

**EXHIBIT A**

COPY

1 SUPREME COURT OF THE STATE OF NEW YORK  
 2 COUNTY OF QUEENS : CIVIL TERM : PART 18  
 -----X  
 3 MANUEL BERMEJO,

4 Plaintiff,

5 -against-

Index No. 23985/09

6 AMSTERDAM & 76th ASSOCIATES, LLC  
 7 and IBEX CONSTRUCTION, LLC,

Trial

8 Defendants.  
 -----X

9 Supreme Courthouse  
 10 88-11 Sutphin Boulevard  
 11 Jamaica, New York 11435  
 12 April 12, 2013

13 B E F O R E :

14 THE HONORABLE DUANE A. HART,

J U S T I C E

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1 (Whereupon, the following takes place on the  
2 record, in open court:)

3 (Whereupon, the jury entered the courtroom and the  
4 following occurred:)

5 THE COURT: Please be seated. And I apologize to  
6 the jury, but I think all present in the courtroom will  
7 tell you, I already had a full morning. Fair statement,  
8 counsel?

9 MR. HACKETT: Yes, your Honor.

10 MR. REILLY: So stipulated, Judge.

11 THE COURT: Mr. Reilly, call your next witness.

12 MR. REILLY: Thank you, your Honor.

13 The defense calls Dr. Michael Katz.

14 THE COURT: Dr. Katz, could you stand and face the  
15 Clerk of the Court?

16 D R. M I C H A E L K A T Z, called as a witness by  
17 and on behalf of the Defendants, after having been first duly  
18 sworn, was examined and testified as follows:

19 COURT CLERK: Have a seat.

20 For the record, Doctor, your name.

21 THE WITNESS: Michael J. Katz M.D.. address is  
22 146-53 Delaware Avenue, Flushing, New York 11355.

23 COURT CLERK: Thank you.

24 THE COURT: Dr. Katz, you testified before. I  
25 want you to speak in a nice, loud, clear voice so everybody

1 in the courtroom can hear the answers to the questions that  
2 are posed to you.

3 Remember, every time you give a medical opinion it  
4 must be to a reasonable degree of medical certainty. If  
5 you can't do it, as occasionally had been done in this  
6 trial, tell me and I will make other arrangements, okay?

7 THE WITNESS: Thank you.

8 THE COURT: Mr. Reilly.

9 MR. REILLY: May I inquire?

10 THE COURT: Yes, you may.

11 MR. REILLY: Thank you.

12 DIRECT EXAMINATION

13 BY MR. REILLY:

14 Q Good morning, Dr. Katz.

15 A Good morning.

16 Q Are you employed, Doctor?

17 A I'm actually self-employed.

18 Q And what is your occupation?

19 A Orthopedic surgeon.

20 Q Could you tell us a little bit about your educational  
21 background?

22 A Certainly. I graduated with honors from Queens College  
23 of City University of New York in 1976. I won a Jonas Salk  
24 Scholarship to attend medical school.

25 I attended Albert Einstein College of Medicine between

1 the years of 1976 and 1980 and graduated with honors. I  
2 attended the University of Pennsylvania Surgery and Orthopedic  
3 Surgery program between the years of 1980 and 1985. I was a  
4 faculty fellow in orthopedic research at the University of  
5 Pennsylvania. I have been certified by the American Board of  
6 Orthopedic Surgeons and elected to fellowship in the American  
7 Academy of Orthopedic Surgery in 1988. I have been in private  
8 practice since that time.

9 Q Are you licensed in the State of New York?

10 A Yes, I am.

11 Q Could you explain a little bit about board  
12 certification?

13 THE COURT: Again, it is--

14 MR. REILLY: Fair, enough, your Honor.

15 Q How about fellowship?

16 A Sure. Fellowship in the American Academy of Orthopedic  
17 Surgeons is dependent on board certified certification, so the  
18 board certification process is done first. After that is done  
19 there is a three year audit period in which your surgical cases  
20 from three years after board certification are checked by the  
21 American Academy of Orthopedic Surgeons. Also a balloting  
22 process in which all of the academy fellows in your area are  
23 polled in order to determine whether you practice ethically and  
24 whether there had been any personal conflicts with any of the  
25 practitioners. If the balloting process is successful and audit

1 is successful you are elected to academy status three years  
2 after your first board certifications. For myself that was in  
3 1988.

4 Q Doctor, you have performed surgeries yourself?

5 A Yes.

6 Q And could you estimate how many surgeries you  
7 performed?

8 A Surgeries are in the thousands. The surgeries consist  
9 of a high percentage of trauma surgeries, and that includes to  
10 all extremities. It also includes a high number of elective  
11 procedures, that includes total hip replacements, total knee  
12 replacements, shoulder arthroscopies and knee arthroscopies.

13 Q Do you have any current hospital privileges?

14 A At this point I practice as an outpatient practitioner.

15 Q What is that,

16 A A free standing outpatient practice I have.

17 THE COURT: What does that mean?

18 THE WITNESS: I have my own office, my own  
19 patients. I practice outpatient, but the surgical  
20 interventions and emergency room are done by others.

21 THE COURT: You have to-- when you say outpatient,  
22 that means you do what colloquially had been called day  
23 surgery.

24 THE WITNESS: I have a nonsurgical practice and  
25 that consists of a consultative practice, seeing patients

1 with difficult fracture problems, people with work-related  
2 injuries and sports injuries that are treated office based  
3 as an outpatient.

4 THE COURT: You don't do surgery anymore?

5 THE WITNESS: No.

6 THE COURT: When was the last time you've done  
7 surgery?

8 THE WITNESS: 2005.

9 Q When, why was it that you stopped surgery?

10 A The bulk of my practice was essentially trauma based,  
11 emergency room call, basically every second night, every third  
12 night, and I wanted to curtail that at that point in time.

13 Q And Doctor, have you ever testified before in court on  
14 behalf of people, either defendants or plaintiffs?

15 A Yes, I have.

16 Q Both or more one or the other?

17 A Both with more one than the other.

18 Q Have you testified more on behalf of--

19 A 80 percent on behalf of defendants, twenty percent on  
20 behalf of plaintiffs.

21 Q Doctor, did there come a time when you conducted an  
22 examination of Mr. Bermejo on behalf of my office?

23 A There was actually two occasions.

24 Q When was the first one?

25 A May 23, 2011.



1 Q Did you review any records in preparation for that  
2 examination?

3 A Yes, I did.

4 Q And just generally, what medical records, can you tell  
5 us?

6 A There are a substantial number of records. Those  
7 records have ranged from the notations from the hospital, as  
8 well as notations from treating sources notes from Dr. Gray and  
9 Dr. Papathomas; those were a series of records.

10 Q Regarding your time, Doctor, how much time is spent in  
11 your private practice and how much time is spent on  
12 consultation, legal consultation?

13 A The private practice is 60 percent of the time. The  
14 consultative legal was 40 percent of the time.

15 Q Was there a translator present at your examination of  
16 Mr. Bermejo on May 23, 2011?

17 A Yes, actually, translator each time, a female from the  
18 plaintiff's law firm on the May 23rd, 2011, substantial Spanish  
19 translator and then Yuri Ramirez, a female translator on the  
20 second date of March 4, 2013.

21 Q We're talking about the first examination, Doctor. How  
22 long did that first examination of Mr. Bermejo take in May of  
23 2011?

24 A 45 minutes.

25 Q Could you describe the examination that was done?

1 A First a history done.

2 THE COURT: Excuse me. Send the jury out.

3 (Whereupon, the jury exited the courtroom and the  
4 following occurred:)

5 THE COURT: Doctor, step out.

6 (Witness complies).

7 THE COURT: Everybody be seated. In the spirit of  
8 the witness' stay outside, I observed something.

9 Mr. Hackett, Mr. Constantinidis, speak to your  
10 office person because she may be a potential witness. You  
11 could speak to her here, as long as you speak to her,  
12 because I have a feeling you are going to call her.

13 (Short pause)

14 THE COURT: Do you need me to explain what I just  
15 did?

16 MR. HACKETT: Yes, that would be--

17 THE COURT: It appears that, and because, you  
18 know, the jury is supposed to observe everything that goes  
19 on in the courtroom. The young lady's name is Gina?

20 MR. HACKETT: Judy.

21 THE COURT: Uri. She was the person who took  
22 Mr. Bermejo to see the doctor on at least one occasion?

23 MR. HACKETT: Both.

24 MR. CONSTANTINIDIS: Both occasions.

25 THE COURT: She was-- she might differ as to some

1 of the testimony of the doctor, fair statement?

2 MR. HACKETT: Yes, your Honor.

3 THE COURT: That's why. I now, based upon what I  
4 observed, I have now -- and you plan to call her, I would  
5 imagine?

6 MR. HACKETT: I do believe I will be doing that,  
7 your Honor.

8 THE COURT: Bring the jury back in. Get the  
9 doctor, first.

10 MR. REILLY: We have no notice of a witness like  
11 that, so I would just object at this point.

12 THE COURT: Again--

13 MR. HACKETT: It would be in the way of rebuttal,  
14 your Honor.

15 THE COURT: Okay.

16 (Whereupon, the jury entered the courtroom and the  
17 following occurred:)

18 THE COURT: Please be seated. Continue.

19 MR. REILLY: Thank you, your Honor.

20 Q Did you take any history from the records that you  
21 reviewed, Doctor?

22 A From the records?

23 Q Yes.

24 A Yes, I did.

25 Q What was that?

1           A     I ascertained an age of 56 at the time of that  
2 evaluation. I ascertained statements of injury to the right  
3 shoulder, right elbow, the back, the right leg, the right foot,  
4 the right ankle.

5                     THE COURT: Excuse me, counsel -- go on.

6           A     I ascertained initial treatment at Elmhurst Hospital,  
7 follow-up treatment with Dr. Papathomas, and those were the  
8 essential elements. Dr. Touliopoulous had performed  
9 arthroscopic surgery on the right shoulder and that is dealt  
10 within the second report.

11          Q     Doctor, did you obtain any history from the plaintiff  
12 himself?

13          A     That really wasn't part of it, no.

14          Q     Okay.

15                     And Doctor, could you please describe the examination  
16 you conducted on Mr. Bermejo that day, May 23, 2011?

17          A     He was 5'5", weighed 180 pounds. He walked with the  
18 aid of crutches. He held the crutches by his side,  
19 predominantly used them for balance. He was examined with his  
20 shirt removed and he had a valid picture I.D..

21                     With respect to the lumbosacral spine, at that point he  
22 was noted to have moderate spasm with restriction and range of  
23 motion. He was only able to flex or bend forward some 50  
24 percent of normal. That was the equivalent of 45 degrees,  
25 extend some 15 degrees; half of normal, which is 30 degrees.

1 Bend to the side some 15 degrees, half of normal bi-laterally.

2 Q Could I stop you there?

3 A Sure.

4 Q Could you --the range of motion, could you explain what  
5 subjective is versus objective?

6 A Right. The range of motion that is taken here is what  
7 is called an active range of motion where the person is  
8 instructed to do various maneuvers. The person processes those  
9 instructions and produces a range of motion.

10 There is another type of range of motion which was not  
11 done here called passive range of motion, in which the examiner  
12 actually moves the extremity of the person's body.

13 Passive range of motion is done ordinarily on a  
14 therapeutic basis, in a person who, say, has paralysis or  
15 stroke, somebody being rehabilitated for some neurologic  
16 condition. That was not the case here. This is strictly of an  
17 observational nature in which notations were made about what the  
18 person was able to do.

19 Q So, is this subjective or objective, what you  
20 conducted?

21 A This is objective measurement with objective device,  
22 but it is under subjective control.

23 Q Meaning what?

24 A That the person processes the request and basically,  
25 performs as they see fit.

1 Q Continue, Doctor, please with the examination.

2 A The provocative test for the lumbosacral spine is a  
3 straight leg raising. The person lies with a flat leg. Leg is  
4 pulled up forward. It stretches the largest nerve in the body,  
5 the sciatic nerve. If there is a problem along the scores of  
6 the sciatic nerve, from the sciatic notch in the pelvis, all the  
7 way down from the foot, the person will complain of pain. That  
8 pain at its worse is pain that radiates from the back, all the  
9 way down the side of the leg into the bottom of the foot. That  
10 was not present.

11 Additionally, what was not present was pain radiating  
12 to the knee and no pain radiating into the thigh or buttock.

13 Q Did you examine Mr. Bermejo's right shoulder?

14 A Yes, I did.

15 Q Could you tell the jury what the results of that were  
16 on May 23, 2011?

17 A Sure. Principle motions in the shoulder are lifting  
18 upward or abduction, forward, which is flexion, back extension,  
19 internal rotation toward the chest. External is like you are  
20 throwing a ball. Those are in tact, they were normal.

21 Apprehension, which is the test where the shoulder has  
22 a tendency to dislocate was normal.

23 Provocative tests were an O'Brien's test in which the  
24 shoulder is brought inward. First, the hand is rotated outward  
25 and rotated inward. What you are looking for is tearing of the

1 back of the labrum. That was not present.

2 And the Hawkins Kennedy test, which is where the arm is  
3 brought upward, bringing the entire ball of the shoulder under  
4 the roof of the shoulder, showed no impingement at that point of  
5 getting stuck.

6 Q And Doctor, was there any examination of the right  
7 elbow?

8 A Yes, there was.

9 Q Could you tell the jury what the result of that was?

10 A No deformity in the elbow. Specifically, a person's  
11 elbow should be out flared, it should make a fairly lazy  
12 L-shaped outward formation. That was the proper formation. It  
13 was not bent or bent inward, and he had a full range of motion,  
14 that is zero, which is straight to 135 degrees, which was fully  
15 bent.

16 You should be able to turn inward with your hand 90  
17 degrees, be able to bring your palm upward 90 degrees; he was  
18 able to do that.

19 Q Was there an examination of the right knee and right  
20 leg?

21 A Right knee principally he had normal orientation. It  
22 was out flaring. He was able to bend the knee from zero to 135  
23 degrees. All stabilizers of the knee were checked. The  
24 xanthochromia ligament, postcruciate ligament and the collateral  
25 ligaments were tested and were in tact, so there were no

1 abnormalities.

2 Q And Doctor, did you also examine Mr. Bermejo's right  
3 foot and right ankle on May 23rd of 2011?

4 A I did.

5 Q Tell the jury what the results of that were.

6 A He had an incision along the back of the foot and  
7 ankle, measured 4 inches, it was puckered. It appeared to be  
8 from childhood. It was not a recent incision. Recent incisions  
9 tend to have some coloration that is pink. This was darkened  
10 and appeared to be old. There was a dorsal bunion along the  
11 hallex.

12 Q Explain.

13 A A protuberance that went on top of the hallex. The  
14 ordinary protuberance in a person who wears tight shoes is on  
15 the side. This is what is called a dorsal bunion or the top of  
16 the-- it is a more uncommon bunion, the bunion that is on top of  
17 the big toe.

18 THE COURT: I think the only word that you used so  
19 far that the jury hasn't heard in this trial is hallex.

20 Q Could you explain what that is?

21 A The hallex is the big toe.

22 Q And anything else about the right foot or right ankle  
23 examination on May 23, 2011?

24 A He wasn't able to bring the foot upward. Under  
25 ordinary circumstances an individual brings their foot upward



1 some 30 degrees. If you look at your-- if you imagine your leg  
2 being my hand, if you imagine the paper being your foot, this is  
3 what is called neutral, where you make a 90 degree angle. Under  
4 your own control you should be able to tilt the foot upward.  
5 This foot did not tilt upward. This foot stayed in this 90  
6 degree position.

7 Q Anything else besides that, Doctor, regarding the right  
8 right or ankle?

9 A He could not bring the foot downward. Ordinarily, you  
10 could bring the foot downward some 45 degrees. This foot stayed  
11 in the zero degree position.

12 Q Did you examine Mr. Bermejo's pulses in his right foot  
13 and right ankle?

14 A I did.

15 Q And did you compare them with the left foot and ankle?

16 A The pulses were in tact. There wasn't a vascular  
17 compromise.

18 Q Now, Doctor, could you please explain what a dropped  
19 foot is?

20 A Sure. A dropped foot is lack of control, principally  
21 for the tibialis anterior muscle. So you could get a drop foot  
22 in several ways; you can have the nerve that basically severs  
23 that, the perineal nerve, which takes its course from the outer  
24 aspect of your leg into your foot; it could be severed, it could  
25 be stretched, it could have something sitting on it. It could

1 be inflamed. So anything that causes problems with that nerve  
2 will cause your foot to flop down with an inability to bring it  
3 up.

4 In addition, you can have a ligamentous problem. You  
5 could actually have--

6 Q What is a ligamentous problem? Explain.

7 A You could have glass or you could have glass or a sharp  
8 object cut your tibialis anterior tendon and you will not be able  
9 to bring your foot upward.

10 THE COURT: Did everybody understand what the  
11 doctor said? He used the formal Latin, if you will, names  
12 for those parts of the lower leg. Does anybody need it to  
13 be explained more colloquially?

14 MR. REILLY: Your Honor anticipated my next  
15 question.

16 Q Could you explain what those parts of the foot you were  
17 just describing for those who aren't physicians?

18 A The thick cable that inserts on the top of the foot  
19 that actually translates the nerve impulse to actually a pull,  
20 an actual mechanical pull is a tendon called the tibialis  
21 anterior. It is thick and inserts onto the top of the foot. If  
22 it is cut, if you sever it, you will not be able to do this  
23 either, you will not be able to bring your foot upward.

24 Q Doctor, do you have an opinion within a reasonable  
25 degree of medical certainty as to whether the plaintiff had a

1 dropped foot as a result of the accident of December 18, 2008?

2 A I believe he had a condition, but it was not dropped  
3 foot.

4 Q And what, in your opinion, within a reasonable degree  
5 of medical certainty, was the condition involved?

6 A He had a contracture. He had a foot that was actually  
7 caught or stuck or that didn't move, but it was not the  
8 condition called dropped foot.

9 Q And what was the condition that you observed in your  
10 opinion within a reasonable degree of medical certainty  
11 regarding the right foot of Mr. Bermejo?

12 A He had had surgical intervention at a much earlier  
13 stage for a club foot deformity, and that involved what was  
14 called a posterior or post-lateral release.

15 Q What, in your examination and review of the examination  
16 that indicated to you that there had been a club foot surgery at  
17 some point in this man's life?

18 THE COURT: Other than history.

19 Q Review of any records?

20 THE COURT: Other than history.

21 Q And examination. Go ahead.

22 A The 4 inch puckered incision and its location along  
23 the back of the foot and ankle and the posture of the foot.

24 THE COURT: So to a reasonable degree of medical  
25 certainty, that couldn't have been any other type of

1 surgery?

2 THE WITNESS: Within a reasonable degree of medical  
3 certainty that was most likely to have been club foot  
4 surgery.

5 MR. HACKETT: Objection, your Honor, and I move to  
6 strike that answer.

7 THE COURT: Excuse me. Sustained.

8 Between when you say it is medically certain, that  
9 most likely means it is not medically certain.

10 Q Based upon the totality of your examination, the review  
11 of the ankle, the review of the records, do you have an opinion  
12 with a reasonable degree of medical certainty as to whether the  
13 plaintiff had club foot surgery at some point in his life?

14 MR. HACKETT: Objection to the form, your Honor.

15 THE COURT: Sustained.

16 MR. HACKETT: Not specific in nature.

17 THE COURT: Again, he mixed --

18 As I said, Doctor, I don't have a problem if you  
19 say most likely, but you can't say something is most likely  
20 and not medically certain. You can't say it is medically  
21 certain, then say it is not medically certain. It will  
22 have the appropriate--

23 Mr. Hackett, you could deal with it in your  
24 closing arguments. But if you can't say that to a  
25 reasonable degree of medical certainty that Mr. Bermejo, at

1       some time before he presented to you, had this club foot  
2       surgery, you got to say it like that.

3               THE WITNESS: Okay.

4               THE COURT: So what is it? Are you medically  
5       certain he had club foot surgery or is it most likely  
6       because of the placement of that surgical scar that he had  
7       club foot surgery?

8               THE WITNESS: I would say most likely.

9               THE COURT: Excuse me.

10              MR. REILLY: May I continue, your Honor?

11              THE COURT: I'm sorry.

12              MR. REILLY: Thank you, your Honor.

13       Q       And club foot surgery at some point, did that involve  
14       in the 1960s, let's say, did that involve screws or hardware of  
15       any kind?

16              MR. HACKETT: Objection. The doctor wasn't  
17       practicing medicine back then.

18              THE COURT: What?

19              MR. HACKETT: The doctor wasn't practicing  
20       medicine back in the 60s.

21              MR. REILLY: Well--

22              THE COURT: Is give me a break a proper response  
23       to your objection? Give me a break.

24              Did you think all night for that? How could you  
25       come up with an objection that is crazy? Overruled.

1 MR. HACKETT: I don't think it is crazy.

2 THE COURT: I'm sure.

3 Doctor, you use a stethoscope. Was the  
4 stethoscope created before 1960 or after 1960?

5 THE WITNESS: Long before.

6 THE COURT: Some things you just pick up as you go  
7 along.

8 MR. REILLY: May I proceed?

9 THE COURT: Please.

10 Q What was the-- what involved club foot surgery back in  
11 approximately 19-- the early to mid 1960s, Doctor?

12 A The presentation of the foot was with the foot downward  
13 and tilted inward, and the surgery was to change the foot to a  
14 neutral 90 degree position and get rid of the inward tilt. So  
15 in order to do that the outward back structures were released  
16 and that was the skin, the fibrous tissue underneath the capsule  
17 of the joint was released. And then the talonavicular joints,  
18 one of the principle joints within the foot, that was oriented  
19 at 90 degrees had to be tilted backward to 40 degrees, which is  
20 the normal tilt, and then that was held in place with a  
21 temporary smooth pin.

22 No threading would be present on the pin. The pin, one  
23 to two pins were put in diverging, and they were removed five or  
24 six weeks after the surgery.

25 MR. HACKETT: Objection, your Honor, I move to

1 strike all of that testimony. There is no record or  
2 testimony, and even the radiologist who testified  
3 yesterday, no indication that any of that happened. No  
4 indication as to how the foot presented.

5 THE COURT: I'm pretty sure that that's why  
6 Mr. Reilly put this doctor on the stand to state his  
7 opinion.

8 MR. HACKETT: It is based on all speculation.  
9 There is nothing--

10 THE COURT: If you and I said it. If he's a  
11 medical expert, that is an opinion.

12 MR. HACKETT: No proof. He is starting with a  
13 premise his foot presented in a certain way.

14 THE COURT: I am sure you are going to discuss  
15 this on your cross-examination with this witness.

16 MR. HACKETT: Very good, your Honor.

17 THE COURT: Is that a fair statement?

18 MR. HACKETT: That is fair.

19 THE COURT: Okay. Go on. So your objection is  
20 overruled.

21 Q Doctor, was any hardware or screws used in that type of  
22 surgery?

23 A No.

24 Q Doctor, do you have an opinion within a reasonable  
25 degree of medical certainty, based on your examination of the

1 plaintiff on May 23, 2011 and your review of records and history  
2 as to whether there was any causal relation between what you  
3 found regarding his foot and the accident of September 18, 2008?

4 A He had a deformity that was not causally related to the  
5 accident mentioned.

6 Q What is the reason for that?

7 A The reason for that is that it just isn't possible to  
8 have all of these changes occur in such a short period time.

9 THE COURT: What is it causally related to?

10 THE WITNESS: To the deformity in childhood,  
11 surgery for that deformity and progression through age,  
12 through various decades.

13 Q Do you have an opinion within a reasonable degree of  
14 medical certainty as to whether the plaintiff had compartment  
15 syndrome?

16 A Right. I had an opinion that the claimant did not have  
17 compartment syndrome.

18 Q What is compartment syndrome, if you could explain  
19 that, Doctor?

20 A Essentially, muscle is a structure that is 60 percent  
21 water. Skin is very flexible. When something intervenes, most  
22 notably blood within the area where muscles are located, it  
23 causes pressure in this flexible compartments. When the  
24 pressure increases close to what the diastolic pressure is of  
25 the person's circulating blood, the pressure is of significance,



1 and that damage is done to the muscle, in many cases irreparable  
2 damage. Muscle cannot take long standing pressure against it  
3 and the muscle dies. It loses its circulation and it dies.

4 THE COURT: So again, does everybody understand  
5 what the doctor just said?

6 Q Doctor, can you explain, based upon your opinion, as to  
7 whether the plaintiff did not have compartment syndrome?

8 A Right. With regard to foot compartment syndrome, while  
9 there is swelling, the principle aspects here are pain that is  
10 out of any type of proportion, and there was a presentation to  
11 Elmhurst Hospital, which is a regional trauma center, and there  
12 is a very definite protocol for people who present, and that  
13 protocol doesn't appear ever to be put in place here.

14 A person who has suspect compartment syndrome is  
15 admitted to the hospital, has a compartment syndrome monitoring  
16 protocol. Their blood pressure is continuously monitored.  
17 Their pain medication intake is continuously monitored. If, in  
18 fact, it is found that their pain medication, their pain  
19 tolerance, need for more and more medication is increasing very  
20 quickly, then immediately a pressure monitor is put into their  
21 leg, or in this case the foot, and the pressures are recorded  
22 against the blood pressures, against the diastolic pressure.  
23 And if it gets very, very close to the diastolic pressure, or  
24 the pressure rises very, very quickly, then surgery is done  
25 right away.

1           So it's a little different in the way this might be  
2 handled in other locations, than in a regional trauma center.  
3 They are very, very astute about looking for this problem.

4           Q     Doctor, just to give us an idea, what is the diastolic  
5 pressure?

6           A     Sure.

7           Q     In relation to somebody's blood pressure?

8           A     Sure. You have a systolic pressure, which is the first  
9 thrust of the heart. When the heart contracts, the blood is  
10 pushed out. But the vascular system is elastic, so there is an  
11 elastic recoil. The first thrust is caused by the heart, but  
12 the second number that is taken is actually the elastic recoil  
13 of the vascular system. That is called the diastolic. So it  
14 gets pushed, but it gets pushed into something that is flexible.  
15 And the second push is the vascular system, and that is the  
16 lower number, which is the diastolic number.

17          Q     So if it is, somebody's blood pressure is 120 over 80,  
18 which would be the diastolic?

19          A     The diastolic would be the 80.

20          Q     Thank you, Doctor.

21                Now, Doctor what would be the progression or result of  
22 childhood club foot surgery in a person when they get older?

23          A     A person with childhood club foot surgery would have a  
24 small foot. They would have a leg that wasn't really fully  
25 competent compared to the other side, assuming the other side

1 didn't have a club foot. And fifty percent of the cases it is  
2 on both sides. And the big muscles of the calf wouldn't really  
3 develop that well, so you would have a thin leg, a shortened  
4 foot. You might actually need two different sizes of shoes  
5 every time you bought footwear, and your heel would be up and  
6 your toes would be pointed down.

7 MR. HACKETT: Objection, your Honor. Move to  
8 strike that.

9 THE COURT: Why are you objecting instead of  
10 dealing with it on cross? You have your choice.

11 MR. HACKETT: I'll deal with on cross, your Honor.

12 Q Doctor, could you explain to the jury what reflex  
13 sympathetic dystrophy is?

14 A A symptom complex. The name has changed some ten years  
15 ago to a name called complex regional pain syndrome. It was  
16 named that people, particularly people with upper extremities  
17 and lower extremity structures, in many case structures that had  
18 some displacement, structures that had some nerve involvement  
19 had a symptom complex in which they had terrible pain, pain that  
20 was unbearable and they developed the following changes:

21 The hand or the foot became reddened, it could even  
22 become purple. It became extraordinarily swollen and all of a  
23 sudden the hair that was along the hands or the legs started to  
24 fall out, and what would happen would be people couldn't touch  
25 the extremity. So if you went to apply any kind of light, light

1 touch to that, the person would recoil and wouldn't allow it, so  
2 much so they couldn't wear a shoe, couldn't wear a sock. When  
3 they went to sleep they couldn't pull the bed sheets over it  
4 because just the blanket touching it would cause them terrible  
5 pain.

6 Q Doctor, in your examination, based upon your  
7 examination, do you have an opinion within a reasonable degree  
8 of medical certainty as to whether the plaintiff, Mr. Bermejo,  
9 had RSD or complex regional pain syndrome?

10 A He did have the change I described. It was not complex  
11 regional pain syndrome.

12 Q What, in your opinion, within a reasonable degree was  
13 those changes related to?

14 A Changes related to what I believe was club foot  
15 surgery.

16 Q Now, Doctor, in the reviews of the records you  
17 reviewed--

18 THE COURT: Specifically, what about a 40 year old  
19 club foot surgery produced symptomology similar to RSD?

20 MR. REILLY: I don't know if it is symptomology.

21 THE COURT: He said he had the symptoms, but he  
22 related them to the club foot surgery.

23 THE WITNESS: I don't see any of the elements of  
24 the changes in color, loss of the hair appendages, the  
25 swelling or the withdrawal or inability to have it, you

1 know, someone touch it. There is the noted contracture,  
2 which is something separate.

3 Q Doctor, in the records you reviewed in preparation for  
4 your May 23rd, 2011 examination of the plaintiff, did you review  
5 the reports of Dr. Papathomas of University Orthopedics?

6 A Yes, I did.

7 Q Doctor, back on March 14, 2013, did you conduct another  
8 examination of the plaintiff?

9 A Yes, I did.

10 Q Was that for a particular reason?

11 A Yes.

12 Q What was that reason?

13 A There had been an intervening right shoulder  
14 arthroscopic procedure by Dr. Touliopoulos.

15 Q Did you review the operative report of  
16 Dr. Touliopoulos regarding right shoulder surgery?

17 A Yes, I did.

18 Q When was that right shoulder surgery conducted, Doctor?

19 A 9/20/12.

20 Q Doctor, could you explain what a partial under surface  
21 tear of the subscapularis tendon and supraspinatus tendon of the  
22 right shoulder is, best as you could tell us in plain language.

23 A Basically, you have four cables that assist you in both  
24 bringing the shoulder upward and bringing the shoulder across.

25 The subscapularis tendon is not only one of the rotator

1 cuff tendons, but it also centralizes the biceps or major muscle  
2 that helps you lift.

3           So out of the four tendons, the notation here is that  
4 the bottom of the tendon has wear and the bottom of the tendon  
5 will have wear when there is degeneration because it rubs  
6 against bone. The top of the tendon complex rubs against  
7 something called a bursae or a sock. It is sometimes filled  
8 with fluid, but it is soft tissue. It really isn't a friction  
9 phenomenon on top, but the bottom of the tendon rubs against  
10 bone and has a friction phenomenon.

11       Q     And regarding this particular plaintiff, do you have an  
12 opinion within a reasonable degree of medical certainty as to  
13 whether the partial under surface tears in those two tendons  
14 were related to the accident of the December 8, 2008?

15       A     They were related to friction or degeneration, but not  
16 related to the accident.

17       Q     And would that be something that is common in somebody  
18 who works with their hands, overhead work?

19       A     Yes, and age related, as well, that the tendons undergo  
20 this type of change as a person ages, with, you know, acceptance  
21 that a large percentage of these are acquiescent and present in  
22 middle aged people.

23       Q     What is a Bankart lesion?

24       A     A Bankart lesion is an evulsion or pulling away of the  
25 bottom portion of the cup of the shoulder. What it involves, a

1 little piece of bone, and then the lip of the shoulder and the  
2 significance is that it is a hallmark for dislocation, either a  
3 discoloration that has occurred or dislocation that potentially  
4 can occur.

5 Q Was a Bankart lesion found pursuant to what is located  
6 in Dr. Touliopoulous's report concerning the right shoulder  
7 surgery?

8 A Bankart lesion was not found and Dr. Touliopoulous's  
9 note makes it certain that not only was the Bankart lesion not  
10 found, but the contusing lesion, the HAGL lesion in just where  
11 soft tissue pulls off and creates the same problem was not  
12 found, as well.

13 Q Do you have an opinion within a reasonable degree of  
14 medical certainty as to the significance or absence of those two  
15 lesions?

16 A That that precludes dislocation or subluxation or  
17 coming out of the socket as a pathology.

18 Q Do you have an opinion with a reasonable degree--

19 THE COURT: An objection?

20 MR. REILLY: Sorry about that, your Honor. I  
21 withdraw that.

22 Q Now, Doctor, in your review of Dr. Touliopoulous's  
23 report, was there generalized synovitis noted?

24 A He noted that, yes.

25 Q And what is generalized synovitis? Explain it as best

1 as you can.

2 A Inflammation. Ordinarily the inflammation causes some  
3 redness in the soft tissues, also causes fluid production.

4 Q Based upon your examination of the plaintiff, did you  
5 have an opinion within a reasonable degree of medical certainty  
6 as to whether that generalized synovitis was related to the  
7 accident of December 18, 2008?

8 A Yes, that the generalized synovitis was not.

9 Q Why is that?

10 A There had been notations that various people have  
11 looked for various symptoms of systemic arthritis, inflammatory  
12 changes, so the thought process was that potentially this could  
13 be due to another cause, not particularly traumatically induced.

14 The various treating doctors, I believe a  
15 rheumatologist--

16 THE COURT: Is your opinion based upon your  
17 opinion or is that your opinion?

18 THE WITNESS: It is my opinion, which is also in  
19 part based on the fact that other physicians were looking  
20 in that direction.

21 Q Doctor, what is a capsule plication?

22 A Capsule plication, as stated in the operative note and  
23 what is stated by Dr. Touliopoulous was the front and back of a  
24 capsule was tightened.

25 Q What is the capsule?



1       A     The capsule is the surrounding tissue that holds the  
2 joint in place. So the joint -- first of all, the cartilage in  
3 the joint is avascular, doesn't have a blood supply. A neuro--  
4 doesn't have a nerve supply and requires nutrition like every  
5 part of the body, every cell requires nutrition. So it gets its  
6 nutrition from fluid, from the joint fluid, and the joint fluid  
7 cannot be all over the place, it has to be contained.

8           So the capsule is the sleeve. It is the covering. It  
9 is the soft shell that holds everything together, principally  
10 with the fluid, could be contained in this balloon-like  
11 structure.

12       Q     Was a capsule plication performed on Mr. Bermejo back  
13 on September 20th, 2012?

14       A     Yes, and that is stated by Dr. Touliopoulous very  
15 clearly.

16       Q     And do you have an opinion within a reasonable degree  
17 of medical certainty as to whether that was related to the  
18 accident of December 18, 2008?

19       A     I do.

20       Q     What is that?

21       A     That there are really two possibilities. Capsule  
22 plication can be done for deficiencies due to trauma, and that  
23 would be heralded by a Bankart lesion, which was not present and  
24 its soft tissue counterpart. The HAGL lesion was not present.  
25 Or it could be done for a deficiency in the ligamentous

1 structure of the capsule.

2 THE COURT: Excuse me, do you object?

3 MR. HACKETT: Not right now, I'm going to--

4 THE COURT: Because I'm not sure that answer was  
5 responsive to that question.

6 Q Was there any indication, based upon your review of the  
7 report and your examination, that the capsule plication was  
8 related to the accident of December 18, 2008?

9 A Yes, and there was not.

10 Q Now, Doctor, what is the subacromial space regarding  
11 the shoulder?

12 A The space between the roof and that is called the  
13 acromion and the rotator cuff tendons. So there is a space.  
14 That space gets smaller as you bring your arm overhead. It is  
15 wider as you have your arm by the side.

16 There is a sack of fluid called the subacromial bursae  
17 that sits right on top of the rotator cuff and occupies about 60  
18 percent of the space.

19 Q And Doctor, was an examination done of the subacromial  
20 space in the operation by Dr. Touliopoulous?

21 A Yes, it was.

22 Q And what did that reveal?

23 A There were pressure changes which he called  
24 hypertrophic changes.

25 Q What does hypertrophic changes mean?

1           A     Means production of bone or calcification that are  
2     presenting and obliterating some of the subacromial space.

3           Q     In your opinion, Doctor, within a reasonable degree of  
4     medical certainty, was that finding of subacromial space related  
5     to the accident of December 18, 2008?

6           A     No.

7           Q     Why is that?

8           A     Because production of those changes occurs over a long  
9     period of time. It tends to be a relatively slow process.  
10    There is no weight bearing going on in the shoulder. Weight  
11    bearing makes these processes go a little quicker. It is a  
12    recognized degenerative process.

13          Q     Is that type of symptomology something that would be  
14    seen, Doctor, with somebody who does overhead work in  
15    construction?

16          A     Yes.

17          Q     Now, Doctor, could you tell us, did you conduct an  
18    examination of Mr. Bermejo's right shoulder on March 4, 2013?

19          A     Yes, I did.

20          Q     And what did that reveal?

21          A     As far as the right shoulder he had well healed  
22    arthroscopic portals or punctures. There was no ongoing  
23    swelling. It wasn't red. There were no skin changes. He had a  
24    deficit in what is called abduction or holding your shoulder by  
25    the side in a trajectory that goes overhead. It should be 170

1 degrees, he only had 165 degrees.

2           The remainder of his range of motion, flexing,  
3 extending, internally rotating, externally rotating were in  
4 tact. His principle nerve that supplies the deltoid muscle was  
5 in tact.

6           Q     What is the deltoid muscle?

7           A     The large three part cowl of muscle that covers the  
8 whole front of the shoulder. And the principle provocative  
9 test, such as an O'Brien's test for the labrum; Hawkins Kennedy  
10 for impingement, lift off for the in tact subscapularis, and the  
11 various positions of the rotator cuff done through the  
12 Hornblower's test, all of those were in tact.

13          Q     Doctor, I'm going to show you a photograph that was  
14 taken. I want to you assume it was taken on January 6, 2009.  
15 The accident was December 18, excuse me, December 18, 2008. It  
16 is the Plaintiff's Exhibit 5 in evidence.

17                   MR. REILLY: May I approach, your Honor?

18                   THE COURT: Yes, you may.

19                   MR. REILLY: Thank you, Judge.

20          Q     Doctor, have you seen this photograph before?

21          A     That was an included photograph, yes.

22          Q     And Doctor, looking at this photograph taken that date,  
23 after that period of time after the accident, do you have an  
24 opinion within a reasonable degree of medical certainty as to  
25 whether the appearance of this gentleman's right foot and leg

1 were related to the accident of December 18, 2008?

2 A Well, it clearly has a deformed posture that it was not  
3 causally related to the accident.

4 Q Why is that?

5 A It is a particular constellation of lack of development  
6 of the back muscles here, tilting of the foot with the side  
7 being present and the area of the bottom foot that it is  
8 characteristic of surgical treatment for club foot.

9 Q Would those things that you describe develop in a  
10 period of time between December 18, 2008 and January 6, 2009?

11 A They would not.

12 Q Doctor, I also want you to assume that the plaintiff  
13 testified he fell from a height of approximately five feet onto  
14 his palms and the bottom of his feet.

15 Do you you have an opinion within a reasonable degree  
16 of medical certainty if that would cause fractures of the  
17 metatarsals?

18 A I do.

19 Q What is that?

20 MR. HACKETT: Objection, your Honor. May we  
21 approach?

22 THE COURT: Sure.

23 (Whereupon, an off the record bench conference  
24 took place.)

25 THE COURT: I'm going to give the jury a rest. Go

1 upstairs. Doctor, step out of the room.

2 THE WITNESS: Sure.

3 (Whereupon, the jury exited the courtroom and the  
4 following occurred:)

5 MR. HACKETT: I object.

6 THE COURT: Overruled.

7 (Whereupon, a short recess was taken, after which  
8 the following occurred:)

9 MR. REILLY: Regarding the possibility the  
10 plaintiff would call this young lady from the office, at  
11 the very least, your Honor, I maintain my objection, as I  
12 did before, but at the very least I would like to talk to  
13 her to see what she is going to say.

14 THE COURT: You could try to talk to her; if she  
15 says no, she says no.

16 MR. REILLY: Okay. Again, I'm going to note my  
17 objection in anticipation she may be called.

18 THE COURT: Again, sir, I only observed her  
19 reaction to a certain answer the doctor gave. Based on  
20 that I assume-- because this isn't my first day doing this,  
21 that she was going to have a discussion with  
22 Mr. Constantinidis, with Gus or Mr. Hackett and she could  
23 become a witness. Again, counsel, is that a fair  
24 observation on my part?

25 MR. HACKETT: That is, your Honor.

1 THE COURT: So, if Mr. Constantinidis or  
2 Mr. Hackett wants to call that witness, then I saw what she  
3 was doing. You want me to keep her in the room?

4 MR. REILLY: Well, I didn't think of that, to be  
5 honest, but now that you are on that point, I think  
6 Mr. Hackett was present there also. I don't know where we  
7 are going with this whole issue.

8 THE COURT: He is an attorney.

9 MR. REILLY: Also a witness and the problem is I  
10 object to the fact-- I don't think there was any issue  
11 brought up about this previously, so that is why I maintain  
12 my objection, at the very least I should be able to talk to  
13 her, obviously --

14 THE COURT: I'll bring her in. Bring her in.

15 MR. REILLY: Are they going to call her, I don't  
16 know. It maybe a moot point.

17 (Whereupon, Reporter Sheila Robinson relieved  
18 reporter Lorraine Marinazzo.)  
19  
20  
21  
22  
23  
24  
25

## PROCEEDINGS

1 THE COURT: Ma'am, step up. Raise your right-hand.

2 (Whereupon, the witness was sworn in at this time by  
3 the Court and testified as follows:)

4 THE COURT: State your name and working address for  
5 the record.

6 THE WITNESS: Yury Ramirez, 35-01 30th Avenue, Suite  
7 200, Long Island City, New 11103.

8 THE COURT: Now, you are a potential witness in this  
9 case now. You have been sitting here throughout the trial  
10 since you are employed by plaintiff's counsel. But now  
11 based upon at least one answer that the current witness  
12 gave you're a potential witness, correct?

13 THE WITNESS: Correct.

14 THE COURT: You have the option, if you want to, to  
15 talk to Mr. Mendelsohn and/or Mr. Reilly. If you do not  
16 want to talk to them you do not have to talk to them. Do  
17 you want to talk to them?

18 THE WITNESS: That's fine.

19 THE COURT: You'll talk to them?

20 THE WITNESS: I will.

21 THE COURT: Okay so Mr. Reilly, Mr. Mendelsohn she  
22 will talk to you at your leisure.

23 MR. REILLY: Could I just finish with the Doctor?

24 THE COURT: You can finish with the doctor and we'll  
25 have Mr. Hackett finish with the doctor and then I'm sure



## PROCEEDINGS

1       that you or one of your colleagues could talk to this  
2       witness, okay?

3               MR. REILLY: I appreciate it, Ms. Ramirez and  
4       Mr. Hackett and Mr. Constantinidis.

5               THE COURT: Thank you. They can be there. Bring  
6       them in. Thank you, Ms. Ramirez. Step outside the  
7       courtroom then. Bring the jury in.

8               COURT OFFICER: All rise. Jury entering.

9               (The jury entered the courtroom and the following  
10       occurred:)

11              THE COURT: Okay, everybody have a seat. Mr. Reilly,  
12       the last question, ladies and gentlemen, while I overruled  
13       Mr. Hackett's objection Mr. Reilly has withdrawn the  
14       question.

15              MR. REILLY: That's correct, your Honor, thank you  
16       and I have no further questions for the doctor. Thank  
17       you, Doctor. Thank you, your Honor.

18              THE WITNESS: Thank you.

19              THE COURT: Do you wish to add something?

20              MR. MENDELSON: Not at this time, your Honor.

21              THE COURT: And again for the record this witness is  
22       called on behalf of Mr. Mendelson's client and Mr.  
23       Reilly's client, is that correct, Gentlemen?

24              MR. MENDELSON: Yes, your Honor.

25              MR. REILLY: That's correct, your Honor.

## PROCEEDINGS

1 THE COURT: Mr. Hackett, you may inquire.

2 MR. HACKETT: Thank you, your Honor.

3 THE COURT: While he's getting his stuff together let  
4 me ask the first question. Doctor, you're being  
5 compensated for your efforts today?

6 THE WITNESS: Yes.

7 THE COURT: What rate are you being compensated?

8 THE WITNESS: \$7,700.

9 THE COURT: \$7,700?

10 THE WITNESS: Yes.

11 THE COURT: Okay, Mr. Hackett continue.

12 MR. HACKETT: Thank you, your Honor.

13 CROSS EXAMINATION

14 BY MR. HACKETT:

15 Q Good morning, Doctor.

16 A Good morning.

17 Q Now, Doctor, you're being compensated today and we  
18 were talking a little bit about the work that you do for  
19 defendants and the work that you do for plaintiffs in regard to  
20 testimony, is that correct?

21 A Right.

22 Q And, Doctor, you're familiar with the verdict  
23 searches that are performed?

24 A Right.

25 Q On expert witnesses?

## DR. KATZ - DEFENDANT - CROSS

1 A Sure.

2 Q And Doctor, would it surprise you that there is in  
3 excess of a hundred verdict searches with your name on it?

4 MR. REILLY: Objection to that, your Honor, with the  
5 verdict searches.

6 THE COURT: Well, I gave the jury the instruction the  
7 other day.

8 MR. REILLY: That's right, your Honor.

9 THE COURT: On how to deal with verdict searches.

10 MR. REILLY: That's right.

11 Q And of those, Doctor, would you be surprised on three  
12 occasions you testified for plaintiffs?

13 A I'd be surprised because the verdict search  
14 information has been used by other attorneys and they came up  
15 with a much higher number.

16 Q And now, Doctor, approximately you told the jury that  
17 approximately 40 percent of your practice is dedicated to  
18 coming and reviewing cases and testifying at trial, is that  
19 correct?

20 A Right.

21 Q And, Doctor, what does that translate to in the way  
22 of money? How much money do you earn on that 40 percent?

23 A It would be in the range of 240 to 275,000.

24 Q And, Doctor, have you made more money in the past  
25 when you've testified, you know, in certain years? Have you

## DR. KATZ - DEFENDANT - CROSS

1 made significantly more money?

2 MR. REILLY: Objection.

3 MR. MENDELSON: Objection.

4 THE COURT: Grounds?

5 MR. REILLY: Form and context.

6 THE COURT: Has he made money in the past for  
7 offering testimony, what's wrong with that?

8 MR. REILLY: What does that mean? More money as  
9 opposed to what?

10 THE COURT: As opposed to less money.

11 MR. REILLY: I would object, your Honor.

12 THE COURT: Overruled.

13 Q And in 2005 you actually made \$350,000 reviewing  
14 records and testifying, isn't that true?

15 A 65121right.

16 Q And, Doctor, you would not consider yourself an  
17 independent medical examiner, isn't that true, in this  
18 particular case?

19 A I don't use that term.

20 Q Because you actually have been retained by a  
21 particular side, is that fair?

22 A That's one element. There's another element to it as  
23 well.

24 Q And, in fact, there are some doctors who would be  
25 considered completely independent, would they not, in certain

## DR. KATZ - DEFENDANT - CROSS

1 cases?

2 A That's right.

3 Q And a doctor that has no connection with the  
4 plaintiff's attorneys and no connection with the defendant's  
5 attorneys would be considered an independent physician; is that  
6 correct?

7 A That's correct.

8 Q And, Doctor, you were given a couple of reports from  
9 some of these independent doctors who examined Mr. Bermejo  
10 through or as part of the Workmen's Compensation procedure, is  
11 that correct?

12 A That's correct.

13 MR. REILLY: Objection, your Honor.

14 THE COURT: Grounds?

15 MR. REILLY: May we approach?

16 THE COURT: Sure. Off the record.

17 (Whereupon, a discussion is held off the record at  
18 the bench.)

19 THE COURT: Back on the record.

20 MR. REILLY: Exception respectfully, your Honor.

21 MR. MENDELSON: Join.

22 THE COURT: The objection's overruled. The  
23 defendants have an exception. Continue, Mr. Hackett.

24 MR. HACKETT: Thank you, your Honor.

25 Q So those doctors would truly be independent, would

## DR. KATZ - DEFENDANT - CROSS

1 they not, Doctor?

2 A In what respect?

3 Q Well, not being necessarily on one side or the other.

4 A Those were doctors who examined from the Workmen's  
5 Compensation perspective?

6 Q Yes.

7 A I think the same issue pertains with regard to them  
8 as a doctor such as myself.

9 Q Okay so they, in effect, won't be more on the  
10 defendant's side of the table, correct?

11 A Well--

12 MR. HACKETT: Well, I will rephrase the question,  
13 your Honor. I'll withdraw that question.

14 Q Now, Doctor, you actually didn't provide any medical  
15 treatment to Mr. Bermejo, correct?

16 A Right.

17 Q And you saw him on two occasions, correct?

18 A Correct.

19 Q On one occasion you saw him and you examined most of  
20 his body, fair statement, the first time you examined his  
21 shoulder?

22 A A larger number of areas, yes.

23 Q And that you examined his foot on that occasion?

24 A Right.

25 Q And on the second occasion when you saw Mr. Bermejo

## DR. KATZ - DEFENDANT - CROSS

1 you examined him primarily for the shoulder, correct?

2 A Right.

3 Q And you didn't examine his foot on that second  
4 occasion, correct?

5 A Correct.

6 THE COURT: Keep your voice up, Doctor.

7 THE WITNESS: Yes, thank you.

8 Q Doctor, on that first exam I believe you said you  
9 took 45 minutes; is that correct?

10 A Right.

11 Q And on that second exam of the shoulder how long did  
12 that take?

13 A That's uncertain.

14 Q Uncertain?

15 A I don't think I have it recorded. No, I don't think  
16 I have it recorded, no. I don't think it's recorded.

17 Q Or would you say it's more or less than 30 minutes?

18 A I don't really recall at this point.

19 Q Do you have a custom and practice when you're doing a  
20 shoulder exam as to how long you generally take?

21 A I don't really have, you know, an allocated time.

22 Q Well, would you believe in at light of your  
23 experience that it would be more or less than 15 minutes?

24 A Quite frankly, I don't know.

25 THE COURT: Excuse me, Doctor, I cannot accept an I

## DR. KATZ - DEFENDANT - CROSS

1 don't know. You have been doing this for awhile. I will  
2 have to insist on what your custom and practice would be  
3 as to what type of, the length of an exam of this type.

4 THE WITNESS: I think in the range of between ten and  
5 20 minutes would be appropriate.

6 Q And, Doctor, in the prior occasions when you've  
7 testified has the time that you've actually spent examining a  
8 plaintiff ever been called into question?

9 A No.

10 Q Doctor, do you recall testifying in a case of Miller  
11 versus Tacopina in Manhattan back on January 18th, 2005?

12 A I don't remember that.

13 Q Do you recall on that particular case being asked if  
14 the examination had actually taken only three minutes?

15 A I don't remember that.

16 Q And well could your examination have taken two to  
17 three minutes, Doctor?

18 A I would seriously doubt that.

19 Q And but it could?

20 A I would doubt it. I don't think that's really  
21 potentially possible.

22 Q Because if it took that short of a period of time  
23 that would actually be not really a good exam, would it,  
24 Doctor?

25 A No, I wouldn't say that. I would say that it



## DR. KATZ - DEFENDANT - CROSS

1 couldn't take three minutes because there'd been detailed  
2 measurements done, including measurements for atrophy,  
3 measurements for force generation, all of these things take  
4 time.

5 Q And so if, in fact, it did take only two or three  
6 minutes that would call into question the quality of your exam,  
7 would it not, Doctor?

8 MR. REILLY: Objection. Relevancy.

9 THE COURT: Overruled.

10 A Yeah, I don't think the quality of the exam has been  
11 called into question.

12 Q Well, what if it took one minute? Would that fall  
13 into question the quality of your exam?

14 MR. REILLY: Objection.

15 THE COURT: Overruled.

16 A I think that would call into question the person  
17 that's making that allegation, the veracity of that person.

18 Q You took 45 minutes on the first examination. Is  
19 that a normal amount of time that you would expend on an  
20 examination of an individual?

21 A That's within a range of a new patient evaluation or  
22 a new evaluation where the person is unfamiliar, yes, it is.

23 Q And now, how many times a day do you do these  
24 physical examinations that result in \$250,000 a year?

25 A Not necessarily done everyday on a weekly basis.

## DR. KATZ - DEFENDANT - CROSS

1 There are some 15 evaluations that comes to about six to 700  
2 per year.

3 Q And so if you're spending 45 minutes on a patient per  
4 examination then you're spending approximately 15 to 20 hours a  
5 week just doing exams of these individuals?

6 A Right.

7 Q And when you first saw Mr. Bermejo before you saw him  
8 you obtained some records from counsel?

9 A Correct.

10 Q And you have listed those records in your report, is  
11 that correct, Doctor?

12 A Correct.

13 Q Were there any other records that you received other  
14 than what's listed in your report?

15 A No. The records that are reviewed are extensively  
16 listed and any records that are ever submitted are listed.  
17 There appear to be other records in the second report and those  
18 are independently listed.

19 Q And those were again records pertaining to the  
20 shoulder, correct?

21 A For the most part that's right.

22 Q Well, was there anything in the second that didn't  
23 pertain to the shoulder?

24 A Well, some of it I think, as you brought out, were  
25 consultative evaluations that were by various consulting

## DR. KATZ - DEFENDANT - CROSS

1 physicians, there's consulting physicians who primarily are a  
2 physiiatric and rehabilitative nature.

3 Q May I see that portion of the record, Doctor, that  
4 you're referring to?

5 A Sure, we had Dr. Vlattus.

6 Q Is that from the first report or the second report?

7 A That's on March 4, 2013.

8 Q Okay.

9 THE COURT: Do you have those notes, Mr. Hackett?

10 MR. HACKETT: I don't know if I have that report,  
11 your Honor. I think I only received--

12 THE COURT: Doctor, I'm going to order you to take a  
13 copy of what the doctor has in his hand. Do you have any  
14 other notes or any other reports?

15 THE WITNESS: No.

16 THE COURT: Okay, could you make four copies of what  
17 the doctor has in his hand. Thank you.

18 Q And in your other hand is the prior report, Doctor?

19 A Correct.

20 THE COURT: You have a copy of that?

21 MR. HACKETT: Yes, I do, your Honor.

22 THE COURT: Okay, why don't you continue with that  
23 while we make copies.

24 Q Doctor, in looking at the first report and the  
25 records that you relied upon those are the records that you

## DR. KATZ - DEFENDANT - CROSS

1 obtained the history pertaining to Mr. Bermejo, correct?

2 A Right.

3 Q And, Doctor, you'd agree that you used that history  
4 then in making your or forming your opinions that you've  
5 testified today?

6 A Partially.

7 Q And well, would you agree with me that, in fact, the  
8 history of a patient is a very significant part of the opinions  
9 and diagnosis that you make?

10 A It's part of it, yes, it is.

11 Q I'm not asking you if it's a part. I'm asking you if  
12 it's a significant part.

13 A It's part of it, yes, it is.

14 THE COURT: Is it significant, yes or no, Doctor?

15 A I think it may very well be in the 40 to 50 percent  
16 range of what's done so it may borderline on significance.

17 Q Well, Doctor, do you recall testifying that you  
18 believe that--

19 THE COURT: Give me the case and the judge and the  
20 county.

21 Q Doctor, do you recall testifying back in March of  
22 2006 on a case of Edwards versus Carrapus in Bronx county?

23 A No.

24 THE COURT: Before what judge?

25 MR. HACKETT: Before Honorable Benjamin Verbati.

## DR. KATZ - DEFENDANT - CROSS

1 THE COURT: Okay.

2 Q Do you recall giving this answer to this question,  
3 Doctor, on Page 16, Line 19: And, Doctor, 70 percent of making  
4 a correct diagnosis 70 percent of that is getting an accurate  
5 history, right? ANSWER: Right. Do you recall giving that  
6 answer to that question?

7 A No.

8 Q Well, Doctor, after hearing that do you have an  
9 opinion as to what percent or how significant it is to get a  
10 proper history before you come to Court and tell a jury what  
11 your impressions are or your diagnosis?

12 A I think it's in that range between 40 and 70 percent  
13 and I think the context for some of those questions is where  
14 false information has been given and I don't believe that there  
15 was false information in the record that were reviewed where  
16 this history was obtained.

17 Q And, Doctor, in the records that you were provided  
18 were you provided with the films themselves?

19 A The actual films were not provided.

20 Q And did you think that was important at all for you  
21 to actually look at the films before coming in front of this  
22 Court and this jury and talking about your impressions or your  
23 opinions, yes or no?

24 A No, a radiologist had reviewed them.

25 Q And, Doctor, in that regard there was a radiologist

## DR. KATZ - DEFENDANT - CROSS

1 that came in here for the defendants, Dr. Feit, and you saw his  
2 reports, correct?

3 A Right.

4 Q And then there were also radiologists that actually  
5 were involved in Mr. Bermejo's treatment, is that correct?

6 A Right.

7 Q And you reviewed those records too, correct?

8 A Can you be specific about those radiologists?

9 Q I'm sorry?

10 A Can you be specific with regard to what those  
11 radiologist's names were?

12 THE COURT: Well, Doctor, you tell me who those  
13 radiologists were.

14 A Let's see, I believe that they are included in the  
15 Elmhurst Hospital Center but I don't have their name, although  
16 I did have the record of 12/22/08.

17 Q Well, how about the, other than the Elmhurst Hospital  
18 record--

19 A Right.

20 Q -- did you review the MRI of a Charles Demarco, his  
21 report?

22 A Well, Charles Demarco is an orthopedic surgeon. He  
23 is not a radiologist, I believe.

24 Q No, he's a radiologist.

25 A He's a radiologist? Let's see what that is. Was

## DR. KATZ - DEFENDANT - CROSS

1 that in the first report or the second report?

2 Q I don't know where you might have not gotten it.

3 A Because what I'm noting is that Dr. Gray--

4 Q No, just sticking to this one. Let's stick with one  
5 at a time.

6 A Okay, let's take one at a time. March 4, 2013 report  
7 of Charles Demarco, M.D. is listed on 9/25/12 so the answer is  
8 affirmative.

9 Q And you're saying that that's the report of 9/25/12?

10 A Correct.

11 Q And what about the report of January 8, 2009?

12 A No, I only see the report of 9/25/12 being listed for  
13 Dr. Charles Demarco.

14 Q Okay and what about the MRI reports from Long Island  
15 College Hospital?

16 A I searched for them. That's why I state that the  
17 actual radiologist name is not listed for MRI CT of Queens but  
18 there are reports for 7/23/11 and there are reports from the  
19 same facility for 11/8/11.

20 Q Did you get any reports pertaining to March of 2009?

21 A Yes, a report of Middle Village Radiology 1/7/09 and  
22 that report was amended at Middle Village Radiology on 1/8/09.  
23 It was reread a day later. They refer the reports of Middle  
24 Village Radiology for the right shoulder of 2/6/09.

25 Q My question isn't that. My question is in March of

## DR. KATZ - DEFENDANT - CROSS

1 2009. Did you get those MRI's?

2 A Which anatomic site specifically?

3 Q The foot.

4 A Yes, I did. There was an MRI report of the right  
5 foot of Long Island College Hospital of 3/5/09.

6 Q Okay. And did you get the MRI report dated July 23rd  
7 of 2011. That was by a Dr. Steven Winter and John Atahs,  
8 A-T-H-A-S?

9 A July 23rd of 2011?

10 Q Yes.

11 A Right. While I did not have their names it was an  
12 MRI of the right hind foot of MRI CT Associates of Queens. It  
13 matches that day of service 7/23/11.

14 Q Great. And that, Doctor, if the opinions that you  
15 read of Dr. Feit differed from the opinions of the radiologist  
16 that were actually involved in his treatment did you rely on  
17 Dr. Feit's as opposed to the treating radiologist or did you  
18 rely on the radiologist who were actually involved with his  
19 treatment in forming your opinions?

20 MR. REILLY: Objection, your Honor.

21 THE COURT: Grounds?

22 MR. REILLY: There's no indication that those  
23 findings necessarily were different in those reports.

24 THE COURT: Overruled.

25 MR. REILLY: Exception.



## DR. KATZ - DEFENDANT - CROSS

1 MR. MENDELSON: Join.

2 A Yes, I think the use of those reports were the  
3 synthesis of the various reports not a opinion based on one or  
4 the other.

5 THE COURT: Excuse me, what does that mean?

6 A It means that all the information was used in total  
7 and nothing was precluded.

8 Q And, Doctor, did you find any differences between Dr.  
9 Feit's reports and the treating radiologist's reports?

10 A I don't remember there being significant differences.

11 Q Doctor, in the records that were provided did you  
12 receive the records of Dr. Roman?

13 A What was the date of that?

14 Q His records were in November of 2008 before the  
15 accident.

16 A Dr. Roman? I don't recall nor do I see a name by the  
17 name of Dr. Roman here.

18 Q And there's no reference in your record as receiving  
19 any records pertaining to Dr. Roman, is that correct?

20 A Correct.

21 Q And you earlier based some of your testimony that  
22 there was a consideration of an inflammatory immune condition  
23 and when you were discussing Mr. Bermejo's shoulder, is that  
24 correct?

25 A Right.

## DR. KATZ - DEFENDANT - CROSS

1 Q And one of the things you were considering was  
2 rheumatoid arthritis, correct?

3 A Among many other considerations.

4 Q But, in fact, did you receive any documents from  
5 defendant's counsel regarding any testing pertaining to  
6 rheumatoid arthritis?

7 A I did not see that, no.

8 Q Doctor, what is a rheumatoid factor?

9 A Rheumatoid factor is an antibody that is found in  
10 approximately 85 percent of patients who have rheumatoid  
11 arthritis.

12 Q And, Doctor, would you have been interested in  
13 obtaining a rheumatoid factor result in regard to Mr. Bermejo?

14 A Certainly if I was treating him I would be.

15 Q And if that was found to be normal would that be  
16 something that would have -- you would of incorporated in your  
17 opinions today?

18 A No, I don't believe that the rheumatologic aspect is  
19 really the focus.

20 Q Okay so when you said that earlier today it really  
21 didn't have anything to do with this case?

22 A No, it was a consideration relative to a hypothetical  
23 question of how you get--

24 Q Well, you were talking about--

25 THE COURT: Excuse me, let him finish.

## DR. KATZ - DEFENDANT - CROSS

1           A     How you get synovitis and the answer was there are  
2 inflammatory causes of synovitis and that obviously is part of  
3 inflammatory conditions.

4           Q     Right but in this case that doesn't come into play,  
5 correct, if the rheumatoid factor is normal?

6           A     Rheumatoid arthritis doesn't come into play but  
7 potentially other inflammatory conditions might. It's  
8 uncertain.

9           MR. HACKETT: Excuse me just a moment, your Honor.

10          THE COURT: Yes.

11          Q     Doctor, what reports did you get regarding Dr.  
12 Castro, the Workmen's Comp doctor -- I'm sorry, Corso, Dr.  
13 Corso?

14          A     There was a report of Dr. Corso that was dated  
15 5/13/10.

16          Q     And did you get any other reports of Dr. Corso?

17          A     No. He was listed as a single report of 5/13/10.

18          Q     Did you get the report of March 3rd, 2011?

19          A     From Dr. Corso?

20          Q     Yes.

21          A     No.

22          Q     Did you get the report of Dr. Corso dated July 21,  
23 2011?

24          A     No.

25          Q     Did you get a report of Dr. Corso dated February 2nd,

## DR. KATZ - DEFENDANT - CROSS

1 2012?

2 A No.

3 MR. HACKETT: Your Honor, I offer these three reports  
4 of Dr. Corso into evidence at this time.

5 MR. REILLY: Objection, your Honor.

6 THE COURT: Grounds?

7 MR. REILLY: There's been no subpoena of them,  
8 there's no being allowed in because they didn't call the  
9 doctor. They didn't exchange him at this point.

10 THE COURT: Let's go in the back.

11 (Whereupon, a discussion is held on the record in  
12 Chambers as follows:)

13 THE COURT: Okay, you want to offer?

14 MR. HACKETT: Well, what's happened previously is  
15 that there have been doctors records that have been  
16 entered into evidence so and one of them is Dr. Corso's.  
17 So these are just subsequent reports of Dr. Corso.

18 MR. REILLY: Well, I'm sorry, Mr. Hackett. Go ahead,  
19 finish.

20 MR. HACKETT: That's it.

21 MR. REILLY: Okay. Well, I believe what Mr. Hackett  
22 is talking about is part of Dr. Gray's records there was  
23 some records or reports from Dr. Corso. Now, we talked  
24 about that perhaps redacting those, believe me, and I  
25 think under the circumstances the back door in this doctor

## DR. KATZ - DEFENDANT - CROSS

1 who quite frankly if he did come in I wouldn't mind  
2 cross-examining him talking about history and looking at  
3 records but he's not here and they exchanged him as an  
4 expert and they exchanged the other guy as Pataro as an  
5 expert. They're not here so why should they be back  
6 doored now for them to avoid unpleasantness in their  
7 treating physicians records.

8 MR. HACKETT: Well--

9 MR. REILLY: That's my problem with this and if it  
10 does come in you will hear it in my summation. You know  
11 that as well as I do.

12 THE COURT: Well if he is offering it and you're  
13 going to pound him on summation what do you need me for?

14 MR. REILLY: But why should I allow the rules of  
15 evidence to be demolished here? That's my fall back.

16 THE COURT: It wouldn't be the first time in this  
17 trial.

18 MR. REILLY: Well, your Honor, I don't really think  
19 that is the case. For the most part I think we have been  
20 careful. I know your honor wasn't crazy with some of the  
21 testimony that's going on with people taking far afield  
22 but I think for the most part we have been pretty good  
23 with that.

24 THE COURT: Gee and Dr. Katz is so centered. I can't  
25 figure out how you could offer them through Dr. Katz.

## DR. KATZ - DEFENDANT - CROSS

1 MR. HACKETT: As I said, some of it has been going in  
2 so it's been, you know.

3 THE COURT: As amazing a witness as he is, I'm not  
4 sure he's the witness you could offer them through. You  
5 could offer them as Workers Comp records, I'll sign the  
6 subpoena so you can get somebody from Workers Comp down  
7 here.

8 MR. HACKETT: We have the Workman's comp. They're  
9 here, the Workman's comp.

10 THE COURT: Are they in the record?

11 MR. CONSTANTINIDIS: Some of them are.

12 MR. MENDELSON: They have only been marked for  
13 identification.

14 MR. REILLY: That's part of reason.

15 THE COURT: But you'd have to have somebody to have  
16 the records authenticated to put them in.

17 MR. HACKETT: I guess we could do that.

18 MR. REILLY: I would object at that point, your  
19 Honor. It's still hearsay.

20 THE COURT: At least I will have a hearing but  
21 Workers Comp's office is right down the street and the  
22 closest one is in the old Mays department store building.  
23 If you serve the subpoena on them and you could probably  
24 do it at lunch. You know where it is?

25 MR. HACKETT: No.

DR. KATZ - DEFENDANT - CROSS

1 THE COURT: You driving?

2 MR. CONSTANTINIDIS: In this weather?

3 THE COURT: You know where the 103 Precinct is?

4 MR. HACKETT: Negative.

5 THE COURT: You're not Queens guys at all.

6 MR. HACKETT: Well, I did use to live in Queens. I  
7 didn't grow up here.

8 THE COURT: If you drove down Jamaica Avenue  
9 Eastbound you would see--

10 MR. CONSTANTINIDIS: Mays would be on the right hand  
11 side, wouldn't it?

12 THE COURT: Well, no, if you drove down Mays would  
13 be -- it's the building after Toys R Us.

14 MR. HACKETT: That's the Workman's Comp building?

15 THE COURT: Yeah, but you'd have to go around the  
16 back way and there's a Worker's comp. You have cell  
17 phones with addresses. It's the same address as the  
18 Jamaica office of the New York Department of Motor  
19 Vehicles. I'd sign a subpoena duces tecum for you to get  
20 somebody in here to authenticate it.

21 MR. HACKETT: Okay.

22 THE COURT: Okay. I'm not sure you can do it today.

23 MR. HACKETT: That's fine.

24 THE COURT: I mean, they would complain but under the  
25 law a so ordered subpoena there doesn't have to be a

## DR. KATZ - DEFENDANT - CROSS

1 notice. They come in now and I'd have that out with the  
2 New York City Department of Health when they told me they  
3 needed 24 hours notice. I said look up the law.

4 MR. HACKETT: We can always have them come in on  
5 Tuesday. I mean, if they couldn't come in Monday, I  
6 guess.

7 THE COURT: So okay.

8 MR. HACKETT: So right now your objection's  
9 sustained.

10 MR. CONSTANTINIDIS: So we can inquire of the witness  
11 if he actually reviewed the report?

12 THE COURT: That he can do.

13 MR. REILLY: Nothing about its content?

14 THE COURT: No. Okay, the objection's sustained.

15 Mr. Hackett, continue.

16 MR. HACKETT: I'm sorry, I didn't hear -- did you  
17 make a ruling, Judge?

18 THE COURT: Yes, the objection is sustained.

19 Q Doctor, to come to your synthesis would you have  
20 liked all of the reports that were generated pertaining to  
21 Mr. Bermejo?

22 A Under the normal circumstances that's optimal, yes.

23 Q And is this one of those normal circumstances?

24 A Yes.

25 Q How about Dr. Gray, did you have Dr. Gray's report of



## DR. KATZ - DEFENDANT - CROSS

1 January 6, 2010?

2 A That certainly sounds familiar but the dates that I  
3 have for Dr. Gray are 3/4/09 and 3/5/09.

4 Q So you weren't provided that report from your  
5 attorneys; is that correct, Doctor?

6 A Well, I have notes by Dr. Gray but not that report,  
7 that's right.

8 Q And, Doctor, referring to the reports of Dr.  
9 Elfenbean, did you receive any of Dr. Elfenbean's reports?

10 A Yes, that name does strike a bell and let's see what  
11 we got.

12 Q About two thirds of the way down the page.

13 A Okay.

14 Q I'm sorry, the last one on the page.

15 A Yes, 12/8/09.

16 Q And were you provided with a report of March 25,  
17 2009?

18 MR. REILLY: Of who?

19 MR. HACKETT: March 25, 2009 of Joseph Elfenbean.

20 MR. REILLY: Okay.

21 A I don't have that date. I have the other date.

22 Q And again, Doctor, would those records have been  
23 something that you would of liked to look at examining doctors  
24 of Mr. Bermejo to have a complete record before you?

25 A Sure.

## DR. KATZ - DEFENDANT - CROSS

1 Q And, Doctor, what kind of a physician is Dr.  
2 Elfenbean?

3 A I don't have it listed offhand but it's possible he  
4 is an orthopedic surgeon.

5 MR. HACKETT: Excuse me for just a moment, your  
6 Honor.

7 Q Doctor, would you agree with me that a treating  
8 physician who is seeing the patient over a period years is in a  
9 better position to give a diagnosis than an individual doctor  
10 who sees a person on one occasion?

11 MR. REILLY: Objection, your Honor. That's not a  
12 fair question. He was only asked to see him once.

13 MR. HACKETT: In regard to his foot.

14 THE COURT: Overruled.

15 MR. REILLY: Exception.

16 MR. MENDELSON: Join.

17 A The treating physician has an advantage and that  
18 advantage is a temporal advantage and if they've seen them over  
19 a series of times and that presents a timeline of treatment  
20 which is not afforded to somebody like myself.

21 Q And that would be true if there were multiple  
22 treating physicians, in this case two treating physicians, and  
23 they would certainly be in a better place to give testimony  
24 regarding his condition as opposed to yourself who has seen the  
25 patient once or twice?

## DR. KATZ - DEFENDANT - CROSS

1           A     I think the temporal advantage exists for all of the  
2     treating physicians.

3           Q     And, Doctor, are you aware that the treating  
4     physicians have previously testified in this case Dr.  
5     Papathomas and Dr. Touliopoulos?

6           A     I'm not aware of.

7           Q     Doctor, was there -- you've testified multiple times  
8     in the past, correct?

9           A     Right.

10          Q     And you're aware that there is daily copy generated  
11     by the court reporters that provides transcripts to the  
12     attorneys and testimony that's happened during the day? Are  
13     you aware of that?

14          A     I'm not aware that it's given at daily but I am aware  
15     that it's transcribed, yes.

16          Q     And are you aware that that testimony is available to  
17     you regarding the prior treating physician's testimony?

18          A     I'm not aware of that, no.

19          Q     Did anyone provide you with the transcripts of the  
20     treating physicians in this case?

21          A     Are you talking about the treatment records or court  
22     transcripts?

23          Q     No, the court transcripts from these past three days.

24          A     No.

25          Q     Would that have been of any interest to you to read

## DR. KATZ - DEFENDANT - CROSS

1 those transcripts to actually hear what the treating physicians  
2 say regarding Mr. Bermejo?

3 A I relied on their medical records. I didn't really  
4 think I needed that.

5 Q And now would it have been of any import to you to  
6 learn what their opinions were and how they reached their  
7 opinions in light of the fact that they have been treating  
8 Mr. Bermejo, Dr. Papathomas had been treating him since from  
9 2009 up to the present day, would that have been of any  
10 interest to you to incorporate into your synthesis, as you  
11 described it, in reaching your opinions here before this jury?

12 A I don't think it's necessary but certainly I have  
13 respect for their own independent reviews and their own  
14 opinions.

15 Q And you recognize Dr. Touliopoulos as a respected  
16 orthopedic surgeon in the community, do you not?

17 A Sure.

18 Q And you certainly wouldn't necessarily question his  
19 integrity before the Court, would you?

20 A That's not my intention at all.

21 Q And, Doctor, did you look at the intraoperative  
22 photographs of Mr. Bermejo of his shoulder?

23 A Those are not part of the records that I was  
24 reviewing, no.

25 Q And, Doctor, when we were talking to Dr. Feit

## DR. KATZ - DEFENDANT - CROSS

1 yesterday we were talking to him about the difference between  
2 MRI's and the view that an orthopedic surgeon gets when he  
3 actually goes into the shoulder capsule. Would you agree with  
4 me that there's a significant difference between what's shown  
5 on an MRI film and what an orthopedic surgeon would see when he  
6 enters the operative field?

7 A Sure.

8 Q And the surgeon is at a much greater advantage in  
9 seeing what is to be seen, isn't that true?

10 A Agreed as well.

11 Q And, in fact, if the orthopedic surgeon was to make a  
12 finding that there was no degenerative degeneration in the  
13 shoulder capsule that would be significant, would it not?

14 A Yes, it would be.

15 Q And even though the MRI might give an indication the  
16 clinical finding on surgery would override that, would it not?

17 A I think it would.

18 Q You think it would or it would?

19 A Yeah, I think in terms of the way you posed the  
20 question as a radiologist point of view it's agreed that  
21 clinical correlation, which is what you're describing, is  
22 preferable.

23 Q Right. And, in fact, as Dr. Feit testified to he  
24 would have to defer to the surgeon, to Dr. Touliopoulos, in  
25 that regard?

## DR. KATZ - DEFENDANT - CROSS

1 A Right.

2 Q So if Dr. Touliopoulos found that there was no  
3 degeneration when he went in would that effect your opinion  
4 that you gave earlier today?

5 A I think that would qualify the opinion to the MRI  
6 study not his surgical procedure, right.

7 Q Well, let me ask -- I don't quite get that. So  
8 Doctor, would your opinion now be different with that  
9 assumption that Dr. Touliopoulos came here and stated that  
10 there was no degeneration when he went in?

11 A But that's a contra distinction to the MRI finding  
12 which notes a partial under surface tear which is a  
13 degenerative finding.

14 THE COURT: Well Doctor, let me ask you, what is the  
15 goal standard?

16 THE WITNESS: Sure.

17 THE COURT: What MRI seems to indicate or what an  
18 experienced physician, an experienced surgeon such as  
19 yourself sees when they go into the shoulder either by a  
20 scope or if they actually go in full throttle?

21 THE WITNESS: Yeah, the surgical would take  
22 preference.

23 Q And so therefore, Doctor, would your opinion  
24 regarding degeneration of Mr. Bermejo's shoulder be different  
25 now that you know that Dr. Touliopoulos testified that when he

## DR. KATZ - DEFENDANT - CROSS

1     went in he did not see degeneration?

2             A     Yeah, if I base the opinion on Dr. Touliopoulos  
3     surgical findings it would be different.

4             Q     And would that then have you leaning to an opinion  
5     that in fact this particular condition was traumatic in nature  
6     of his shoulder?

7             A     No, I don't think I'd go that far but I would  
8     certainly respect him for pointing out that it was not  
9     degenerative.

10            Q     And Doctor, a fall from a scaffold with contact with  
11     the shoulder could cause an injury -- I'm sorry, a fall from a  
12     scaffold with contact, direct contact to an elbow could cause  
13     an injury to the shoulder, could it not?

14                   MR. REILLY: Objection. Speculation, your Honor.

15                   THE COURT: No his speculation is an opinion.

16                   Overruled.

17             A     It could, sure.

18             Q     And a tear of the supra spinatus tendon can cause  
19     pain, can it not?

20             A     Yes, it can.

21             Q     And restriction of motion?

22             A     That as well.

23             Q     And it can require surgical intervention, could it  
24     not?

25             A     Yes.

## DR. KATZ - DEFENDANT - CROSS

1 Q And Doctor, could an individual fall and have a tear  
2 of the shoulder, tear of the supra spinatus tendon and then  
3 that particular complaint of pain become A symptomatic or go  
4 away for a period of time?

5 A Yes, it can.

6 Q And could that same tear of the shoulder be  
7 aggravated by the use or continuous use of crutches?

8 A That is true.

9 Q And to the point where it becomes so painful that the  
10 person requires surgery?

11 A True.

12 Q And Doctor, synovitis, that can be related to trauma,  
13 can it not?

14 A Yes, it can.

15 Q And the capsular plication, am I saying that right?

16 A Yes, you are.

17 Q That can also be related to trauma, can it not?

18 A It can.

19 Q And you had said that that would also or you might be  
20 looking for ligamentous, ligament damage in regard if it was  
21 related to trauma, correct?

22 A Right.

23 Q And, Doctor, if I told you to assume that Dr.  
24 Touliopoulos stated that he found ligament damage when he went  
25 in and did the procedure would that change your opinion as to



## DR. KATZ - DEFENDANT - CROSS

1 what you previously testified to?

2 A No because I reviewed his operative note and the type  
3 of ligamentous damage that is the hallmark of trauma he stated  
4 was not there but I certainly respect any other statements he  
5 made regarding ligamentous damage because that's the basis for  
6 the capsular plication.

7 MR. HACKETT: Just a moment, your Honor, before I  
8 leave the shoulder.

9 Q And, in fact, the ligaments of the shoulder Dr.  
10 Touliopoulos applied sutures in that regard? Did you observe  
11 that in the operative report?

12 A Yes, I did.

13 Q All right, Doctor, you had said that you don't have  
14 any privileges with hospitals at the present time, is that  
15 correct?

16 A Correct.

17 Q And Doctor, are you of the opinion that Manuel  
18 Bermejo, I'm going to move to his foot.

19 THE COURT: Well, it's about lunchtime so if you're  
20 going to move to his foot we're going to -- let's do it  
21 after lunch.

22 MR. HACKETT: Very good, your Honor.

23 THE COURT: Okay. Ladies and gentlemen, we're coming  
24 close to the end of the testimony though we still have a  
25 few more witnesses next week and a couple doctors but the

## DR. KATZ - DEFENDANT - CROSS

1 end game is in sight. But today I will let you enjoy this  
2 great weather. I don't want you to think about the case,  
3 talk about the case, worry about the case. I want you to  
4 come back to the second floor at 2:00 o'clock. We have --  
5 Christine is trying to do the impossible.

6 COURT OFFICER: You said second floor.

7 THE COURT: Third floor. I'm sorry, third floor.  
8 See without Officer Battle I'm almost lost. But you know,  
9 I commend you on trying to do the impossible and replace  
10 Officer Battle if only for one day.

11 COURT OFFICER: I'm just a little shorter.

12 THE COURT: Yes. I want you to come back to the  
13 third floor at 2:00 clock and we'll continue with the  
14 trial then. Okay, take charge.

15 COURT OFFICER: All rise. Jury exiting.

16 (The jury exited the courtroom and the following  
17 occurred:)

18 THE COURT: Doctor, please return at 2:00 o'clock.  
19 Don't talk about the case with anyone.

20 (The witness leaves the stand.)

21 (Whereupon, Senior Court Reporter Sheila Robinson is  
22 relieved by Senior Court Reporter Lorraine Marinazzo.)  
23  
24  
25

1 A F T E R N O O N S E S S I O N

2 (Whereupon, the following takes place on the  
3 record, in open court:)

4 (Whereupon, the jury entered the courtroom and the  
5 following occurred:)

6 THE COURT: Good afternoon, everybody. Please be  
7 seated. Thank you, officer.

8 Mr. Hackett, you were about to start on cross.

9 MR. HACKETT: Yes, your Honor. Thank you. May I  
10 proceed?

11 THE COURT: Yes, you may.

12 CROSS EXAMINATION

13 BY MR. HACKETT:

14 Q Good afternoon, Dr. Katz.

15 A Good afternoon.

16 Q Doctor, we were talking about-- you were talking about  
17 compartment syndrome earlier this morning; is that correct?

18 A That's right.

19 Q And it is your opinion that Manuel did not have  
20 compartment syndrome?

21 A Right.

22 Q Based on your review of the emergency room records,  
23 correct?

24 A Right.

25 THE COURT: Keep your voice up, Doctor.

1 A Yes.

2 Q And Doctor, if someone had compartment syndrome  
3 subsequent to that diagnosis, would you expect discoloration of  
4 the foot?

5 A I don't really understand the question.

6 Q Okay.

7 If someone had compartment syndrome and let's say they  
8 had a cast on their foot and the cast was taken off, would you  
9 expect to see discoloration of the foot?

10 A It is not necessary to have discoloration.

11 THE COURT: Doctor, if a patient presented at an  
12 ER with-- without compartment syndrome but subsequent  
13 treated and/or events caused a suspicion of compartment  
14 syndrome, what, if anything, would you expect to see on  
15 that foot?

16 THE WITNESS: How long are we talking afterwards?

17 THE COURT: You tell me.

18 THE WITNESS: Acutely it's a very swollen  
19 extremity. As you go out in time, some of that swelling  
20 dissipates. Acutely you have this purplish discoloration.  
21 As you go out in time some of that dissipates, either  
22 completely or incompletely. In time certainly leads to  
23 atrophy of muscle.

24 Q Would that discoloration, in fact, go to such a degree  
25 that it would look black?

1           A     Potentially.

2           Q     And when you reviewed the notes of Dr. Gray, did you  
3 see any indication of that particular finding that the skin  
4 color was black?

5           A     I did.

6           Q     Was that of any significance to you, Doctor?

7           A     It was.

8           Q     And that would certainly be significant or a symptom of  
9 an injury to the foot, would it not?

10          A     Yes.

11          Q     And Doctor, would you agree with me that if an  
12 individual has an injury to a foot and a cast is applied, that  
13 that may cause compartment syndrome if the cast is too tight?

14          A     Yes, it could.

15          Q     Or if the swelling and the cast, the two together, if  
16 the swelling has no where to go, it could cause compartment  
17 syndrome of the leg?

18          A     That's right.

19          Q     And Doctor, if I asked you to assume that Dr. Gray was  
20 of the opinion that Mr. Bermejo-- Dr. Gray who is a treating  
21 physician--

22                   THE COURT: Which juror is coughing? Number 5?  
23           Do you need a cup of water?

24                   THE JUROR: No, thank you.

25                   THE COURT: Sure? Continue.

1 Q Doctor, I'm going to ask you to assume that Dr. Gray  
2 had a diagnosis of compartment syndrome, one of the treating  
3 physicians; would that change your opinion as to whether or not  
4 Manuel had compartment syndrome, yes or no?

5 A Not by itself, no.

6 Q I'm going to ask you to assume that Dr. Papathomas, his  
7 treating podiatrist had a diagnosis of compartment syndrome,  
8 would that change your opinion, yes or no?

9 A No.

10 Q If I ask you to assume that Dr. Touliopoulous had a  
11 diagnosis of compartment syndrome, would that change your  
12 opinion?

13 A No.

14 Q I'm going to ask you to assume that Dr. Corso had a  
15 diagnosis of compartment syndrome; would that change your  
16 opinion?

17 MR. REILLY: Objection, your Honor.

18 MR. MENDELSON: Objection.

19 MR. REILLY: Hearsay.

20 THE COURT: He didn't say Dr. Corso was, saw  
21 Mr. Bermejo, but did Dr. Corso have -- is that  
22 inconsistent, Dr. Corso finding?

23 MR. REILLY: Dr. Corso's records aren't in  
24 evidence.

25 THE COURT: That is not the question. The records

1 may or may not be in evidence, but it's a question if this  
2 witness should have been sent Dr. Corso's records or chart  
3 or evaluation.

4 MR. REILLY: Could I have the question read back?

5 THE COURT: Lorraine, read it back. I will tell  
6 you what, before you do that, do you have Dr. Corso's  
7 evaluation?

8 MR. HACKETT: Yes, I do.

9 THE COURT: Show it to the witness. Proceed.

10 MR. REILLY: I will maintain the same objection,  
11 your Honor, hearsay.

12 (Hanging)

13 THE COURT: Noted, but overruled.

14 MR. REILLY: Note my exception.

15 THE COURT: Tell me when you are finished, Doctor.

16 THE WITNESS: Sure. Yes. Thank you.

17 THE COURT: Okay.

18 The doctor was boarded in what? What is his board  
19 certification?

20 MR. HACKETT: Dr. Corso is, your Honor, I would  
21 have to check his curriculum vitae.

22 THE COURT: Okay.

23 MR. HACKETT: May I proceed while we're looking at  
24 that?

25 THE COURT: Doctor, did you finish examining that

1 document?

2 THE WITNESS: Yes, I have.

3 THE COURT: Hand it back to the officer, please.

4 THE WITNESS: Thank you.

5 (Hanging)

6 MR. CONSTANTINIDIS: Your Honor, he's a physician  
7 duly licensed in the field of orthopedic surgery, board  
8 certified.

9 THE COURT: Okay.

10 MR. REILLY: I'm going to object to any testimony  
11 regarding that.

12 THE COURT: Noted but overruled, Doctor.

13 MR. MENDELSON: There is no CV. Can we approach?

14 THE COURT: Okay.

15 (Whereupon, an off the record bench conference  
16 took place.)

17 THE COURT: Overruled.

18 Doctor, I want you to assume that Doctor, what is  
19 this gentleman's name?

20 MR. CONSTANTINIDIS: Salvatore Corso.

21 THE COURT: Dr. Corso is a board certified  
22 orthopedist. Now ask your question.

23 Q Doctor, after reviewing --

24 Doctor, if you -- now that you are aware of Dr. Corso's  
25 opinion, does that change your opinion in regard to whether or



1 not the compartment syndrome was caused by the accident?

2 A It does not change my opinion.

3 Q And Doctor, I want you to assume that Dr. Elfenbein was  
4 of the opinion that Manuel Bermejo had compartment syndrome.

5 THE COURT: What is that doctor's specialty?

6 MR. REILLY: Objection.

7 THE COURT: Grounds?

8 MR. REILLY: Same grounds, your Honor.

9 THE COURT: Noted and overruled.

10 MR. MENDELSON: Join.

11 MR. REILLY: Note my exception.

12 THE COURT: Noted.

13 Q I want you to assume that Dr. Elfenbein, who is a board  
14 certified orthopedic surgeon, was of the opinion that  
15 Manuel Bermejo had compartment syndrome and it was caused by the  
16 accident; would that change your opinion?

17 A No.

18 Q Doctor, I want you to assume that Dr. Mills, who is a  
19 board certified orthopedic surgeon, was of the opinion that  
20 Manuel Bermejo had compartment syndrome and was caused by the  
21 accident; would that change your opinion?

22 MR. REILLY: Objection.

23 MR. MENDELSON: Objection.

24 THE COURT: Overruled.

25 MR. REILLY: Haven't heard of that doctor at all.

1 THE COURT: Excuse me, where is-- show them. I  
2 assume he is from the same place as the other two doctors?

3 MR. CONSTANTINIDIS: Yes, your Honor.

4 THE COURT: Show them the document which is--  
5 (Hanging)

6 MR. REILLY: May we approach?

7 THE COURT: Step up.

8 (Whereupon, an off the record bench conference  
9 took place.)

10 MR. REILLY: Note my objection.

11 THE COURT: Noted, overruled.

12 MR. REILLY: Exception.

13 THE COURT: Noted.

14 Q I want you to assume that Dr. Edward Mills, a diplomate  
15 of the American Board of Orthopedic Surgery was of the opinion  
16 that Manuel Bermejo had compartment syndrome that was caused by  
17 the accident of December 18, 2008; would that change your  
18 opinion?

19 A It would not.

20 Q And Doctor, as opposed to individually, considering all  
21 of these doctors who have formed this diagnosis and opinion,  
22 considering all of those doctors en mass, would that change your  
23 opinion regarding the compartment syndrome pertaining to  
24 Mr. Bermejo?

25 A It would not.

1 MR. REILLY: Same objection based on hearsay.

2 MR. MENDELSON: Join.

3 THE COURT: Hearsay is not the problem. Objection  
4 is overruled anyway.

5 Q So let's talk about the condition of Mr. Bermejo's foot  
6 before this accident.

7 How many surgical scars have you seen on Mr. Bermejo's  
8 foot?

9 A One.

10 THE COURT: Keep your voice up.

11 A One.

12 Q And that is at the back of his heel; is that correct?

13 A Right.

14 Q And you don't know what Mr. Bermejo's foot looked like  
15 before this, when he was a little boy, do you?

16 A No.

17 Q And there are all types of degrees of club foot, are  
18 there not?

19 A Correct.

20 Q And Doctor, have you had some experience with treating  
21 patients with club foot?

22 A Yes.

23 Q Would it be fair to say that more often than not, after  
24 treatment they lead a totally normal life?

25 MR. REILLY: Objection as to time, place, where

1 the treatment was.

2 MR. HACKETT: I will withdraw the question, your  
3 Honor.

4 THE COURT: I would. The variable here is that  
5 Mr. Bermejo's club foot, treatment for club foot,  
6 basically, hadn't changed in many, many years; fair to  
7 statement, Doctor?

8 THE WITNESS: No.

9 THE COURT: In America.

10 THE WITNESS: Actually, it has changed. My report  
11 states that it was the Ponseti method changed the treatment  
12 of club foot.

13 THE COURT: When was that?

14 THE WITNESS: Fully accepted around 1980.

15 THE COURT: Well, that is 35 years ago, 33 years  
16 ago.

17 THE WITNESS: Right.

18 THE COURT: Sustained.

19 Q Doctor, you first saw Manuel about two and a half years  
20 after the accident, correct?

21 A Correct.

22 Q So the first opportunity that you had to examine him  
23 was at two and a half years after the incident, correct?

24 A Correct.

25 Q And at that point he had been a considerable amount of

1 time away from the date of the accident, fair?

2 A That's fair.

3 Q And Doctor, with club foot, would you expect to have  
4 somebody with a flat foot?

5 A Are you speaking untreated or treated?

6 Q Let's do one at a time.

7 A Untreated, no. Treated, potentially, potentially yes.

8 Q And Doctor, when you had talked about your examination  
9 of Mr. Bermejo you had done a physical examination of his foot;  
10 is that correct?

11 A Right.

12 Q And when you did that exam, what were your findings in  
13 regard to range of motion?

14 A With regard to range of motion--

15 THE COURT: Keep your voice up, Doctor.

16 A He had no ability to dorsiflex. He had no ability to  
17 plantarflex. He had lost inversion and he had lost eversion.

18 Q In fact, all of that movement was at zero degrees,  
19 correct, Doctor?

20 A That's right.

21 Q And that would mean a complete fusion of the ankle,  
22 would it not?

23 A That, I can't answer the question the way it is, but I  
24 could answer the question, if you restate it.

25 THE COURT: Try this. If not a complete fusion,

1           virtually complete immobility of the ankle.

2                     THE WITNESS: That's for certain.

3           Q     And Doctor, when we turn to the last page of your  
4 report, do you indicate or do you give an opinion as to what  
5 Mr. Bermejo's ability is in regarding his ability to walk?

6           A     That he had a steady gait.

7           Q     What do that mean?

8           A     That he was able to transfer weight from one foot to  
9 the other in a tandem fashion and in a normal fashion.

10          Q     So, with an ankle that is completely immobile, you have  
11 him walking normally?

12          A     No, it is not walking normally. You recognize that  
13 there are five different stages to gait and one of the stages  
14 involved transferring your weight from one foot to the other.

15          Q     But at the time of your exam he could not walk  
16 normally, correct?

17          A     At the time of my exam he brought crutches to the  
18 evaluation that he used for balance. He held them by his side  
19 but he was able to do the tandem transfer from one leg to the  
20 other.

21          Q     Well, if somebody has an ankle that doesn't move, is  
22 that individual-- putting aside, Mr. -- any individual, if they  
23 can't move their ankle, are they going to be able to walk  
24 normally?

25          A     No, the other phases of gait are abnormal, but the

1 transfer phase is normal.

2 Q That's what I am asking you, Doctor. What other parts  
3 of his gait were abnormal?

4 A The other phases of the gait are push off. You would  
5 not be able to push off correctly. You would not be able to do  
6 heel strike correctly, but the mid portion of gait, in which you  
7 transfer to the other leg, is normal.

8 Q And would an individual with a frozen ankle, would that  
9 individual have any difficulty going up a ladder?

10 A Yes.

11 Q And would an individual with a frozen ankle be unable  
12 to climb a scaffold?

13 A Right.

14 Q And would an individual--

15 THE COURT: Excuse me, did Mr. Bermejo present to  
16 you with a frozen ankle?

17 THE WITNESS: No, I wouldn't say it is frozen, I  
18 would say that he lacked, he had restriction in all of the  
19 planes of motion. I'm not saying that it's frozen, he just  
20 couldn't do this.

21 THE COURT: So frozen is a 10 on a scale of 1 to  
22 10. What is his ankle, upon presentation to you?

23 THE WITNESS: 7.

24 Q Well, if you can't move your ankle in any way -- so he  
25 was zero, he can't move his ankle down. He couldn't move his

1 ankle up and he couldn't move his ankle left or right?

2 THE COURT: You said frozen is a 10?

3 THE WITNESS: Right.

4 Q Well, in Mr. Bermejo's condition, would he be able to  
5 climb a scaffold with the zero degrees in every direction that  
6 you found?

7 A How high on the scaffold?

8 Q Six feet high.

9 A With normal hip and knee function you would be able to  
10 get the leg up. In a work shoe, the foot and ankle would be at  
11 90 degrees, so it might be possible.

12 Q And how about--

13 THE COURT: Excuse me, I would require that you  
14 give your answer as an expert in the field of orthopedic  
15 surgery. It might be possible is not the standard. To a  
16 reasonable degree of medical certainty as an experienced  
17 orthopedist would you expect a person similarly situated as  
18 Mr. Bermejo, to be able to climb up and down a ladder  
19 fairly easily?

20 THE WITNESS: No.

21 Q How about a scaffold, would he be able to do that?

22 A The scaffold, no.

23 Q And Doctor, in your report you indicate that he could  
24 go back to work, correct?

25 A Right.



1 Q But not in any type of a manual labor job, right?

2 A Right.

3 Q And so, and you are not a vocational rehab doctor,  
4 right?

5 A Right.

6 Q And now, Doctor, atrophy can affect the function of the  
7 leg, can it not?

8 A Right.

9 Q And when you performed this 45 minute examination of  
10 Mr. Bermejo the first time, did you find any atrophy of his leg?

11 A The presence of atrophy wasn't noted, no.

12 Q And did you find any atrophy in his foot at that time?

13 A Atrophy wasn't noted, no.

14 Q And Doctor, if I told you that his treating physicians  
15 found atrophy, significant atrophy in both his leg and his foot,  
16 would that surprise you?

17 A No.

18 Q Would you consider that a significant finding if you  
19 found Mr. Bermejo to have a marked atrophy in his leg?

20 A Yes.

21 Q And it would be in accordance with good and accepted  
22 medical practice to include that in your report, would it not?

23 A If you found it, yes.

24 Q And what would it take to find atrophy in the leg, what  
25 would you have to do, look at the leg?

1       A     No, it wouldn't take looking at it, it would probably  
2     take doing side bex measurements to see what kind of work output  
3     there was from the leg, versus contralateral leg.

4       Q     Did you do that?

5       A     No, and I don't believe that the doctors you mentioned  
6     did it either.

7       Q     And could you have done a measurement of the leg, isn't  
8     that how it is often done; you actually measure the calf of one  
9     leg and measure the calf of the other leg?

10      A     You wouldn't get what you are after, which is power  
11     output, whether it is weak or stronger. The preferable method  
12     is side bex measurement.

13      Q     If there's a significance loss of muscle mass, wouldn't  
14     you get that by simply putting a measuring tape around the calf  
15     of one leg and measuring tape around the calf of the other,  
16     isn't that a standard test that orthopedic surgeons do all the  
17     time to measure atrophy?

18      A     Not for what you-- for simple atrophy, which is a  
19     combination of the skin, the fat layer and the muscle. What you  
20     are talking about is dramatic atrophy, and that should be  
21     quantitated using a side bex apparatus.

22      Q     If it is dramatic, wouldn't it be then even more  
23     significant when you did that measuring tape around the leg,  
24     wouldn't you have even a more significant finding that one leg  
25     is ten inches and the other leg is seven inches?

1 A I think potentially.

2 Q And Doctor, if I told you that when you were doing this  
3 review, before you wrote this report, did you happen to see in  
4 any of the radiographs that there was significant intrinsic  
5 atrophy of the foot?

6 A Are you talking about plain x-rays?

7 Q No, MRIs.

8 A MRIs?

9 Q Yes. Do you remember seeing that?

10 A That there was intrinsic atrophy?

11 Q Of the foot, yes.

12 A I think what I saw on those studies--

13 Q Yes or no, did you see intrinsic atrophy of the foot  
14 when you looked at the radiographic MRI reports, before you  
15 wrote this report and came in here to testify before this jury?

16 A Yes.

17 Q And why didn't you include that in your report?

18 A I wasn't asked to make a radiologic analysis.

19 Q But you were asked to provide a report and you said  
20 that you relied on the MRI reports in coming to the conclusion  
21 that's in this piece of paper, Doctor, isn't that true?

22 A Right.

23 Q But you just happen to leave that part out that he had  
24 intrinsic atrophy that wasn't shown in the earlier records, but  
25 was shown in the later MRIs, approximately 11 months after the

1 accident.

2 A As well as the coalition and fusion of the bone.

3 Q I will get to that, Doctor. One thing at a time.  
4 is there a reason why you didn't put--

5 MR. REILLY: Objection.

6 MR. MENDELSON: Objection.

7 THE COURT: Excuse me.

8 Q Is there a reason--

9 THE COURT: Mr. Hackett.

10 MR. HACKETT: All right.

11 THE COURT: Chill out.

12 MR. HACKETT: I'm sorry.

13 Q Is there a reason why you didn't put the intrinsic  
14 atrophy of his foot in your record when it was clearly in the  
15 treating radiologist's report, Doctor?

16 A No.

17 Q Doctor, yes or no, can compartment syndrome cause  
18 injury to the nerves of the foot?

19 A Yes.

20 Q And, in fact, Doctor, were you given an EMG that was  
21 taken of Mr. Bermejo's leg that showed injury to the perineal  
22 and tibia nerves?

23 A Correct.

24 Q And frankly, isn't it true that as you testified  
25 earlier that an injury to the perineal nerve could cause drop

1 foot?

2 A Yes, it can.

3 Q And in this case, if Mr. Bermejo had an injury to the  
4 perineal nerve, then it would be very reasonable to expect a  
5 dropped foot, would it not?

6 A Among other conditions, yes.

7 Q I'm just talking about one thing at a time, Doctor.

8 Would it be a reasonable diagnosis for a doctor, like  
9 Dr. Papathomas to make a determination that he has dropped foot  
10 after clinically examining it and also backing it up with an EMG  
11 that shows a nerve injury to the perineal nerve?

12 A Not in the presence of the fusions that are present.  
13 In the presence of a flexible foot, which this is not.

14 Q And compartment syndrome can cause atrophy, isn't that  
15 true, Doctor?

16 A Yes.

17 Q Doctor, you don't believe that Manuel suffers from  
18 Charcot foot?

19 A It's a possibility.

20 Q And what do you base that on, Doctor?

21 A Based on the radiographic views reported of the small  
22 joints of the ankle.

23 Q And Doctor, that is a condition that's generally found  
24 with diabetic individuals, correct?

25 A Not exclusively, but in the diabetic population, that

1 is correct.

2 Q All right, not exclusively, but isn't the majority of  
3 the individuals who have Charcot, diabetic?

4 A No, the more of most.

5 Q Let me ask you another question.

6 A Okay.

7 Q There is another segment of the population that have  
8 Charcot, individuals that have syphilis?

9 A Yes.

10 Q And Doctor, you know that Mr., that Manuel is not  
11 diabetic, correct?

12 A Right.

13 Q And from the tests that you have done, he doesn't have  
14 syphilis?

15 A Right.

16 Q And Doctor, would you agree with me that Charcot is  
17 usually a condition that is found in both feet?

18 A Yes.

19 Q And Mr. -- did you examine both feet, by the way?

20 A No.

21 Q Well, Doctor, I want you to assume that his left foot  
22 is normal. Would you -- would that affect your thinking in  
23 regard to whether or not he has Charcot, that is it bilateral,  
24 it is not in both feet in Mr. Bermejo's situation?

25 A Well, not on a metabolic basis, that's right.

1 Q And Doctor, would you agree with me that Charcot is  
2 something that doesn't go away?

3 A Yes, I agree with that.

4 Q It continues to progress and get worse as time goes  
5 forward?

6 A I agree with that.

7 Q And that is why it is considered as a term as a bag of  
8 bones, correct?

9 A Right.

10 Q The feet just get worse and worse, they start to-- the  
11 bones actually start to go through the bottom of the foot and  
12 the skin ulcerations?

13 A Correct.

14 Q Mr. Bermejo have any ulcerations of his foot?

15 A He did not.

16 Q And Doctor, in your review of the radiographic, the  
17 MRIs and x-rays, there was some mention of a possibility of  
18 Charcot, was there not?

19 A Right.

20 Q Were you given the MRI report?

21 THE COURT: Or the MRI.

22 Q Or the MRI.

23 A Where is that completed?

24 Q July 23, 2011.

25 A Where was it completed?

1 Q MRI, CT Associates of Queens?

2 A 7/23/11.

3 Q Yes.

4 A Yes, I have that report.

5 Q And did that report, after you reviewed it did that  
6 affect your thinking about Charcot in any way?

7 A I don't believe so, no.

8 Q Doctor, do you remember reading from that report that,  
9 and again, I'm reading from the July 23, 2011 MRI report of the  
10 treating radiologist John Athas. There are no findings to  
11 indicate neuropathic Charcot arthrosis. Do you recall reading  
12 that, Doctor?

13 A Right offhand I don't, but I certainly take you at your  
14 word.

15 Q So would that have any affect on your thinking in  
16 regard to Charcot in light of the fact that the radiologist  
17 found no findings of it in 2011?

18 A Sure.

19 Q And how would that affect your opinion that he does not  
20 have it?

21 A Well, that there's a difference in opinion between two  
22 radiologists, one believes he does and one believes that he  
23 doesn't. I did not include a diagnosis of Charcot when I came  
24 to a diagnosis.

25 Q So you didn't think that it was Charcot when you wrote



1 your report, correct?

2 A I didn't think enough of it to actually think that it  
3 required stating, right.

4 Q And, in fact, the impression in this report states that  
5 stable chronic changes of the foot since 11/19, 2009, which is  
6 approximately two years before that, stable changes. That means  
7 nothing has really happened from November '09 up to the time of  
8 the reading of this report, correct, Doctor?

9 A Sounds like that, yes.

10 Q And you wouldn't expect that if it was a Charcot foot,  
11 correct?

12 A Yes.

13 Q You would expect Charcot to continue to progress and  
14 get worse and worse, correct?

15 A Right.

16 Q And that is not what has happened in Mr. Bermejo's  
17 case, correct?

18 A Right.

19 Q And, in fact, the report states that there is no  
20 evidence of a Charcot joint or prominent arthrosis; would that  
21 affect your opinion, Doctor?

22 A Sure.

23 Q In the earlier, in the earlier MRIs that were done in  
24 January of '07, the radiologist there did not find a fusion of  
25 the foot; isn't that correct?

1 A Right.

2 Q And that's also true for the second reading of that  
3 film on January 8, 2009, correct, Doctor?

4 A Right.

5 Q And in March of 2009 they also don't find fusion of the  
6 bone, correct, Doctor?

7 A Right.

8 Q It is only in November of 2009 that they see a fusion  
9 that has occurred, correct?

10 A Right.

11 Q And so that would indicate that that was not  
12 pre-existing, correct, Doctor; that that fusion occurred some  
13 time after the accident?

14 A Potentially, yes.

15 Q If it is not seen on the films before, it is not seen  
16 on the prior MRIs and it is later, then you would expect that  
17 must have happened between the date of the accident and the  
18 November '09 film?

19 MR. REILLY: Objection.

20 A Except for the fact that CT is the optimal study for  
21 these bony fusions in the foot and you're basically basing it on  
22 plain films and MRI, which are not the optimal study.

23 THE COURT: You still object?

24 MR. REILLY: No, your Honor.

25 Q Okay, Doctor, but the films that all the treating

1 physicians were relying on didn't show any fusion of those bones  
2 and it did show up in November of '09, did it not?

3 A Yes.

4 Q So even though it is not necessarily the best  
5 diagnostic tool, it certainly showed the condition and showed it  
6 every time an MRI was done after that; isn't that correct,  
7 Doctor?

8 A Right.

9 Q And Dr. Feit had testified that it is not unusual for  
10 fractures not to show up initially on x-ray films immediately  
11 around the time of the accident, is that ---would you agree with  
12 that statement?

13 A Sure.

14 Q In fact, subsequent MRIs did show fractures of the  
15 metatarsals, did they not?

16 A Yes.

17 Q So the second metatarsal and third and fourth  
18 metatarsal?

19 A Right.

20 Q Would you agree with me those fractures occurred as a  
21 result of the accident of December 18, 2008?

22 A In some form, yes.

23 Q Would you agree with me that the accident on December  
24 18, 2008 caused those fractures to two, three and four of the  
25 metatarsals?

1 MR. REILLY: Objection.

2 THE COURT: Overruled.

3 A Potentially they were stress fractures. It was  
4 uncertain whether they were acute fractures or stress fractures,  
5 it is a gray area.

6 Q They didn't show up on the films that were taken at the  
7 hospital, correct, Doctor?

8 A Right.

9 MR. REILLY: Objection.

10 THE COURT: Grounds?

11 MR. REILLY: That is a mischaracterization. There  
12 were two different interpretations of the films at the  
13 hospital.

14 THE COURT: Did they show up on the films, Doctor?

15 THE WITNESS: I believe one of the interpreters  
16 did not see it but one did.

17 THE COURT: Did you see it?

18 THE WITNESS: I just saw a report.

19 THE COURT: Okay.

20 Q So you are telling this jury that a fracture was found  
21 on the films that were done at the emergency room on December 18  
22 or shortly thereafter December 18 of 2009?

23 MR. REILLY: Objection.

24 MR. MENDELSON: Objection.

25 MR. REILLY: Already been --

1 THE COURT: Sustained.

2 Do you have the films in evidence?

3 MR. HACKETT: We have the reports.

4 THE COURT: Why don't you show the doctor the  
5 films?

6 MR. REILLY: Films from Elmhurst were in evidence.

7 THE COURT: Show this doctor the films.

8 MR. HACKETT: I don't need to do it. If they want  
9 to do it, they can.

10 THE COURT: Okay.

11 Q Doctor, there is no question that some of those x-rays,  
12 the first time they are seen are after this accident; isn't that  
13 true, Doctor?

14 A That's true.

15 Q That would certainly show there was significant trauma  
16 to the foot; isn't that true?

17 A The presence of these fractures would assert that, yes.

18 Q And Doctor, Dr. Feit yesterday testified that he  
19 observed swelling on the films and/or edema. Is swelling or  
20 edema, is that something that you would see as a result of a  
21 traumatic event?

22 MR. REILLY: Objection. I don't know which ones  
23 we are talking about, about the edema. That is testimony  
24 from yesterday.

25 THE COURT: Overruled.

1                   You could answer that, Doctor.

2           A     Yes.

3           Q     And Doctor, in regard to the fusion, would it be of any  
4     significance if during the period of time that Dr. Gray was  
5     treating Manuel he had range of motion and later on, even at the  
6     time of your examination his range of motion was zero; would  
7     that be any indication that the fusion happened some time  
8     between the date of the accident and today?

9           A     Right.

10          Q     And Doctor, would you agree with me that if you do have  
11     a nerve injury caused by trauma, that that could cause muscle  
12     atrophy?

13          A     Yes.

14          Q     And can that cause bone loss?

15          A     Yes.

16          Q     And can it cause pain?

17          A     Yes.

18          Q     Permanent pain?

19          A     Yes.

20          Q     And Doctor, can trauma cause RSD or CRPS?

21          A     Yes.

22          Q     And can an injury to a nerve set off that RSD or CRPS?

23          A     Yes.

24          Q     And Doctor, if I asked you to assume that

25     Dr. Papathomas was of the opinion that Mr. Bermejo had RSD or

1 some type of a nerve injury that was causing him significant  
2 pain, would that change your opinion at all in regard to  
3 Mr. Bermejo's situation?

4 A No.

5 Q If I asked you to assume that Dr. Touliopoulous --

6 If I asked you to assume, Doctor, that Dr. Corso was of  
7 the opinion that Manuel had RSD and it was caused by the  
8 accident, would that change your opinion?

9 MR. REILLY: Objection.

10 MR. MENDELSON: Objection.

11 THE COURT: Grounds?

12 MR. REILLY: Hearsay. Same objection as before.

13 THE COURT: Okay. Noted and overruled.

14 A No.

15 MR. MENDELSON: Exception, please.

16 MR. REILLY: Exception.

17 Q If I told you that Dr. Anthony Spatarro, a diplomate of  
18 the American Board of Orthopedic Surgery was also of the opinion  
19 that Manuel had compartment syndrome, RSD and contracture of the  
20 right foot caused by the accident, would that affect your  
21 opinion at all?

22 A No.

23 MR. REILLY: Same objection.

24 MR. MENDELSON: Objection.

25 THE COURT: Step up.

1 (Whereupon, an off the record bench conference  
2 took place.)

3 THE COURT: Send the jury upstairs.

4 THE COURT OFFICER: All rise.

5 (Whereupon, the jury exited the courtroom and the  
6 following occurred:)

7 THE COURT: Step down for a second, Doctor.

8 On the record, who are these doctors?

9 MR. HACKETT: Dr. Corso, Dr. Spattaro and I  
10 believe Dr. Elfenbein.

11 THE COURT: And this attorney is working with you?

12 MR. CONSTANTINIDIS: Yes.

13 THE COURT: Step up, counselor.

14 I want you, counsel, identify yourself.

15 MR. FELDMAN: Brian Feldman, Constantinidis and  
16 Associates, 35-01 38 Avenue.

17 THE COURT: Are you driving?

18 MR. FELDMAN: No.

19 THE COURT: Can you walk eight or ten blocks or  
20 take a bus on Jamaica Avenue?

21 MR. FELDMAN: Sure.

22 THE COURT: Because the 56 bus goes down there.

23 I want you to-- I'm going to sign these subpoenas.

24 You are going to serve them on the Worker's Compensation  
25 Board. Their Jamaica office is Jamaica Avenue, the



1 backside of Jamaica Avenue and 169th Street or so. You  
2 could get it from the same place as a driver's license.

3 I'm going to sign these subpoenas. You are going  
4 to serve them on them this afternoon. I want these doctors  
5 here Monday morning. It is not their call and I'm putting  
6 it on the record if they want to be here or not, they are  
7 State employees and counsel, you could tell them I said  
8 that. They are State employees. They will be here and  
9 they will wait until I get to them.

10 MR. CONSTANTINIDIS: Very good, your Honor.

11 MR. HACKETT: Your Honor--

12 (Off the record)

13 THE COURT: Mr. Feldman, I will sign them as  
14 Mr. Hackett and Mr. Constantinidis continue with the  
15 examination of this witness.

16 MR. HACKETT: Very good.

17 MR. MENDELSON: Could I run across the hall for a  
18 second?

19 THE COURT: Sure.

20 Doctor, you could step down and stretch your legs  
21 too.

22 (Short pause)

23 (Whereupon, the following takes place on the  
24 record, in camera:)

25 (Whereupon, a phone call is being made)

1 THE COURT: This is Justice Duane Hart in Queens  
2 Supreme Court. I would like to speak to one of the  
3 attorneys, please?

4 A What is your last name?

5 THE COURT: Judge Hart in Queens Supreme Court.

6 A And what is it in regard to?

7 THE COURT: Are you an attorney?

8 A No, I will get you over to one.

9 THE COURT: Good.

10 A Hold on a second.

11 THE COURT: Good.

12 (Short pause)

13 THE COURT: Mr. Munnelly, this is Justice Duane  
14 Hart in Queens Supreme Court. You an attorney, sir?

15 MR. MUNNELLY: Yes, I am.

16 THE COURT: We're on the record. I am in the  
17 middle of a trial. I have attorneys telling me they sent  
18 subpoenas to the Workers Compensation Bureau for doctors  
19 and records and they have been blown off.

20 MR. MUNNELLY: Well, I don't know what you are  
21 referring to, so if you could give me--

22 THE COURT: I have the attorneys here. I'm going  
23 to put, this attorney's name is Patrick Hackett. This is  
24 Mr. Munnelly, how do you spell your--

25 MR. MUNNELLY: M-U-N-N-E-L-L-Y.

1 THE COURT: Mr. Hackett, this is Mr. Munnelly.

2 MR. HACKETT: Hello, Mr. Munnelly.

3 MR. MUNNELLY: How are you doing?

4 MR. HACKETT: Good.

5 We're trying to get a couple of doctors to get  
6 into the courthouse and testify regarding their examination  
7 of our client.

8 MR. MUNNELLY: Okay.

9 MR. HACKETT: We had served a couple of subpoenas  
10 on two of them and we did not-- they did not appear.

11 MR. MUNNELLY: You served subpoenaed on these  
12 doctors?

13 MR. HACKETT: Correct.

14 MR. MUNNELLY: And they didn't appear?

15 MR. HACKETT: Correct.

16 THE COURT: They were Workers Compensation  
17 doctors, so they are doing business--

18 MR. MUNNELLY: Wait a minute, your Honor, there is  
19 no such thing--

20 THE COURT: They are doing business, they are  
21 performing IMEs on behalf of the Worker's Compensation.

22 MR. MUNNELLY: No, they are performing IMEs on  
23 behalf of an insurance carrier. We authorize doctors. A  
24 doctor cannot treat an injured worker without being board  
25 authorized, but these are all private doctors, not board

1 doctors. We have no control.

2 If you served a subpoena on a doctor and they have  
3 not complied with the subpoena, then your remedy would be  
4 to hold the doctor in default on the subpoena, I'm not  
5 quite sure.

6 THE COURT: So educate me. What is the connection  
7 if a Worker's comp orders IME on a person who is applying  
8 for benefits? What is the connection between that doctor  
9 and Worker's Comp?

10 MR. MUNNELLY: Judge, we don't order IMEs, that is  
11 something that a carrier will do. We're an adjuratory  
12 agency, very similar to any witness that would appear  
13 before your Honor.

14 They come in with a medical report. We consider  
15 the medical report. In order to have a compensable  
16 Worker's Comp claim we need medical evidence of a  
17 work-related injury. So a claimant will file a claim  
18 alleging that they were injured on the job and they will  
19 have to submit proof of that by way of a doctor's report.  
20 A treating physician will file a report with us, saying  
21 that I treated the claimant for X, and in my opinion it is  
22 causally related to his work, which is a requirement to get  
23 Worker's Compensation.

24 THE COURT: I will take you at your word. Now,  
25 however, there's Part 2 of this phone call.

1 MR. MUNNELLY: Okay.

2 THE COURT: Who are you trying to get from  
3 Worker's Comp, Mr. Hackett?

4 MR. HACKETT: We served a subpoena for records,  
5 but did not serve a subpoena for a person.

6 THE COURT: We have to get somebody to certify a  
7 Worker's Comp record.

8 MR. MUNNELLY: That we do.

9 THE COURT: Who would I get and--

10 MR. MUNNELLY: By law you have to submit the  
11 subpoena to the secretary of the board. It has to be a so  
12 ordered subpoena and we will turn that around immediately,  
13 and we will certify, pursuant to the CPLR, the file of the  
14 Board's file in connection with any claim, if it is a so  
15 ordered subpoena.

16 THE COURT: It will be so ordered. And can  
17 Mr. Hackett fax it to you?

18 MR. MUNNELLY: He has to serve it on the secretary  
19 to the board.

20 THE COURT: Who is the secretary to the board?  
21 Where does that person sit?

22 MR. MUNNELLY: In Schenectady, New York.

23 THE COURT: In person?

24 MR. MUNNELLY: No, doesn't have to be served in  
25 person. She will accept a fax, an E-mail, as long as it is

1 a so ordered subpoena.

2 THE COURT: You have that fax number, sir?

3 MR. MUNNELLY: Sure. Hold on one second, let me  
4 get that for you.

5 (Short pause)

6 MR. MUNNELLY: You could fax it to area code 518  
7 402-0113.

8 THE COURT: Does-- Mr. Hackett, speak up, when  
9 have you become shy?

10 MR. HACKETT: Does that person have a name?

11 MR. MUNNELLY: Well, yes, the secretary of the  
12 board is Kim McCarrol, M-C-C-A-R-R-O-L.

13 MR. HACKETT: Very good, thank you.

14 THE COURT: And see, you are the unfortunate one  
15 to pick up this the phone call.

16 MR. MUNNELLY: That is okay, I'm the general  
17 counsel to the board.

18 THE COURT: Mr. Hackett would also fax a copy to  
19 you, sir, as a courtesy.

20 MR. MUNNELLY: That is fine.

21 THE COURT: Could we have your fax number?

22 MR. MUNNELLY: You could use the same fax number.  
23 My office is right down the hall from the secretary's  
24 office.

25 THE COURT: Now, I have four attorneys here. Do

1 any of you have, while we have this gentleman on the  
2 record, do any of you have any questions, because I will  
3 let him go about his business and enjoy the beautiful  
4 weather in Schenectady.

5 MR. REILLY: Not here.

6 MR. HACKETT: How soon can we expect the records?

7 MR. MUNNELLY: Well, if we receive the so ordered  
8 subpoena today, they will go out, depending on how large  
9 they are, they go out on Monday. They are expedited. I  
10 would make sure the secretary sees it.

11 THE COURT: So we have a stipulation. Would you  
12 take the certification from the secretary of the board or a  
13 letter from this gentleman to certify the records, either  
14 one, by stipulation? I am asking you?

15 MR. REILLY: Well, your Honor, I still have the  
16 same problem regarding some of those reports, some of the  
17 other reports.

18 THE COURT: That is a different issue.

19 MR. REILLY: I understand that, Judge. The  
20 records themselves insofar as they are certified as the  
21 comp records--

22 THE COURT: Subject to redaction.

23 MR. REILLY: Yes, subject to redaction, but a lot  
24 of it has to be redacted.

25 MR. MENDELSON: Most of it has to be redacted.

1 THE COURT: That is my problem.

2 MR. MENDELSON: Your Honor, the records that--

3 THE COURT: Aren't you glad you picked up this  
4 phone call, counsel?

5 MR. MUNNELLY: Yes, I am.

6 MR. MENDELSON: The records that the Comp Board  
7 would have--

8 THE COURT: Why don't you identify yourself so  
9 this person knows who to get angry at?

10 MR. REILLY: That was-- I'm Mike Reilly, the one  
11 just talking. I have one of the--

12 THE COURT: And you are from?

13 MR. REILLY: Andrea G. Sawyers, counsel for  
14 defendant Ibex.

15 MR. MENDELSON: I'm Richard Mendelsohn from  
16 London Fischer. We represent Amsterdam in this matter.

17 The problem we have, your Honor, with respect to  
18 those records, we have the objection to the report which we  
19 previously stated. The records would then contain treating  
20 physicians' records, which are purely duplicative of  
21 everything that is already into evidence, and then there  
22 would be records--

23 THE COURT: This is not for this gentleman, this  
24 is for me later on.

25 MR. MENDELSON: Okay, you were asking about the



1 stipulation and where we are going.

2 THE COURT: You could hold them. For now, what  
3 I'm going to have-- our reporter is one of the great  
4 reporters of all time, Lorraine Marinazzo. She is going to  
5 e-mail a portion of this conversation to you, sir. Can I  
6 have your e-mail address?

7 MR. MUNNELLY: Talking to me, Judge?

8 THE COURT: Yes.

9 MR. MUNNELLY: It is Kenneth, K-E-N-N-E-T-H, dot  
10 M U N N E L L Y at WCB dot Gov dot NY.

11 THE COURT: Do any of you have any questions with  
12 regard to this?

13 MR. HACKETT: No, your Honor.

14 MR. REILLY: No.

15 MR. MENDELSON: No.

16 THE COURT: I do have one question.

17 Now, do you have one carrier or do you have many  
18 carriers who do the Worker's Comp.

19 MR. MUNNELLY: Is that a question for me, sir?

20 THE COURT: Yes. You said that the doctors are  
21 employed by the carrier. Is it one carrier or are there  
22 many carriers, or could you look up the carrier with regard  
23 to the claimant we are talking about in this case?

24 MR. HACKETT: I think this is a State Insurance  
25 Fund.

1 THE COURT: So State Insurance Fund?

2 MR. MENDELSON: I believe so.

3 MR. REILLY: Yes.

4 THE COURT: Sir, and the State Insurance Fund is a  
5 typical carrier for you, Mr. Munnelly?

6 MR. MUNNELLEY: Judge, the State Insurance Fund is  
7 a carrier of last resort. They have about 30, 38 percent  
8 of Worker's Comp--- it is a State entity, but it runs as  
9 an insurance company. So if someone cannot get insurance  
10 from a private carrier, such as Liberty Mutual or  
11 Traveller's, et cetera, et cetera, they can go to the State  
12 Insurance Fund and the State Insurance Fund must write them  
13 Worker's Comp insurance.

14 THE COURT: Since Mr. Reilly is from Travellers,  
15 they insure everybody with a smile.

16 MR. MUNNELLEY: And could pay.

17 THE COURT: Well, obviously you haven't been  
18 sitting in on this case.

19 MR. REILLY: Other extenuating circumstances, as  
20 we all know.

21 THE COURT: Thank you. Have a great weekend.

22 MR. MUNNELLEY: Bye-bye.

23 MR. HACKETT: Well, I think if I'm getting this  
24 right, there's a consensus that we can stipulate to put it  
25 into evidence, it is just that they're going to redact

1 certain portions of it. That would be --

2 THE COURT: There is no stipulation.

3 MR. HACKETT: There isn't a stipulation.

4 THE COURT: You could tell the doctors-- could you  
5 call the doctors and recite Section 2308 of the CPLR to  
6 them. You know what that says?

7 MR. HACKETT: What is that?

8 THE COURT: Look it up.

9 MR. MENDELSON: Disobedience of--

10 THE COURT: It is not contempt.

11 MR. REILLY: I give up.

12 THE COURT: 2308. One of the old time great  
13 sections.

14 (Continued on next page)

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1 THE COURT: You could call the doctors, testimony  
2 them they better be here Monday morning. They could call  
3 their attorneys. You could refer them to Section 2308 of  
4 the CPLR and remind them that if they don't come in they  
5 could be held in contempt and the sheriff could bring them  
6 here from the county they reside in, or they could be held  
7 as, per statute, responsible for the entire financial loss  
8 of the party that seeks to call them, and they in effect  
9 blow off. You will fax the subpoenas to Mr. Munnelly ASAP.

10 (Courtroom)

11 THE COURT: Bring the jury down, please.

12 (Whereupon, reporter Sheila Robinson relieved  
13 reporter Lorraine Marinazzo.)  
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## DR. KATZ - DEFENDANT - REDIRECT

1 THE COURT: You done with this witness?

2 MR. HACKETT: I believe I am, your Honor.

3 THE COURT: Okay, bring them in.

4 COURT OFFICER: All rise. Jury entering.

5 (The jury entered the courtroom and the following  
6 occurred:)

7 THE COURT: Okay, while you were upstairs -- please  
8 be seated. While you folks were upstairs taking a break  
9 we did have an issue that I was dealing with so it wasn't  
10 that we took a break. Mr. Hackett.

11 MR. HACKETT: I'm done with this witness, your Honor.

12 THE COURT: Okay, Mr. Mendelsohn, Mr. Reilly, do you  
13 have anything else?

14 MR. REILLY: A few questions, your Honor.

15 THE COURT: Okay.

16 MR. REILLY: Thank you.

17 THE COURT: Counsel, finish that quickly,  
18 Mr. Constantinidis.

19 MR. CONSTANTINIDIS: I'm trying, Judge.

20 REDIRECT EXAMINATION

21 BY MR. REILLY:

22 Q Doctor, how are you?

23 A Good, thank you.

24 Q Few questions here, Doctor. There were no records  
25 from Ecuador that were available to you?

## DR. KATZ - DEFENDANT - REDIRECT

1 A There were none.

2 Q And did you review the records of Dr. Papathomas,  
3 plaintiff's treating podiatrist?

4 A Yes, I did.

5 THE COURT: Keep your voice up, Doctor.

6 A Yes, I did.

7 MR. REILLY: And they are noted as Exhibit 18, in  
8 evidence, your Honor so I'll show him my copy just to save  
9 time.

10 Q But, Doctor, I'm just going to show you --

11 MR. REILLY: If I may approach, your Honor?

12 THE COURT: Yes, you may.

13 Q Showing you May 4, 2009 record. If you could just  
14 read the first sentence.

15 A Patient is a 44 year old male with history of work  
16 related --

17 THE COURT: Keep your voice up and a little slower.

18 A On December 18th, 2008 while working as a bricklayer.

19 Q And, Doctor, could you just read this part here.

20 A He states that his history of club foot surgery when  
21 he was a small child back in Ecuador but had no pain or  
22 dysfunction to his right foot secondary to the childhood  
23 condition.

24 Q Now, Doctor, is it -- do people who have a childhood  
25 club foot repair accommodate?

## DR. KATZ - DEFENDANT - REDIRECT

1 A Yes, they do.

2 Q And how do they do that, Doctor?

3 A Basically through bracing at times, through footwear,  
4 especially footwear that goes above the ankles and that  
5 controls the motion of the ankle.

6 Q Would a construction boot be something like that?

7 A Yes, it is.

8 Q And somebody who would be able to accommodate the  
9 difficulties with a childhood club foot repair, could that  
10 person work in construction?

11 A Yes.

12 Q And, Doctor, when you saw Mr. Bermejo on May 23rd,  
13 2011 did you attempt to elicit a history from him directly?

14 A Yes, I did.

15 Q Were you allowed to do that?

16 A It was very difficult because Mr. Hackett became  
17 explosive.

18 Q Okay, thank you, sir. Now, Doctor, based on what you  
19 reviewed concerning the scar of the right foot, based on the  
20 review of the records that you were sent, your examination --

21 THE COURT: Excuse me, can't let that go. You said  
22 Mr. Hackett became explosive. What does that mean?

23 A He was highly combative with the simplist of  
24 questions and the historical portion was, for the most part,  
25 gotten from records and not from answers.

## DR. KATZ - DEFENDANT - REDIRECT

1 MR. REILLY: May I continue, your Honor?

2 THE COURT: You may.

3 Q Doctor, based on your review of the scar on the right  
4 foot and based on your review of the medical records and your  
5 looking at the photograph that was shown to you previously what  
6 is your opinion regarding or did you reach a conclusion as to  
7 the cause of the condition of the plaintiff's foot when you  
8 looked at him on May 23rd, 2010?

9 A It's post surgical changes from club foot that was  
10 attempted to be corrected through surgical techniques that were  
11 available when it was corrected.

12 Q Now, Doctor, the promoting a nerve was talked about.  
13 Can there be an issue or positive finding on an EMG regarding  
14 peroneal nerve for someone with a childhood club foot repair?

15 A Yes.

16 Q How does that come to happen?

17 A Whenever you posture the foot in an abnormal position  
18 that the foot is not meant to be in a compression of the nerve  
19 occurs.

20 Q And based on your review of the situation here is  
21 that the situation -- conclusion you came to with regard to  
22 Mr. Bermejo?

23 A Yes.

24 Q Now, there was some talk about fusion, Doctor, and  
25 I'll refer you to the -- did you review the right foot MRI



## DR. KATZ - DEFENDANT - REDIRECT

1 report of Middle Village Radiology from January 7, 2009,  
2 Doctor?

3 A I did.

4 MR. REILLY: That's part of Dr. Gray's records in  
5 evidence, your Honor.

6 THE COURT: Okay.

7 Q Doctor, there's a notation there of chronic deformity  
8 of the tibial talar joint with subchondral,  
9 S-U-B-C-H-O-N-D-R-A-L, sclerosis. What is the meaning of that  
10 in plain language, Doctor?

11 A Plain language what it means is when the tibia or the  
12 leg bone meets the first bone in the ankle there are arthritic  
13 changes at that interface.

14 Q What is sclerosis mean?

15 A Sclerosis means basically a thickening of the bone.  
16 When abnormal loads are applied to a bone the bone hypertrophy  
17 it becomes bigger, something called Wolf's Law, the bone  
18 responds directly to stresses that are applied to it. If you  
19 put more stresses against the bone the bone gets bigger. If  
20 you take stresses away the bone thins out and becomes weak.

21 Q Is that something that's similar to a or co mingling  
22 a fusion?

23 A Yes.

24 Q And again, regarding childhood club foot repair,  
25 would that be considered fusion of some sort?

DR. KATZ - DEFENDANT - REDIRECT

1 MR. HACKETT: Objection, your Honor.

2 THE COURT: Sustained.

3 Q Was any -- in childhood club foot repair, such as  
4 that as we have been talking about in the 1960's, did that  
5 involve any sort of fusion?

6 MR. HACKETT: Objection, your Honor.

7 THE COURT: Excuse me, Counsel, step up with my  
8 secretary. Sustained.

9 Q Regarding the -- if there was marked narrowing noted  
10 in the x-rays on the Elmhurst Hospital on December 22nd, 2008  
11 would that be indicative of a progression of a fusion?

12 A It would be indicative of abnormal wear from  
13 something that was long standing.

14 Q Could x-ray of a childhood club foot repair reveal a  
15 joining of the bones or coalition of the bones?

16 MR. HACKETT: Objection, your Honor.

17 THE COURT: Overruled.

18 A Coalitions occurs in conjunction with club foot  
19 deformity in children who are afflicted by that.

20 Q And can you explain that to the jury, Doctor?

21 A Sure. There are basically two coalitions or where  
22 cartilage is lost and the bones join in the hind foot. One is  
23 something called a calcaneal clavicular and the other is talar  
24 calcaneal. What it means is that the two bones do not segment,  
25 do not separate during development and stay as one bone. A lot

## DR. KATZ - DEFENDANT - REDIRECT

1 of this occurs during the embryonic phase, the bones separate.  
2 You start with one big bone and then ordinarily everything gets  
3 divided up. This is a situation where that process,  
4 developmental process is incomplete. Either you're left a bone  
5 that stays fused or it's half fused and that happens with  
6 increased infrequency in people who are inflicted with club  
7 foot so they go together.

8 Q Doctor, I'm going to talk to you about the right  
9 shoulder surgery that Dr. Touliopoulos performed back on  
10 December 20th, 2012. Did you review Dr. Touliopoulos operative  
11 report?

12 A I did.

13 Q And regarding intraoperative pictures that was  
14 mentioned to you before, would the report typically be  
15 generated after an arthroscopic surgery of the right shoulder  
16 be based on those intraoperative photographs?

17 A That's right. The narrative report explains in words  
18 what was actually done in a typically and it typically is  
19 basically mimics in the pictures.

20 Q And again, regarding the operative report of  
21 9/20/2012 were there any signs of a Bankart lesion?

22 MR. HACKETT: Objection.

23 THE COURT: Sustained. Asked and answered.

24 MR. REILLY: This is on redirect.

25 THE COURT: But you asked it on direct. The fact

## DR. KATZ - DEFENDANT - REDIRECT

1       that you asked it on direct doesn't mean you get to reask  
2       it again on redirect.

3             MR. REILLY: It was brought up on recross.

4             THE COURT: But the answer didn't change, I assume,  
5       from your direct to your redirect.

6       Q     Doctor, based upon your review of the report of  
7       September 20th, 2012 do you have an opinion within a reasonable  
8       degree of medical certainty as to whether any of the repair  
9       performed was related to the accident of December 18th, 2008?

10      A     I do have an opinion.

11      Q     And what is your opinion, Doctor?

12      A     That it wasn't.

13      Q     Why is that?

14      A     Essentially the rotator cuff was not torn from above,  
15     it was not separated. The labrum or the lip was not detached,  
16     it didn't pull any bone with it, it didn't pull any cartilage  
17     above it. Those are the hallmarks of significant trauma within  
18     the shoulder.

19             MR. REILLY: Thank you very much, Doctor. I have  
20     nothing further.

21             THE COURT: Mr. Hackett.

22             MR. HACKETT: Just a couple.

23     REXCROSS EXAMINATION

24     BY MR. HACKETT:

25             Q     Doctor, you said that at the exam I was combative?

## DR. KATZ - DEFENDANT - RECROSS

1 A Yes.

2 Q And explosive?

3 A Yes.

4 Q And this prevented you from getting a proper history;  
5 is that correct?

6 A Yes.

7 Q Do you usually rely on the plaintiff's attorney to  
8 give a history, yes or no, Doctor?

9 MR. REILLY: Objection.

10 MR. MENDELSON: Objection.

11 THE COURT: No, overruled.

12 Q Do you rely on a plaintiff's attorney to give you a  
13 history that you're going to rely on?

14 A No.

15 Q Because you have multiple records to get that  
16 history, correct?

17 A One of the best--

18 Q Doctor, yes or no, you had a whole list of records to  
19 determine what his history was, correct?

20 A And that's verified verbally speaking one on one.

21 Q Doctor, yes or no, you had a whole list of records  
22 that you could of obtained a history but that would of actually  
23 required you to go look at those records and read them as  
24 opposed to getting a quick answer from an attorney in a  
25 particular examination, isn't that true?

## DR. KATZ - DEFENDANT - RECROSS

1 A That's not true.

2 MR. REILLY: Objection.

3 MR. MENDELSON: Objection.

4 THE COURT: Overruled.

5 A That's abusive.

6 Q That's what?

7 A It's abusive.

8 Q And you've had problems with other attorneys, have  
9 you not, Doctor?

10 A Not really.

11 MR. REILLY: Objection.

12 MR. MENDELSON: Objection.

13 THE COURT: Overruled.

14 Q Doctor, do you recall another attorney being  
15 insulting to you?

16 A Yes.

17 Q Okay and do you recall another attorney who is--

18 THE COURT: Names. I want names and transcripts,  
19 names and trials and before what judge.

20 MR. HACKETT: Excuse me for a moment, your Honor. I  
21 have to go back.

22 Q In regard -- do you recall testifying in the case of  
23 St. Lawrence versus Engle in Suffolk County on March 23rd,  
24 2012?

25 A I don't remember that.

## DR. KATZ - DEFENDANT - RECROSS

1 Q And do you recall --

2 THE COURT: What question was asked and what question  
3 was answered?

4 Q Do you recall giving this answer to this question:

5 QUESTION: You refer to him in your report. Would you use the  
6 word rude? Would that be a good way to describe how you feel  
7 he acted toward you referring towards plaintiff's attorney?

8 ANSWER: Oh, no. Rude would be nothing. This person was  
9 highly aggressive and belligerent. You recall giving that  
10 testimony?

11 A I don't remember that but--

12 Q And then do you recall in regard to an attorney Chris  
13 McGrath from Sullivan, Papain, Block and McGrath on a case  
14 DiNapoli versus Abbott, Nassau County on November 7th, 2005  
15 where you find him to be insulting? You recall that?

16 A May very well have been.

17 Q So you have some issue with attorneys, do you not,  
18 Doctor?

19 MR. REILLY: Objection.

20 MR. MENDELSON: Objection.

21 THE COURT: Overruled.

22 A I have an issue with the people who are the most  
23 aggressive and have the worse behavior and you fit in that  
24 classification.

25 Q And, Doctor, wouldn't it make the most sense that you

## DR. KATZ - DEFENDANT - RECROSS

1 would rely on your own attorneys to get a history of the  
2 plaintiff from the medicals and from the deposition testimony  
3 that was held?

4 MR. REILLY: Objection.

5 MR. MENDELSON: Objection.

6 THE COURT: Overruled.

7 Q Yes or no, Doctor?

8 A Not at all. Among a civilized individual--

9 THE COURT: Excuse me, one at a time.

10 MR. REILLY: Thank you, your Honor.

11 THE COURT: Doctor, you can finish answering the  
12 question.

13 A Sure. Among civilized individuals it is commonly  
14 obtained from the person who's being examined very much in the  
15 same way that a person is being examined in their doctor's  
16 office. It's a minority of individuals who believe that this  
17 is an opportunity to be aggressive, belligerent and to bully  
18 the examiner.

19 Q You've been doing this for a long time, Doctor, have  
20 you not?

21 A Right.

22 Q Are you bullied by attorneys?

23 A I was bullied by you.

24 Q Oh, well, I apologize for that, Doctor. Do you  
25 recall in your report that this was the bullying, I asked him



## DR. KATZ - DEFENDANT - RECROSS

1 whether he had surgery and he said -- and he stated, referring  
2 to me, you should have all that. I asked him whether he was  
3 hospitalized and Mr. Hackett stated, obtain that from your  
4 attorney. I asked him whether he received physical therapy and  
5 then he stated obtain that from the attorney. Do you recall  
6 writing that in your report?

7 A I do recall but there are other statements as well.

8 Q And did you, in fact, know that Mr. Bermejo was asked  
9 600 pages of questions regarding his prior history and anything  
10 else that you may have wanted?

11 A Yes and I knew --

12 THE COURT: Excuse me, let the doctor finish his  
13 answer.

14 A Yes and as his representative you could of behaved in  
15 a civilized fashion.

16 Q Okay. And Doctor, did you have an opportunity, did  
17 you go back and read those 600 pages to get all of the  
18 information that you could possibly want?

19 A I don't believe those were presented, no.

20 MR. HACKETT: That's all I have, your Honor.

21 THE COURT: Okay. Doctor, thank you for coming in.  
22 You may step down.

23 THE WITNESS: Thank you very much. Thank you.

24 (The witness leaves the stand.)

25 MR. HACKETT: I have one short witness, your Honor.

## DR. KATZ - DEFENDANT - RECROSS

1 THE COURT: I'll let you call that witness.

2 MR. REILLY: Can we just approach?

3 THE COURT: Yep. Off the record.

4 (Whereupon, a discussion is held off the record at  
5 the bench.)

6 THE COURT: Back on the record. Call your witness.

7 MR. HACKETT: We call Yury Ramirez to the stand.

8 MR. REILLY: Your Honor, can I approach one more  
9 time? I just want to find out something.

10 THE COURT: Sure. Off the record.

11 (Whereupon, a discussion is held off the record at  
12 the bench.)

13 THE COURT: Back on the record. Call her on the  
14 stand.

15 MR. REILLY: Note my objection, your Honor.

16 MR. MENDELSON: Join.

17 THE COURT: It's noted.

18 MR. HACKETT: She's also known as Judy.

19 THE COURT: Well, she'll tell us that.

20 MR. HACKETT: So I had referred to her in the past as  
21 Judy.

22 THE COURT: I'm sure she could tell us her name.

23 COURT OFFICER: Watch your step going up and then  
24 you're going to face the clerk, okay. Remain standing.

25 THE COURT: Okay, ma'am, please face the clerk of the

## RAMIREZ - PLAINTIFF - DIRECT

1 Court and please follow her instructions.

2 THE CLERK: Raise your right-hand.

3 (Whereupon, the witness was sworn in at this time by  
4 the Clerk of the Court and testified as follows:)

5 THE CLERK: Thank you. Lower your hand, have a seat.  
6 For the record, your name.

7 THE WITNESS: Yury Ramirez.

8 THE CLERK: Would you spell your first name for me?

9 THE WITNESS: Y-U-R-Y.

10 THE COURT: Louder.

11 THE CLERK: And your business address?

12 THE WITNESS: 35-01 30th Avenue, Suite 200, Long  
13 Island City, New York 11103.

14 THE CLERK: What's the suite number?

15 THE WITNESS: 200.

16 THE CLERK: Thanks.

17 THE COURT: Ma'am, you've sat in the courtroom  
18 throughout most of the trial and you've heard me tell  
19 people speak in a nice loud clear voice.

20 THE WITNESS: Yes.

21 THE COURT: I want you to do the same. Mr. Hackett.

22 MR. HACKETT: Thank you, your Honor.

23 DIRECT EXAMINATION

24 BY MR. HACKETT:

25 Q Do you also go by the name of Judy?

## RAMIREZ - PLAINTIFF - DIRECT

1 A Yes.

2 Q And are you employed?

3 A Yes.

4 Q By whom are you employed?

5 A Constantinidis and Associates.

6 THE COURT: Do you get paid enough?

7 THE WITNESS: No.

8 THE COURT: Okay, just wanted to get that out there  
9 first.

10 MR. HACKETT: You could negotiate for him.

11 Q And what do you -- what is your position at the firm?

12 A I am Mr. Constantinidis paralegal.

13 Q And how long have you been with the firm?

14 A Eight years.

15 Q And did there come a time when you met Manuel  
16 Bermejo?

17 A Yes.

18 Q And did you know Mr. Bermejo other than through the  
19 law firm?

20 A No.

21 Q Since that time is there any relationship between  
22 yourself, through your family and Mr. Bermejo or Mr. Bermejo's  
23 family?

24 A None.

25 Q And have you been involved in any way during this

## RAMIREZ - PLAINTIFF - DIRECT

1 litigation between or assisted in any way?

2 A Yes.

3 Q And how is that?

4 A I would translate for him.

5 THE COURT: For who?

6 THE WITNESS: For Mr. Bermejo.

7 THE COURT: Okay.

8 Q Thank you. And did there come a time when I asked  
9 you to come with me for a physical examination of Mr. Bermejo?

10 A Yes.

11 Q And where was the first or where was the first  
12 occasion that you did that?

13 A I don't remember the exact date but I know it was on  
14 liability IME with Dr. Katz.

15 Q And where did that physical examination take place?

16 A In the doctor's office in Flushing.

17 Q And were you present the entire time from the time  
18 that Mr. Bermejo arrived at the office until the time that we  
19 left?

20 A Yes.

21 Q And were you actually present during his physical  
22 examination?

23 A I was.

24 Q And do you recall how much time transpired from the  
25 time that Dr. Katz came into the room until Dr. Katz left the

## RAMIREZ - PLAINTIFF - DIRECT

1 room?

2 A About ten minutes.

3 Q And during that period of time can you tell the jury  
4 what occurred?

5 A Well, in the first visit the first, I would say,  
6 five, six minutes there was a lot of arguments going on between  
7 the attorney and the Doctor because the Doctor was not prepared  
8 with the client's medical background so he was asking a lot of  
9 questions as to how the accident occurred and what medical  
10 treatments he had received from the date of accident until the  
11 date of the appointment and then afterwards the remainder--

12 Q Before we get there, did anyone raise their voice  
13 during that exchange?

14 A Yes. Dr. Katz was very upset.

15 Q And what did he say?

16 A Well, I believe he gave you a lecture on if you were  
17 a little bit nicer to people you would do better in life and he  
18 was just very annoyed that, you know, Mr. Hackett would not  
19 allow Mr. Bermejo to give him a full explanation, a full, you  
20 know, of all his medical treatment and of how the accident  
21 occurred.

22 Q And did I ever raise my voice during that meeting?

23 A No.

24 Q And what happened after that exchange?

25 A He was examined. It was about three minutes or four

## RAMIREZ - PLAINTIFF - DIRECT

1 minutes tops.

2 Q And did you actually see him do the physical  
3 examination?

4 A Yes.

5 Q And did Mr. Bermejo take his shoe off?

6 A Yes.

7 Q And--

8 THE COURT: I'm glad you're not leading.

9 MR. HACKETT: Just trying to get through it quickly.

10 THE COURT: Don't worry about it. I have time.

11 Q You recall anything else from that particular visit  
12 to Dr. Katz office?

13 A I don't recall the details. I just know that he  
14 examined his foot. I'm not sure but I believe he examined his  
15 back. I'm not really sure. I can't tell you.

16 Q And did there come a time when you returned to Dr.  
17 Katz office?

18 A Yes.

19 Q And do you recall when that was?

20 A I believe it was in March of this year.

21 Q And was that again for a visit for an examination by  
22 Dr. Katz of Manuel?

23 A Yes, it was for liability IME for the right shoulder.

24 Q And how long did that exam take?

25 A The actual exam was three minutes. The total

## RAMIREZ - PLAINTIFF - DIRECT

1 evaluation was like five.

2 Q And how do you know that it was three minutes?

3 A I pretty much timed it.

4 Q And how did you time it?

5 A With my phone.

6 MR. HACKETT: That's all I have, your Honor.

7 THE COURT: Okay again, we're going to give you a  
8 short break to get your stair climbing exercise in. We'll  
9 bring you back down in five or ten minutes hopefully.

10 COURT OFFICER: All rise. Jury exiting.

11 (The jury exited the courtroom and the following  
12 occurred:)

13 THE COURT: Ma'am, if you so choose you can speak to  
14 Mr. Reilly and Mr. Mendelsohn. If you have changed your  
15 mind fine but it's your choice. You can step down.

16 (The witness leaves the stand.)

17 MR. REILLY: Your Honor, first --

18 MR. MENDELSON: Your Honor, can we speak together  
19 briefly?

20 THE COURT: Sure.

21 MR. HACKETT: Thank you.

22 (Brief recess.)

23 THE COURT: Back on the record. You ready?

24 MR. REILLY: Yes, I just have a few questions.

25 COURT OFFICER: Ready?



## RAMIREZ - PLAINTIFF - DIRECT

1 THE COURT: Yes.

2 COURT OFFICER: All rise. Jury entering.

3 (The jury entered the courtroom and the following  
4 occurred:)

5 THE COURT: Okay, please be seated. Mr. Reilly, you  
6 have a few questions?

7 MR. REILLY: Just a few questions, your Honor.

8 CROSS-EXAMINATION

9 BY MR. REILLY:

10 Q Good morning -- good afternoon, ma'am. Its been a  
11 long day.

12 A Good afternoon.

13 Q You and I have met before in the course of this case,  
14 correct?

15 A Yes.

16 Q And you have worked for Mr. Constantinidis for eight  
17 years?

18 A Yes.

19 Q Okay, steadily all for those eight years you have  
20 worked there?

21 A Yes.

22 Q And you know Mr. Hackett?

23 A Yes.

24 Q You know him for about the same amount of time, is  
25 that fair to say?

## RAMIREZ - PLAINTIFF - CROSS

1 A Fair.

2 Q Okay and it's fair to say Mr. Bermejo is a client of  
3 Mr. Constantinidis?

4 A He is.

5 Q And you have spent a lot of time with him, correct?

6 A When he goes to the office, yes.

7 Q You help translate. That's what I mean, in the  
8 course of this case, right? Of course we know that, okay, and  
9 after you translated for him?

10 A Yes.

11 Q At various times?

12 A Yes.

13 Q Okay. And it's fair to say you like to see him do  
14 well in this case, correct, ma'am?

15 A Yes.

16 Q Okay now when you went to the first visit to Dr. Katz  
17 you weren't there when Dr. Katz reviewed the records, correct?

18 A No.

19 Q So you don't know how long he spent reviewing any  
20 records or anything like that, correct?

21 A I wouldn't know.

22 Q Okay because you weren't there, right?

23 A That's correct.

24 Q Okay. And had you been to other defense doctors or  
25 doctors retained by defendant's offices over the years working

## RAMIREZ - PLAINTIFF - CROSS

1 for Mr. Constantinidis?

2 A No.

3 Q This is the only time you've ever been to a doctor's  
4 office who was retained by defendants?

5 A Yes.

6 Q And so therefore -- have you been -- would you be  
7 surprised a doctor would want to talk to a person and get their  
8 history?

9 A Would I be surprised?

10 Q Right. Are you aware that's what usually happens to  
11 the doctor?

12 MR. HACKETT: Objection to as to what usually  
13 happens.

14 THE COURT: Are you aware that happens quite often  
15 that the doctors who want to speak to the patients  
16 directly or the party that they are examined directly?

17 A Well, I am aware that the defendants are to provide  
18 their doctors with all the medical documentation required for  
19 the visit.

20 THE COURT: That's not the question.

21 Q That's not the question.

22 MR. REILLY: Move to strike as not responsive, Judge.

23 THE COURT: Excuse me, application granted.

24 Sometimes would you be surprised if you found out that the  
25 doctors quite often want to get a history from the subject

## RAMIREZ - PLAINTIFF - CROSS

1           being examined directly?

2           A     No, I wouldn't be surprised.

3           Q     And have you been to any of Mr. Bermejo's medical  
4     appointments for his doctors retained by plaintiffs like Dr.  
5     Papathomas, Dr. Touliopoulos?

6           A     I only went to one.

7           Q     And were you present while Mr. Bermejo was in the  
8     room with that doctor?

9           A     Yes.

10          Q     Who was that doctor?

11          A     Dr. Kyriakides.

12          Q     Okay and did Dr. Kyriakides talk to Mr. Bermejo?

13          A     Yes. That was before his right shoulder surgery.

14          Q     You translated for Mr. Bermejo?

15          A     Yes, I did.

16          Q     And Dr. Kyriakides did that to get a history from  
17     Mr. Bermejo, correct?

18          A     Right because he needed, I guess, discharge for the  
19     surgery.

20          Q     Okay and at the second examination earlier this year  
21     that was just for the right shoulder, correct?

22          A     Right.

23          Q     And Mr. Bermejo, was he questioned by Dr. Katz at  
24     that time, asked any questions through you?

25          A     He was.

## RAMIREZ - PLAINTIFF - CROSS

1 Q Mr. Hackett was present for that, correct?

2 A Yes.

3 Q And he allowed that to be done, correct?

4 A Yes.

5 MR. REILLY: I have nothing further, ma'am. Thank  
6 you.

7 THE COURT: Mr. Hackett, you have anything else?

8 MR. HACKETT: Just one.

9 REDIRECT EXAMINATION

10 BY MR. HACKETT:

11 Q Judy, other than using your phone to determine how  
12 much time Dr. Katz spent on the second exam do you have any  
13 other information regarding how long that took?

14 A Yes.

15 Q And what is that?

16 A A video.

17 Q A video of the examination?

18 A Yes.

19 MR. REILLY: Whoa, your Honor, objection.

20 THE COURT: Now we have -- excuse me, I'm going to  
21 send you guys home. Why? Because this discussion is  
22 going to take awhile and I'm not going to send you  
23 upstairs because it's going to take awhile. Okay, it's  
24 going to take awhile. Enjoy your weekend. I want you to  
25 come back at 9:30. Don't think about this case, don't

## RAMIREZ - PLAINTIFF - REDIRECT

1 talk about this case, don't worry about this case. I  
2 understand this is going to be the last day of lousy  
3 weather for awhile hopefully. Enjoy the weekend. I will  
4 see you when you come to the third floor. Unfortunately  
5 Officer Battle will be back from his other duties so enjoy  
6 your weekend.

7 COURT OFFICER: All rise. Jury exiting.

8 (The jury exited the courtroom and the following  
9 occurred:)

10 THE COURT: Okay, ma'am, you can step down.

11 (The witness leaves the stand.)

12 THE COURT: So, there's a video?

13 MR. HACKETT: Yes, Judge.

14 THE COURT: And you noticed Mr. Mendelsohn and  
15 Mr. Reilly when about this video?

16 MR. HACKETT: We didn't because there's no need to do  
17 that, your Honor.

18 THE COURT: I realize that. You plan --

19 MR. REILLY: The jury heard it.

20 THE COURT: Yes. You have an application?

21 MR. REILLY: Your Honor, I think it's a mistrial. I  
22 really -- I'm flummoxed to tell you the truth. I've never  
23 had anything like this happen in the entire time I've been  
24 doing this.

25 THE COURT: This is a trial that keeps on giving.

## PROCEEDINGS

1 MR. REILLY: Well, I don't know what to tell you but  
2 I cannot say --

3 THE COURT: Do we have the video produced to  
4 something that's viewable?

5 MR. HACKETT: Yes, your Honor.

6 MR. REILLY: It shouldn't be reviewed.

7 MR. MENDELSON: Your Honor, counsel was clearly  
8 aware of this. There was no disclosure, nothing about  
9 this.

10 THE COURT: See the problem is it's certainly not  
11 admissible in the direct case. It's probably admissible  
12 in a rebuttal case but I don't know what the video says.  
13 Is there some way we can hookup this video?

14 MR. HACKETT: Yes.

15 THE COURT: Okay, hook it up. Let's see it.

16 MR. REILLY: That's not disclosure.

17 MR. MENDELSON: Nothing about this comes --

18 MR. REILLY: This is completely improper, Judge.

19 MR. MENDELSON: Two minutes ago --

20 THE COURT: Sir, as I said, this is the trial that  
21 keeps on giving in so many different ways.

22 MR. MENDELSON: Just for the record, we join in that  
23 application, your Honor.

24 THE COURT: So why don't you see the video. And,  
25 what's your last name, ma'am?

## PROCEEDINGS

1 THE WITNESS: Ramirez.

2 THE COURT: Ms. Ramirez, step back up on the witness  
3 stand.

4 MR. HACKETT: Your Honor, she can turn this on and  
5 allow you to view it.

6 THE COURT: Okay and for the record you're saying  
7 that you took this video?

8 THE WITNESS: I didn't.

9 THE COURT: Who took the video?

10 MR. HACKETT: I did, your Honor.

11 MR. REILLY: I'm sorry?

12 THE COURT: Mr. Hackett took the video.

13 MR. MENDELSON: Your Honor, we're entering into a  
14 totally different world, your Honor.

15 THE COURT: So many different things, so many.

16 MR. MENDELSON: We've got Counsel acting as a  
17 witness now, acting as an undercover surreptitious spy  
18 videoing an individual conducting an examination.

19 MR. HACKETT: Stop.

20 MR. MENDELSON: I'm at a loss of words right now how  
21 far this goes.

22 MR. HACKETT: There's no prohibition of individual --

23 THE COURT: But there is a prohibition from you  
24 acting as a witness or becoming a witness that I tried to  
25 skirt and that's a problem and the person who can certify



## PROCEEDINGS

1       that video is you Mr. Hackett.

2           MR. HACKETT: No, your Honor. The video could be --  
3       it can be certified by itself because it's going to be  
4       clear the parties who are in the video. It's going to be  
5       clear it's a video of Mr. Bermejo and it's also going to  
6       be, if it needs any other certification, to be done by Ms.  
7       Ramirez.

8           MR. REILLY: Well, you know something, besides the  
9       fact this is completely, completely beyond anything I have  
10      ever dealt with.

11          THE COURT: As is every other part of this trial.

12          MR. REILLY: There's been a few things but this  
13      really takes the cake and quite frankly I am surprised at  
14      counsel because we have gotten along collegially as  
15      colleagues here, we're adversaries, we have gotten along.

16          THE COURT: You still are.

17          MR. REILLY: Well, you know something, this almost  
18      amounts if they are trying to do something else I think  
19      that's going on here. Is this a day in a life video I am  
20      getting right now beside the fact he is a witness to this?

21          THE COURT: No.

22          MR. HACKETT: No, the only time that -- we frankly  
23      weren't intending to use it except when the doctor got on  
24      the stand and said that his examination was 20 minutes  
25      long when it clearly was not then that became a situation.

## PROCEEDINGS

1 MR. REILLY: I don't know if it was edited, I haven't  
2 seen it, it hasn't been exchanged. What is the difference  
3 here at this point, you know? But obviously --

4 MR. HACKETT: There is.

5 MR. REILLY: It's totally, totally --

6 MR. CONSTANTINDIS: Between 15 and 20 minutes ago and  
7 that's when this became an issue, your Honor and of  
8 course --

9 MR. HACKETT: And how does it prejudice the  
10 defendants?

11 MR. REILLY: There is a whole list of things here  
12 that's a problem.

13 THE COURT: It's ten after 4:00 on a Friday. I hope  
14 you guys have access to Lexis or Westlaw because Monday  
15 morning at 9:30 you folks on the defense side are going to  
16 tell me why I should declare a mistrial and you folks on  
17 the plaintiff's side are going to tell me why I shouldn't  
18 declare a mistrial. I've never seen this. I've never  
19 seen this. I've been trying cases as an attorney or I've  
20 been a law secretary or I've been a judge in this building  
21 since 1981. I have never seen it in any way, shape or  
22 form.

23 MR. HACKETT: Well, it's very--

24 THE COURT: I know this is not an issue of first  
25 impression because there have been some surreptitious

## PROCEEDINGS

1 tapes introduced into evidence during trials before. The  
2 specific packaging of this -- well, publishing in this  
3 manner to the jury was surprising to say the least. That  
4 while the witness who was a member of the plaintiff's law  
5 office blurted out, in a planned manner, that there was a  
6 tape of this. Notwithstanding there is a continuing order  
7 signed by both parties in our preliminary order which I've  
8 been actually long enough to have been one of the law  
9 secretaries involved in preparing the original order so I  
10 know what's in there when we started doing it in the  
11 1980's, there is a requirement not of discovery but of  
12 disclosure that if you got a recording you've got to give  
13 it up, not when you're asked for it without being asked  
14 for it. And while it usually goes in a day in the life  
15 circumstance, last time I checked it is party neutral. If  
16 you got a tape that is pertinent to this action you got to  
17 give it up without the other party being asked and the  
18 reason is because they don't know you have it so they  
19 don't know to ask for it. You disagree Mr. Hackett?

20 MR. HACKETT: I disagree with that, your Honor, in  
21 this regard.

22 THE COURT: And why?

23 MR. HACKETT: Because there was not a determination  
24 as to whether or not we were going to use it or not.

25 THE COURT: That's not your call. That's my call.

## PROCEEDINGS

1 MR. HACKETT: I understand that, your Honor.

2 THE COURT: Excuse me, that's my call or that's Judge  
3 O'Donoghue's call or that's the call of somebody else who  
4 sits in the front of the courtroom with a black robe. If  
5 you got the tape -- that's why we distinguish between  
6 disclosure and discovery. They don't know you have it so  
7 they don't know to ask for it.

8 MR. HACKETT: I understand that, your Honor. It's my  
9 understanding that that is not something that is required  
10 to be turned over. If that was my understanding I would  
11 of done that. It was a film not taken of the defendants.  
12 It was taken of the examining physician.

13 THE COURT: That doesn't matter. It's not of the  
14 defendant. It's a film that has some bearing on this  
15 litigation.

16 MR. MENDELSON: Judge, they made a whole case out of  
17 the doctors are part of the defendant's essentially.

18 THE COURT: Well, I've got to admit, on the other  
19 hand Dr. Katz, if anyone had dealt with Dr. Katz in the  
20 past based on his testimony it would of been reasonable  
21 for them to have a tape because he is testifying a 45  
22 minute IME. What universe does he live in? If I ever see  
23 a doctor do a 45 IME it will be the first time. You know,  
24 and the problem is forget about your firm going to greater  
25 expense and forget about the defendants going to greater

## PROCEEDINGS

1 expense, the court system has gone through great expense  
2 to try this case. In fact, knowing the way we do business  
3 and knowing what the bench book says, I would of denied  
4 the motion and continued with the trial knowing the tape  
5 existed. However, the jury knows the tape existed as  
6 Mr. Reilly points out. So they would have wanted to see  
7 the tape consistent with the now attack on the credibility  
8 of Dr. Katz. If you've got a tape that is in effect  
9 calling him a liar and basically destroying the  
10 defendant's defense because part of their defense is Dr.  
11 Katz observations and now if you showed that he is a liar  
12 there goes their entire case which I'm sure Mr. Mendelsohn  
13 and Mr. Reilly wouldn't want.

14 You've got to convince me, both of you, and it might  
15 take you -- it might not help your weekend.

16 MR. REILLY: It's already being worked on, your  
17 Honor.

18 THE COURT: And gentlemen and ma'am because this is  
19 now a major problem. I don't even need a written brief.  
20 I need the cases that can give me some guidance. I will  
21 tell you right now, my tendency is to grant Mr. Mendelsohn  
22 and Mr. Reilly's application.

23 MR. REILLY: Or at the very least give a curative  
24 instruction.

25 THE COURT: How am I going to cure that? How am I

## PROCEEDINGS

1 going to say that? Nine intelligent people of the jury  
2 say I heard there is a tape that says Dr. Katz is lying  
3 his butt off. If you're up there in the jury room and  
4 they know there's that tape why are they not going to  
5 say -- the first question is going to be, Judge, can we  
6 see the tape?

7 MR. HACKETT: Then he should be asking that, Judge.  
8 I agree.

9 THE COURT: This is truly the trial that keeps on  
10 giving.

11 MR. REILLY: You're right, Judge. Its got to be a  
12 mistrial.

13 THE COURT: I don't know if it's got to be a mistrial  
14 but you're going to convince me either way at 9:30.

15 MR. HACKETT: Very good.

16 MR. REILLY: Okay, Judge.

17 THE COURT: I don't know if you're going to be in  
18 front of what I did this morning because I think that's  
19 coming back Monday or in back of it but it's going to put  
20 me in a great mood. Enjoy your weekend.

21 MR. REILLY: You too, Judge.

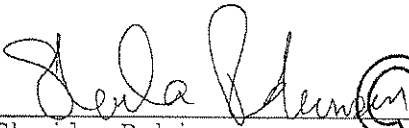
22 MR. HACKETT: Very good, your Honor.

23 (The trial was adjourned to April 15, 2013, at 9:30  
24 a.m.)  
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REPORTER'S CERTIFICATION

I hereby certify that the foregoing is a true and accurate transcript of the original stenographic minutes in this case.

  
Sheila Robinson  
Official Court Reporter.

**COPY**

COPY

1 SUPREME COURT OF THE STATE OF NEW YORK  
2 COUNTY OF QUEENS: CIVIL TERM : PART 18

-----X

3 MANUEL BERMEJO,

4 Plaintiff,

Ind. No.

5 - against -

23985/09

Jury Trial

6 AMSTERDAM & 76TH ASSOCIATES, LLC  
and IBEX CONSTRUCTION, LLC,

Defendants.

-----X

7 April 15, 2013  
8 Queens Supreme Court  
88-11 Sutphin Boulevard  
9 Jamaica, New York 11435

10 B E F O R E : THE HONORABLE DUANE A. HART,  
Justice, Supreme Court

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23  
24 Sheila Robinson  
25 Official Court Reporter



## PROCEEDINGS

1 THE COURT: On the record. First thing with this, a  
2 little something that I'm going to do. All the discovery  
3 in this case is complete. There will be no more discovery  
4 and that is now the law of the case. I looked up the law  
5 and I got memos of law. Counselor, I need your memo of  
6 law.

7 MR. REILLY: May I approach, your Honor?

8 THE COURT: I'll take -- I can assume that I'm  
9 getting Amicus from Shaub Ahmuty?

10 MR. REILLY: Yes. Actually, yes.

11 THE COURT: Under Section 3101, strange enough 3101d  
12 the tape should have been turned over. No, it should have  
13 been turned over. Doesn't make any sense. All tapes are  
14 supposed to be disclosed. Period. There is no other way.  
15 All tapes are supposed to be turned over. The question  
16 is, who caused the problem? Is it the plaintiff for not  
17 turning over the tape? Is it the defendants for hiring  
18 this doctor in the first place who evidently, if the tapes  
19 are to be believed and I don't know if they're to be  
20 believed conducting an examination that didn't last the  
21 length of what he said it was supposed to last, it was  
22 shorter than it was and that might put into question the  
23 first examination that he said lasted 45 minutes? Or was  
24 it the doctor who, if you are to believe the tape  
25 conducting an examination that was short of what the tape

## PROCEEDINGS

1 indicates? Who caused the mistrial? Was it one or two or  
2 three? My belief is all three parties caused the  
3 mistrial. All three caused the mistrial.

4 The plaintiffs clearly should have turned over the  
5 recorded tape. If the tape, cellphone, whatever it was,  
6 clearly there was no way around it. You're supposed to  
7 turn it over.

8 MR. HACKETT: May I be heard, your Honor?

9 THE COURT: Sure.

10 MR. HACKETT: In looking at the cases, your Honor,  
11 you're absolutely correct. If it is a party in the  
12 action. This is a non party.

13 THE COURT: I realize it's a non party but the  
14 statute doesn't say non party. Some of the cases do but  
15 the statute doesn't say it because usually that non  
16 turnover of the tape is by, it's a surveillance tape on a  
17 plaintiff.

18 MR. HACKETT: That is correct, your Honor.

19 THE COURT: I don't know if there's any case which  
20 talks about a tape produced by the plaintiff as to a  
21 defense witness. Did you find any case like that?

22 MR. HACKETT: I saw -- I found -- yes. Not videotape  
23 but I did found audiotape.

24 THE COURT: I'm talking videotape or audiotape.

25 MR. HACKETT: I did find a 2011 Second Department

## PROCEEDINGS

1 case that states that, your Honor, that in C.P.L.R. 3101  
2 in Section 1-A it talks about the parties that I agree  
3 totally if it's a party to the action I would of been  
4 required to turn that over.

5 THE COURT: What's the case that I missed that the  
6 Second Department case that says that there's a difference  
7 between a video tape and an audio tape?

8 MR. HACKETT: It doesn't say there is a difference  
9 between the two. It just states -- it talks about it is  
10 the case of Valencia versus O'Bashio.

11 THE COURT: Okay.

12 MR. HACKETT: I believe that's the case, Judge.

13 THE COURT: Oh, but this isn't during the trial.

14 MR. HACKETT: Well--

15 THE COURT: This is a protective order.

16 MR. HACKETT: Exactly, your Honor.

17 THE COURT: No.

18 MR. HACKETT: See, there's a difference. Apparently  
19 if the party had testified at a deposition then I would of  
20 certainly and there was something to indicate that there  
21 was that the videotape or the written statement or  
22 something else was going to be completely at odds with the  
23 person's testimony then I would of been required to turn  
24 it over.

25 THE COURT: Well, we can differ.

## PROCEEDINGS

1 MR. HACKETT: Well, if I may, your Honor. I don't  
2 mean to interrupt.

3 THE COURT: Sure.

4 MR. HACKETT: But also in 3101 it specifically in  
5 Section 2, I believe it's D, it specifically states that  
6 I'm turning work product does not have to be turned over.  
7 It's a specific--

8 THE COURT: I'm not buying it. Your work product, if  
9 that's your explanation then your work product is anything  
10 that you work at. No. And I cited 3101d. No, you should  
11 have turned it over. You didn't.

12 MR. HACKETT: Well, your Honor, again--

13 THE COURT: You didn't.

14 MR. HACKETT: -- it was not evidence in chief and  
15 frankly --

16 THE COURT: Does it saying anything in the statute  
17 about anything in chief?

18 MR. HACKETT: For parties that's correct.

19 THE COURT: No, it doesn't say, it doesn't  
20 differentiate. I read the statute several times. It does  
21 not differentiate. It clearly does not. So again that  
22 brings me back to the threshold question is it your fault  
23 for causing the mistrial, is it your fault for causing the  
24 mistrial or is it the doctor's fault for causing the  
25 mistrial? My opinion is it's all three.

## PROCEEDINGS

1           Now, this is the problem. This is why I get  
2           everybody here. Because I've put on the record before we  
3           started all discovery is over you are now stuck with this  
4           doctor even in a retrial. You are stuck with this doctor.  
5           You, the plaintiffs, are stuck in a retrial with the cost  
6           of bringing the case. The other parties have associated  
7           issues of time and costs that now cause a problem. So the  
8           question is, do you want to settle it? I would suggest,  
9           and that's why everybody's here and even if the doctor  
10          wants to contribute because clearly, and I believe I left  
11          a message with you that the doctor should come by with his  
12          own attorney.

13           MR. REILLY: He did, your Honor. I conveyed that to  
14          the doctor.

15           THE COURT: I'm not letting the doctor take the stand  
16          again unless he has counsel. The doctor's career doing  
17          IME's might be over. If he gets caught in a lie on  
18          something that's material at trial his future use to  
19          anyone is useless, correct? That will follow the doctor  
20          forever. There is one doctor, for instance -- and counsel  
21          you can step up with your Amicus brief and go on the  
22          record. Could I have your appearance, please?

23           MS. TRACY: Deidra Tracy, Shaub, Ahmuty, Citron and  
24          Spratt.

25           THE COURT: And you're filing an Amicus brief in

## PROCEEDINGS

1 support of whom?

2 MS. TRACY: IBEX. We're Appellate counsel for IBEX  
3 Construction.

4 THE COURT: Okay. So, this is truly a pox on  
5 everybody's house because I'm going to grant a mistrial  
6 unless you can settle it. And unless you can settle it,  
7 and this goes -- I put in a call to counsel for the  
8 third-party for the D/J action because they might be part  
9 of this, unless you can figure out a way to settle it I  
10 will declare the mistrial and post mistrial I will have a  
11 sanctions hearing and I will, Doctor, be turning the  
12 record over to the district attorney. So, you got a  
13 choice. You can collectively get yourselves out of this  
14 problem or I will do what I will do. Second call. And  
15 mark these in evidence as Court exhibits, all the memos.

16 (Court Exhibit 3, Memo of Law, so marked and received  
17 into evidence.)

18 (Court Exhibit 4, Memo of Law, so marked and received  
19 into evidence.)

20 (Court Exhibit 5, Memo of Law, so marked and received  
21 into evidence.)

22 (Court Exhibit 6, Memo of Law, so marked and received  
23 into evidence.)

24 (Brief recess.)

25 THE COURT: On the record. Doctor, step up. If you

## PROCEEDINGS

1 got a personal attorney I will call him or her up right  
2 now because you need one right now. Mark these Court  
3 exhibits. Off the record.

4 (Brief recess.)

5 THE COURT: On the record. Okay Doctor, I know you  
6 want to say something but I suggest you not say anything  
7 until you are dealing with an attorney. I would strongly  
8 suggest that you wait. You have an attorney coming in  
9 today?

10 THE WITNESS: We're trying.

11 THE COURT: I would strongly suggest you not do  
12 anything because you're in more trouble than you think.  
13 It's probably that your career doing IME's is over. It's  
14 possible, unless this case is settled, that I might be  
15 taking more -- the attorneys have a duty basically not to  
16 do anything with regards to the district attorney. If I  
17 find out or if I even suspect something is going on I have  
18 a duty to get in touch with the district attorney and  
19 getting in touch with the district attorney is not a good  
20 thing for you in this case. Is that understood?

21 THE WITNESS: Yes, sir.

22 THE COURT: Good. Have a seat or try to find your  
23 attorney? Off the record.

24 (Brief recess.)

25 THE COURT: On the record.

## PROCEEDINGS

1 MR. REILLY: In regard to your Honor's ruling about  
2 defendants not being able to call another orthopedist.

3 THE COURT: Discovery is closed.

4 MR. REILLY: Well, this is a very exceptional  
5 circumstance, your Honor.

6 THE COURT: Your doctor might've told a material  
7 falsehood.

8 MR. REILLY: Therefore I think under those  
9 circumstances that should warrant another exam so I would  
10 take exception to your Honor's ruling about that.

11 THE COURT: Wait a minute, you -- firstly, Dr. Katz  
12 you now have an attorney. Counsel, you want to step up  
13 and put your appearance on the record?

14 MR. VOZZA: My name is David Vozza, Kern Augustine  
15 Conroy & Schoppmann, P.C., 865 Merrick Avenue, Westbury.

16 THE COURT: Counsel, is it likely that based upon the  
17 little you know about you would let your client continue  
18 to offer testimony in this trial?

19 MR. VOZZA: Absolutely not, Judge.

20 MR. REILLY: In light of those circumstances, your  
21 Honor.

22 THE COURT: But I could declare a mistrial and if the  
23 mistrial -- like I said, you still have this doctor who  
24 will now not testify. The plaintiff -- I'm not going to  
25 say the plaintiff didn't do anything wrong because the



## PROCEEDINGS

1 plaintiff shouldn't have taped the IME firstly and then if  
2 they taped the IME they should have told the defendant  
3 that they take the IME and the doctor shouldn't of lied  
4 about the length of the IME to cause the plaintiff to come  
5 up with the tape of the IME.

6 MR. REILLY: With all due respect, your Honor, and we  
7 also take exception with your ruling, the defendants are  
8 just as much a victim here as anything else. We're not  
9 present when these exams take place. We have to have  
10 faith in the doctors that when they put down their time  
11 that they spend that's the time they spend and given the  
12 circumstances where we have an individual who may have--

13 THE COURT: The word is lied.

14 MR. REILLY: Those are your Honor's words.

15 THE COURT: He may have lied not misrepresented. He  
16 may have lied.

17 MR. REILLY: May have lied. We are just as much a  
18 victim as we're involved in this case, your Honor, and for  
19 those reasons I believe they are exceptional circumstances  
20 that is we should be allowed to retain someone else.

21 THE COURT: So let me get this straight. Your theory  
22 is you got a witness who may have lied and because he may  
23 have lied that you get by and you're not stuck with him?  
24 That's your theory?

25 MR. REILLY: Not that we get by, your Honor, but

## PROCEEDINGS

1 we're being penalized for the acts of somebody who we have  
2 no idea that they were acting in that way but also the  
3 steps that were taken to reveal this lie I think are  
4 extraordinary in as much themselves.

5 THE COURT: Did I sound like I was familiar with the  
6 steps that were taken to reveal the lie?

7 MR. REILLY: Not at all, your Honor.

8 MR. VOZZA: Under these circumstances, your Honor,  
9 which I extremely unusual to say the least, your Honor  
10 noted I would except to your Honor's ruling not to retain  
11 another physician should the case proceed to another trial  
12 at some point. That's what I'm saying, Judge, for now on  
13 the record. I have other things to say but we'll see.

14 THE COURT: I'm not declaring a mistrial. I am going  
15 to let the jury go home today. I'm going to send my  
16 officer down to tell the jury they can come back tomorrow  
17 at 9:30. Are you so advised Officer Battle?

18 COURT OFFICER: So advised.

19 THE COURT: Then I'm not going to bring them up but I  
20 don't know what I'm going to do with Dr. Katz but I am  
21 telling the attorneys for the plaintiff I want that tape  
22 reduced to something, a CD or something, where I can now  
23 possess it because that may go to the district attorney  
24 and you're still stuck with. You have an exception but  
25 you still have Dr. Katz as your expert.

## PROCEEDINGS

1 MR. HACKETT: I had sent that tape -- I was able to  
2 put it on an Email and I extend it to defense counsel so I  
3 will.

4 THE COURT: And now we come up with the problem  
5 that -- who is the videographer of the tape?

6 MR. HACKETT: That was myself, your Honor.

7 THE COURT: So what is your application with regards  
8 to that?

9 MR. REILLY: That the firm of Constantinidis &  
10 Associates be disqualified as counsel for the plaintiff.

11 MR. MENDELSON: Same application.

12 THE COURT: Because you're now a witness.

13 MR. HACKETT: Actually, in looking at the case law on  
14 that, your Honor, the video can be certified by the video  
15 itself and if --

16 THE COURT: It's not who has certified. It's who  
17 they want to call. You're a potential witness.

18 MR. HACKETT: I'm only trial counsel and once I would  
19 be called as a witness I would be able to resume as trial  
20 counsel, your Honor.

21 MR. REILLY: I don't believe so, your Honor. He was  
22 acting on behalf of the firm. If he is trial counsel why  
23 is he there for the independent medical examination? He  
24 was there with a representative of Constantinidis to  
25 translate. The firm is deeply embedded in.

## PROCEEDINGS

1 THE COURT: All the more reason this case should be  
2 settled.

3 MR. HACKETT: Reason why the video was taken  
4 initially, your Honor --

5 THE COURT: Because he had attacks on you on your  
6 person by Dr. Katz in the IME report which to me were  
7 amazing, personal attacks on the attorney in the IME  
8 report.

9 MR. HACKETT: And so the sole purpose of taking  
10 that --

11 THE COURT: Do I you need further room?

12 MR. HACKETT: No, your Honor.

13 THE COURT: I think it would be prudent again,  
14 Counsel, if for you to explore Dr. Katz participation in  
15 future court matters whether they be Workers Comp, whether  
16 they be in this building or any other building where  
17 somebody has to take an oath --

18 MR. VOZZA: Your Honor, I hear what you're saying.

19 THE COURT: I hope Dr. Katz hears what I'm saying.

20 MR. HACKETT: He does as well. We both appreciate  
21 what you're saying. We'll definitely--

22 THE COURT: Good. I'm going to second call this  
23 while you figure out how you can settle this case so I can  
24 seal this record so that I don't have to send things over  
25 to the district attorney, so that I don't have to remove

## PROCEEDINGS

1 counsel from this case, so that the defendant isn't put in  
2 a position where they have to go forward on the RSD case  
3 with no orthopedist and so the disclaiming carrier for the  
4 third-party defendant isn't caught holding a three to six  
5 million dollar bag. All of those are occurring not  
6 without the realm of happening, correct. They can all  
7 happen in this case. Parties can be sanctioned, people  
8 can go to jail. Am I making it up? No. Continued second  
9 call.

10 MR. REILLY: Thank you, your Honor.

11 THE COURT: Off the record.

12 (Brief recess.)

13 THE COURT: Back on the record. He has a motion to  
14 disqualify you.

15 MR. REILLY: I just want to make that part of the  
16 record.

17 THE COURT: By the way, on the record. When can you  
18 get me a copy of the examination? Give it to the clerk.  
19 Let the record reflect that -- I need an envelope, I have  
20 counsel submitting a thumb drive. We're going to mark  
21 that a court exhibit. Seal the envelope, madam clerk.  
22 Madam reporter, mark it in evidence as a Court exhibit.

23 (Court Exhibit 7, thumb drive, so marked and received  
24 into evidence.)

25 MR. HACKETT: In regard to this motion, this is the

## PROCEEDINGS

1 first time that we're having notice of this so if we could  
2 have an opportunity --

3 THE COURT: Okay, if the case isn't settled today I  
4 will give you time to respond.

5 MR. HACKETT: Very good.

6 THE COURT: Okay Doctor, have a seat. Counsel, step  
7 up. For the record, Mr. Hackett has delivered a thumb  
8 drive of the IME to the Clerk of the Court and its been  
9 marked as a Court exhibit. Sir, I'm also, at your  
10 expense, ordering you to produce three other thumb drives,  
11 one for Mr. Reilly, one for Mr. Mendelsohn and one for --  
12 I'm sorry, Counsel, I forgot your name.

13 MR. VOZZA: Vozza, V-O-Z-Z-A.

14 THE COURT: Mr. Vozza.

15 MR. HACKETT: Yes, your Honor.

16 THE COURT: I want them to be delivered -- you can  
17 have them tomorrow?

18 MR. HACKETT: Yes, I believe so.

19 THE COURT: I want one to be delivered to each of  
20 these attorneys tomorrow at your expense. Do any of you  
21 have any further applications?

22 MR. MENDELSON: Yes, your Honor, just in furtherance  
23 of the application, oral application made a few moments  
24 ago.

25 THE COURT: Okay, deliver that application. Do you

## PROCEEDINGS

1 have a memo of law to back it up?

2 MR. REILLY: Yes, it's part of the motion in limine.

3 THE COURT: Mark the memo of law, I believe, Court 8.  
4 Give it to the Court Reporter.

5 (Court Exhibit 8, Memo of Law, so marked and received  
6 into evidence.)

7 THE COURT: Okay Mr. Hackett, I will give you until  
8 tomorrow to respond if this case isn't settled.

9 MR. HACKETT: Thank you, your Honor.

10 THE COURT: I want you folks to continue to try to  
11 work it out. Again, I'm not going to hold on to this case  
12 in this posture forever. If you can't work it out today I  
13 will declare a mistrial tomorrow and I will take the  
14 remedial actions that I have told you that I was taking.  
15 It may result -- again, I don't need to read the laundry  
16 list of what will befall all the parties. Every one of  
17 you has some sort of negative consequence to this case not  
18 being settled and this record being sealed. Everybody,  
19 the plaintiffs and the counsel, defendants, the doctor,  
20 third-party defendants, everyone. This has been --  
21 Justice O'Donoghue and I, and I keep him up on what's  
22 going on with this case all the time, we can't figure out  
23 what you guys did at any step of the proceeding. It's  
24 just, you know, we tried to explain it to the  
25 Administrative Judge. He kept saying no, they didn't --

## PROCEEDINGS

1 no, they didn't. I don't know what you guys did but  
2 whatever was done we're now in a position that -- I just  
3 never seen anything like it. It boggles my mind. So you  
4 got until really about 4:00 o'clock this afternoon to try  
5 and settle this because if I have to deal with this case  
6 tomorrow stuff will start happening. You get back to me  
7 at 2:00 o'clock.

8 MR. HACKETT: Thank you, Judge.

9 MR. MENDELSON: Thank you, your Honor.

10 MR. VOZZA: Is there an appearance necessary for Dr.  
11 Katz?

12 THE COURT: I would think you and the doctor would be  
13 the first ones to open up this building in the morning.

14 MR. VOZZA: Just making sure. Thank you, Judge.

15 THE COURT: I would think if the doctor has a  
16 calendar of patients or people he is going to see tomorrow  
17 I think he would want to cancel them.

18 MR. VOZZA: Sure.

19 THE COURT: Because, again, I am not making the  
20 determination at this point if he is lying or not but if  
21 someone determines that the doctor was lying or if I think  
22 that there is a hint that he was lying I'm going to be the  
23 least of his problems. My friends in my former office in  
24 the district attorney they might have a conversation with  
25 you, Counsel, his malpractice carrier will have a



## PROCEEDINGS

1 conversation, the State Department of Health would have a  
2 conversation with him, the other the defendants would have  
3 a conversation with him and I don't think any of these  
4 conversations are going to be beneficial to him and just  
5 from what I heard from the defendants, Mr. Reilly, would  
6 that be correct?

7 MR. REILLY: Possibility, Judge.

8 THE COURT: Mr. Mendelsohn?

9 MR. MENDELSON: Yes, your Honor.

10 THE COURT: So I would imagine what he wants to be  
11 the first and I'm sure that Everest Insurance because they  
12 are somewhere in the complaint with this counsel. Put  
13 your appearance on the record again.

14 MS. ODELSON: Ann Odelson, Carroll McNulty and Kull.

15 THE COURT: Ms. Odelson, I'm sure Everest might have  
16 a conversation with him.

17 MS. ODELSON: Yes, your Honor.

18 THE COURT: So I would imagine you guys would want to  
19 open up the building.

20 MR. VOZZA: Judge, just making sure.

21 THE COURT: Okay.

22 MR. VOZZA: Thank you.

23 THE COURT: You're welcome. Yes, ma'am?

24 MS. ODELSON: Ann Odelson on the record also  
25 appearing on the order to show cause for Marble to be

## PROCEEDINGS

1 withdrawn as counsel under the D/J action.

2 THE COURT: We're following that as we're following  
3 the rest of the case.

4 MS. ODELSON: Is our appearance required tomorrow,  
5 your Honor?

6 THE COURT: You might want to be here too.

7 MS. ODELSON: Okay.

8 THE COURT: With an adjuster from -- because all  
9 sorts of stuff.

10 MS. ODELSON: If the adjuster is available by phone  
11 would that be sufficient?

12 THE COURT: Counsel, given the mess this case has  
13 become I'm not going to tell you what to do.

14 MS. ODELSON: Understood, your Honor.

15 THE COURT: I would imagine if I had the possibility  
16 of several million dollars at stake I might want to be  
17 here.

18 MS. ODELSON: Understood, your Honor.

19 THE COURT: And last time I checked, Mr. Reilly, are  
20 you -- is your client, not your client, is your carrier  
21 still looking somewhere in the direction of Everest?

22 MR. REILLY: That is correct, your Honor.

23 THE COURT: So take whatever advice you want, do what  
24 you want to do. I would imagine they'd want to be here.

25 MS. ODELSON: Understood, your Honor, but are you

## PROCEEDINGS

1 issuing an order today on the order to show cause?

2 THE COURT: Doesn't sound like it does it?

3 MS. ODELSON: Just wanted to be clear, your Honor.

4 THE COURT: Sounds like I'm letting people swing in  
5 the wind, doesn't it?

6 MS. ODELSON: I'm sorry?

7 THE COURT: Sounds like I'm letting people swing in  
8 the wind, doesn't it?

9 MS. ODELSON: Your words, your Honor.

10 THE COURT: My words, my sentiments.

11 MS. ODELSON: Understood.

12 THE COURT: Thank you.

13 MS. ODELSON: You're welcome.

14 REPORTER'S CERTIFICATION

15 I hereby certify that the foregoing is a true and accurate  
16 transcript of the original stenographic minutes in this case.

17  
18   
19 Sheila Robinson  
20 Official Court Reporter.  
21  
22  
23  
24  
25