee
14 went forward and came into contact with the
15 bumper of his Verizon truck. The plaintiff
16 himself testified that his knee hit the
17 back bumper as he was reaching into the van
18 to put the safety cones back inside the
19 van. And the county brought the actual EMT
20 who responded to the scene of this accident
21 so you could hear her testimony about the
22 plaintiff's complaints at the scene of the
23 accident.

24 It was Sheila Skidmore's obligation
25 on behalf of the Yaphank Ambulance Fire

1 Department to accurately report everything
2 that Jason told her at the scene of the
3 accident. She's not a party to this
4 litigation. She has no involvement with
5 any party to this litigation. She is a
6 pure and complete non-party witness that is
7 not affected one way or the other
8 concerning the outcome of this case. And
9 her ambulance call report is part of the

10 hospital record in this case. The hospital
11 record is Defendant's Exhibit I.

12 Sheila Skidmore's prehospital care
13 report is in evidence as part of the
14 Brookhaven records. Now, listen to what
15 Ms. Skidmore wrote in her report. Listen
16 to what she told us from the stand when she
17 came in pursuant to subpoena to testify in
18 case. (Reading) Plaintiff's chief
19 complaint: My leg hurts.

20 Now, after speaking with Jason
21 Kowalsky, Ms. Skidmore had to make her
22 objective physical assessment, which notes:
23 Negative neck and back pain. There was not
24 even a complaint of back pain at that
25 point.

1 The plaintiff and his counsel would
2 have us believe that Jason Kowalsky was
3 incoherent at the scene of the accident.
4 But we know that's just not true. And how
5 do we know that? Sheila Skidmore at the
6 scene of the accident administered a
7 Glasgow coma test to the plaintiff. And
8 it's noted right on her report where she
9 has the vital signs for the Glasgow coma
10 test. This test reflects the plaintiff's
11 cognitive abilities. She stated in her
12 direct testimony and in her report that
13 there was no loss of consciousness. She
14 also notes that the plaintiff was alert
15 both times that she took his vital signs,
16 and he scored a Glasgow coma scale of 15
17 out of 15 each time he was tested. He
18 scored the highest possible score in every
19 category of the test. Spontaneous eye
20 movement, highest possible score. Highest
21 possible score for verbal communication.
22 Highest possible score for motor function.
23 There was nothing wrong with the plaintiff
24 cognitively at the scene of the accident.
25 He knew precisely what he was saying and

1 precisely what he was reporting when he
2 said it to Ms. Skidmore. The only injury
3 he sustained was to his right knee.

4 By the way, folks, he didn't just
5 say it there. He's taken to the hospital,
6 and he tells the triage nurse the same
7 thing, and it's in the hospital records,
8 folks. (Reading) Denies loss of
9 consciousness. No spinal injuries.

10 Deformity and laceration to right knee.
11 One spot in the reports.

12 The intake sheet: (Reading) He was
13 working outside and a car/pickup truck hit
14 his right lower extremities. Patient
15 states this is the only injury he has. No
16 head trauma, loss of consciousness,
17 numbness or weakness.

18 And again, later on in the report
19 from Brookhaven Memorial Hospital: At 1630
20 hours: (Reading) The only complaint that
21 the patient has is right knee pain.
22 Patient denied any other complaints.
23 Visitors are reporting other complaints.

24 Now, the visitors in the hospital,
25 we know was Mrs. Kowalsky, his brother, his

1 estranged wife, and his mother-in-law.
2 Somebody was reporting something else that
3 Jason was denying.

4 I invite you to look at these
5 records. It is a wealth of information.
6 It's the first time that Jason had the
7 opportunity to talk about this accident,
8 and I believe he talked about it truthfully
9 and straightforward. His knee was hurt.

10 The prehospital care report also
11 notes that the plaintiff had some abrasions
12 and scrapes on his right knee, right hand,
13 and the back of his arms. There's no
14 notation of any kind that there was any
15 trauma to the plaintiff's neck or back.

16 Before we talk a little bit about
17 the physical evidence in this case, let me
18 just take the opportunity with you to
19 review some of the testimony of the
20 witnesses who were produced in this case.

21 As the first person up, it sort of
22 falls upon me to remind you who testified,
23 and I'll do that and it's going to take a
24 bit of time and I apologize for that.

25 Let's start with the first

1 witnesses, Linda Peterson and Raymond
2 Rancourt. To be perfectly honest, folks, I
3 don't know why the plaintiff called these
4 witnesses, other than to generate sympathy
5 from you. They offered nothing other than
6 the manner in which the accident occurred.
7 Linda Peterson was a witness to the
8 accident who made a 911 call, and we heard
9 her 911 call. She rendered no medical care
10 in this case.

11 Raymond Rancourt was involved in the
12 motor vehicle accident from the county, and
13 we heard his 911 call. I submit to you,
14 ladies and gentlemen, that the testimony of
15 Ms. Peterson and my client, Raymond
16 Rancourt, has nothing to do with the injury
17 claims that have been presented in this
18 case. Of course, if the county disputed
19 anything concerning the happening of this
20 accident, sure, you could hear their
21 testimony. And there may actually be some
22 substance in the testimony that you'd want
23 to hear. But neither were involved in his
24 medical treatment. Neither are damage
25 witnesses.

1 When we focus on medical treatment,
2 it becomes apparent why the plaintiff
3 wanted you to focus on the accident
4 instead. The county was completely
5 forthright when it conceded fault for this
6 accident.

7 MR. RICIGLIANO: Objection.

8 THE COURT: I told you during--
9 There's an objection. I told you during
10 the opening remarks that what lawyers say
11 in their opening statements and closing
12 statements is not evidence. The evidence
13 is what you heard from witnesses and what's
14 in those exhibits. I will in a short while
15 be giving you the law applicable to this
16 case. You'll accept the law, of course, as
17 I give it to you. All right? Thank you.

18 MR. JEFFREYS: But was the plaintiff
19 equally forthright with you concerning his
20 injury claims? Did the plaintiff tell his
21 physicians everything concerning his prior
22 medical history, or did he hide that
23 information even from them? These are
24 issues that you will need to decide as a
25 jury.

1 THE COURT: Excuse me. I should
2 have told you something else. Ultimately,
3 questions of credibility, who to be
4 believe, who not to believe, it's up to
5 you. Lawyers are certainly required, their
6 dutybound to comment on it and to make
7 suggestions. But ultimately, credibility
8 is your call. Thank you. I'm sorry.

9 MR. JEFFREYS: No problem, Your
10 Honor. And along those lines, the judge
11 will tell you that there's a concept in the
12 law known as falsus in uno. And that
13 concerns the general believability of a
14 witness who has told an untruth.

15 Listen carefully to that charge.
16 There are legal consequences when a witness
17 is not forthright with you. You're the
18 members of our jury who are the truth
19 finders in this case, and I'm relying on
20 you to find the truth.

21 And I don't think I need to remind
22 you that there was another issue in this
23 case concerning a potential lie told by
24 Jason Kowalsky or his back surgeon, Dr.
25 Merola, in this case. And I don't like to

1 use the word lie, but that's what it was.

2 During his testimony, the plaintiff
3 clearly stated that he did not sign the
4 informed consent norm for his back surgery
5 until the day after the surgery occurred.

6 MR. RICIGLIANO: Objection.

7 THE COURT: Is there an objection?

8 MR. RICIGLIANO: Yes.

9 THE COURT: The comment you heard

10 just now, as well as the comments you may
11 hear may reflect the attorney's
12 interpretation or express an opinion as to
13 what you should find as to-- going back to
14 that credibility thing. I'm going to give
15 you a charge that's called falsus in uno.
16 I don't know why they use Latin, but they
17 use the Latin. As with all instructions I
18 give you, pay careful attention to it. You
19 can find that a statement was simply a
20 misstatement, you can find it was a lie,
21 you can find it was meaningful or harmless,
22 all right? All questions of fact, all
23 questions of credibility are beyond the --
24 they're for you to decide. That's your
25 province. And within that province, you

1 reign supreme. Not me, not the attorneys.
2 Go ahead.

3 MR. JEFFREYS: Thank you, Your
4 Honor. At that point, Jason Kowalsky tells
5 us that his surgeon came to him and told
6 him that the surgical procedure that was
7 conducted was different from the one that
8 he thought he was going to have, and it was
9 only then that Mr. Kowalsky said that he
10 signed the consent form.

11 His surgeon, Dr. Merola, clearly
12 indicated that the surgery could not have
13 taken place without a consent form that was
14 signed by Jason Kowalsky. Dr. Merola went
15 so far as to say he would not even be
16 allowed to get into the operating room
17 without a consent form. So I presented Dr.
18 Merola with the ultimate question on that
19 point. So if Jason said to you--
20 Withdrawn. Sorry. If Jason said that you
21 came to him with a consent form after the
22 surgery took place, that would just not be
23 true, correct? And Dr. Merola said
24 correct.

25 But suppose we believe the testimony

1 concerning the consent form that Jason
2 Kowalsky told us? Then Dr. Merola most
3 certainly told us a mistruth.

4 On this critical point of informed
5 consent to have surgery, only one person
6 can be right on that question. Either
7 Jason Kowalsky is telling a lie, that he
8 didn't give the informed consent until
9 after the surgery, or Dr. Merola is telling
10 a lie concerning the signature on the
11 consent form. But let's take a few minutes
12 to go through with you what those five
13 principle medical providers that you heard
14 testify in this case said.

15 They were Dr. Blyznak, Dr. Wani, Dr.
16 Merola, Dr. Finkel, and Dr. Reiser. And
17 I'll discuss each of their testimony one at
18 a time. And of course, ladies and
19 gentlemen, if your recollection is
20 different from mine, go with your
21 recollection. If you need anything read
22 back to you, Anna takes everything down
23 that we've said in this courtroom. You can
24 come back and ask for a readback at any
25 time, if you need it.

1 Let's start first with Dr. Blyznak.
2 I know that the plaintiff would want us to
3 believe that there are discrete doctors for
4 the plaintiff's knee and for his back. The
5 testimony establishes, however, that Dr.
6 Blyznak was the plaintiff's exclusive
7 orthopedic surgeon for the first 18 months
8 or so following this accident. He handled
9 every element of the plaintiff's claimed
10 injuries, whether it was the claim of the
11 neck, the claim of the knee, the claim of
12 the back, or any other orthopedic claim.
13 He was the sole orthopedic surgeon treating
14 the plaintiff following this accident.

15 The plaintiff initially presented at
16 Dr. Blyznak's office on June 15th, 2009,
17 three days after this accident. The
18 plaintiff's primary complaint is to the
19 right knee. On follow-up visits, the
20 plaintiff made a separate complaint of low
21 back pain. And what did Dr. Blyznak do?
22 He ordered an MRI of the plaintiff's low
23 back. He told us that's the proper thing
24 to do.

25 The MRI was conducted approximately

1 six weeks after the accident at a location
2 known as Medical Arts Radiology. That MRI
3 report was discussed with Dr. Blyznak, and
4 Dr. Blyznak confirms that the plaintiff had
5 an unremarkable MRI of his low back, with
6 the exception of the compressed disc at
7 L5-S1, which he described as degenerated.
8 And we know from so much other testimony
9 that was had in this case that the

10 plaintiff does have a lumbarized L5
11 vertebrae-- sacralized L5 vertebrae. And
12 that's a congenital problem that has
13 nothing to do with this car accident.

14 We also know from the evidence this
15 case that the plaintiff has hypoplasia in
16 the disc at L5-S1. Hypoplasia, as each
17 medical provider told us that was asked, is
18 a congenital underdevelopment of an organ
19 or tissue. It has nothing to do with the
20 car accident.

21 Dr. Blyznak sent the plaintiff to an
22 expert in the field of back surgery, Dr.
23 Morgan Chen. Now, it's notable that the
24 plaintiff didn't call his first back
25 doctor, Dr. Morgan Chen, as a witness in

1 this case. Didn't call him. But Dr.
2 Blyznak discussed with us Dr. Chen's
3 consultation report with the plaintiff on
4 November 13, 2009. Dr. Chen diagnosed the
5 plaintiff with degenerative disc disease.
6 Nothing traumatic, nothing acute, nothing
7 from this car accident. Simply a
8 degenerative disc disease. But Dr. Blyznak
9 properly didn't just stop his treatment.

10 He was the plaintiff's orthopedic surgeon.
11 His treatment then focused on the injury
12 that was actually from this car accident,
13 an injury to the right knee.

14 Dr. Blyznak performed an
15 arthroscopic knee procedure on December 2,
16 2009, and he told us that the arthroscopic
17 procedure required three very small holes
18 to be put into the side of the plaintiff's
19 knee, one of which was for drainage, so
20 that it could be explored arthroscopically.

21 On arthroscopic viewing of the right
22 knee, Dr. Blyznak told us that there was a
23 partial tear of the medial meniscus of the
24 right knee, and that tear was fixed with
25 two Fast-Fix sutures. That was the only

1 portion of the knee that needed surgical
2 repair whatsoever. Dr. Blyznak examined
3 the balance of the knee and found that
4 there was no need for any other surgical
5 repair. The arthroscope was removed from
6 plaintiff's knee, he was bandaged and given
7 a brace, and told to attend three courses
8 of physical therapy.

9 From Dr. Blyznak's perspective, long
10 before there was even a thought of a back
11 surgery with Dr. Merola, the plaintiff was
12 able to return to sedentary to light duty
13 work as of March, 2010. But we already
14 know that the plaintiff didn't return to
15 work as he was cleared to by Dr. Blyznak.

16 The next physician that we heard
17 from in this case was Dr. Shafi Wani, and
18 although he's a little bit difficult to
19 understand, he provided us with a lot of
20 information. Dr. Wani was the second
21 physician outside of the hospital to treat
22 the plaintiff.

23 Now, Dr. Wani also told us that he
24 reviewed the initial MRI films that were
25 taken at Medical Arts Radiology six weeks

1 after the accident. He doesn't believe
2 that they were unremarkable. Instead, he
3 believes that the films that were taken six
4 weeks after the accident already showed the
5 degenerative disc disease at L2-L3, L3-L4,
6 and L4-L5. Dr. Wani also confirmed that
7 there was that sacralized vertebrae at
8 L5-S1. And Dr. Wani was asked whether the
9 degenerative condition in the plaintiff's
10 back as he saw in the initial MRI six weeks
11 after the accident was related to this car
12 accident. And he said no.

13 Now, the plaintiff has continued to
14 treat with Dr. Wani, receiving so much pain
15 medication and so much anti-inflammatory
16 medication, that it leaves one to question
17 what Dr. Finkel told us. Whether the
18 plaintiff had become addicted to
19 prescription medications, a complication
20 that was discussed by Dr. Finkel. Although
21 I'll talk in detail about Dr. Finkel's
22 testimony, remember that that was a major
23 issue for him concerning all of those
24 opiate prescriptions that were given to
25 Jason Kowalsky. That's one of the

1 complications.

2 But what's most striking about Dr.
3 Wani's testimony concerns the continuation
4 of treatment when the plaintiff moved to
5 Florida. The plaintiff has been living in
6 the state of Florida since February of
7 2010. He has a doctor named Dr. Pritchard
8 down in the state of Florida to tend to his
9 needs. Yet, every 30 days, the plaintiff
10 gets on a plane from the state of Florida
11 and does the round trip from Florida to New
12 York and then back from New York to Florida
13 so that he can see Dr. Wani. This is where
14 I need you to rely on your common sense in
15 assessing the plaintiff's claim of alleged
16 disability. The plaintiff claims total
17 disability as a result of this accident,
18 yet he's able to do this flight over and
19 over and over again for the past four and a
20 half years.

21 No matter what accommodation is made
22 for Jason Kowalsky in the flights from
23 Florida to New York and on the return
24 flights, is there any doubt in anyone's
25 mind that such a repeated flight in tight

1 quarters of an airplane leads one to
2 believe that Jason Kowalsky is not as
3 disabled as he would have us believe?

4 Also, we have to keep in mind an
5 issue that Mr. Kowalsky raised himself on
6 direct examination. Jason says that he's
7 obligated to continue to pay for his
8 medical costs through COBRA. Yet, he
9 professes that he's receiving no money from
10 income whatsoever as of the time of this
11 trial. Has Mr. Kowalsky adequately
12 explained to you where the money is coming
13 from for him to pay for his COBRA benefits
14 and for his housing in the state of
15 Florida?

16 We know from his testimony that he
17 has separated from his wife. So who's
18 paying for expenses? We know that his
19 parents say that they pay all the expenses
20 for the plane tickets back and forth to
21 Florida. But they also-- Mrs. Kowalsky
22 also didn't tell us who is paying the
23 everyday living expenses that Jason
24 Kowalsky has.

25 MR. RICIGLIANO: Objection.

1 THE COURT: Things that lawyers may
2 tell you on summation may be important,
3 they may be unimportant. That's why we use
4 terms such as relevance and materiality,
5 which I'll describe to you shortly. If
6 it's important, you make that
7 determination. If it's something else, you
8 make that determination. Thank you.

9 MR. JEFFREYS: Now, the plaintiff is
10 making a claim to you of lost wages.
11 Wouldn't you want to know that little bit
12 of information so that you could see
13 whether Jason Kowalsky is earning a living
14 from some other source that he didn't tell
15 us about?

16 And let's think of what Dr. Wani
17 does for the plaintiff. He's continually
18 injecting the plaintiff with a combination
19 of non-steroidal anti-inflammatory
20 medications and local anesthetic for four
21 years without any change. His treatment
22 has not changed, and there's no sign that
23 Jason is getting any better. Even after
24 the surgery that the plaintiff would have
25 you believe is related to this car

1 accident, Dr. Wani's regimen has not
2 changed one bit.

3 During his treatment of the
4 plaintiff, Dr. Wani orders EMG and NCV
5 tests. These are the objective tests that
6 neurologists rely on. And Dr. Wani's
7 office itself conducts both of these tests.
8 The tests take into account the entirety of
9 the plaintiff's body, and both tests come
10 back normal.

11 Dr. Wani tells us, without doing any
12 cranial exam at all, that the plaintiff has
13 something known as postconcussion syndrome.
14 Dr. Wani tells us that the one test that is
15 conclusive concerning postconcussion
16 syndrome is a brain stem evoked potential
17 test. But Dr. Wani claims from his notes
18 that he did conduct that test, but he
19 didn't have the results with him.

20 Now, after more than a year of
21 treatment with Dr. Wani, Dr. Wani
22 appropriately asked for a second lumbar MRI
23 to be conducted at Lenox Hill Radiology by
24 a radiologist name Dr. William Louie. The
25 report of that MRI was summarized by Dr.

1 Wani as being continued degenerative
2 findings in the plaintiff's lumbar spine.
3 There's nothing acute or traumatic in the
4 findings of the lumbar spine that was
5 ordered by Dr. Wani. It is consistent with
6 Dr. Wani's position that the plaintiff has
7 degenerative disc disease.

8 So every diagnostic test that was
9 ordered or reviewed by Dr. Wani in

10 reference to this case demonstrates that
11 there was no acute or traumatic problems
12 from this car accident that gives rise to
13 the plaintiff's back problems.

14 Now, the next physician that we
15 heard from in this case was Dr. Andrew
16 Merola. The plaintiff told us on his
17 direct exam that he found Dr. Merola by
18 searching the internet for a back surgeon.
19 But Dr. Merola testified that he was
20 expressly referred to Jason by Dr. Shafi
21 Wani.

22 In response to Dr. Merola's claim of
23 direct referral, we also have Dr. Wani's
24 testimony that he was not in any manner
25 involved in the decision to have lumbar

1 surgery and not involved in the selection
2 of Dr. Merola. Dr. Merola tells us that he
3 was given a prescription for a neurologic
4 consultation that was dated June-- a
5 neurologic surgeon consultation that was
6 dated June 11, 2012 by Jason Kowalsky. Dr.
7 Merola told us that on that first day that
8 he saw the plaintiff, he had already made
9 up his mind that he was going to do back

10 surgery on this young man. Dr. Merola
11 never looked at any of the plaintiff's
12 records before he recommended surgery. Dr.
13 Merola never spoke to any of the
14 plaintiff's treating doctors before he
15 recommended surgery. Dr. Merola decided
16 that he was going to cut this plaintiff's
17 back open from the moment of the first
18 visit. And for that, I feel bad for Jason
19 Kowalsky. He chose a surgeon who wanted to
20 cut him open rather than pursue any form of
21 conservative treatment.

22 And as all of the orthopedic
23 surgeons who testified in this case told
24 us, their job is not only conducting
25 surgery. They fully assess their patients

1 in order to determine whether conservative
2 treatment without surgery would be more
3 appropriate than immediately cutting a
4 patient open. And in this case, folks, you
5 are being asked to determine whether the
6 surgery conducted by Dr. Merola was
7 medically necessary and related to this car
8 accident.

9 Dr. Merola, however, determined over
10 the course of a single consultation what
11 every other physician had been ruminating
12 over for a three-year period. He came to
13 the conclusion that without any medical
14 history for this patient, that surgery at
15 L5-S1 was the appropriate course of action.
16 That was the surgery point that he wanted
17 to have done. Let's not forget L5-S1,
18 ladies and gentlemen, is where that
19 hypoplastic degenerative disc is in the
20 plaintiff's back.

21 Now, Dr. Merola was in a slightly
22 different position than any of the other
23 physicians who testified in reference to
24 this case. Why? Because Dr. Merola had
25 previously given sworn testimony in front

1 of Jason Kowalsky's workers compensation
2 board case concerning the lumbar surgery
3 claim. That testimony was rendered a mere
4 six weeks before the plaintiff's surgery
5 was conducted. And as that testimony
6 demonstrates, Dr. Merola relied upon the
7 discogram that he ordered from Dr. Norman
8 Schoenberg in rendering his sworn
9 conclusions before the workers compensation
10 board during his deposition. And I
11 presented portions of those depositions to
12 you while Dr. Merola testified.

13 And what's the discogram, ladies and
14 gentlemen? It's a test that's designed to
15 provoke pain in the lumbar spine. If the
16 lumbar spine is injured, there will be a
17 painful response. And as the testimony
18 revealed in this case, everyone relied upon
19 the discogram findings in rendering their
20 care to Jason Kowalsky. That is, until we
21 come to trial, when the plaintiff's
22 surgeon, Dr. Merola decides to distance
23 himself from the results of that discogram.

24 The discogram demonstrates that
25 there was no pain being generated at any

1 lumbar level of the plaintiff's back as a
2 result of the provocative test that was
3 designed to inspire pain. The one thing
4 that the test did show that we've known
5 from the first x-ray on the first
6 hospitalizations right after this accident
7 happened, and they're all in evidence, was
8 that Jason Kowalsky had a sacralized L5
9 vertebrae, and he had hypoplasia at the
10 L5-S1 level. It's the same diagnosis over
11 and over again.

12 In fact, as Dr. Merola told us, he
13 testified at the plaintiff's workers
14 compensation case concerning the area of
15 the low back where he wanted to do surgery,
16 the L5-S1 level. He expressly noted in his
17 testimony that the L3-L4 disc and the L4-L5
18 disc were asymptomatic and not causing
19 pain. And the records from New York
20 Downtown Hospital, where the back surgery
21 was done some three years after this
22 accident, which are in evidence as
23 Plaintiff's Exhibit 29, note that the
24 surgery that was to be conducted on
25 Mr. Kowalsky was supposed to be an L5-S1

1 laminectomy. And the discharge summary
2 says that that was actually the surgery
3 that was done. But that was not the
4 surgery that was done. Dr. Merola told us
5 that he did surgery at the L4-L5 level.

6 I submit to you, based upon the
7 evidence that we have in this case, that
8 Dr. Merola fully intended on performing
9 surgery at L5-S1, as he told the workers
10 compensation board, and is noted in the New
11 York Downtown Hospital records. When he
12 actually cut open the plaintiff's back, he
13 noted what every other doctor actually who
14 had reviewed Jason's records already knew.
15 The area that Dr. Merola was intent on
16 fusing had already been partially and
17 congenitally fused. I submit that a
18 reasonable interpretation of the evidence
19 is that as long as the back was already
20 open, Dr. Merola decided to do some other
21 place-- find some other place to do
22 surgery, much to Jason's chagrin.

23 So he removed an asymptomatic,
24 non-painful disc, and then went to Jason
25 Kowalsky after the surgery and told him to

1 sign a new consent form that was given
2 after the fact.

3 But even if there was a problem at
4 L5-S1, assume that there was a problem,
5 every physician who testified in reference
6 to this case indicated that the plaintiff's
7 lumbar spine had degenerative conditions,
8 not traumatically induced conditions.

9 Dr. Wani specifically said, L4-5 has
10 degenerative problems, when he looked at
11 the films. Dr. Merola would have us
12 believe that he found the answer to the
13 plaintiff's problems when he operated on an
14 asymptomatic disc that was not causing any
15 pain at L4-L5, and we know that is simply
16 untrue.

17 Look at the level of pain
18 medications that Jason Kowalsky continues
19 to take even after the surgery. He has
20 degenerative back disease and he needs to
21 take the medications. Yes, I feel bad for
22 Jason Kowalsky in that regard. He's taking
23 four different types of pain medications
24 now, including methadone.

25 Clearly, the evidence demonstrates

1 that the plaintiff's back condition, that
2 degenerative back disease is simply getting
3 worse over time. The plaintiff tells us
4 that he takes more and more pain
5 medication, but it's not working as it used
6 to when he started to take it. We heard
7 all of his doctors tell us about this
8 degenerative disc disease, and it happens
9 to all of us as part of the aging process.

10 And you say, Well, Jason was a young man.
11 But the hard work that Jason did, and he
12 should be applauded for the hard work he
13 did as a Verizon field technician, only
14 made the problems speed up. As Dr. Finkel
15 told us, hard work, such as being a lineman
16 for Verizon that involves heavy lifting and
17 moving, causes degeneration of the back to
18 occur much faster than someone who has a
19 sedentary job, and Dr. Finkel told us, like
20 a priest.

21 I also invite you to look at the New
22 York Downtown Hospital records concerning
23 Mr. Kowalsky's surgery. There's not a
24 single reference to a car accident as being
25 the cause of that surgery. There's not a

1 single car reference-- not single
2 reference to the car accident anywhere in
3 the history at all in the New York Downtown
4 Hospital records. All that's there is what
5 we've known from the beginning of this
6 case, that Jason Kowalsky has degenerative
7 disc disease in his back.

8 The next physician to testify was
9 the one who has seen Jason Kowalsky the
10 most recently out of all the physicians in
11 this case. Dr. Noah Finkel performed an
12 independent medical examination of the
13 plaintiff on June 3rd, 2014. He reviewed
14 all of the plaintiff's medical records and
15 reports. And did he look at the discogram
16 films? No, he didn't. All he did was do
17 what all of the other physicians did.
18 Relied upon the discogram report that was
19 prepared by Norman Schoenberg, the
20 colleague of Dr. Merola, who he still uses
21 to do his discograms.

22 And looking at the entirety of the
23 plaintiff's medical history, Dr. Finkel
24 told us that the knee injury was related to
25 the car accident, but the back injury had

1 no relation to the car accident.

2 The issue of-- This medical issue,
3 ladies and gentlemen, requires physicians
4 to give us definition. It's a matter of a
5 physician looking at medical records and
6 making an appropriate diagnosis concerning
7 a particular patient. And Dr. Finkel did
8 that, and came to the conclusion that the
9 plaintiff's problems started at L5-S1. The

10 plaintiff has that hypoplastic disc at
11 L5-S1. The plaintiff has degenerative disc
12 disease throughout his lower lumbar spine.
13 And the plaintiff's problems originate and
14 continue due to the L5-S1 disc.

15 And doesn't that make sense, ladies
16 and gentlemen? The plaintiff had surgery
17 at an otherwise asymptomatic and non-pain
18 producing disc at L4-L5, yet, he continues
19 to have intense pain. I submit to you, the
20 reason he has pain is the precise reason
21 that Dr. Finkel told us during his
22 testimony. The plaintiff's problem is
23 coming from his L5-S1 disc. That is the
24 disc where surgery should have been done in
25 this matter, and since surgery was not done

1 at that disc, and the plaintiff still has
2 pain, it is a reasonable conclusion to say
3 that the L5-S1 disc is the one that's
4 producing the plaintiff's pain. Only two
5 discs cause the problems of the radicular
6 pain down into the legs. L5-S1, L4-L5.
7 Jason has had surgery at L4-L5. He
8 continues to have the radicular pain in his
9 legs. The only other solution is L5-S1,
10 the degenerative disc that exists in his
11 lower spine.

12 Then, ladies and gentlemen, we also
13 had a neurologist named Dr. Howard Reiser
14 testify in reference to this matter.
15 Dr. Reiser is somewhat unique in this case,
16 because like Dr. Nestor Blyznak, his exam
17 took place before the plaintiff ever went
18 to Dr. Merola to consider back surgery.
19 Dr. Reiser was able to render his opinion
20 based upon all available records at the
21 time of his examination and after
22 completing a thorough physical exam. And
23 while speed is certainly not determinative
24 on any issue in this case concerning
25 medical care, it is clear that Dr. Reiser

1 spent more time with Jason Kowalsky on one
2 single visit than any other medical care
3 providers had on their individual visits.

4 And Dr. Reiser tells us that
5 neurology is a very precise branch of
6 medicine concerned with the brain and
7 nervous system. It's kind of monitoring
8 the body's electrical system. I believe he
9 called himself an electrician. As Dr.

10 Reiser told us, he did a series of
11 neurologic examinations of every part of
12 the plaintiff's neurologic system and
13 determined whether there were any
14 neurological problems.

15 The examination showed that there
16 was no radicular pain, which is radiating
17 pain coming from the nerves into the
18 extremities, or numbness, and everything
19 was negative on that exam. So in 2010,
20 everything is negative. And why is the
21 timing of Dr. Reiser's appointment so
22 important in this case? His complete
23 neurological exam was done before the
24 plaintiff ever consulted with Dr. Merola.
25 Before there was even a thought of that

1 consultation.

2 Dr. Reiser's exam was completed in
3 September, 2010, just a few months after
4 the plaintiff's own then treating
5 physicians, Dr. Wani and Dr. Blyznak,
6 cleared the plaintiff to return to
7 sedentary or light duty work. And that
8 ended the doctors' testimony in this case.
9 There were only five of them, folks, and
10 that ended their testimony.

11 If you conclude, as I do, ladies and
12 gentlemen, that the plaintiff's surgery at
13 L4-L5 is simply unrelated to this car
14 accident, then I submit there's no need to
15 consider any of the additional testimony
16 that has been rendered by the plaintiff's
17 experts in this case.

18 The county is responsible for
19 whatever you find is fair and reasonable
20 compensation for the plaintiff's knee
21 injury and its resultant arthroscopic
22 surgery. The physicians who have testified
23 concerning the knee have all indicated that
24 the plaintiff has appropriately healed, and
25 his condition is as far as it can be,

1 resolved.

2 The plaintiff would have you
3 speculate into the future in order to
4 increase potential damages in this case.
5 And how did he do that? He produced an
6 economist and a life care plan expert
7 solely to increase potential damage in this
8 case. If you do not believe that the back
9 injury is related to this car accident,

10 then the plaintiff is not disabled from
11 this car accident. Because the disability
12 is from the back surgery.

13 The physicians who testified before
14 Dr. Merola all indicated that Jason could
15 return to work, albeit in a different
16 position than he had as a Verizon field
17 tech. But as of March of 2010, he could
18 return to work. And the plaintiff chose
19 not to return to work.

20 Significantly, even the plaintiff's
21 back surgeon, Dr. Merola, had to concede
22 that the plaintiff could return to
23 sedentary to-- sedentary to light work.
24 And you heard me read each of those
25 physicians' testimonies yesterday afternoon

1 concerning their conclusions about
2 sedentary to light work.

3 Dr. Wani told us that the
4 plaintiff's consumption of some of his
5 medications may affect his ability to do
6 some type of work because they would
7 involve executive decisions. But even Dr.
8 Wani established that the plaintiff could
9 return to some work, if he wanted to.

10 On his direct examination, Jason
11 Kowalsky told us his dreams for the future.
12 Had this accident never occurred, Jason
13 Kowalsky wanted to work the minimum number
14 of years that he had to at Verizon, and
15 then be involved in some sort of appliance
16 repair or handy man type company. In
17 short, he wanted to own his own business.

18 These are the plaintiff's
19 aspirations, according to his own
20 testimony. The economist hired by the
21 plaintiff's attorney in this matter didn't
22 listen to the hopes or goals of their own
23 client. Instead, in order to maximize the
24 economist's predictions, he had him working
25 as a Verizon employee until he was age 62,

1 well past the statistical work expectancy.
2 And the plaintiff's economist, Dr. Thomas
3 Fitzgerald, told us that he used 62 years
4 of age as a retirement, not based on any
5 statistics based upon the type of work that
6 Jason Kowalsky was involved in, and not
7 based on any wishes of Jason Kowalsky to
8 actually leave Verizon and open his own
9 business. He picked that because it was
10 the first year that Jason Kowalsky would be
11 entitled to social security benefits. Of
12 course the economist didn't take into
13 account Jason Kowalsky's health in
14 rendering his opinion. He said that was
15 beyond his specialty. He didn't review any
16 information concerning Jason's health.
17 Again, he says that's beyond his specialty.
18 He didn't speak to Mr. Kowalsky in any
19 detail concerning his hopes and
20 aspirations. He didn't speak to any of the
21 plaintiff's medical care providers, and he
22 didn't speak to the plaintiff's family. He
23 was tasked with one function. Increase the
24 number that the plaintiff would be
25 requesting from you at the time of trial.

1 And that's what an economist does. That's
2 what their job is.

3 But, again, ladies and gentlemen, if
4 you find that the back injury is not
5 related to this car accident, as every
6 medical care provider has said in this
7 case, if you find that it is a degenerative
8 disc disease, as every medical care
9 provider has found in the case, then the

10 economist's analysis is useless.

11 The undisputed fact is that the
12 plaintiff suffers from degenerative disc
13 disease that has nothing to do with this
14 car accident.

15 And then the plaintiff produced a
16 purported life care plan expert, Dr. Harold
17 Bialsky. Now, Dr. Bialsky told us that he
18 did what can only be described as a
19 half-hearted analysis two weeks before this
20 trial in order to present further inflated
21 figures to you. He didn't do what he was
22 trained to do as a life planning expert.

23 Dr. Bialsky told us what he does as
24 a life planning expert in order to
25 anticipate future costs of his patients.

1 He speaks with the patient, he reviews
2 every medical record, he speaks with the
3 plaintiff's doctors, he speaks with the
4 plaintiff's family and their caregivers,
5 and he makes certain that he does a home
6 visit to the plaintiff's home in order to
7 do a thorough analysis. In this case,
8 ladies and gentlemen, Dr. Bialsky told us
9 that he didn't do any of that. And I feel
10 sort of bad that Dr. Bialsky was put into
11 that position in this case. He told us
12 that his entire record review was reading
13 four documents that were prepared by the
14 plaintiff's counsel solely for the purpose
15 of this lawsuit. That is the entire basis
16 of his analysis. Yes, the expert told us
17 that he had reduced his fee by 50 percent
18 because the request had been for something
19 less than a complete and proper analysis.
20 But that also creates a flaw in Dr.
21 Bialsky's testimony.

22 I submit to you that due to Dr.
23 Bialsky's acknowledged inability to
24 complete a life care plan in reference to
25 this matter, his statistics and

1 presentation are useless. Everything of
2 any value in his analysis says undetermined
3 in the charts that he showed us. All of
4 his significant statements and his
5 significant statistics contain the word
6 undetermined. And since Dr. Bialsky did
7 not perform a complete analysis, he didn't
8 even know that the plaintiff's physician
9 had cleared the plaintiff to return to work
10 in a sedentary to light work capacity.

11 Dr. Bialsky told us that he had
12 previously been qualified as a vocational
13 rehabilitation--

14 MR. RICIGLIANO: Objection.

15 THE COURT: Read back the last
16 sentence, please.

17 (Whereupon, the referred to portion
18 of the record was read back)

19 THE COURT: Whether that's what he
20 said or not, remember, that's for you to
21 decide. Summations are suggestions,
22 suggestions as to where the evidence--
23 counsel's suggestions as to where the
24 evidence leads you and proposed
25 conclusions. If that's not the case,

1 you'll decide that. If any comment a
2 lawyer makes is not the case, is not the
3 fact, you decide it. Why do we have a
4 trial? Real simple. Contested questions
5 of fact. You, the jurors, determine what
6 the facts are. You resolve the issue of
7 the contested questions of fact. Go on
8 from there.

9 MR. JEFFREYS: Thank you, Your

10 Honor. You'll remember, ladies and
11 gentlemen, that I went through with Dr.
12 Bialsky all of the cases that he had
13 previously testified in, all over the
14 country. And he told us each level of
15 specialty that he was involved with in all
16 of those cases. And he told us that he had
17 previously qualified as a vocational
18 rehabilitation expert in other cases where
19 he testified. That simply what the
20 testimony was, folks.

21 This is a completely different
22 specialty from a life planning expert.
23 Curiously, the plaintiff didn't retain Dr.
24 Bialsky for his vocational rehabilitation
25 expertise. Instead, the county retained

1 the sole vocational rehabilitation expert
2 whose numbers are unchallenged.

3 Now, it's the job of a vocational
4 rehabilitation expert to determine if
5 there's a job available for an individual.
6 That's what a vocational rehabilitation
7 person does. Dr. Bialsky told us and Joe
8 Pessalano told us.

9 Joe Pessalano confirmed what the
10 plaintiff's own physicians had told us,
11 that the plaintiff can work in a sedentary
12 to light work. He took into account the
13 medical restrictions that could be placed
14 on Jason Kowalsky, and eliminated every job
15 that would be too intense for Mr. Kowalsky
16 to perform.

17 It is unrebutted that if he was to
18 choose to go to work, Jason Kowalsky would
19 have many job options available to him.
20 Now, is that a guarantee that he would get
21 a job? Of course not. You have to
22 interview. You have to do what's required
23 to get a job. But there are jobs
24 available. He could make gainful
25 employment that he wants. He could have

1 that customer contact that he longs for.
2 He could secure benefits and he could earn
3 money. Whether in the New York
4 metropolitan area or the Spring Hill,
5 Florida, area, Mr. Pessalano tells us that
6 the plaintiff has job options available to
7 him with salaries that range between
8 \$30,810, and \$90,310, depending upon the
9 location and the selected employment.

10 So, ladies and gentlemen, that's the
11 evidence that you've been presented in this
12 case. Now, it's your responsibility to
13 evaluate that evidence. You've heard the
14 facts, and you'll shortly hear the law.
15 And the application of the law will bring
16 this case to a close.

17 It's now time for you to do what
18 lawyers wish we could do on every day. You
19 cloak yourself in the law that we all hold
20 so dear. And you place on the blindfold
21 that Lady Liberty wears as she holds the
22 scales of justice, and you say: Did the
23 plaintiff meet his burden of proof on each
24 of his issues? I have no burden here,
25 folks. The plaintiff has the burden of

1 proof, and the judge will tell you all
2 about that burden.

3 Listen to the law. I've told you
4 the county's position in this matter. The
5 accident caused the plaintiff's knee
6 injury. Nothing else.

7 As Justice Garguilo told you at the
8 beginning of the case, counsel may comment
9 on potential value of the valid claims that
10 are presented, and I'll do that in this
11 case, since there with was so much stuff
12 presented to you that was not causally
13 related to this accident.

14 This accident caused an injury to
15 the plaintiff's right knee and the need for
16 an arthroscopic surgery that required to
17 Fast-Fix sutures to repair a partial torn
18 meniscus. It required a period of physical
19 therapy and a brief period of
20 rehabilitation. That is the only injury
21 related to this accident. Evidence has
22 established that the plaintiff's condition
23 has resolved concerning the knee.

24 And the plaintiff could have gone on
25 with his life as of March, 2010. That he

1 chose not to, by circumstances out of his
2 control. His degenerative disc disease is
3 a different problem.

4 But it's still up to you to
5 determine whether the plaintiff's knee
6 injury qualifies as a serious injury under
7 the law as Justice Garguilo will outline
8 for you. But I offer you this in the event
9 that you find a causally related

10 arthroscopic partial meniscal tear related
11 to this accident that is a serious injury.
12 The fair and reasonable compensation for
13 that injury falls either side of \$50,000.
14 That's what the value of the scope is,
15 folks. A little more, if you think that
16 the surgery was particularly difficult. A
17 little less if you think the surgery was
18 fairly routine.

19 So, folks, I've taken a little bit
20 longer than I said, and I apologize for
21 that. But I went through everything that I
22 think you need to know in this case.

23 So on behalf of the County of
24 Suffolk, its agencies and employees, I
25 thank you so much for your kind attention

1 in this case. And I thank you for letting
2 me talk to you for about an hour on this
3 case and what my thoughts are. But most
4 importantly, I thank you for your
5 deliberations. Thank you.

6 THE COURT: Thank you, Mr. Jeffreys.

7 MR. JEFFREYS: Thank you, Your
8 Honor.

9 THE COURT: Mr. Ricigliano is going
10 to follow with his summation, but he has
11 to-- we have to rearrange some of the
12 audiovisual equipment. We're going to take
13 a ten minute recess. You'll hear Mr.
14 Ricigliano's summation upon your return.
15 Continue to maintain, you know, an open
16 mind until you hear everything. That's why
17 you don't discuss the case until I give you
18 direction to do so. We'll see you in ten
19 minutes. Don't discuss the case yet.

20 (The jury exited the courtroom, and
21 there was a recess).

22 THE COURT: Gentlemen, I'm going to
23 modify the verdict sheet, actually
24 supplement it. State separately the amount
25 to be awarded, if any, to plaintiff Jason

1 Kowalsky, for the following items of damage
2 from the date of your verdict to the
3 remainder of Jason Kowalsky's life, and the
4 cost of future ACL reconstruction, the cost
5 of future total knee replacement, cost of
6 future lumbar fusion.

7 Now, the issue came up after the
8 summation as to whether or not the verdict
9 sheet should have the generic on the

10 exacerbation--

11 MR. RICIGLIANO: No, no--

12 MR. JEFFREYS: The charge.

13 THE COURT: Excuse me, the charge,
14 the charge on what's generically known as
15 the exacerbation.

16 MR. RICIGLIANO: And susceptibility.

17 THE COURT: And susceptibility.

18 I'll ask both of you-- And as always,
19 remain candid with the Court. Did one
20 doctor offer an opinion that the underlying
21 condition was aggravated, exacerbated or
22 made the plaintiff more susceptible to the
23 lumbar injury presented to the jury?

24 MR. JEFFREYS: I can tell you Dr.
25 Wani said in his testimony that this could

1 be an aggravation of a preexisting
2 condition. I don't believe he went any
3 further than that, but there was testimony
4 from Dr. Wani.

5 MR. RICIGLIANO: I think there was
6 testimony that if the plaintiff had a
7 degenerative disc problem, that it would
8 make him more susceptible to an annular
9 tear. I thought there was testimony that

10 if Jason had degenerative disc disease,
11 that would make him more susceptible to an
12 annular tear due to trauma. That's what I
13 thought--

14 MR. JEFFREYS: I don't remember
15 that, Your Honor. But I do remember Dr.
16 Wani, because I looked to see if the
17 plaintiff made a case out for an
18 aggravation. And that's the only testimony
19 on aggravation, because my thought process
20 was, what I said earlier to --

21 MR. RICIGLIANO: To make it easy --

22 THE COURT: Off the record.

23 (Discussion held off the record)

24 (Whereupon, there was a brief

25 recess)

1 THE COURT OFFICER: Jury entering.
2 (The jury re-entered the courtroom).

3 THE CLERK: Counsel waiving roll
4 call?

5 MR. RICIGLIANO: Yes.

6 MR. JEFFREYS: Yes.

7 THE COURT: After Mr. Ricigliano's
8 summation, I'll tell you the extended
9 recess had nothing to do with us planning a
10 golf outing. We had to make last-minute
11 amendments and changes to the verdict
12 sheet, and I appreciate the input from both
13 attorneys.

14 Mr. Ricigliano, your summation.

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

17 Your Honor, Counsel, and ladies and
18 gentlemen of the jury. When we met way
19 back in jury selection, which seems like a
20 long time ago now, I mentioned to you that
21 my job in this case is to show you all of
22 Jason's harms and losses. What was the
23 level of harm that was done to him, and
24 what are all his losses. And I encouraged
25 all of you and I actually asked all of you

1 to give me your assurance that when it came
2 to this point, making decisions in this
3 case, that you would only decide the case
4 on the level of harm that was done to Jason
5 and whatever losses flow from that harm.
6 And if you remember, I gave you that image
7 of an imaginary figurative box. And I
8 asked you to give me your assurance, your
9 promise that you would only focus in on
10 what's in that box. Because that's the
11 only thing that mattered and that's the
12 only thing that you can determine in
13 deciding whether or not to allow money in
14 your verdict. And all of you assured me
15 that you would.

16 Now, at the time, I couldn't really
17 elaborate on why that image of a box was so
18 important. But now we're at the end of the
19 case, and I can tell you why it was so
20 important for me to do that. I knew how
21 Mr. Jeffreys was going to try this case.
22 And he was going to try the case the way
23 that most defense lawyers try these cases,
24 and that is to do something which I like to
25 call reality distortion. I knew that he

1 was going to take you as much as he could
2 outside the box and remove your focus away
3 from what's inside the box. Because if he
4 does, his goal is to confuse the issues and
5 remove your attention from the only thing
6 that matters. What were the harms done to
7 Jason and what are his losses?

8 My job during the trial and my job
9 in the summation is to focus you in on
10 what's in that box. Not just the harms and
11 losses, but the evidence. And when I say
12 evidence, I'm not going to give you what he
13 gave you, which is supposition and
14 inferences and speculation. I'm going to
15 talk to you about the medical proof and the
16 medical evidence in this case. And I'm
17 going to do everything I can to keep you
18 inside that box. Because that is what you
19 need to use to decide this case.

20 So let's talk about that. I told
21 you at the beginning of the trial that
22 Jason has three injuries, which all of you
23 by this point know what they are. His
24 knee, right knee, his low back and the fact
25 that he has chronic pain. Those are really

1 the injuries that we're claiming as a
2 result of this collision.

3 Now, I'm not going to spend a lot of
4 time on the knee for a couple of reasons.
5 The first is, Dr. Finkel, gladly or
6 happily, I should say, conceded that this
7 collision caused Jason's knee injuries.
8 And you just heard Mr. Jeffreys do the same
9 thing. He's told that you that this

10 collision has caused Jason's knee injuries
11 and the need and requirement for surgery.
12 And if you remember, Dr. Finkel took it a
13 step further and said that anything related
14 to the knee, the surgery, the physical
15 therapy, the convalescence, it's all
16 related to the collision. But I just want
17 to take a moment and focus on that, if I
18 may. I'm going to refer to it later on.

19 The important part about that
20 admission by both Dr. Finkel and Mr.
21 Jeffreys is the way in which this collision
22 occurred. The reason that I called Linda
23 Peterson and the reason why I called Mr.
24 Rancourt is I wanted you to understand the
25 severity of this impact, and I also wanted

1 you to understand what happened to Jason
2 physically when the collision occurred.

3 Linda Peterson said, if you
4 remember, that he went flying in the air.
5 And we know that the severity of the
6 impact, just like I told you in opening,
7 was enough to cause damage to the Verizon
8 van, push that Verizon van forward, caused
9 Mr. Rancourt to hit his head on the

10 steering wheel, even though he had his
11 seatbelt, and of course, propel Jason out
12 into the roadway.

13 Dr. Finkel testified when I
14 cross-examined him and said that that
15 mechanism of injury, being hit by a truck
16 and being shown, and the way in which your
17 body twists and rotates, those rotational
18 forces is enough to cause soft tissue
19 injury in the knee. They've admitted that.
20 And what I want you to think about and
21 we're going to talk about it a little bit
22 more is, they've admitted that that
23 mechanism of injury, the way in which
24 Jason's body moved, exerted enough
25 rotational force to have caused soft tissue

1 injury tears in the knee. But somehow,
2 some way, they don't think that that
3 mechanism of injury, the same mechanism is
4 enough to cause tears of the soft tissue of
5 the back.

6 So, the knee, obviously, I don't
7 need to spend a lot of time on, because as
8 you've heard, is causally related to the
9 collision. The truck hits Jason, causing
10 the injury. Everything that flows from the
11 knee is causally related. Defendants have
12 admitted that.

13 So let's talk about what this case
14 really is about. This case -- let's be
15 honest -- is a fight over the back. Now,
16 you may say to yourself, although I'm sure
17 most of you have figured it out, why is the
18 county so quick to admit injury to the
19 knee, but not so quick to admit injury to
20 the back? And the reason is because, as I
21 said in opening, if the county is
22 responsible for the injury to Jason's back,
23 then they're responsible for compensating
24 him for every single item of loss on the
25 verdict sheet. And they don't want to pay

1 for it. So that's why they're conceding
2 the knee, but they're not conceding the
3 back.

4 Dr. Wani during the course of his
5 testimony almost got out a phrase that all
6 doctors use. And the phrase is, When you
7 hear the sound of hoof beats in the
8 distance, think horses, not zebras. And
9 ~~the idea behind that is, when you're~~
10 diagnosing a patient, you want to spend
11 your time focusing on the diagnosis that
12 allows you to make the least amount of
13 assumptions. The simplest explanation for
14 something. The simplest explanation in
15 this case-- Again, focusing you in just
16 on the box and what is simple and what
17 makes sense to you. The simplest
18 explanation is when Jason is hit by the
19 truck, not only does his body twist and
20 cause those soft tissue injury to the knee,
21 but his body twists and causes soft tissue
22 injury to the spine as well.

23 He then wakes up the next day and he
24 can't move. He goes to the hospital, he's
25 transported to the hospital and complains

1 about his back, because he's just been hit
2 by a truck. And his condition over time
3 gets worse.

4 And ultimately, he gets in the hands
5 of a spinal surgeon who knows what he's
6 doing, and he diagnoses him with this
7 annular tear. And he determines that the
8 annular tear was caused by the collision,
9 and that's what's causing Jason's pain and
10 he fixes it. That's really the simple
11 explanation. He's hit by a truck. He has
12 a back injury. He's eventually diagnosed,
13 properly treated, and in fact, he gets
14 better. That's as simple as it gets. But
15 there's all this distortion that you've
16 been thrown. Again, I'm going to talk
17 about what the medical evidence, what the
18 medical proof is in this case.

19 Now, Mr. Jeffreys made some promises
20 to you in opening, promises which he hasn't
21 fulfilled. He told that you Jason had
22 some-- a prior history of back pain. And
23 he's talked about it in summation too, and
24 I'm going to address that. He also told
25 you, and he's been telling you since jury

1 selection, that Jason has a congenital
2 defect that in some way caused all the pain
3 he had after the collision. And of course,
4 as he said during his summation, it's his
5 opinion, and he's made the point that Dr.
6 Merola performed an unnecessary surgery.
7 So let's talk about the back injury.

8 It is undisputed in this case, every
9 ~~single medical expert who testified agrees~~
10 that Jason Kowalsky had an annular tear.
11 No one disputes that. It's on the
12 discogram. Dr. Merola saw it. All the
13 medical experts, including on both sides,
14 have agreed that he sustained an annular
15 tear.

16 Now, the question arises, how do we
17 know that the annular tear was caused by
18 the collision? Well, first of all, we know
19 because of the mechanism. Again, the same
20 mechanism that caused the soft tissue
21 injury in the knee, which they agree, is
22 the same mechanism that caused the soft
23 tissue injury in the spine. And again, I
24 know when I did my opening I was actually
25 wrong, because I was referring to this side

1 of the disc (indicating). But really, it's
2 the posterior, the back of the disc that
3 ends up becoming torn.

4 Both orthopedic surgeons-- I'm
5 sorry -- Both orthopedic doctors, Dr.
6 Merola and Dr. Finkel, the defense doctor,
7 both agreed that an annular tear can be
8 caused by trauma, trauma like being hit by
9 a truck.

10 Both of them-- And this is a very
11 important point that I want to make, ladies
12 and gentlemen. Both Dr. Merola and Dr.
13 Finkel confirmed that Jason sustained
14 injuries to his back as a result of this
15 collision. Dr. Finkel said and he agreed
16 that as a result of this collision, Jason
17 sustained an injury to his back.

18 In fact, I asked Dr. Finkel, Do you
19 agree that Jason had problems or an injury
20 to his back that he needed treatment for
21 for a period of time after the collision?
22 And he said yes. And I said to him, Tell
23 us the day, the month and the year that
24 these symptoms resolved. He said he didn't
25 know. But he confirmed the injury.

1 The other way that we know that the
2 annular tear was caused by the collision is
3 based upon Dr. Merola's testimony. And
4 again, Dr. Merola was the only doctor who
5 testified who actually was able to observe
6 that annular tear, and he described it as a
7 transverse tear, across the annulus, across
8 the area of the disc. I used this for an
9 example, but it's the back. And the
10 material inside, the nuclear material
11 leaked out, came out, and was compromising
12 the neural foramen. And it was impinging
13 on the nerves that run along the spine in
14 the area of L4-5.

15 Dr. Merola said that if Jason had
16 that type of injury prior, there would be
17 no way that he would have been able to do
18 his job and work without complaints of pain
19 or eventually, going for treatment. He
20 would have had to have some pain. He would
21 not have been able to do his job. We know
22 all about that job not just from Jason, but
23 from Brad French. It's a physical job.
24 There's lifting, there's carrying, and
25 carrying heavy things.

1 The two undisputed facts in this
2 case, unchallenged, are that Jason had an
3 annular tear, which, by the way, never
4 showed up on films prior. And the second
5 undisputed fact is that if he had that
6 annular tear before this collision, there
7 was no way that he was going to be able to
8 work. You didn't hear either the
9 ~~orthopedists or the neurologists from the~~
10 defense dispute that. That testimony by
11 Dr. Merola is completely undisputed.

12 So, if during the deliberations
13 someone says, How do we know that the
14 annular tear was caused by this collision,
15 remind them that the mechanism of the
16 injury, the way that Jason's body moved and
17 twisted, those rotational forces, the
18 loading that Dr. Merola described that
19 occurs with the back during trauma, that is
20 the mechanism by which an annular tear is
21 caused.

22 If someone says during
23 deliberations, Well, how do we know the
24 annular tear was caused by the collision,
25 remind them that every-- that Dr. Merola,

1 his testimony regarding that annular tear
2 and Jason's inability to work with that
3 condition is absolutely undisputed.

4 So how do we know, then, once we
5 confirm that Jason has an annular tear--
6 Let me back up. Let me say a few other
7 words about the discogram. The other way
8 that we know that Jason had an annular
9 tear, it's confirmed on the discogram. And
10 I hope that what you saw in the way that we
11 tried this case was, we tried to bring as
12 much evidence and medical proof as we could
13 so you could see it and make all your
14 determinations with it. And one of the
15 things that we showed you, not the defense,
16 but we showed you is that discogram. And
17 Dr. Merola showed you exactly where that
18 tear was on that diagnostic test.

19 Now, there is a disagreement about
20 whether the discogram was negative, whether
21 the discogram showed something. Several of
22 the doctors in this case testified that you
23 don't treat the test. You treat the
24 patient. And I think what you've seen
25 during the course of this trial is that

1 medical physicians disagree about the
2 results of tests. It happens all the time.
3 And that's why they use clinical
4 examination. And even though that test was
5 read as negative, Jason still had in
6 clinical examination, problems relating to
7 the nerves in his back.

8 So, we know that the annular tear
9 was caused by the collision. The next
10 issue is, well, what about the surgery?
11 How do we know that that sacralized spine
12 or that congenital issue that Jason has is
13 not causing the pain that he was having?
14 Again, you have to rely upon Dr. Merola's
15 testimony. And let me say a few words
16 about him.

17 The defendants could hire anybody
18 they want to come in and present medical
19 evidence for you guys. They could have
20 hired a spinal surgeon, they could have
21 hired a neurosurgeon, they could have hired
22 somebody to who does spinal surgery to say
23 that Dr. Merola didn't do a proper surgery,
24 or that his opinion is incorrect. But they
25 didn't hire a spinal surgeon or a

1 neurosurgeon or someone who does that type
2 of surgery--

3 MR. JEFFREYS: Objection.

4 THE COURT: As I said during Mr.
5 Jeffreys's summation, I'll say it during
6 Mr. Ricigliano's summation, a summation is
7 meant to be the attorney's commenting on
8 the evidence that's adduced and the
9 inferences-- the inferences and

10 conclusions they wish you to draw from the
11 evidence. I hate to sound like a broken
12 record. You can accept it, you can reject
13 it, you can agree with the attorney in
14 whole or in part. Just remember, it's not
15 evidence. It's a suggestion. Thank you.

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

18 MR. RICIGLIANO: Dr. Merola is
19 especially trained in spinal surgery. He's
20 done a fellowship. He's written
21 peer-reviewed articles and books on spinal
22 surgery. And he does it day in and day
23 out. The idea that he had no knowledge or
24 concept of what was going on with Jason is
25 preposterous. This is what he told us. He

1 told us that initially, yes, he saw that
2 there might be an issue with L5-S1. And it
3 makes sense because Jason, on clinical
4 examination with Dr. Wani and with Dr.
5 Merola, was having pain with the L5 and S1
6 nerve distribution. And it is true that
7 that can be compromised at L5-S1 disc.

8 Dr. Merola, before he did the
9 surgery, told us that he was concerned
10 about that annular tear. And he reviewed
11 all of the films that had been taken on
12 Jason prior to the surgery. And he sat
13 with his team, and they went over all the
14 films, and they discussed the case and
15 decided that they were going to address
16 that annular tear.

17 Now, Dr. Merola, who's the only
18 doctor that was able to be inside Jason's
19 body, opens him up and goes inside. Look
20 at the hospital records. The hospital
21 records-- The Downtown Hospital records
22 are in evidence. Mr. Jeffreys didn't move
23 them into evidence. I moved them into
24 evidence. And I want you to read them if
25 you have any questions.

1 There's not-- The consent is not
2 for an L5-S1 fusion. The consent is for an
3 L4-5 fusion, and an L5-S1 laminectomy. And
4 I'll talk about that in a moment.

5 If there are any issues also
6 regarding the consent form, you can look
7 there and see it as well. This idea that
8 Jason didn't consent or the consent form
9 was somehow signed after surgery to hide
10 something, it's-- it's-- you can make
11 your own decision, but the record is here
12 if you have any questions about that. I
13 think Dr. Merola made it pretty clear that
14 he wasn't doing the surgery, no one does
15 surgery until the patient consents first.
16 And perhaps Jason, if he even said that,
17 might have been confused because he was
18 about to go into some major surgery.

19 Once Dr. Merola begins his surgery,
20 he goes to L4-5. And this is a very
21 important point. And he told us that you
22 can have nerve impingement of the-- of
23 the nerve that controls L5-S1 distribution
24 at L4-5. Because the nerves pass by that
25 level of the spine. In fact, Dr. Finkel

1 agreed when I asked him on
2 cross-examination if that were true.

3 So Dr. Merola goes in and he sees
4 that there's this transverse tear. The
5 annulus is torn, and the material inside
6 has now leaked out and come out. And it's
7 now in the foramina and is impinging on the
8 nerve that supplies the L5-S1 distribution.
9 And he's able to see that and he's able to
10 confirm that. He didn't go in willy-nilly
11 to do one surgery, and all of a sudden mid
12 stream just do another surgery. He saw
13 that it was impinging on a nerve, and he
14 removes the disc. You can see in the
15 hospital records that the disc that is
16 removed is L4-5. Not L5-S1. L4-5. It's
17 sent to the lab, and there are studies that
18 are done on it, pathology studies. You can
19 look at the pathology study. The disc
20 that's removed is L4-5, the same as the
21 consent.

22 So, now he's relieved the pressure
23 on the nerve at L4-5. He's taken that
24 annular tear that's caused by this
25 collision and he's removed it. But now,

1 because he's a thorough surgeon, not some
2 hack, he has to decide and determine if
3 L5-S1 is also causing the problem, because
4 that could be a problem.

5 He goes down to L5-S1 and he does--
6 if you remember his testimony-- a minor
7 laminectomy. And these are the lamina.
8 They look kind of like the roof of a house.
9 And he takes a little bit of the lamina and
10 he removes it so he can see and observe the
11 L5-S1 disc. That's the disc that Mr.
12 Jeffreys has been telling you from day one
13 is sacralized and is causing his problem.
14 He goes and he looks at the L5-S1 disc, and
15 when he does, he sees that there's no
16 impingement on the nerve at that level.
17 And when he sees that, he realizes and he
18 confirms that the problem with the L5-S1 or
19 the nerve that supplies L5-S1 was at L4-5,
20 where the tear was. And there's no problem
21 at L5-S1. And what does he do? He closes
22 Jason up. Now, if there was a problem with
23 L5-S1, he said he would have removed this
24 disc. He would have fused this level as
25 well. Because Jason is not completely

1 sacralized. He's partially sacralized. He
2 could have removed that disc if he needed
3 to. But he didn't need to.

4 The minute that Dr. Merola does that
5 laminectomy and confirms that L5-S1 is not
6 the problem, his whole theory about
7 sacralization goes completely out the
8 window. It falls like a house of cards.

9 The disc that Jason Kowalsky has in his
10 back right now at L5-S1 is the same disc
11 that he had on the day of surgery, is the
12 same disc that he had on the date this
13 collision occurred, is the same disc that
14 he had while he was working for Verizon.
15 Dr. Merola didn't touch it. And if he did,
16 then you can make an argument for L5-S1.

17 The nerve impingement and the nerve
18 problem was at L4-5. That's where he did
19 the removal of the disc. And that's the
20 level where the annular tear was.

21 So -- And just to be clear, he
22 didn't-- Dr. Merola didn't do this through
23 hocus pocus. We didn't do this by trying
24 to pull the wool over your eyes. We proved
25 this through medical evidence, through

1 science. He showed you the images. He
2 showed you what he did. It's in the
3 hospital records.

4 So that promise by Mr. Jeffreys has
5 failed. He has no medical evidence or
6 proof that L5-S1 was causing Jason's
7 problems. None. The medical proof in this
8 case is that it was L4-5. And every single
9 doctor who's testified in this case, all of
10 them have said that a sacralized spine will
11 not cause pain. There's been no evidence
12 in this case that the fact that Jason has a
13 partially sacralized spine will cause pain.
14 No evidence of that.

15 So, if somebody during deliberations
16 says, Well, wait a minute, how do we know
17 that the annular tear at L4-5 was causing
18 Jason's problems, make sure that you tell
19 them there's no evidence in this case that
20 a sacralized spine will cause pain. Tell
21 them that Dr. Merola looked at that -- and
22 he's the only one -- looked at that L5-S1
23 disc and left it alone.

24 And then here's the other issue:
25 Mr. Jeffreys-- Let me back up. There's

1 been some pink elephants that have been in
2 the room during this trial, and defense
3 lawyers love pink elephants too. They like
4 to keep them in the corner, and they like
5 to infer and drop innuendo in and try to
6 get you thinking, again, outside the box.

7 Now, we as plaintiff lawyers, what
8 we do is what my mother always told me to
9 do, is introduce everybody to the pink
10 elephant. When you have a pink elephant in
11 the room, let everybody know what it is.
12 He wants you to believe that the pink
13 elephant during this case is that Dr.
14 Merola did an unnecessary surgery. And
15 let's take it a step further. He wants you
16 to believe that Dr. Merola did an
17 unnecessary surgery either because he was
18 confused about what was going on, or
19 because he wanted to make money on the
20 surgery. Not true. Completely untrue.
21 And I'll tell you why. The best way to
22 determine whether or not a surgery is
23 successful is whether or not it works. And
24 Jason said on direct examination that the
25 constant pain that he had-- and this is

1 documented in Dr. Merola's records -- the
2 constant pain that he had was relieved
3 after the surgery. Yes, he still has pain,
4 and that's related to chronic pain, which
5 I'll talk about in a little while. But if
6 you do a surgery and it helps the patient,
7 that's not an unnecessary surgery. And Dr.
8 Merola also told us that if he had left
9 that L4-5 annular tear alone, it would have
10 progressed to a point where Jason's
11 symptoms and problems would have gotten
12 worse. So it wasn't an unnecessary
13 surgery. He wants you to believe that
14 because then you're going to find that Dr.
15 Merola is some rogue doctor who just went
16 in there willy-nilly and just started
17 cutting Jason up. It's not true. And I
18 think you can tell that, not just from Dr.
19 Merola's testimony, but the way in which he
20 testified. He showed you all the pictures,
21 he explained how he did the procedure, and
22 he explained it in detail.

23 And one other thing. The greatest
24 resource that jurors have-- I think I
25 told you in juror selection-- is your

1 common sense. Dr. Merola has been doing
2 spinal surgery for a while, and he worked
3 very hard on his career. If he did an
4 unnecessary surgery, then he's basically
5 throwing away his reputation and his
6 practice and all of it for no reason other
7 than to hurt Jason Kowalsky. Why would he
8 do that? Especially because the doctors
9 who treated Jason, they have a devotion.
10 Their devotion is to helping their
11 patients, helping their patients. Dr.
12 Merola was in emergency surgery the day
13 before he testified. He's not a rogue
14 doctor.

15 And then lastly, Mr. Jeffreys talks
16 to us about these priors. And this is
17 really where the reality gets very
18 distorted. I want to be very clear about
19 what Jason's prior back problems were. He
20 has one visit to Brookhaven Hospital, and
21 Mr. Jeffreys keeps referring to it as a
22 hospitalization. It wasn't a
23 hospitalization. He went to the hospital,
24 to the ER with back pain, and he left. He
25 was given a referral for a pain management

1 doctor. He didn't go. He was given
2 prescription medication. He took it for
3 one or two days and then he stopped.
4 That's not a history of back pain. That's
5 one visit to the doctor.

6 And in terms of the podiatrist,
7 Jason went to the podiatrist in April of
8 2009, and he went to the podiatrist in
9 September of 2005. And he went to the
10 podiatrist not because of his back, but
11 because of his feet. And Mr. Jeffreys
12 apparently thinks that none of us can read.
13 But if you do read this, it says, because
14 these are in evidence, place a mark yes or
15 no to indicate if you have had any of the
16 following. And Jason indicated that he had
17 had a back problem in the past. There are
18 no medical records to indicate that Jason
19 ever went to the doctor other than that
20 Brookhaven visit. And that Brookhaven
21 visit actually supports our position,
22 because the reason I didn't have Dr. Merola
23 talk about the MRI-- again, it's in
24 evidence, you can see it-- is when he had
25 the MRI at Brookhaven in 2008, it was

1 negative. There was no annular--

2 MR. JEFFREYS: Objection.

3 Objection, Your Honor.

4 MR. RICIGLIANO: I'll rephrase.

5 MR. JEFFREYS: There's no testimony
6 about that MRI.

7 MR. RICIGLIANO: It's in evidence.

8 MR. JEFFREYS: No, it's not.

9 THE COURT: Stop.

10 MR. RICIGLIANO: The report is in
11 evidence.

12 MR. JEFFREYS: No, it's not.

13 THE COURT: Just stop. Gentlemen,
14 if the document is in evidence, comment on
15 a document. You disagree with it. So you
16 just said you were going to rephrase
17 something. If you wish to, you can. I've
18 suggested to the jury about four, five
19 times now what the impact of the summation
20 is, what the obligation of counsel is
21 during summation. I'm certain they will
22 abide by the Court's instruction.

23 MR. RICIGLIANO: That MRI shows no
24 annular tear in September of 2008, which is
25 a different result than what Jason had on

1 the discogram after the collision in June
2 of 2009.

3 Now, there was also this issue in
4 terms of degeneration. What we're talking
5 about with degeneration is, Jason has what
6 people of his age typically have. Our
7 backs over time wear down. They do. But
8 the only medical treatment that Jason has,
9 that you've seen, is that one Brookhaven
10 visit, and he never went back to the doctor
11 after that. The judge has told us during
12 the trial a few times, you can't speculate
13 on the evidence. The only evidence before
14 you of any prior back problem where Jason
15 had treatment was that Brookhaven visit.
16 That's it. So this idea that he has this
17 prior history of back trouble, the prior
18 history of back problems, it doesn't exist.

19 What we do know about Jason is the
20 following: We know that he was working at
21 his job for many years, doing that physical
22 job without complaint, without a problem,
23 without missing work. And that tells you
24 everything you need to know about any prior
25 back problem that Jason has. So if someone

1 during deliberations says, Well, what about
2 Jason's back problem, remind them that his
3 prior history of back pain consists of--
4 or treatment, I should say, consists of
5 that one Brookhaven visit where he never
6 went to a pain management doctor. He was
7 in the hospital emergency room and left,
8 and he went back to work the next day and
9 was able to work consistently up until the
10 day that this collision occurred.

11 And here's the most important part:
12 There's been no medical proof from the
13 defendant that says or links any prior
14 problem that Jason had to the condition he
15 has now. In fact, the medical proof in
16 this case is exactly the opposite. The
17 medical proof in this case is that Jason
18 was able to work without limitation until
19 after this collision, the collision that
20 caused this annular tear.

21 And the last thing that I'll say on
22 this issue is this: As far as any
23 degenerative condition that Jason has,
24 you're going to get a-- if you recall,
25 Dr. Merola said that if Jason had some

1 weakening of his back because of age and
2 normal wear and tear that we all have, it
3 would have made him more susceptible to the
4 annular tear during the collision anyway.
5 And the judge is going to give you a charge
6 with respect to someone who's more
7 susceptible to an injury during trauma. I
8 want you to listen to that charge relating
9 to susceptibility.

10 So, as far as the back is concerned,
11 this is the medical proof in the case:
12 Jason never had any consistent back
13 treatment, never went for physical therapy
14 for his back, never took any pain
15 medication for his back other than that
16 Brookhaven visit where he took medication
17 one or two days. He is then involved in a
18 collision. That collision is the type that
19 can cause soft tissue injury, not just to
20 the knee, but to the back. He complains
21 about his back within less than 48 hours
22 after the collision. He has continued
23 complaints of pain that get worse. He has
24 nerve irritation in the L5-S1 distribution,
25 and he ultimately goes to Dr. Merola, who

1 confirms during the surgery that there's,
2 A, an annular tear, and that the annular
3 tear is causing that problem to Jason's
4 nerves at L5-S1.

5 That is the medical proof in this
6 case. And if you look inside that box,
7 that is what should be there. And it is
8 the simplest explanation for all of this.
9 ~~Not priors, not sacralization, not whether~~
10 or not he signed the consent form, not
11 whether or not Jason was lying about his
12 prior history, which basically consists of
13 nothing. That is the medical proof in this
14 case. And here's the most important point,
15 ladies and gentlemen: It is completely
16 unrefuted and un rebutted by the defendants.

17 Now, the last injury that Jason has,
18 as you all know, is a diagnosis of chronic
19 pain by Dr. Wani. The only person who's
20 testified at this trial who's a specialist
21 in pain and pain management is Dr. Wani.
22 Dr. Finkel said that he refers his patients
23 who have pain to pain management doctors.
24 And Dr. Reiser said and admitted that he's
25 not a pain specialist. So the only person

1 who's testified at this trial who knows how
2 to manage pain or do pain management is Dr.
3 Wani. And Dr. Wani described for us how
4 chronic pain occurs. And Dr. Merola did a
5 little bit of that the other day when he
6 mentioned to us, that's why amputees will
7 continue to have pain even after the loss
8 of a limb. There is an imprint of pain
9 that exists on the brain, and once that's
10 there, it doesn't go away. It's not pain
11 curing, it's pain management. And the way
12 in which Dr. Wani has tried to manage Jason
13 is through those trigger injections and
14 obviously through the medications that he's
15 been prescribing Jason.

16 The important part about the chronic
17 pain is that it is a chronic pain which has
18 in large part kept Jason out of work.
19 Because Dr. Wani testified that he has not
20 cleared Jason to go back to work. And it's
21 by and large because of the side effects of
22 the medication that Jason is taking.

23 So I asked all of you, or we
24 mentioned at the beginning of the case,
25 what is it that we're going to ask you, the

1 members of the jury, to do? And I told you
2 that we're going to ask you to fix those
3 things that can be fixed, help those-- help
4 to make up those things that can't be fixed
5 or helped. Now, how are you going to do
6 that? You're going to do that by answering
7 questions, which you'll get shortly, which
8 is a verdict sheet. And I want to talk to
9 you about what the verdict sheet says and
10 how you should answer it based upon the
11 evidence in the case. I had hoped to put
12 this up on the screen, but I wasn't able to
13 do that because of the revision. I'm going
14 to hold this up and hopefully you can see
15 it. I'm going to go through the questions
16 with you and tell you how I believe you
17 should answer it based on the evidence in
18 the case.

19 So the first question is: Was the
20 accident of June 12th, 2009 a substantial
21 factor in causing plaintiff's injury? I
22 don't know if you folks in the back can see
23 it, but you'll see it soon enough. So, was
24 the accident of June 12th, 2009 a
25 substantial factor in causing the

1 plaintiff's injuries? The answer to that
2 question is yes. The mechanism of injury
3 for both the knee and the back is the same.
4 That twisting, that rotational injury,
5 rotational forces that are applied to the
6 soft tissues of the body. So the answer is
7 yes.

8 Also, defendants have admitted and
9 ~~conceded that the knee injury is related to~~
10 the collision.

11 And lastly, we know that this
12 collision is a substantial factor in
13 causing the back injury because of all the
14 medical proof that I've laid out for you.
15 The mechanism of injury, the annular tear,
16 which did not exist before but was
17 confirmed after, and the fact that when Dr.
18 Merola went in and did the surgery, he was
19 able to determine that it was the annular
20 tear and nothing else at L4-5 that was
21 causing Jason's problems. So the answer to
22 the first question should be that, yes, the
23 accident of June 12th, 2009 was a
24 substantial factor in causing the
25 plaintiff's injuries.

1 The second is: Did plaintiff
2 sustain a permanent consequential
3 limitation of use of a body organ or member
4 as a result of the accident on June 12th,
5 2009? So here, you're being-- And the
6 judge is going to read you the instructions
7 or the law pertaining to this question. A
8 permanent consequential limitation of use
9 of a body organ or member.

10 Let me start with the knee. Dr.
11 Blyznak mentioned that Jason sustained both
12 a torn meniscus, but also that ACL tear.
13 And he said that the ACL tear is
14 significant because once you tear the ACL,
15 the function of the knee is forever
16 altered. It's never going to move the same
17 way again. So there's a limitation on the
18 knee.

19 The back, clearly, there's a
20 limitation. Jason doesn't have the L4-5
21 disc in his back any longer. You saw the
22 images of the fusion, the screws and where
23 they're located. His spine is never going
24 to move the way that a normal spine does.
25 So because of both of those injuries,

1 injuries to the ACL, the injuries to the
2 lower back, and the evidence and the
3 testimony, medical testimony from the
4 doctors, the answer, did plaintiff sustain
5 a permanent consequential limitation of use
6 of a body organ or member as a result of
7 the accident on June 12th, 2009, should be
8 answered yes.

9 You're going to see that there's a
10 series of other questions that you'll have
11 to answer. You will not have to answer
12 those -- I'm sure the judge will go through
13 this with you -- if you answered question
14 two yes.

15 But I'm going to go through these,
16 just in the event you actually get to these
17 questions. You may not end up answering
18 these questions. As I said, the judge will
19 explain it, but I want to go through this
20 with you anyway.

21 Question three: Has the plaintiff
22 sustained a significant limitation of use
23 of a body function or system as a result of
24 the accident on June 12th, 2009? So a
25 significant limitation of use of a body

1 function or system. The answer to this
2 question is also yes, for the same reasons
3 that I discussed earlier. The knee is
4 never going to function the same way again.
5 The back will not ever move as a normal
6 back will. Will never again operate the
7 way that Jason's back was in June of 2009.

8 Four: Did plaintiff sustain a
9 medically determined injury or impairment
10 of a non-permanent nature as a result of
11 the accident on June 12th, 2009 that
12 prevented him from performing substantially
13 all of the material acts that constituted
14 his usual and customary daily activities
15 for not less than 90 days during the 180
16 days-- excuse me-- immediately following
17 the accident.

18 So this question is asking whether
19 Jason sustained a medically determined --
20 or an injury, medically determined injury
21 or impairment that prevented him from doing
22 his daily activities for the first 90 out
23 of 180 days.

24 Now, if you recall the testimony on
25 this point, let's think about what the

1 testimony was for the first 90 days after
2 the collision. He was on crutches and
3 wearing a brace and wasn't able to ambulate
4 or get around. And Dr. Blyznak, if you
5 recall the testimony-- Again, if you have
6 any questions about the testimony, Anna has
7 everything down. You can always ask for a
8 readback. But the testimony was that--
9 from Dr. Blyznak, that he kept Jason out of
10 work medically from the day that he first
11 saw him, which was three days after the
12 collision, until March of 2010.

13 So Jason had a medically determined
14 injury that prevented him from returning to
15 work and doing his daily activities, which
16 included walking for-- from three days
17 after the date of the collision until March
18 of 2010. So he did have a medically
19 determined injury that prevented him from
20 doing his normal activities or customary
21 daily activities for 90 out of the first
22 180 days following the collision. And
23 again, the judge will read you the law on
24 that point.

25 Now, there are also questions

1 related to Jason's lost earnings. And I'm
2 not going to go through all of these
3 questions. I'm going to tell you what the
4 components are and what the amounts are.

5 As Mr. Jeffreys said, we are
6 permitted to make a suggestion to all of
7 you as to what the amounts should be for
8 each component of loss. So let me just
9 stick with lost earnings and lost benefits.

10 There's a few things that we know
11 about Jason, despite Mr. Jeffreys's attempt
12 to paint him otherwise. We know that Jason
13 is a hard worker. He was a hard worker.
14 We know that Jason is a family man. We
15 know that he's a fighter. That when he had
16 the opportunity to try to get well, he
17 tried to get well. And it would be very
18 difficult for me to say all those things
19 about Jason and then tell you in the same
20 breath, well, Jason is never going back to
21 work.

22 Now, I know that they hired Mr.
23 Pessalano and he came in. I don't think
24 his opinion was really that valid, because
25 he really didn't have any information to

1 discuss Jason's transferable skills,
2 because he based it on his education, which
3 he has no clue about, and he based it on
4 Verizon training, which he also had no clue
5 about. Bud I don't-- I think that
6 there's a likelihood, knowing the way that
7 Jason is, and knowing his attempts to try
8 to get well, that he may return to work. I
9 definitely think that that is a
10 possibility. Whether there's a vocational
11 rehabilitationist or not, I think he's
12 going to make an attempt. I don't think
13 it's going to be easy. He's not going to
14 get paid as much. He's going to be doing a
15 job that he didn't choose or may not
16 necessarily like all that much. He may not
17 be able to do it for as long a period of
18 time, and he's going to be competing with
19 other people who are well and who are more
20 experienced. But I do think that there is
21 the possibility that exists that he's going
22 to return to work. And I think that it's
23 okay for you to consider that in the
24 deciding how much money to allow for his
25 lost earnings.

1 I don't think, though, however, that
2 he's going-- despite what Mr. Pessalano
3 said, that he's going to be able to recoup
4 his benefits. Verizon is a great company.
5 There's not a lot of companies like that
6 out there where you get those kind of
7 benefits. I know what Mr. Pessalano said,
8 but I don't know what world he's living in
9 where you're going to get those kinds of
10 benefits. He's not going to get those
11 benefits again.

12 So we wanted to come up with a
13 number that took into consideration the
14 possibility that Jason would go back to
15 work, whether it's a part-time or full-time
16 basis, or making less, and we wanted to
17 take into consideration that he obtained
18 all of his benefits, because I don't think
19 he's getting those back.

20 So there's going to be questions for
21 each category of loss on Jason's lost
22 earnings and benefits. And let me tell you
23 the numbers that we suggest in terms of
24 that item of loss. The medical insurance
25 benefits--

1 Oh, let me say one other thing. I'm
2 sorry. My job is to consider the worst
3 case scenario for Jason. Because this is
4 his only opportunity to come to the members
5 of the community and ask for them to allow
6 money for all his losses. He doesn't get
7 to come back in five years or ten years or
8 20 years. The reason why we hire
9 economists and the reason why we ask people
10 like Dr. Bialsky to give cost projections
11 is because I have to consider the worst
12 case scenario. That maybe he won't be able
13 to work. That is a possibility. He hasn't
14 been cleared for work yet. I have to
15 consider that he may need additional
16 surgeries. I have to consider all of that.

17 So when we hired Dr. Fitzgerald, we
18 wanted him to consider the worst case
19 scenario, that he's never going to go back
20 to work. And Dr. Fitzgerald figured out
21 past, future and then total amounts of
22 Jason's lost earnings and loss of benefits.
23 And this is in evidence as Plaintiff's 24,
24 so you can always refer to this if you need
25 to.

1 We are asking all of you to allow
2 for medical insurance benefits, 250,631 in
3 losses. And that's the number that Dr.
4 Fitzgerald gave us.

5 We're asking you to allow \$16,942 in
6 past savings plan benefits, \$115,725 in
7 future lost savings plan and benefits.

8 We're also asking you to allow
9 \$981,190 in future Verizon pension
10 benefits. Again, benefits that we don't
11 expect that he's going to be able to
12 accrue.

13 And then we're asking you, just to
14 make it easy and to take into consideration
15 and into account that he may return to work
16 half of his-- I'm sorry -- all of his
17 past lost earnings, because he's been
18 dealing with those surgeries, with the
19 chronic pain, he's not been released to go
20 back to work. That number for past lost
21 earnings is 392,569. And then we're asking
22 you to allow Jason half of his future lost
23 earnings, which is \$1,340,721. And we're
24 also asking you to allow half of his
25 foregone social security retirement

1 benefits in the amount of \$483,167, for a
2 total lost earnings of \$1,823,888, taking
3 into consideration that he may return to
4 work.

5 We're also asking that you allow
6 money for future medical procedures. And
7 let me just find that so I can talk to you
8 about that. And let me say a few words
9 about Dr. Bialsky. I only asked Dr.
10 Bialsky to do a cost projection and not a
11 life care plan, because that's what the
12 evidence in this case was going to be.
13 Jason doesn't need a life care plan. The
14 only future medical care that he needs,
15 according to his doctors, is the three
16 surgeries I'm going to talk to you about.
17 The problem is that unless somebody comes
18 in and talks about what the costs of those
19 surgeries are, I can't get up in summation
20 and ask all of you to allow that cost. So
21 that's why I asked Dr. Bialsky to do that
22 calculation, and that calculation only.
23 Because that's what the evidence in this
24 case was from the doctors. That's their
25 only projection in terms of future medical

1 care. Well -- I'm sorry -- that and
2 medications. So, I didn't ask him to
3 create or come up with a life care plan
4 because the doctors didn't recommend that.
5 So the idea that he sort of did half the
6 job or anything like that is preposterous.
7 In fact, if I asked him to do a life care
8 plan, his numbers would have been that much
9 higher. I just wanted him to do a cost
10 projection, so that when the doctors gave
11 their opinions regarding future medications
12 and future surgeries, you would know how
13 much all of that is going to cost.

14 So, cost of future ACL
15 reconstruction, the testimony about that
16 was that Jason has a partially torn ACL,
17 and that if he engages in any what Dr.
18 Blyznak called high risk activities, he
19 runs the risk of tearing the ACL. Now,
20 here I think you have to do kind of a
21 balancing act. If Jason is going to go
22 back to work, the likelihood of him tearing
23 the ACL is going to increase, because he's
24 going to be more active. If he doesn't go
25 back to work, and you're going to therefore

1 perhaps allow for the surgery, but allow
2 less in lost earnings. If Jason doesn't go
3 back to work and he's not going to be as
4 active, you may allow more in lost
5 earnings, but not allow for the ACL
6 reconstruction.

7 So I leave it up to you to do that
8 sort of balancing act. But we're asking
9 for the cost of the future ACL
10 reconstruction. The total cost of that is
11 \$24,754.

12 The knee replacement I think is more
13 of a likelihood, and I'll tell you why.
14 Dr. Blyznak testified that Jason, when he
15 had that torn ACL, is in all likelihood
16 going to develop posttraumatic arthritis.
17 And he's going to develop that regardless
18 of his level of activities. So whether he
19 goes back to work or whether he doesn't,
20 the likelihood of Jason developing
21 posttraumatic arthritis and requiring a
22 knee replacement is very high. So the
23 total cost that we're asking for the knee
24 replacement is \$84,199, which is the cost
25 that Dr. Bialsky gave to us in 2014

1 dollars.

2 And then lastly is the lumbar spine
3 fusion, which I think is really the most
4 likely surgery that Jason is going to need.
5 And again, we talked about in jury
6 selection all of you being able to project
7 future damages, including medical care
8 costs. Because this is Jason's only
9 opportunity to come to all of you and ask
10 you to allow money. Because ten, 20 years
11 from now, he can't come back. Dr. Merola
12 testified that in all likelihood, in 20
13 years-- and that's the year that he gave.
14 I know it's undetermined on here. The
15 reason it's undetermined is because we
16 can't predict the future. But Dr. Merola
17 estimated in approximately 20 years, the
18 level above Jason's fusion is probably
19 going to be needed to be fused as well,
20 because of the wear and tear, the extra
21 wear and tear that comes about because he's
22 fused at L4-5. And the cost of that
23 surgical intervention is \$135,598.

24 There's also the cost of
25 medications. This, I leave to you. Jason

1 is taking medications, and Dr. Wani hasn't
2 cleared him. I think that if there's a
3 likelihood that he's going to go back to
4 work, there's a likelihood that he's going
5 to stop taking medications. So the costs
6 that we gave were for his lifetime. And
7 obviously, if he needs medications, which
8 is a possibility, for the rest of his life,
9 then you'll give us or we would ask that

10 you allow the numbers in this plan. But I
11 do think that if there's a likelihood that
12 he's going back to work, he's going to
13 decrease or eliminate his medication. And
14 I leave that for all of you to talk about
15 and decide in terms of the future costs of
16 medication.

17 And that leaves the largest
18 component of loss for Jason, and that is
19 his past and his future pain and suffering.

20 The amount of money that we're
21 asking you to allow for Jason's past pain
22 and suffering from the date of the
23 collision until now is a million dollars.
24 And I want to talk to you and explain to
25 you why that is the appropriate number for

1 this kind of a case.

2 Pain and suffering is, in many ways,
3 subjective. And there's different kinds of
4 suffering. But I want you to think about
5 what Jason has gone through from the date
6 of this collision until the present. Not
7 just the surgical procedures that cause
8 pain and are risky, but the convalescence.
9 The step by step that he took up and down
10 those stairs, the steps that he took
11 outside of his home, that's all part of it.
12 The adjustments that he's had to make to
13 his life. The fact that he hasn't been
14 able to return to work since 2009. That's
15 all part of his pain and suffering.

16 If Jason was in the process of
17 putting a painting, let's say, into his
18 Verizon van, and Mr. Rancourt came up and
19 hit the painting and the painting was worth
20 a million dollars, I'm sure that none of
21 you would hesitate to allow money for the
22 total cost of that painting, because that's
23 what it's worth. Here we're talking about
24 the fair market value of someone's life,
25 their health.

1 When Jason arrived at Yaphank-Middle
2 Island Road that day, he didn't have pain,
3 he didn't have a damaged spine, he didn't
4 have a damaged knee. He was able to go to
5 work every day. And he's lost all of that.
6 And this is his only opportunity to ask all
7 of you to allow money for that.

8 The last component is allowing money
9 for future pain and suffering and what
10 Jason is going to go through in the future.
11 That number we're going to leave to all of
12 you. But I want to make a couple of
13 suggestions and I want you to think about a
14 couple of things.

15 The money that you allow for future
16 pain and suffering should be more than what
17 you allow for the past, because this is
18 money that Jason is asking for for the rest
19 of his life. And when you think about pain
20 and suffering, think about the different
21 ways in which people suffer. We always
22 think about suffering related to pain. But
23 when your son comes to you and asks you
24 with the ball in his hand and you throw the
25 ball and you try, because Jason tries and

1 he can't do it, and you see the look of
2 disappointment in his eyes, that's
3 suffering. When you're not going to work
4 with the guys and meeting with them in the
5 morning and doing the job that you're good
6 at and that you like and that you can
7 support your family with, and that you have
8 a career and a life to build on, that's
9 suffering. When you're isolated all day
10 and you're not interacting with people,
11 that's suffering.

12 All of you told me about your jobs.
13 And many of you told me with pride what you
14 do for a living, how you've worked your way
15 up. And I think all of you told me it was
16 the people that you would miss the most.
17 And if you're not around people and you're
18 not able to interact with them, and you
19 don't have a purpose in life, your self
20 esteem that you get from your work, that is
21 suffering. And all we're asking is for you
22 to allow money for that suffering, for the
23 suffering that Jason didn't cause. We're
24 here because someone else did this to
25 Jason. He didn't do it to himself. So I

1 want you to take that into consideration
2 when you're discussing this case.

3 Mr. Jeffreys has-- always says that
4 he represents the representatives and the
5 employees of the county. And I know why he
6 said that. He said that because you're all
7 from Suffolk County and he wants you to
8 feel some kinship with him because he
9 represents Suffolk County. And I'm sure if
10 I were him, I would do the same thing. But
11 I look at it a different way. All of you
12 are members of this community. You are
13 members of Suffolk County, and you have a
14 say as to how things are done here, because
15 it's your community. And you have an
16 incredible responsibility in this case, but
17 you also have an incredible opportunity.
18 You have seen first hand the way that the
19 county conducts its business when they harm
20 somebody. They call him a liar, they call
21 the doctor a hack, they bring in other
22 doctors that aren't as qualified, they drop
23 an innuendo, an inference. This is how
24 they conduct business. The county doesn't
25 want to be held accountable or responsible

1 for what they did to Jason. But you all
2 have a say in that.

3 I told you in jury selection that
4 this was the type of case that would have
5 an effect on the community. Your verdict
6 will stand for something. And it will
7 stand for, you will be holding the county
8 finally responsible and accountable for
9 what they did to Jason.

10 We also talked about getting this
11 case late in the day, and late in the day
12 on a Friday. You're not getting it that
13 late, and you're not getting it on a
14 Friday. But this has been a long trial.
15 And you've heard a lot of evidence and
16 you've heard lawyers talk for a long, long
17 time, and you're probably worn out.

18 I just want to remind you of the
19 assurance that you gave me. I want you to
20 remember that you promised me that you'd
21 take whatever time is necessary to come up
22 with the right decisions in this case. And
23 I also want you to remember the promise
24 that you made to me that if I prove my
25 case, you would allow money for every

1 single component of Jason's loss, even if
2 it was a lot of money. No matter who it
3 helps, no matter who it hurts. You all
4 gave me that assurance. And I also want
5 you to remember that, implicitly, I gave a
6 promise to all of you. I didn't say it. I
7 didn't really explicitly indicate it, but
8 the promise was that I can't ask you to
9 live up to your promises unless I deliver
10 on my end. Implicit in the promises that
11 you gave to me is a promise that I made to
12 all of you that I would come to court with
13 the goods. I just can't get up and ask you
14 to allow this money just because I want to
15 win the case or I want to help Jason.
16 That's not how it works. I can only stand
17 up here and ask you to allow money if I've
18 made good on my promise to come in with
19 evidence, with evidence of harms and
20 losses, with medical evidence, with
21 scientific evidence that establishes all of
22 Jason's claims and shows you from a medical
23 standpoint all his harms and losses. And I
24 say to you, ladies and gentlemen, most
25 respectfully, I have lived up to my end of

1 the bargain. I have brought to you all the
2 evidence that you need to render a verdict
3 for Jason, to render a verdict that allows
4 money for every single component of his
5 losses. And now that I've done my job, I'm
6 respectfully asking all of you to return
7 the favor that you made to me in jury
8 selection. And if you remember, I told you
9 when it came to summation, that I would
10 remind you of that promise that you made to
11 me.

12 It would be very, very difficult for
13 me to more eloquently thank you than Mr.
14 Jeffreys has or than Judge Garguilo has,
15 but I'm going to try anyway. It's very
16 hard to tell a group of people how much it
17 means to me as a trial lawyer to have the
18 ability to come to members of the community
19 and have them listen to our dispute and
20 resolve it. The effort that you have given
21 to this case has been remarkable. I mean
22 incredible. The attention level, the
23 sacrifices that you had to make trying to
24 get here in some difficult situations is
25 nothing short of really, really amazing.

1 I believe very deeply in this
2 system. I've devoted my entire life to it.
3 But I will tell you as a trial lawyer that
4 there is nothing more incredible and
5 remarkable, and it gets me every time, to
6 see people from the public come and really
7 care about their case, and make an effort
8 to try to listen and try to be fair. And
9 all of you have done that. And every time

10 it happens, I'm always amazed at the
11 process. And it makes me believe that this
12 process is the best process that we have.

13 So on behalf of Jason, I want to
14 thank all of you for all of your time and
15 all of your attention and all the efforts
16 that you made to try to do your best to
17 listen and to help us resolve this dispute
18 and all the time and attention that I know
19 each and every one of you will give during
20 your deliberations. Thank you very much.

21 THE COURT: Thank you, Mr.
22 Ricigliano. Ladies and gentlemen, it's
23 1:35 -- Excuse me. It's 1:25. We'll take
24 the luncheon recess. We'll reconvene at
25 2:30. At 2:30 I will give you the law

1 applicable to this case. Thereafter,
2 you'll commence your deliberations. It's
3 not time to talk about the case yet because
4 I haven't given you the instructions.
5 Enjoy your lunch. I'll see you at 2:30.

6 (The jury exited the courtroom, and
7 there was a luncheon recess.)

8 (AFTERNOON SESSION)

9 THE CLERK: Part 47 is back in

10 session. Case on trial continues. All
11 parties are present, absent the jury, Your
12 Honor.

13 THE COURT: Thank you.

14 THE COURT OFFICER: Jury entering.

15 (The jury re-entered the courtroom)

16 THE CLERK: Welcome back, jurors.

17 Counsel waiving roll call?

18 MR. RICIGLIANO: Yes.

19 MR. JEFFREYS: Yes.

20 THE CLERK: Thank you. Please be
21 seated.

22 At this time, the Court is about to
23 deliver its charge to the jury. No one is
24 permitted to exit the courtroom while the
25 Court is delivering its charge. Please

1 make sure all cell phones are in the off
2 position. If you need to leave the
3 courtroom, please do so now.

4 Members of the jury, please give
5 your attention to the Court. Your Honor.

6 THE COURT: Thank you. Welcome
7 back. Members of the jury, we come now to
8 that portion of the trial when you are
9 instructed on the law applicable to the
10 case and after which you will retire for
11 your final deliberations. You have now
12 heard all the evidence introduced by the
13 parties, and through arguments of their
14 attorneys, you have learned the conclusions
15 which each party believes should be drawn
16 from the evidence presented.

17 You will recall at the beginning of
18 the trial I stated for you certain
19 principles so that you could have them in
20 mind as the trial progressed. Briefly,
21 they were that you are bound to accept the
22 law as I give it to you, whether or not you
23 agree with it. You are not to ask anyone
24 else about the law. You should not
25 consider or accept any advice about the law

1 from anyone else but me.

2 Furthermore, you must not conclude
3 from my rulings or anything I have said
4 during the trial that I favor any party to
5 this lawsuit. Furthermore, you may not
6 draw any inference from an unanswered
7 question, nor consider testimony which has
8 been stricken from the record in reaching
9 your decision.

10 Finally, in deciding how much weight
11 you choose to give to the testimony of any
12 particular witness, there is no magical
13 formula which can be used. The tests used
14 in your everyday affairs to decide the
15 reliability or unreliability of statements
16 made to you by others are the tests you
17 will apply in your deliberations.

18 The items to be taken into
19 consideration in determining the weight you
20 will give to the testimony of a witness
21 include the interest or lack of interest of
22 the witness in the outcome of the case; the
23 bias or prejudice of the witness, if there
24 be any; the age, the appearance, the manner
25 of the witness as the witness testified;

1 the opportunity that the witness had to
2 observe the facts about which he or she
3 testified; the probability or improbability
4 of the witness's testimony when considered
5 in the light of all the evidence in the
6 case.

7 If you find that any witness has
8 willfully testified falsely as to a
9 material fact, that is, as to an important
10 matter, the law permits you to disregard
11 completely the entire testimony of that
12 witness upon the principle that one who
13 testifies falsely about one material fact
14 is likely to testify falsely about
15 everything. You are not required, however,
16 to consider such a witness as totally
17 unbelievable. You may accept so much of
18 his or her testimony as you deem true and
19 disregard what you feel is false.

20 By the processes by which I have
21 just described to you, you, as the sole
22 judges of the facts, decide which of the
23 witnesses you will believe, what portion of
24 their testimony you accept, and what weight
25 you will give to it.

1 The burden of proof rests upon the
2 plaintiff. That means that it must be
3 established by a fair preponderance of the
4 credible evidence that the claim plaintiff
5 makes is true. The credible evidence means
6 the testimony or exhibits that you find
7 worthy to be believed. A preponderance of
8 the evidence means the greater part of such
9 evidence. That does not mean the greater
10 number of witnesses or the greater length
11 of time taken by either side. The phrase
12 refers to the quality of the evidence, that
13 is, its convincing quality, the weight and
14 the effect that it has on your minds.

15 The law requires that in order for
16 the plaintiff to prevail on a claim, the
17 evidence that supports his claim must
18 appeal to you as more nearly representing
19 what took place than the evidence opposed
20 to his claim. If it does not, or if it
21 weighs so evenly that you are unable to say
22 that there is a preponderance on either
23 side, then you must decide the question in
24 favor of the defendant. It is only if the
25 evidence favoring the plaintiff's claim

1 outweighs the evidence opposed to it that
2 you can find in favor of the plaintiff.

3 If in the course of your
4 deliberations your recollection of any part
5 of the testimony should fail, or you have a
6 question about my instructions to you on
7 the law, you have the right to return to
8 the courtroom for the purpose of having
9 such testimony read to you or have such
10 question answered. And the mechanism for
11 that is, the court officer is stationed
12 right outside the deliberation room.
13 You'll all have pad and paper. Jot down
14 your request, give it to the court officer,
15 he brings it to us, and we get you in here
16 and answer your question. Keeping in mind,
17 by the way, the instruction I gave you at
18 the beginning of the trial regarding
19 note-taking. You can take your notes into
20 the deliberation room, but keep in mind the
21 instruction. It's the recollection that
22 comes first. Any questions you have can be
23 decided not on the basis of a juror's
24 notes, but on having the testimony or your
25 question answered by the Court.

1 In deciding this case, you may
2 consider only the exhibits which have been
3 admitted in evidence and the testimony of
4 the witnesses as you have heard in this
5 courtroom, or as there has been read to you
6 testimony given on examination before trial
7 or similar type proceedings. Under our
8 rules of practice, an examination before
9 trial is taken under oath and is entitled
10 to equal consideration by you,
11 notwithstanding the fact that it was taken
12 before the trial and outside the courtroom.
13 However, arguments, remarks and summations
14 of the attorneys are not evidence, nor is
15 anything that I now say or may have said
16 with regard to the facts evidence.

17 Although as jurors you are
18 encouraged to use all of your life
19 experiences in analyzing the testimony, in
20 reaching a fair verdict, you may not
21 communicate any personal professional
22 expertise you might have or other facts not
23 in evidence to the other jurors during
24 deliberations. You must base your
25 discussions and decisions solely on the

1 evidence presented to you during the trial
2 and that evidence alone. You may not
3 consider or speculate on matters not in
4 evidence or matters outside the case.

5 While it is important that the views
6 of all jurors be considered, a verdict of
7 five of the six members of the jury will be
8 sufficient under the law. Whenever five of
9 your members are in agreement on a verdict,
10 you may report your verdict to the Court.

11 In reaching your verdict, you are
12 not to be affected by sympathy for any of
13 the parties, what the reaction of the
14 parties or of the public to your verdict
15 may be, whether it will please or displease
16 anyone, be popular or unpopular, or indeed,
17 any consideration outside the case as it
18 has been presented to you in this
19 courtroom. You should consider only the
20 evidence, both the testimony and the
21 exhibits, find the facts from what you
22 consider to be the believable evidence, and
23 apply the law as I now give it to you.
24 Your verdict will be determined by the
25 conclusion you reach, no matter whom the

1 verdict helps or hurts.

2 As you already know, a lawsuit is a
3 civilized method of determining differences
4 between people. It is basic to the
5 administration of any system of justice
6 that the decision on both the law and the
7 facts be made fairly and honestly. You as
8 the jurors and I as the Court have a heavy
9 responsibility to assure that a just result

10 is reached in deciding the differences
11 between the plaintiff and the defendants in
12 this case.

13 As jurors, your fundamental duty is
14 to decide from all the evidence that you
15 have heard and the exhibits that have been
16 submitted what the facts are. You are the
17 sole, the exclusive judges of the facts.
18 In that field, you are supreme, and neither
19 I nor anyone else may invade your province.
20 As sole judges of the facts, you must
21 decide which of the witnesses you believed,
22 what portion of their testimony you
23 accepted, and what weight you give to it.

24 On the other hand and with equal
25 emphasis, I charge you that you are

1 required to accept the law as it is given
2 to you in this charge and in any
3 instructions that I have given you during
4 the course of the trial. Whether you agree
5 with the law as given to you by me or not,
6 you are bound by it. Once again, you are
7 not to ask anyone else about the law. You
8 should not consider or accept any advice
9 about the law from anyone else but me.

10 Now, the process by which you arrive
11 at a verdict is, first, to decide from all
12 the evidence and the exhibits what the
13 facts are. And second, to apply the law as
14 I give it to you to the facts as you have
15 decided them to be. The conclusion thus
16 reached will be your verdict.

17 Your verdict will be in the form of
18 answers to written questions which I will
19 submit to you. I'll submit the Court copy
20 to our foreperson, and every juror will
21 have a copy of the verdict sheet during
22 deliberations.

23 In the course of the trial, it has
24 been necessary for me to rule on the
25 admission of evidence and on motions made

1 with respect to the applicable law. You
2 must not conclude from any such ruling I
3 have made or from any questions I may have
4 asked or from anything that I have said
5 during the course of the trial or from
6 these instructions or the manner in which
7 they are given that I favor any party to
8 this lawsuit. It is your recollection of
9 the evidence and your decision on the
10 issues of fact which will decide this case.

11 At times during the trial, I have
12 sustained objections to questions asked
13 without allowing the witness to answer, or
14 where an answer was made, instructed that
15 it be stricken from the record and that you
16 disregard it and dismiss it from your
17 minds. You may not draw any inference or
18 conclusions from an unanswered question,
19 nor may you consider testimony which has
20 been stricken from the record in reaching
21 your decision. The law requires that your
22 decision be made solely upon the evidence
23 before you. Such items as I have excluded
24 from your consideration were excluded
25 because they were not legally admissible.

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

8 The testimony of a witness may not
9 conform to the facts as they occurred
10 because he or she is intentionally lying;
11 because the witness did not accurately see
12 or hear what he or she is testifying about;
13 because the witness's recollection is
14 faulty; or because the witness has not
15 expressed himself or herself clearly in
16 testifying. Once again -- I've said this
17 before -- there's no magical formula by
18 which you evaluate testimony. All of you
19 bring with you to this courtroom all of the
20 experience and background of your lives.
21 In your everyday affairs, you decide for
22 yourselves the reliability or unreliability
23 of things people tell you. The same tests
24 that you use in your everyday dealings are
25 the tests which you apply in your

1 deliberations.

2 For instance, the interest or lack
3 of interest of any witness in the outcome
4 of this case; the bias or prejudice of a
5 witness, if there any; the age, 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 the other evidence in the case are
13 all items to be considered by you in
14 deciding how much weight, if any, you will
15 give to the witness's testimony.

16 If it appears that there is 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 stories together. If, however,
21 that is not possible, you will have to
22 decide which of the conflicting testimony
23 and/or stories you will accept.

24 Now, during the course of the trial,
25 you heard reference to workmen's

1 compensation. The fact that the plaintiff
2 may have received and/or applied for
3 workers compensation benefits has no
4 bearing on any other issue in the case than
5 the weight you gave to the witness's
6 testimony. Now, what do I mean by that?
7 The lawyers at various times during the
8 trial read to you from testimony or
9 depositions taken in connection with the

10 workmen's compensation proceeding. The
11 only impact that has on this case, that
12 testimony, the fact that there is or may be
13 a workmen's compensation claim has nothing
14 to do with your job in this case.

15 Now, we talk about evidence. Facts
16 must be proved by evidence. Evidence
17 includes the testimony of a witness
18 concerning what the witness saw, heard or
19 did. Evidence also includes writings,
20 photographs or other physical objects which
21 may be considered as proof of a fact.

22 Evidence can be either direct or
23 circumstantial. Facts may be proved either
24 by direct or circumstantial evidence or by
25 a combination of both. You may give

1 circumstantial evidence less weight, more
2 weight, or the same weight as direct
3 evidence.

4 So what's the difference between
5 direct evidence and circumstantial
6 evidence? Now I'm going to tell you.

7 Direct evidence is what a witness
8 saw, heard or did, which, if believed by
9 you, proves a fact. For example, let us
10 suppose that a fact in dispute is whether I
11 knocked over a water glass near the witness
12 chair. If someone testifies that he or she
13 saw me knock over the glass, that is direct
14 evidence that I knocked over the glass.

15 What's circumstantial evidence?
16 Circumstantial evidence is evidence of a
17 fact which does not directly prove a fact
18 in dispute, but which permits a reasonable
19 inference or conclusion that the fact
20 exists.

21 For example, a witness testifies
22 that he saw a water glass on this bench.
23 The witness states that while he was
24 looking the other way, he heard the
25 breaking of glass, looked up and saw me

1 wiping water from my clothes and from the
2 papers on the bench. This testimony is not
3 direct evidence that I knocked over the
4 water glass, because the witness didn't see
5 it. It's circumstantial evidence from
6 which you can reasonably infer that I
7 knocked over the glass.

8 Those facts which form the basis of
9 an inference must be proved, and the
10 inference to be drawn must be one that may
11 be reasonably drawn. In the example, even
12 though the witness did not see me knock
13 over the glass, if you believe his
14 testimony, you could conclude that I did.
15 Therefore, the circumstantial evidence, if
16 accepted by you, allows you to conclude
17 that the fact in dispute, who knocked over
18 the water glass, has been proved.

19 In reaching your conclusion, you may
20 not guess or speculate. Suppose, for
21 example, the witness testifies that the
22 water glass was located equally distant
23 from the court clerk and me. The witness
24 states that he heard the breaking of glass
25 and looked up to see both the court clerk

1 and me brushing water from our clothes. If
2 you believe that testimony, you still could
3 not decide on that evidence alone who
4 knocked over the water glass. Where these
5 are the only proved facts, it would be only
6 a guess as to who did it. But if the
7 witness also testifies that he heard the
8 clerk say, I am sorry, this additional
9 evidence would allow you to decide who
10 knocked over the glass.

11 Now, this next instruction deals
12 with expert witnesses. In this case, we've
13 had expert testimony from Dr. Blyznak, an
14 orthopedist; Dr. Wani, pain management and
15 neurology; Dr. Merola, orthopedic spinal
16 surgery; a Ph.D., Dr. Fitzgerald, an
17 economist; Harold Bialsky, rehab
18 counselling; Dr. Noah Finkel, orthopedic
19 surgeon; Dr. Howard Reiser, neurology; and
20 Joseph Pessalano, a rehabilitation
21 specialist.

22 You will recall that those witnesses
23 testified concerning their qualifications
24 and expertise in the various fields I just
25 told you about, and they were permitted to

1 give their opinions concerning issues in
2 this case.

3 When a case involves a matter of
4 science or art or requires special
5 knowledge or skill not ordinarily possessed
6 by the average person, an expert is
7 permitted to state his or her opinion for
8 the information of the Court and the jury.

9 The opinions stated by the expert
10 who testified before you were based on
11 particular facts as the expert obtained
12 knowledge of them and testified to them
13 before you, or, as the attorney who
14 questioned the expert asked the expert to
15 assume.

16 You may reject an expert's opinion
17 if you find the facts to be different from
18 those which formed the basis of the
19 opinion. You may also reject the opinion
20 if, after careful consideration of all the
21 evidence in the case, expert and other, you
22 disagree with the opinion. In other words,
23 you are not required to accept an expert's
24 opinion to the exclusion of the facts and
25 circumstances disclosed by other testimony.

1 Such an opinion is subject to the same
2 rules concerning reliability as the
3 testimony of any other witness. It is
4 given to assist you in reaching a proper
5 conclusion. It is entitled to such weight
6 as you find the expert's qualifications in
7 the field warrant, and must be considered
8 by you, but it is not controlling upon your
9 judgment.

10 Now, during some of the experts'
11 testimony, they were given demonstrative
12 exhibits, you know, charts and pictures.
13 The only evidence you consider as evidence
14 in this case is documents and things that
15 have been marked in evidence, and they're
16 in a pile over there. Any demonstrative
17 exhibits that were used to explain the
18 witness's testimony in and of itself is not
19 evidence of the actual event or how it
20 happened, but was admitted for the limited
21 purpose of illustrating and understanding
22 the opinion of the expert.

23 The plaintiff and Mr. Rancourt, one
24 of the named defendants, testified before
25 you. As parties to the action, both are

1 interested witnesses. An interested
2 witness is not necessarily less believable
3 than a disinterested witness. The fact
4 that he is interested in the outcome of the
5 case does not mean that he has not told the
6 truth. It is for you to decide-- It is
7 for you to decide from the demeanor of the
8 witness on the stand and such other tests
9 as your experience dictates whether or not

10 the testimony has been influenced
11 intentionally or unintentionally by his
12 interest.

13 You may, if you consider it proper
14 under all the circumstances, not believe
15 the testimony of such a witness, even
16 though it is not otherwise challenged or
17 contradicted. However, you are not
18 required to reject the testimony of such a
19 witness and may accept all or such part of
20 his testimony as you find reliable and
21 reject such part as you find unworthy of
22 acceptance.

23 This case will be decided on the
24 basis of answers that you give to certain
25 questions that will be submitted to you.

1 Each of the questions calls for a yes or no
2 answer or some numerical figure.

3 While it is important that the views
4 of all jurors be considered, five of the
5 six of you must agree on the answer to any
6 question, but listen carefully: But the
7 same five persons need not agree on all the
8 answers. When five of you have agreed on
9 any answer, the foreperson of the jury will

10 write the answer in the space provided for
11 each answer, and each juror will sign in
12 the appropriate place to indicate his or
13 her agreement or disagreement.

14 When you have answered all the
15 questions that require answers, report to
16 the Court. Do not assume from the
17 questions or from the wording of the
18 questions or from my instructions on them
19 what the answers should be.

20 Now, this is the verdict sheet
21 (indicating). It should be plural, because
22 there's more than one page. I'm going to
23 go through it with you. The first question
24 is: Was the accident of June 12th, 2009 a
25 substantial factor in causing plaintiff's

1 injury? And there's lines for yes and no
2 votes, and then there's an instruction
3 after the first question.

4 If your answer to question one is
5 yes, continue to question two. If your
6 answer is no, proceed no further and report
7 to the Court.

8 Question two: Did plaintiff sustain
9 a permanent consequential limitation of use
10 of a body organ or member as a result of
11 the accident on June 12th, 2009?

12 In a short while, I'm going to give
13 you the definition of a permanent
14 consequential limitation of use of a body
15 organ.

16 Once again, lines for yes, lines for
17 no, followed by an instruction. If your
18 answer to question two is yes, continue to
19 question five. If your answer to question
20 two is yes, continue to question five. If
21 your answer is no, continue to question
22 three.

23 Question three: Did plaintiff
24 sustain a significant limitation of use of
25 a body function or system as a result of

1 the accident on June 12th, 2009? Once
2 again, I'm going to give you the definition
3 shortly of a significant limitation of use
4 of a body function or system.

5 The instructions after the question,
6 again, the signature lines. If your answer
7 to question three is yes, continue to
8 question five. If your answer is no,
9 proceed to question four.

10 Question four: Did plaintiff
11 sustain a medically determined injury or
12 impairment of a non-permanent nature as a
13 result of the accident on June 12, 2009
14 that prevented him from performing
15 substantially all of the material acts that
16 constituted his usual and customary daily
17 activities for not less than 90 days during
18 the 180 days immediately following the
19 accident? In a short while I'll give you
20 an instruction on that also. And then
21 signature lines and instructions.

22 If your answer to question four is
23 yes, continue to question five. If your
24 answer is no, proceed no further and report
25 to the Court.

1 Question five: State separately the
2 amount awarded, if any, in favor of the
3 plaintiff, Jason Kowalsky, for the
4 following item of damage from the time of
5 the occurrence up to the date of your
6 verdict: Conscious pain and suffering,
7 including loss of enjoyment of life by
8 plaintiff. A blank line for an amount.
9 Once again, signature lines for yes or no.

10 Then an instruction, proceed to question
11 six.

12 State separately the amount awarded,
13 if any, in favor of the plaintiff, Jason
14 Kowalsky, for the following item of damage
15 from the date of your verdict into the
16 future: Conscious pain and suffering,
17 including loss of enjoyment of life, by
18 plaintiff. Once again, a blank line with a
19 dollar sign and signature lines.

20 Instruction thereafter.

21 Proceed to question seven: State
22 separately the amount awarded, if any, to
23 plaintiff Jason Kowalsky for the following
24 items of damages from the time of the
25 occurrence, June 12, 2009, to the date of

1 your verdict. A: Jason Kowalsky's loss of
2 earnings from June 12, 2009 through the
3 date of your verdict. If you decide not to
4 make an award as to item seven, you will
5 insert the word none. Once again,
6 signature lines, instruction.

7 Proceed to question eight: State
8 separately the amount to be awarded, if
9 any, to plaintiff Jason Kowalsky for the

10 following items of future damages from the
11 date of your verdict to be incurred in the
12 future: Jason Kowalsky's loss of earnings
13 from the date of your verdict to be
14 incurred in the future. Blank line. The
15 number of years for which the amount is
16 awarded. Blank line. I'll give you an
17 instruction shortly about years.

18 If you decide not to make an award
19 as to item eight, you will insert the word
20 none. Once again, signature lines.

21 Proceed to question nine: State
22 separately the amount to be awarded, if
23 any, to plaintiff Jason Kowalsky for the
24 following items of damages from the date of
25 your verdict to be incurred in the future.

1 A: Jason Kowalsky's medical and health
2 insurance benefits from the date of your
3 verdict to be incurred in the future.
4 Blank line with a dollar sign. The number
5 of years for which this amount is awarded.

6 By the way, on these questions that
7 ask you to put in a number of years, if you
8 do award a dollar amount, don't divide it
9 by the number of years to use that number
10 in the blank space. It's the total amount.
11 The number of years has a different
12 purpose. The most common mistake or
13 confusion we get on the verdict sheet is it
14 calls for an amount, and then it says the
15 number of years, and it's understandable at
16 times jurors think, well, let's divide the
17 amount that we've come up with by the
18 number of years and put that amount in.
19 You follow me? You put the gross amount
20 in. If you have any questions when you're
21 deliberating, just come out and ask us.

22 If you decide not to make an award
23 as to item nine -- as to item 9-A,
24 actually, you'll insert the word none.

25 Question nine has two parts, 9-A and

1 9-B. Nine-B: State separately the amount
2 awarded, if any, to plaintiff Jason
3 Kowalsky for the following items of damages
4 from the date of your verdict to be
5 incurred in the future: The cost of future
6 ACL reconstruction, cost of future total
7 knee replacement, cost of future lumbar
8 fusion. Again, blank spaces.

9 If you do not make an award as to
10 item 9-B, you will insert the word none as
11 to each item. Again, signature lines,
12 instruction.

13 Proceed to question ten: State
14 separately the amount to be awarded the
15 plaintiff Jason Kowalsky, if any, for the
16 following items of damages from the date of
17 the occurrence, June 12, 2009, through the
18 date of your verdict: Jason Kowalsky's
19 savings plan benefits from June 12th, 2009
20 to the date of your verdict. If you decide
21 not to make an award as to item ten, write
22 the word none. Once again, signature
23 lines.

24 Proceed to question 11: State
25 separately the amount to be awarded to

1 plaintiff Jason Kowalsky, if any, for the
2 following items of future damages from the
3 date of your verdict to be incurred in the
4 future. Most of these questions have two
5 time periods, from the accident to the
6 verdict date. The verdict date going
7 forward. Jason Kowalsky's savings plan
8 benefits from the date of your verdict to
9 be incurred in the future. The number of
10 years for which the amount is awarded. If
11 you decide not to make an award as to item
12 11, you will insert the word none. Once
13 again, signature lines.

14 Item 12: State separately the
15 amount to be awarded to plaintiff Jason
16 Kowalsky, if any, for the following items
17 of future damages from the date of your
18 verdict to be incurred in the future. A:
19 Jason Kowalsky's pension benefits from the
20 date of your verdict to be incurred in the
21 future. The number of years for which this
22 amount is awarded. If you decide not to
23 make an award as to item 12, insert the
24 word none.

25 And the last question: State

1 separately the amount to be awarded to
2 plaintiff Jason Kowalsky, if any, for the
3 following items of future damages from the
4 date of your verdict to be incurred in the
5 future: Jason Kowalsky's social security
6 retirement benefit from the date of your
7 verdict to be incurred in the future. A
8 line for the number of years. If you
9 decide not to make an award, insert the
10 word none, and a signature line. Each of
11 you will get a copy of this during your
12 deliberations.

13 Okay. This next portion of the
14 instructions has language in it which is in
15 the verdict sheet I just read you.

16 An act or omission is regarded as a
17 cause of an injury if it was a substantial
18 factor in bringing about the injury. That
19 is, if it had such an effect in producing
20 the injury that reasonable people would
21 regard it as a cause of the injury.

22 Okay. This next one is the
23 definition of permanent consequential
24 limitation of use of a body organ or
25 member. I believe it's question two on the

1 verdict sheet.

2 You must answer the following
3 question: Did Jason Kowalsky sustain a
4 permanent consequential limitation of use
5 of a body organ or member as a result of
6 the accident of June 12, 2009?

7 A limitation of use of a body organ
8 or member means that the body organ or
9 member does not operate at all or operates
10 only in some limited way. It is not
11 necessary for you to find that there has
12 been a total loss of the use of the body
13 organ or member. The limitation of use
14 must be consequential, which means that it
15 is significant, important or of
16 consequence. A minor, mild or slight
17 limitation of use is not significant,
18 important or of consequence.

19 If you find that Mr. Kowalsky
20 sustained a permanent limitation of use as
21 a result of the accident of June 12th,
22 2009, and that the limitation is
23 consequential, as I have defined it to you,
24 you must answer the question yes.

25 If you find that there is no

1 permanent limitation as a result of the
2 accident of June 12th, 2009, or that the
3 limitation is not consequential, you must
4 answer the question no.

5 You may have to answer the following
6 question, depending on your answer to the
7 first question: Did Mr. Kowalsky sustain a
8 significant limitation of use of a body
9 function or system as a result of the
10 accident of June 12th, 2009?

11 A limitation of use of a body
12 function or system means that the function
13 or system does not operate at all, or
14 operates only in some limited way. It is
15 not necessary for you to find that there
16 has been a total loss of the body function
17 or system or that the limitation is
18 permanent. However, the limitation of use
19 must be significant, meaning that the loss
20 is important or meaningful. A minor, mild
21 or slight limitation of use is not
22 significant.

23 If you find that the plaintiff,
24 Mr. Kowalsky, sustained a limitation of use
25 as a result of the accident of June 12th,

1 2009, and that the limitation is
2 significant, you must answer the question
3 yes. If you find that the plaintiff did
4 not sustain a limitation of use as a result
5 of the accident on June 12th, 2009, or that
6 the limitation is not significant, you must
7 answer the question no.

8 The next one deals with that 90 out
9 of 180 day instruction I read to you in the
10 verdict sheet.

11 You may have to answer the following
12 question: Did Mr. Kowalsky sustain a
13 medically determined injury or impairment
14 of a nonpermanent nature as a result of the
15 accident on June 12th, 2009 that prevented
16 him from performing substantially all of
17 the material acts that constituted his
18 usual and customary daily activities for a
19 period of not less than 90 days during the
20 180 days immediately following the
21 accident?

22 A medically determined injury is one
23 that is supported by testimony of
24 appropriate medical professionals, such as
25 a doctor.

1 If you find that as a result of the
2 accident, there is a medically determined
3 injury or impairment of a nonpermanent
4 nature that prevented Mr. Kowalsky from
5 performing substantially all of the
6 material acts that constituted his usual
7 and customary daily activities for not less
8 than 90 days during the 180 days
9 immediately following the accident, you
10 must answer the question yes.

11 If you find that as a result of the
12 accident on June 12th, 2009, Mr. Kowalsky
13 did not sustain a medically determined
14 injury or impairment of a nonpermanent
15 nature that prevented him from performing
16 substantially all the material acts that
17 constituted his usual and customary daily
18 activities for not less than 90 days during
19 the 180 days immediately following the
20 accident, you must answer the question no.

21 Okay. My charge to you on the law
22 of damages must not be taken as a
23 suggestion that you should find for the
24 plaintiff. It is for you to decide on the
25 evidence presented and the rules of law I

1 have given you whether the plaintiff is
2 entitled to recover from the defendant.

3 If you decide that the plaintiff is
4 not entitled to recover from the defendant,
5 you need not consider damages. Only if you
6 decide that the plaintiff is entitled to
7 recover will you consider the measure of
8 damages. If you find that the plaintiff is
9 entitled to recover from the defendant, you

10 must render a verdict in a sum of money
11 that will justly and fairly compensate the
12 plaintiff for all losses resulting from
13 injuries he sustained.

14 During their closing remarks, both
15 lawyers suggested specific dollar amounts
16 he believes to be appropriate compensation
17 for the specific elements of the
18 plaintiff's damages. An attorney is
19 permitted to make suggestions as to the
20 amount that should be awarded, but those
21 suggestions are argument only and not
22 evidence and should not be considered by
23 you as evidence of the plaintiff's damages.
24 The determination of damages is solely for
25 you, the jury, to decide.

1 If you find for the plaintiff,
2 Mr. Kowalsky, he is entitled to recover a
3 sum of money which will justly and fairly
4 compensate him for any injury and conscious
5 pain and suffering to date, it means up to
6 now, caused by the defendants.

7 In determining the amount, if any,
8 to be awarded plaintiff for pain and
9 suffering, you may take into consideration
10 the effect that plaintiff's injuries have
11 had on his ability to enjoy life. Loss of
12 enjoyment of life involves the loss of the
13 ability to perform daily tasks, to
14 participate in the activities which were a
15 part of the person's life before the
16 injury, and to experience the pleasures of
17 life.

18 If you find that Mr. Kowalsky, as a
19 result of his injuries, suffered some loss
20 of the ability to enjoy life, and that he
21 is certainly aware at some level of the
22 loss, you may take that loss into
23 consideration in determining the amount to
24 be awarded the plaintiff for pain and
25 suffering, including loss of enjoyment of

1 life, from the date of the accident to
2 date, up to now.

3 With respect to plaintiff's injuries
4 or disabilities, the plaintiff is entitled
5 to recover for future pain, suffering and
6 disability and the loss of his ability to
7 enjoy life. In this regard, you should
8 take into consideration the period of time
9 that the injuries or disabilities are

10 expected to continue. If you find that the
11 injuries or disabilities are permanent, you
12 should take into consideration the period
13 of time that the plaintiff can be expected
14 to live.

15 In accordance with statistical life
16 expectancy tables, Mr. Kowalsky has a life
17 expectancy of 79 years. Such a table,
18 however, provides nothing more than a
19 statistical average. It neither guarantees
20 that Mr. Kowalsky will live an additional
21 41 years or means that he will not live for
22 a longer period. The life expectancy
23 figure I have given you is not binding upon
24 you, but may be considered by you, together
25 with your own experience and the evidence

1 you have heard concerning the condition of
2 Mr. Kowalsky's health, his habits,
3 employment, and activities in deciding what
4 Mr. Kowalsky's present life expectancy is.

5 The fact that Mr. Kowalsky may have
6 a physical or mental condition that makes
7 him more susceptible to injury than a
8 normal healthy person does not relieve the
9 defendant of liability for all injuries

10 sustained as a result of their negligence.
11 The defendant is liable even though those
12 injuries are greater than those that would
13 have been sustained by a normal healthy
14 person under the same circumstances.

15 If your verdict is in favor of the
16 plaintiff, plaintiff will not be required
17 to pay income taxes on the award, and you
18 must not add or subtract from the award any
19 amount on account of income taxes.

20 If you decide for the plaintiff,
21 Mr. Kowalsky, he will be entitled to
22 recover the amount of reasonable
23 expenditures for medical services and
24 medicines, including physicians' charges,
25 nursing charges, hospital charges,

1 diagnostic expenses, and x-ray charges.

2 If you find that the plaintiff will
3 need medical, hospital or nursing expenses
4 in the future, you will include in your
5 verdict an amount for those anticipated
6 medical, hospital and nursing expenses
7 which are reasonably certain to be incurred
8 in the future and were necessitated by
9 plaintiff's injuries.

10 If you find that Mr. Kowalsky is
11 entitled to an award for medical expenses
12 to be incurred in the future, you will fix
13 the dollar amount of expenses over the
14 entire period that you find that
15 Mr. Kowalsky will incur such expenses and
16 include that amount in your verdict.

17 In your verdict, you will state
18 separately the amount awarded for future
19 medical expenses. You will state in your
20 verdict the amount awarded and the period
21 of years over which such award is intended
22 to provide compensation. Do not state an
23 amount per year, but only the total amount
24 for the entire period. When I went through
25 the verdict sheet, I mentioned that to you,

1 where you have the year lines.

2 The plaintiff, Mr. Kowalsky, is
3 entitled to be reimbursed for any earnings
4 lost as a result of his injuries caused by
5 the defendant's negligence or from the time
6 of the accident to today.

7 Let me do that over. Mr. Kowalsky
8 is entitled to be reimbursed for any
9 earnings lost as a result of his injuries
10 caused by the defendant's negligence from
11 the time of the accident up to today.

12 Moreover, if you find that as a
13 result of those injuries, Mr. Kowalsky has
14 suffered a reduction in his capacity to
15 earn money in the future, then he is also
16 entitled to be reimbursed for loss of
17 future earnings. Any award you make for
18 earnings lost to date must not be the
19 result of speculation. Any award must be
20 calculated from the time that you find
21 Mr. Kowalsky was disabled from working by
22 the injuries and the amount that you find
23 he would have earned had he not been
24 disabled.

25 Any awards you make for plaintiff's

1 earnings capacity in the future should be
2 determined on the basis of his earnings
3 before the accident, the condition of his
4 health, his prospects for advancement, and
5 the probabilities with respect to future
6 earnings before the accident, the extent to
7 which you find that those prospects or
8 probabilities have been reduced by the
9 injuries, the length of time that you find
10 plaintiff would reasonably be expected to
11 work had he not been injured, the nature
12 and hazards of his employment, and any
13 other circumstances which would have an
14 effect on Mr. Kowalsky's earning capacity.

15 Mr. Kowalsky is now approaching just
16 about 38 years of age and has testified to
17 a work life expectancy up until he reaches
18 62. If you find that Mr. Kowalsky is
19 entitled to an award for reduction in
20 earnings capacity in the future, you will
21 fix the dollar amount of such reduction
22 over the entire period that you find he
23 will be-- he will suffer from such
24 reduction and include that amount in your
25 verdict.

1 Once again, through the testimony
2 from the economist, it was suggested that
3 he would only work up until he reaches the
4 age of 62.

5 In your verdict, you will state
6 separately the amount awarded for loss of
7 earnings to date, if any, and if you make
8 an award for loss of future earnings, you
9 will state in your verdict the amount

10 awarded and the period of years over which
11 such award is intended to provide
12 compensation. Do not state an amount per
13 year, but only a total amount for the
14 entire period.

15 If you decide for the plaintiff, you
16 must include in your verdict an award for
17 past and future pain and suffering, as I
18 told you already. That amount must include
19 the amount for the injuries suffered and
20 for the future effect of the injury, if
21 any.

22 Based upon the evidence, you may
23 also include an award for each of the
24 following items separately divided into
25 amounts intended to compensate the

1 plaintiff for damages incurred before your
2 verdict and amounts intended to compensate
3 the plaintiff for damages to be incurred in
4 the future. For instance, medical
5 expenses, loss of earnings, impairment of
6 earnings ability, custodial care or
7 rehabilitative services.

8 As a matter of fact, in the verdict
9 sheet, we also list medical and medicine,
10 health insurance benefits, savings plan
11 benefits, pension benefits, and social
12 security benefits.

13 If you make an award for any item of
14 damage to be incurred in the future, then
15 for each such item you must state the
16 period of years over which the amount
17 awarded-- excuse me-- the amount awarded
18 is intended to provide compensation, and
19 the amount you fix must represent the full
20 amount awarded to plaintiff for that item
21 of damage for the future period without
22 reduction to present value.

23 I have now outlined for you the
24 rules of law that apply to this case and
25 the processes by which you weigh the

1 evidence and decide the facts.

2 Traditionally, juror number one, Ms.
3 Conway?

4 JUROR NUMBER ONE: Yes.

5 THE COURT: Because of being in the
6 first seat, you are designated the
7 foreperson of this jury. In order that
8 your deliberations may proceed in an
9 orderly fashion, you must have a

10 foreperson, but of course her vote is
11 entitled to no greater weight than that of
12 any other juror.

13 Your function, to reach a fair
14 decision from the law and the evidence, is
15 an important one. When you're in the jury
16 room, listen to each other and discuss the
17 evidence and issues in the case among
18 yourselves. It is the duty of each of you
19 as jurors to consult with one another and
20 to deliberate with a view of reaching
21 agreement on a verdict, if you can do so
22 without violating your individual judgment
23 and your conscience. While you should not
24 surrender conscientious convictions of what
25 the truth is and of the weight and effect

1 of the evidence, and while each of you must
2 decide the case for yourself and not merely
3 consent to the decision of your fellow
4 jurors, you should examine the issues and
5 evidence before you with candor and
6 frankness and with a proper respect and
7 regard for the opinions of each other.
8 Remember in your deliberations that the
9 dispute between the parties is for them a

10 very important matter. They and the Court
11 rely upon you to give full and
12 conscientious deliberation and
13 consideration to the issues and evidence
14 before you. By so doing, you carry out to
15 the fullest your oaths as jurors to truly
16 try the issues of this case and render a
17 true verdict.

18 Gentlemen, did I miss anything?

19 MR. RICIGLIANO: Can we approach,
20 Judge?

21 THE COURT: I think I did.

22 (Sidebar discussion held off the
23 record)

24 THE COURT: As to the instruction I
25 gave you on loss of earnings, future loss

1 of earnings, Mr. Kowalsky is now 38 years
2 of age and, as I told you, has a life
3 expectancy of 79 years, according to his
4 mortality tables. He has a work life
5 expectancy, separate and apart from what
6 the economist said about him working to 62,
7 of 23.2 years, a work life expectancy, 23.2
8 more years.

9 Such tables, once again, are of
10 course nothing more than a statistical
11 average. They neither assure that
12 Mr. Kowalsky will have a working life--
13 excuse me-- will have the span of working
14 life that I have given you, nor assure that
15 his working span will not be greater.

16 The figures I have given you as to
17 both mortality and work life are not
18 binding upon you, but may be considered by
19 you together with your own experience and
20 the evidence you have heard in determining
21 what Mr. Kowalsky's work life expectancy
22 is. Sufficient?

23 MR. RICIGLIANO: Yes.

24 MR. JEFFREYS: Yes, Your Honor.

25 THE COURT: We have to make one tiny

1 change to the verdict sheet, which we'll do
2 as soon as I-- as soon as I direct you to
3 commence any deliberations.

4 All the exhibits are over here.
5 You're entitled to all the exhibits by just
6 asking for them. Correct?

7 MR. RICIGLIANO: Yes.

8 MR. JEFFREYS: Yes, Your Honor.

9 THE COURT: All of them, some of

10 them or whatever. If you want the
11 exhibits, just let the court officer know
12 and we'll provide you with all the
13 exhibits. Every juror will get a verdict
14 sheet.

15 It is now time to commence your
16 deliberations. Everyone, with the
17 exception of Mr. Silvestri, just follow the
18 court officer. With the exception of Mr.
19 Silvestri. You may commence your
20 deliberations.

21 (The jury exited the courtroom to
22 commence deliberations)

23 (Alternate juror remained in the
24 courtroom)

25 THE COURT: Everybody sit down,

1 please. Mr. Silvestri --

2 ALTERNATE JUROR: Yes, sir.

3 THE COURT: --as you know, you sit
4 as an alternate in this case. So what
5 we're going to do is, we're going to give
6 you a private suite for the time being.
7 Rob, my court officer, will take you.
8 Here's what I anticipate happening. The
9 most I anticipate-- Well, let's see what

10 happens when the jury comes back, and
11 we'll-- we'll let you in on everything.
12 Okay? When they have questions, you'll be
13 brought back in. If they have a verdict,
14 you'll be brought back in. If somebody,
15 God forbid, gets sick, we'll talk some
16 more, okay?

17 ALTERNATE JUROR: So I'm staying?

18 THE COURT: Yes. Everybody is
19 standing just for you.

20 (Alternate juror exited the
21 courtroom.)

22 (Whereupon, court session was in
23 recess during deliberations)

24 (Court session resumed)

25 THE CLERK: Part 47 is back in

1 session. Case on trial continues. All
2 parties are present, absent the jury.

3 THE COURT: I'm going to excuse them
4 for the night.

5 MR. RICIGLIANO: Okay, Judge.

6 MR. JEFFREYS: Okay.

7 THE COURT OFFICER: Jury entering.

8 (The jury re-entered the courtroom)

9 THE CLERK: All deliberating jurors

10 and alternate juror are now present.

11 Counsel waiving roll call?

12 MR. RICIGLIANO: Yes.

13 MR. JEFFREYS: Yes.

14 THE COURT: Ladies and gentlemen,
15 it's almost a quarter to. We're going to
16 recess for the evening. The exhibits are
17 still here. If you want them, just let us
18 know. You can have them.

19 We'll reconvene tomorrow morning.
20 If it's okay with you, you'll reconvene, if
21 it's okay, if it's not too early, at 9:15,
22 and you'll be escorted right into the
23 deliberation room. If it's not okay, and
24 you want 9:45 because of whatever things
25 you have to do in the morning, somebody nod

1 to me or raise your hand if it's not okay.

2 Okay. Good.

3 So report at 9:15 tomorrow morning.

4 The court officer will take you directly

5 into the deliberation. If you want the

6 exhibits, just let him know. He'll give

7 you all the exhibits.

8 Now, I've been telling you at every

9 recess don't discuss the case among

10 yourselves until it's the appropriate time.

11 And the time was when both sides rested,

12 summations, and my instructions. But the

13 only time you discuss the case is when

14 you're together as a deliberative body,

15 meaning all of you together. So don't

16 discuss the case among yourselves or with

17 anyone else until you're together as a

18 deliberative body, which will be tomorrow

19 morning at 9:15. We'll see you then. Have

20 a good night. Safe home.

21 (The jury exited the courtroom, and

22 the trial adjourned for the day)

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* * * * *

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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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