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

JASON KOWALSKY,

Plaintiff,

-against-

INDEX NO.
41227/2009

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

JURY TRIAL

Defendants.

August 14, 2014
Riverhead, New York

BEFORE:

HON. JERRY GARGUILO,
SUPREME COURT JUSTICE
And a Jury

APPEARANCES:

WILLIAM RICIGLIANO, ESQ.
JOEL H. ROBINSON, ESQ.
Attorneys for Plaintiff
232 Madison Avenue - Suite 1200
New York, New York 10016

SUFFOLK COUNTY DEPARTMENT OF LAW
Attorneys for Defendants
H. Lee Dennison Building - 6th Floor
100 Veterans Memorial Highway
P.O. Box 6100
Hauppauge, New York 11788-0099
BY: CHRISTOPHER A. JEFFREYS, ESQ.
Assistant County Attorney

BY: ANNA M. LOPINTO
OFFICIAL COURT REPORTER

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

your behalf?

A. Yes.

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

A. Yes.

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

A. Yes.

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

A. Yes.

Q. And I've explained that to you?

A. You did.

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

A. I do.

Q. You're making that decision voluntarily?

A. I am.

Q. No one is forcing you to do it?

A. No.

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

A. I am.

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

THE WITNESS: Yes.

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

THE WITNESS: No, it doesn't.

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

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

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

THE COURT: Yes.

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

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

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

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

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

MR. RICIGLIANO: Correct.

THE COURT: And all of the threshold questions.

MR. RICIGLIANO: Correct.

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

the damage questions, the amount questions, the money questions.

MR. RICIGLIANO: Yes.

THE COURT: Mr. Jeffreys?

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

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

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

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

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

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

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

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

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

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

Nick, bring them in.

MR. RICIGLIANO: So you are reserving, Judge?

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

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

MR. JEFFREYS: The verdict sheet.

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

MR. RICIGLIANO: Right.

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

MR. RICIGLIANO: Right.

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

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

THE COURT: Yes, of course I will.

THE COURT OFFICER: Jury entering.

(The jury entered the courtroom)

THE CLERK: Good morning, jurors. Counsel waiving roll call?

MR. RICIGLIANO: Yes.

MR. JEFFREYS: Yes.

THE CLERK: Thank you. Please be seated.

THE COURT: We've come to that point-- First of all, good morning. Welcome back. We've come do that point of the trial where you will hear the summations. As I told you in the opening instructions, summations are in the reverse order of openings. So you'll hear from Mr. Jeffreys first on behalf of the County of Suffolk, as well as Raymond Rancourt.

Gentlemen, there is a stipulation, is there not?

MR. RICIGLIANO: Yes.

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

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

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

THE COURT: Thank you.

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

case that County of Suffolk owns the vehicle that was being operated by Raymond Rancourt on the day of this accident, that it was being operated with the County of Suffolk's permission, that Raymond Rancourt was in the course and scope of his employment with the County of Suffolk at the time of this accident, and that the County is responsible for any negligent acts of Raymond Rancourt.

THE COURT: Sufficient?

MR. RICIGLIANO: Yes.

THE COURT: Okay, so stipulated. Mr. Jeffreys.

MR. JEFFREYS: Thank you, Your Honor.

THE COURT: Thank you, sir.

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

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

It's both myself and Mr. Ricigliano's duties as attorneys to zealously represent our clients in this case. That is our charge as an attorney. We have different styles, clearly, but I hope that my presentation of the evidentiary facts in this case have assisted you in understanding what this case is all about. I also hope that you found my representation of your county to be appropriate for the case that was presented to you.

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

that have been admitted into evidence.

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

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

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

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

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

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

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

The county is not responsible for every injury that its residents have. When a car accident is presented, the county is responsible for those injuries that are causally related to the accident. The county has never questioned that Jason Kowalsky's knee injury and the resultant arthroscopic surgery is causally related to this accident. But the county can only pay for those injuries that are causally related to the accident.

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

For each injury claimed by the plaintiff, I submit to you that you must determine whether the accident was a substantial factor in causing that injury. I submit to you that the evidence established that the car accident simply was not a factor, a substantial factor in causing the plaintiff's back problem and back surgery.

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

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

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

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

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

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

was a result of this accident. As I told you in my opening statement, you may find that the knee injury was caused by this accident. And that's okay. But the county maintains that the plaintiff's back injury and the resultant surgery have absolutely nothing to do with this car accident. That's why in jury selection, when the plaintiff's counsel talked to you about harms and losses, I made certain that you knew that the harms and losses had to be causally related to the car accident that we're here about.

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

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

The plaintiff and his mother wanted to see Dr. Kleeman or his partner, Dr. Manoff, while they were at Brookhaven Memorial Hospital, because they had previously seen him (indicating).

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

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

These two physicians, Dr. Kleeman and Dr. Manoff work at Brookhaven Orthopedics. And plaintiff was conveniently referred to Brookhaven Orthopedics on his discharge from Brookhaven Memorial Hospital.

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

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

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

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

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

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

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

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

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

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

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

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

It's up to you to determine whether you believe that Jason Kowalsky was being truthful and forthright when he testified in this case. Would he not have disclosed his prior back problems if they hadn't been discovered? Would he have told us if they hadn't been discovered? I think we know the answer to that by looking at every medical record and every medical history that he gave to the physicians that treated him in this case. He denied to every medical care provider that he saw in reference to this accident that he ever had a prior back problem. And that is extremely disturbing.

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

final diagnosis of causation.

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

The only physicians to testify in this case that were provided with complete copies of the plaintiff's medical records and reports were the physicians retained by the County of Suffolk to perform independent medical examinations of the plaintiff. Now, they are conducted pursuant to the guidelines of court, and they get one opportunity to see the plaintiff. And they had that one opportunity. And I submit to you that their findings in this case are the sole findings of causation that you should adhere to.

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

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

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

Department to accurately report everything that Jason told her at the scene of the accident. She's not a party to this litigation. She has no involvement with any party to this litigation. She is a pure and complete non-party witness that is not affected one way or the other concerning the outcome of this case. And her ambulance call report is part of the hospital record in this case. The hospital record is Defendant's Exhibit I.

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

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

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

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

By the way, folks, he didn't just say it there. He's taken to the hospital, and he tells the triage nurse the same thing, and it's in the hospital records, folks. (Reading) Denies loss of consciousness. No spinal injuries. Deformity and laceration to right knee. One spot in the reports.

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

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

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

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

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

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

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

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

Let's start with the first

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

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

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

MR. RICIGLIANO: Objection.

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

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

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

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

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

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

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

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

MR. RICIGLIANO: Objection.

THE COURT: Is there an objection?

MR. RICIGLIANO: Yes.

THE COURT: The comment you heard just now, as well as the comments you may hear may reflect the attorney's interpretation or express an opinion as to what you should find as to-- going back to that credibility thing. I'm going to give you a charge that's called falsus in uno. I don't know why they use Latin, but they use the Latin. As with all instructions I give you, pay careful attention to it. You can find that a statement was simply a misstatement, you can find it was a lie, you can find it was meaningful or harmless, all right? All questions of fact, all questions of credibility are beyond the -- they're for you to decide. That's your province. And within that province, you

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

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

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

But suppose we believe the testimony

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

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

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

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

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

The MRI was conducted approximately

six weeks after the accident at a location known as Medical Arts Radiology. That MRI report was discussed with Dr. Blyznak, and Dr. Blyznak confirms that the plaintiff had an unremarkable MRI of his low back, with the exception of the compressed disc at L5-S1, which he described as degenerated. And we know from so much other testimony that was had in this case that the plaintiff does have a lumbarized L5 vertebrae-- sacralized L5 vertebrae. And that's a congenital problem that has nothing to do with this car accident.

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

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

this case. Didn't call him. But Dr. Blyznak discussed with us Dr. Chen's consultation report with the plaintiff on November 13, 2009. Dr. Chen diagnosed the plaintiff with degenerative disc disease. Nothing traumatic, nothing acute, nothing from this car accident. Simply a degenerative disc disease. But Dr. Blyznak properly didn't just stop his treatment. He was the plaintiff's orthopedic surgeon. His treatment then focused on the injury that was actually from this car accident, an injury to the right knee.

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

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

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

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

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

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

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

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

complications.

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

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

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

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

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

MR. RICIGLIANO: Objection.

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

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

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

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

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

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

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

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

So every diagnostic test that was ordered or reviewed by Dr. Wani in reference to this case demonstrates that there was no acute or traumatic problems from this car accident that gives rise to the plaintiff's back problems.

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

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

surgery and not involved in the selection of Dr. Merola. Dr. Merola tells us that he was given a prescription for a neurologic consultation that was dated June-- a neurologic surgeon consultation that was dated June 11, 2012 by Jason Kowalsky. Dr. Merola told us that on that first day that he saw the plaintiff, he had already made up his mind that he was going to do back surgery on this young man. Dr. Merola never looked at any of the plaintiff's records before he recommended surgery. Dr. Merola never spoke to any of the plaintiff's treating doctors before he recommended surgery. Dr. Merola decided that he was going to cut this plaintiff's back open from the moment of the first visit. And for that, I feel bad for Jason Kowalsky. He chose a surgeon who wanted to cut him open rather than pursue any form of conservative treatment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Clearly, the evidence demonstrates

that the plaintiff's back condition, that degenerative back disease is simply getting worse over time. The plaintiff tells us that he takes more and more pain medication, but it's not working as it used to when he started to take it. We heard all of his doctors tell us about this degenerative disc disease, and it happens to all of us as part of the aging process. And you say, Well, Jason was a young man. But the hard work that Jason did, and he should be applauded for the hard work he did as a Verizon field technician, only made the problems speed up. As Dr. Finkel told us, hard work, such as being a lineman for Verizon that involves heavy lifting and moving, causes degeneration of the back to occur much faster than someone who has a sedentary job, and Dr. Finkel told us, like a priest.

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

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

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

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

no relation to the car accident.

The issue of-- This medical issue, ladies and gentlemen, requires physicians to give us definition. It's a matter of a physician looking at medical records and making an appropriate diagnosis concerning a particular patient. And Dr. Finkel did that, and came to the conclusion that the plaintiff's problems started at L5-S1. The plaintiff has that hypoplastic disc at L5-S1. The plaintiff has degenerative disc disease throughout his lower lumbar spine. And the plaintiff's problems originate and continue due to the L5-S1 disc.

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

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

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

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

And Dr. Reiser tells us that neurology is a very precise branch of medicine concerned with the brain and nervous system. It's kind of monitoring the body's electrical system. I believe he called himself an electrician. As Dr. Reiser told us, he did a series of neurologic examinations of every part of the plaintiff's neurologic system and determined whether there were any neurological problems.

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

consultation.

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

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

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

resolved.

The plaintiff would have you speculate into the future in order to increase potential damages in this case. And how did he do that? He produced an economist and a life care plan expert solely to increase potential damage in this case. If you do not believe that the back injury is related to this car accident, then the plaintiff is not disabled from this car accident. Because the disability is from the back surgery.

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

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

concerning their conclusions about sedentary to light work.

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

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

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

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

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

But, again, ladies and gentlemen, if you find that the back injury is not related to this car accident, as every medical care provider has said in this case, if you find that it is a degenerative disc disease, as every medical care provider has found in the case, then the economist's analysis is useless.

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

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

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

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

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

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

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

MR. RICIGLIANO: Objection.

THE COURT: Read back the last sentence, please.

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

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

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

MR. JEFFREYS: Thank you, Your Honor. You'll remember, ladies and gentlemen, that I went through with Dr. Bialsky all of the cases that he had previously testified in, all over the country. And he told us each level of specialty that he was involved with in all of those cases. And he told us that he had previously qualified as a vocational rehabilitation expert in other cases where he testified. That simply what the testimony was, folks.

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

the sole vocational rehabilitation expert whose numbers are unchallenged.

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

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

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

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

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

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

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

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

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

This accident caused an injury to the plaintiff's right knee and the need for an arthroscopic surgery that required to FasT-Fix sutures to repair a partial torn meniscus. It required a period of physical therapy and a brief period of rehabilitation. That is the only injury related to this accident. Evidence has established that the plaintiff's condition has resolved concerning the knee.

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

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

But it's still up to you to determine whether the plaintiff's knee injury qualifies as a serious injury under the law as Justice Garguilo will outline for you. But I offer you this in the event that you find a causally related arthroscopic partial meniscal tear related to this accident that is a serious injury. The fair and reasonable compensation for that injury falls either side of $50,000. That's what the value of the scope is, folks. A little more, if you think that the surgery was particularly difficult. A little less if you think the surgery was fairly routine.

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

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

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

THE COURT: Thank you, Mr. Jeffreys.

MR. JEFFREYS: Thank you, Your Honor.

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

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

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

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

Now, the issue came up after the summation as to whether or not the verdict sheet should have the generic on the exacerbation--

MR. RICIGLIANO: No, no--

MR. JEFFREYS: The charge.

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

MR. RICIGLIANO: And susceptibility.

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

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

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

MR. RICIGLIANO: I think there was testimony that if the plaintiff had a degenerative disc problem, that it would make him more susceptible to an annular tear. I thought there was testimony that if Jason had degenerative disc disease, that would make him more susceptible to an annular tear due to trauma. That's what I thought--

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

MR. RICIGLIANO: To make it easy --

THE COURT: Off the record.

(Discussion held off the record)

(Whereupon, there was a brief recess)

THE COURT OFFICER: Jury entering.

(The jury re-entered the courtroom).

THE CLERK: Counsel waiving roll call?

MR. RICIGLIANO: Yes.

MR. JEFFREYS: Yes.

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

Mr. Ricigliano, your summation.

MR. RICIGLIANO: Thank you, Your Honor.

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

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

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

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

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

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

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

Now, I'm not going to spend a lot of time on the knee for a couple of reasons. The first is, Dr. Finkel, gladly or happily, I should say, conceded that this collision caused Jason's knee injuries. And you just heard Mr. Jeffreys do the same thing. He's told that you that this collision has caused Jason's knee injuries and the need and requirement for surgery. And if you remember, Dr. Finkel took it a step further and said that anything related to the knee, the surgery, the physical therapy, the convalescence, it's all related to the collision. But I just want to take a moment and focus on that, if I may. I'm going to refer to it later on.

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

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

Linda Peterson said, if you remember, that he went flying in the air. And we know that the severity of the impact, just like I told you in opening, was enough to cause damage to the Verizon van, push that Verizon van forward, caused Mr. Rancourt to hit his head on the steering wheel, even though he had his seatbelt, and of course, propel Jason out into the roadway.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

neurosurgeon or someone who does that type of surgery--

MR. JEFFREYS: Objection.

THE COURT: As I said during Mr. Jeffreys's summation, I'll say it during Mr. Ricigliano's summation, a summation is meant to be the attorney's commenting on the evidence that's adduced and the inferences-- the inferences and conclusions they wish you to draw from the evidence. I hate to sound like a broken record. You can accept it, you can reject it, you can agree with the attorney in whole or in part. Just remember, it's not evidence. It's a suggestion. Thank you.

MR. JEFFREYS: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

The minute that Dr. Merola does that laminectomy and confirms that L5-S1 is not the problem, his whole theory about sacralization goes completely out the window. It falls like a house of cards. The disc that Jason Kowalsky has in his back right now at L5-S1 is the same disc that he had on the day of surgery, is the same disc that he had on the date this collision occurred, is the same disc that he had while he was working for Verizon. Dr. Merola didn't touch it. And if he did, then you can make an argument for L5-S1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

negative. There was no annular--

MR. JEFFREYS: Objection. Objection, Your Honor.

MR. RICIGLIANO: I'll rephrase.

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

MR. RICIGLIANO: It's in evidence.

MR. JEFFREYS: No, it's not.

THE COURT: Stop.

MR. RICIGLIANO: The report is in evidence.

MR. JEFFREYS: No, it's not.

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

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

the discogram after the collision in June of 2009.

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

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

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

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

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

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

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

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

That is the medical proof in this case. And if you look inside that box, that is what should be there. And it is the simplest explanation for all of this. Not priors, not sacralization, not whether or not he signed the consent form, not whether or not Jason was lying about his prior history, which basically consists of nothing. That is the medical proof in this case. And here's the most important point, ladies and gentlemen: It is completely unrefuted and unrebutted by the defendants.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Now, there are also questions

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

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

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

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

discuss Jason's transferable skills, because he based it on his education, which he has no clue about, and he based it on Verizon training, which he also had no clue about. Bud I don't-- I think that there's a likelihood, knowing the way that Jason is, and knowing his attempts to try to get well, that he may return to work. I definitely think that that is a possibility. Whether there's a vocational rehabilitationist or not, I think he's going to make an attempt. I don't think it's going to be easy. He's not going to get paid as much. He's going to be doing a job that he didn't choose or may not necessarily like all that much. He may not be able to do it for as long a period of time, and he's going to be competing with other people who are well and who are more experienced. But I do think that there is the possibility that exists that he's going to return to work. And I think that it's okay for you to consider that in the deciding how much money to allow for his lost earnings.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

dollars.

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

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

is taking medications, and Dr. Wani hasn't cleared him. I think that if there's a likelihood that he's going to go back to work, there's a likelihood that he's going to stop taking medications. So the costs that we gave were for his lifetime. And obviously, if he needs medications, which is a possibility, for the rest of his life, then you'll give us or we would ask that you allow the numbers in this plan. But I do think that if there's a likelihood that he's going back to work, he's going to decrease or eliminate his medication. And I leave that for all of you to talk about and decide in terms of the future costs of medication.

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

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

this kind of a case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I believe very deeply in this system. I've devoted my entire life to it. But I will tell you as a trial lawyer that there is nothing more incredible and remarkable, and it gets me every time, to see people from the public come and really care about their case, and make an effort to try to listen and try to be fair. And all of you have done that. And every time it happens, I'm always amazed at the process. And it makes me believe that this process is the best process that we have.

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

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

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

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

(AFTERNOON SESSION)

THE CLERK: Part 47 is back in session. Case on trial continues. All parties are present, absent the jury, Your Honor.

THE COURT: Thank you.

THE COURT OFFICER: Jury entering.

(The jury re-entered the courtroom)

THE CLERK: Welcome back, jurors. Counsel waiving roll call?

MR. RICIGLIANO: Yes.

MR. JEFFREYS: Yes.

THE CLERK: Thank you. Please be seated.

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

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

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

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

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

from anyone else but me.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

verdict helps or hurts.

As you already know, a lawsuit is a civilized method of determining differences between people. It is basic to the administration of any system of justice that the decision on both the law and the facts be made fairly and honestly. You as the jurors and I as the Court have a heavy responsibility to assure that a just result is reached in deciding the differences between the plaintiff and the defendants in this case.

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

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

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

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

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

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

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

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

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

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

deliberations.

For instance, the interest or lack of interest of any witness in the outcome of this case; the bias or prejudice of a witness, if there any; the age, the appearance, the manner in which the witness gives testimony on the stand; the opportunity that the witness had to observe the facts about which he or she testifies; the probability or improbability of the witness's testimony when considered in the light of the other evidence in the case are all items to be considered by you in deciding how much weight, if any, you will give to the witness's testimony.

If it appears that there is a discrepancy in the evidence, you will have to consider whether the apparent discrepancy can be reconciled by fitting the two stories together. If, however, that is not possible, you will have to decide which of the conflicting testimony and/or stories you will accept.

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

compensation. The fact that the plaintiff may have received and/or applied for workers compensation benefits has no bearing on any other issue in the case than the weight you gave to the witness's testimony. Now, what do I mean by that? The lawyers at various times during the trial read to you from testimony or depositions taken in connection with the workmen's compensation proceeding. The only impact that has on this case, that testimony, the fact that there is or may be a workmen's compensation claim has nothing to do with your job in this case.

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

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

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

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

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

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

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

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

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

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

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

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

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

give their opinions concerning issues in this case.

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

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

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

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

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

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

interested witnesses. An interested witness is not necessarily less believable than a disinterested witness. The fact that he is interested in the outcome of the case does not mean that he has not told the truth. It is for you to decide-- It is for you to decide from the demeanor of the witness on the stand and such other tests as your experience dictates whether or not the testimony has been influenced intentionally or unintentionally by his interest.

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

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

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

While it is important that the views of all jurors be considered, five of the six of you must agree on the answer to any question, but listen carefully: But the same five persons need not agree on all the answers. When five of you have agreed on any answer, the foreperson of the jury will write the answer in the space provided for each answer, and each juror will sign in the appropriate place to indicate his or her agreement or disagreement.

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

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

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

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

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

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

Once again, lines for yes, lines for no, followed by an instruction. If your answer to question two is yes, continue to question five. If your answer to question two is yes, continue to question five. If your answer is no, continue to question three.

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

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

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

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

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

Question five: State separately the amount awarded, if any, in favor of the plaintiff, Jason Kowalsky, for the following item of damage from the time of the occurrence up to the date of your verdict: Conscious pain and suffering, including loss of enjoyment of life by plaintiff. A blank line for an amount. Once again, signature lines for yes or no. Then an instruction, proceed to question six.

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

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

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

Proceed to question eight: State separately the amount to be awarded, if any, to plaintiff Jason Kowalsky for the following items of future damages from the date of your verdict to be incurred in the future: Jason Kowalsky's loss of earnings from the date of your verdict to be incurred in the future. Blank line. The number of years for which the amount is awarded. Blank line. I'll give you an instruction shortly about years.

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

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

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

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

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

Question nine has two parts, 9-A and

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

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

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

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

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

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

And the last question: State

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

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

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

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

verdict sheet.

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

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

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

If you find that there is no

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

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

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

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

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

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

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

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

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

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

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

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

If you decide that the plaintiff is not entitled to recover from the defendant, you need not consider damages. Only if you decide that the plaintiff is entitled to recover will you consider the measure of damages. If you find that the plaintiff is entitled to recover from the defendant, you must render a verdict in a sum of money that will justly and fairly compensate the plaintiff for all losses resulting from injuries he sustained.

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

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

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

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

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

With respect to plaintiff's injuries or disabilities, the plaintiff is entitled to recover for future pain, suffering and disability and the loss of his ability to enjoy life. In this regard, you should take into consideration the period of time that the injuries or disabilities are expected to continue. If you find that the injuries or disabilities are permanent, you should take into consideration the period of time that the plaintiff can be expected to live.

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

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

The fact that Mr. Kowalsky may have a physical or mental condition that makes him more susceptible to injury than a normal healthy person does not relieve the defendant of liability for all injuries sustained as a result of their negligence. The defendant is liable even though those injuries are greater than those that would have been sustained by a normal healthy person under the same circumstances.

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

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

diagnostic expenses, and x-ray charges.

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

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

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

where you have the year lines.

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

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

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

Any awards you make for plaintiff's

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

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

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

In your verdict, you will state separately the amount awarded for loss of earnings to date, if any, and if you make an award for loss of future earnings, you will state in your verdict the amount awarded and the period of years over which such award is intended to provide compensation. Do not state an amount per year, but only a total amount for the entire period.

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

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

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

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

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

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

evidence and decide the facts.

Traditionally, juror number one, Ms. Conway?

JUROR NUMBER ONE: Yes.

THE COURT: Because of being in the first seat, you are designated the foreperson of this jury. In order that your deliberations may proceed in an orderly fashion, you must have a foreperson, but of course her vote is entitled to no greater weight than that of any other juror.

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

of the evidence, and while each of you must decide the case for yourself and not merely consent to the decision of your fellow jurors, you should examine the issues and evidence before you with candor and frankness and with a proper respect and regard for the opinions of each other. Remember in your deliberations that the dispute between the parties is for them a very important matter. They and the Court rely upon you to give full and conscientious deliberation and consideration to the issues and evidence before you. By so doing, you carry out to the fullest your oaths as jurors to truly try the issues of this case and render a true verdict.

Gentlemen, did I miss anything?

MR. RICIGLIANO: Can we approach, Judge?

THE COURT: I think I did.

(Sidebar discussion held off the record)

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

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

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

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

MR. RICIGLIANO: Yes.

MR. JEFFREYS: Yes, Your Honor.

THE COURT: We have to make one tiny

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

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

MR. RICIGLIANO: Yes.

MR. JEFFREYS: Yes, Your Honor.

THE COURT: All of them, some of them or whatever. If you want the exhibits, just let the court officer know and we'll provide you with all the exhibits. Every juror will get a verdict sheet.

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

(The jury exited the courtroom to commence deliberations)

(Alternate juror remained in the courtroom)

THE COURT: Everybody sit down,

please. Mr. Silvestri --

ALTERNATE JUROR: Yes, sir.

THE COURT: --as you know, you sit as an alternate in this case. So what we're going to do is, we're going to give you a private suite for the time being. Rob, my court officer, will take you. Here's what I anticipate happening. The most I anticipate-- Well, let's see what happens when the jury comes back, and we'll-- we'll let you in on everything. Okay? When they have questions, you'll be brought back in. If they have a verdict, you'll be brought back in. If somebody, God forbid, gets sick, we'll talk some more, okay?

ALTERNATE JUROR: So I'm staying?

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

(Alternate juror exited the courtroom.)

(Whereupon, court session was in recess during deliberations)

(Court session resumed)

THE CLERK: Part 47 is back in

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

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

MR. RICIGLIANO: Okay, Judge.

MR. JEFFREYS: Okay.

THE COURT OFFICER: Jury entering.

(The jury re-entered the courtroom)

THE CLERK: All deliberating jurors and alternate juror are now present. Counsel waiving roll call?

MR. RICIGLIANO: Yes.

MR. JEFFREYS: Yes.

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

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

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

So report at 9:15 tomorrow morning. The court officer will take you directly into the deliberation. If you want the exhibits, just let him know. He'll give you all the exhibits.

Now, I've been telling you at every recess don't discuss the case among yourselves until it's the appropriate time. And the time was when both sides rested, summations, and my instructions. But the only time you discuss the case is when you're together as a deliberative body, meaning all of you together. So don't discuss the case among yourselves or with anyone else until you're together as a deliberative body, which will be tomorrow morning at 9:15. We'll see you then. Have a good night. Safe home.

(The jury exited the courtroom, and the trial adjourned for the day)

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I N D E X

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

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

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Anna M. Lopinto

Official Court Reporter

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