

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF KINGS - CIVIL TERM - PART 66

3 -----X
4 CAROLINE TUTONE,

5 Plaintiff, Index No.
6 021193-12
7 -against- Jury Trial

8 ST. ANSELM ROMAN CATHOLIC CHURCH and
9 ARCHDIOCESE OF NEW YORK,

10 Defendant.

11 -----X

12 Supreme Court
13 360 Adams Street
14 Brooklyn, New York
15 May 8, 2017

16 B E F O R E:

17 HONORABLE RICHARD VELASQUEZ,

18 Justice, and a jury

19 A P P E A R A N C E S:

20 BISOGNO & MEYERSON, ESQS.
21 Attorneys for Plaintiff
22 7018 Fort Hamilton Parkway
23 Brooklyn, New York 11228
24 BY: PATRICK BISOGNO, ESQ.

25 PICCIANO & SCAHILL, P.C.
Attorneys for Defendant
1065 Stewart Avenue, Suite 210
Bethpage, New York 11714
BY: FRANCIS J. SCAHILL, ESQ.

Nora Lee, RPR
Official Court Reporter

Proceedings

1 THE COURT: Thank you, counsel.

2 Counsellor, plaintiff, ready to call your
3 first witness?

4 MR. BISOGNO: Yes, sure. I'm going to call
5 Caroline Tutone.

6 THE COURT: Miss Tutone.

7 **C A R O L I N E T U T O N E , the Plaintiff herein,**
8 **after having been first duly sworn by the Clerk of the**
9 **Court, took the witness stand and testified as follows:**

10 COURT CLERK: Please be seated.

11 State your name and address for the record.

12 THE WITNESS: My name is Caroline Tutone,
13 675 Tysens Lane, Apartment 1A.

14 THE COURT: Good morning.

15 THE WITNESS: Good morning, Judge.

16 THE COURT: Counsellor, you may inquire.

17 MR. BISOGNO: Judge, I want to see if we can
18 have -- I'm going to hand these to counsel, see if he
19 agrees; it can go into evidence.

20 (Pause in proceedings.)

21 MR. SCAHILL: No objection, your Honor.

22 THE COURT: Very well.

23 MR. BISOGNO: Okay, slide number one.

24 MR. SCAHILL: I have a few as well, Pat.

25 Can we agree on them now?

Proceedings

1 (Pause in proceedings.)

2 MR. SCAHILL: These are the ones I asked you
3 to agree to, Pat.

4 (Pause in proceedings.)

5 MR. BISOGNO: Okay, we can agree on a few
6 other ones.

7 MR. SCAHILL: Want to put these in as
8 defendant's?

9 MR. BISOGNO: If you'd like.

10 THE COURT: Let the record reflect that
11 defendant's exhibits have also been admitted into
12 evidence.

13 MR. SCAHILL: Thank you, your Honor.

14 COURT OFFICER: Plaintiff's Exhibits 1
15 through 16 in evidence, so marked.

16 (Whereupon, collective documents were marked
17 and received in evidence as Plaintiff's Exhibits 1-16.)

18 THE COURT: Very good. Ready to proceed,
19 counsellor?

20 MR. BISOGNO: Excuse me?

21 THE COURT: Ready?

22 MR. BISOGNO: Yes. I'm just trying to get
23 this working, Judge.

24

25

Tutone - Plaintiff - Direct

1 DIRECT EXAMINATION

2 BY MR. BISOGNO:

3 Q Okay. Carol, you got to do me a favor when you
4 speak, which I know you can speak loud because I've heard
5 you speak loud as you've yelled at me. Speak loud enough
6 so the last juror can hear you, okay.

7 All right, just going to get this set up.

8 All right, now, do me a favor, can you tell us
9 how long you've lived at your current address?

10 A. Five years.

11 Q Where did you live before?

12 A. 15 Thomas Place, in Staten Island.

13 Q And that's where?

14 A. Staten Island, New York.

15 Q And in total, Carol, how long have you lived in
16 Staten Island?

17 A. For 19 years.

18 Q Now, at any point -- you heard Mr. Scahill's
19 opening. At any point -- well, by the way, who do you
20 live with at your address?

21 A. Myself.

22 Q How long have you been living on your own?

23 A. My husband passed eight years.

24 Q Eight years ago? And at the time of this
25 accident, was he alive?

Tutone - Plaintiff - Direct

1 A. No.

2 Q And you're a widow twice, correct?

3 A. Yes.

4 Q You got married once early on?

5 A. Yes.

6 Q How long were you married the first time?

7 A. Not long. He died at 34.

8 Q He was 34 years old? Okay. And then you
9 remarried. Unfortunately, your last husband passed away,
10 so you've been living alone for quite a number of years?

11 (Witness nodding head.)

12 THE COURT: I need you to verbalize.

13 A. Yes, yes.

14 Q You got to speak because she can't take down a
15 nod of the head.

16 A. Eight years.

17 Q Remember, he has to hear you.

18 Now, do you have any children?

19 A. Five.

20 Q Do any of them live nearby you?

21 A. In the area.

22 Q Give me their names and ages. You don't have to
23 give me their ages. I know it's a tough one, but --

24 A. Josephine LaBua, Anthony Natoli, Dominick Natoli,
25 Frank Natoli is deceased, my son; and Joseph Natoli.

Tutone - Plaintiff - Direct

1 Q And the little boy that you were taking care of,
2 you heard my opening?

3 A. My great grandson.

4 Q That's whose grandson?

5 A. My son that passed away. It's his daughter's
6 baby.

7 Q Now, and I hate to ask you this but I think they
8 already know now. You said you just turned 79, right?

9 A. No, I'm 79 until May 26th.

10 Q Oh. I said 80 but you cut me short, so you don't
11 want to get to that 80 plateau, right?

12 A. No, I don't want to get there, so...

13 Q All right, so we're going to call you 79.

14 And can you tell the jury your highest degree of
15 education?

16 A. Three years' high school, Girls Commercial.

17 Q And where is that? Is it in Brooklyn? Staten
18 Island?

19 A. It's in Brooklyn, around Prospect Park, Botanical
20 area, Botanical Garden area.

21 Q Are you a native Brooklynite?

22 A. Yes.

23 Q And when was the last time that you were actually
24 employed?

25 A. When I was at St. Anselm's Church, St. Anselm

Tutone - Plaintiff - Direct

1 Rectory.

2 Q And where did you work before then?

3 Well, number one, how long did you work there?

4 A. 22 years.

5 Q And before that, where did you work?

6 A. St. Athanasius Church.

7 Q And that's on Bay 4th --

8 A. Bay Parkway and 63rd Street or 62nd Street.

9 Q And what did you do at your job at St. Anselm's?
10 What did you do? Tell the jury in detail.

11 A. I cooked, I cleaned, housekeeping, laundry, and
12 ironing of the shirts and cloths for the altar.

13 Q So you did the church, the cloths, everything?

14 A. Everything.

15 Q Did you do the same at -- I grew up calling it
16 St. A, on Bay Parkway.

17 A. Same job.

18 Q Same job?

19 A. Same job.

20 Q All right. And was there a reason why you quit,
21 or were you let go? Were you terminated?

22 A. I had quit -- no. I went to St. Anselm from
23 St. Athanasius. I was still for awhile and then I went to
24 St. Anselm.

25 Q And how long -- well, what was the reason why you

Tutone - Plaintiff - Direct

1 left St. Anselm's?

2 A. Retired.

3 Q That was it; you were done?

4 A. I guess.

5 Q Okay. Now, we're here to talk about an accident
6 that you had at St. Anselm's, all right. Do you remember
7 the date of that accident?

8 A. April 25th.

9 Q By the way, I forgot to ask you, what's your date
10 of birth; did I ask you that?

11 A. My date of birth is May 26th.

12 Q You got to give me the year, too.

13 A. 1937.

14 Q All right. And the date of your accident was
15 what?

16 A. April 25th.

17 Q Two thousand and --

18 A. -- twelve.

19 Q Now, at that time, you weren't working for the
20 church, were you?

21 A. No.

22 Q And what was the reason why you were going to
23 church that day?

24 A. Visit a friend and go to church.

25 Q Who was the friend?

Tutone - Plaintiff - Direct

1 A. Patricia Brannick.

2 Q How did you know Patricia?

3 A. I know her for many years. She lives on
4 81st Street, in Brooklyn.

5 Q The same address as where the accident happened,
6 roughly? Not the same house but the same block?

7 A. She lives on 81st.

8 Q Okay. And did you go there first or did you go
9 there second or did you not go at all?

10 A. No, I never got there.

11 Q You never got there.

12 Now, when you drove to Brooklyn that day, where
13 did you come from?

14 A. My home.

15 Q Why did you have the baby with you?

16 A. I babysit for him.

17 Q Did you do that every day or was it Monday,
18 Wednesday and --

19 A. My granddaughter's a policewoman and I babysit
20 for the baby.

21 Q Okay, so does he stay with you at night?

22 A. No.

23 Q Does she drop him --

24 A. He goes home.

25 Q So you took him. Why were you taking him with

Tutone - Plaintiff - Direct

1 you that day?

2 A. I was taking him to church and to see my friend.

3 Q Showing off.

4 A. That's exactly right.

5 Q And were you going for a mass at St. Anselm's or
6 were you going for some other reason?

7 A. No, light a candle, say a prayer. I love the
8 church.

9 Q Now, you've heard both opening statements. When
10 you worked at St. Anselm's, where -- well, would you drive
11 there?

12 A. Yes.

13 Q And would you park your car somewhere in the area
14 when you worked there for 22 years?

15 A. I parked the car on the rectory lot, which has
16 nothing to do with the parking lot. It was on the rectory.

17 Q So when you pulled up -- now, the rectory was on
18 what street?

19 A. 82nd Street.

20 Q And when you parked on the rectory, how many
21 years did you do that? Was it the full 22 years, or were
22 there times you parked somewhere else?

23 A. Almost all the time. Once in a while I would go
24 into the lot; the spots were taken.

25 Q I'm sorry, repeat that.

Tutone - Plaintiff - Direct

1 A. I would go into the lot if the priest was parked
2 there and I couldn't park. I would go into the parking
3 lot.

4 Q So of those 22 years, in those 22 years, did you
5 ever park in the lot that was between 82nd, 81st, the lot
6 where you eventually had your accident?

7 A. Yes.

8 Q Now, I told the jury that -- pretend this table,
9 the end of this table was the lot, that being 82nd Street,
10 this being -- excuse me. This would be 82nd (indicating);
11 this would be 81st (indicating). Does the lot go all the
12 way to Third Avenue?

13 A. No, it goes towards Third Avenue, but it's mainly
14 on Fourth Avenue.

15 Q So Fourth Avenue. So if this was Fourth Avenue,
16 this would be the lot (indicating)?

17 A. Right.

18 Q And when you would park, where would you usually
19 park?

20 Now, I'm going to show you a picture.

21 MR. SCAHILL: Can we have the -- just bear
22 with me one second.

23 (Pause in proceedings.)

24 Q Now, Carol, what kind of car did you drive that
25 day?

Tutone - Plaintiff - Direct

1 MR. SCAHILL: Pat, before you do that, can
2 we just tell the judge, Mr. Bisogno has a Google Earth
3 map, that he doesn't have a hard printed. He's going
4 to use that for identification purposes. Can we just
5 ask that be printed and marked as an exhibit tomorrow?

6 THE COURT: Very well.

7 MR. BISOGNO: Absolutely, absolutely. I
8 just want to get it up here and we'll --

9 (Pause in proceedings.)

10 Q Now, okay, so you would park there, you said, on
11 occasion even when you worked there, correct?

12 A. Yes.

13 Q Now, is this picture that's up there a fair and
14 accurate representation of the way the lot looked? Here's
15 the church.

16 A. Right.

17 Q 82nd Street, and the lot.

18 A. Right.

19 Q Talk louder.

20 A. Yes, yes.

21 Q So that's the general configuration even at the
22 time of your accident?

23 A. Yes.

24 Q Okay. Now, I am going to help you down.
25 Actually, you know what, I brought you a pointer. I

Tutone - Plaintiff - Direct

1 brought you a pointer.

2 Now, what I want you to do is just to point to
3 the area that when you worked there, when you worked
4 there, where you'd usually park, okay. Can you do that.

5 I'm going to show you how to use this. See. See
6 this button. Press that button and you point to the
7 screen, okay. Press this button.

8 A. You're showing me the lot?

9 Q That's the lot.

10 A. Not the rectory.

11 Q No, no. What I want you to show the jury, where
12 you parked there in this lot. When you parked, when you
13 weren't in the rectory spot, okay. You got to press this
14 button, the top.

15 A. The entrance of the lot would be here (indicating).

16 Q Right.

17 A. And then I would go into the lot and park on the
18 left side.

19 Q Okay. Now, the area that you pointed to right
20 now, there's a little -- there's a little fenced-in area?

21 A. Yes.

22 Q Who parked in that fenced-in area?

23 A. The priests parked there.

24 Q So that area has three cars?

25 A. Yes.

Tutone - Plaintiff - Direct

1 Q Are those the priests' cars?

2 A. Yes.

3 Q Where would you park? Did you park in the gate
4 with the priests?

5 A. Right outside.

6 Q Not inside the gate?

7 A. Not inside.

8 Q We have the gate around this place, correct?

9 A. Yes, right.

10 Q And the priest area, that's gated off inside the
11 lot?

12 A. Right.

13 Q Okay. And can you show us, if you can, where the
14 handicapped spots were?

15 A. Handicapped spots are along Fourth Avenue.
16 There're about three of them.

17 Q Now, you also pointed to the entrance as being
18 right here (indicating)?

19 A. The entrance is here (indicating).

20 Q So am I correct to say, the entrance would be
21 82nd Street?

22 A. Yes.

23 Q All right. Now, so that morning, is there --
24 well, let me ask you this. Is there any other spot that
25 you can pull into that driveway, any other block?

Tutone - Plaintiff - Direct

1 A. No, there's only one entrance.

2 Q Just 82nd. All right, now, on the dates that you
3 would park there, before, before your accident and while
4 you worked there, did you ever park in a handicapped spot
5 at all?

6 A. No.

7 Q All right.

8 A. They were always taken by the parishioners.

9 Q Now, when you worked there, did you have a
10 handicapped placard?

11 A. Yes.

12 Q And you never used it?

13 A. Yes.

14 Q You never used it in the church area?

15 A. No.

16 Q Why not?

17 A. I have a plate. Maybe I don't understand the
18 question.

19 Q My question is, you said that you let the
20 parishioners use it?

21 A. Yes.

22 Q And you would never take up the spots?

23 A. No, because it was an early mass. They were
24 there early in the morning and they were older than me.

25 Q Okay. You do that with a smile.

Tutone - Plaintiff - Direct

1 A. Yes. I feel sorry for them. Now I feel sorry
2 for me.

3 Q Now, when you pulled in, can you tell us where
4 you parked?

5 A. I pulled into the lot and I made my turn this way
6 (indicating), and then I turned my car around and backed
7 into this spot.

8 Q Okay. Now, I'm going to show you another
9 picture, if we have them.

10 All right, do you know what spot you pulled in?
11 Was it -- you said there are handicapped spots all along
12 here.

13 A. Right here (indicating).

14 Q Was it the first spot? the second spot? the third
15 spot?

16 A. The first one.

17 Q The first spot, which is right here, which is
18 empty in this photo?

19 A. It's empty.

20 Q Now, this whole black area, that wasn't there at
21 the time that you fell, was it, just so we're clear?

22 A. No.

23 Q Okay. Now, let me just show you something else.
24 Carol, when you -- there was a statement by Mr. Scahill
25 that you gave three versions of how the accident happened.

Tutone - Plaintiff - Direct

1 When you pulled in, did you put the rear of your
2 car towards Fourth Avenue? In other words, you know the
3 difference between backing in and pulling in?

4 A. I sure do.

5 Q Okay. And when you came to this lot that day,
6 did you back in or did you pull in?

7 A. No, I pulled in, and then I turned my car around
8 and then backed in.

9 Q Okay. So, the back of your car would have been
10 towards where?

11 A. Fourth Avenue.

12 Q All right, we're going to do this right here.
13 Okay.

14 Now, all right, are you familiar with this area?

15 MR. SCAHILL: Can we just identify what
16 exhibit we're referring to?

17 THE COURT: Please.

18 MR. BISOGNO: This is Plaintiff's Exhibit,
19 looks like 12.

20 THE COURT: Plaintiff's 12.

21 Q Okay. Plaintiff's 12, now, is that the spot that
22 you parked in the day of the accident?

23 A. Yes.

24 Q Now, backing into this spot right here, your car
25 would be facing where the priests parked?

Tutone - Plaintiff - Direct

1 A. It would be facing Third Avenue.

2 Q Okay. Now, this spot itself, when you pulled in
3 that day, were there any other cars next to you?

4 A. No.

5 Q None?

6 A. None.

7 Q Carol, when you pulled in, was that the first
8 time you ever even used this spot?

9 A. I may have used it in the years, I don't know,
10 maybe once.

11 Q All right, in the years prior to?

12 A. Prior, way prior to this.

13 Q All right. Now, after you pulled into this spot,
14 what did you do next?

15 A. I pulled into the spot, I turned my engine off,
16 and I had some papers in the car that I wanted to get rid
17 of. My baby was in the backseat, and I took the papers
18 out. I opened the door, went to the back window. I
19 kissed my baby. I said, Max, Nanny will be right back.
20 That's all I remembered.

21 Q Okay.

22 A. I -- my foot --

23 Q Hold on, we're going to go step by step. So you
24 kissed the baby good-bye?

25 A. Yes.

Tutone - Plaintiff - Direct

1 Q And you told him you would be right back. Where
2 were you going?

3 A. To the garbage pail.

4 Q Now, I'm going to show you this picture which is
5 marked as Plaintiff's Exhibit 11.

6 Is the garbage pail visible in that picture?

7 A. Right there (indicating).

8 Q That's the garbage pail. So, Carol, in order to
9 get to that garbage pail, you have to cross the entranceway?

10 A. Yes.

11 Q Now, can you tell us what time this accident
12 roughly occurred?

13 A. I believe it was 3 o'clock, five after, in the
14 3 o'clocks.

15 Q Now, on this day, was it a school day?

16 A. Yes.

17 Q So it was a weekday?

18 A. Yes.

19 Q Do you recall -- I know it's a tough one, but do
20 you recall what day of the week it was?

21 A. No.

22 Q You got to talk loud enough, okay.

23 A. No.

24 Q So, now, it was your intention to cross the
25 entranceway and get to that garbage pail?

Tutone - Plaintiff - Direct

1 A. Get to the garbage pail and come back.

2 Q And come back. Now, did you start going to the
3 garbage pail?

4 A. Yes.

5 Q After you actually kissed the baby, did you ever
6 close your door?

7 Now, your car is parked this way (indicating), in
8 this spot, correct? Let me have that for a second. Your
9 car is parked this way in the spot, as you testified
10 earlier. The back would be here; the front is here
11 (indicating), correct?

12 A. Right.

13 Q Did you ever close your front door?

14 A. No.

15 Q Was there a reason why you didn't close it?

16 A. Because I was coming right back.

17 Q All right. And when you started walking, which
18 way were you looking?

19 A. Straight ahead.

20 Q To what?

21 A. Straight ahead to the garbage pail and to the
22 entrance, because it's an active driveway. Cars come in
23 and out of there all the time.

24 Q Now, you worked there a long time and you've been
25 there a number of times. Did you ever notice if mothers

Tutone - Plaintiff - Direct

1 who come and pick their kids up over here actually park in
2 this driveway?

3 A. Not really.

4 Q Park in the parking lot?

5 A. They go in the lot but not in the handicapped.

6 Q That's what I wanted to know, just in the lot
7 themselves.

8 I'm going to show you a picture, if I can, which
9 is Plaintiff's Exhibit 13. Now, that's pretty much a fair
10 and accurate picture of the way it looks when kids come
11 out of school that day?

12 A. Exactly.

13 Q Now, and these mothers, the bunch of them that
14 are there, they parked in the lot, correct, you said?

15 A. Most of them do.

16 Q Okay. Now, as you were walking, did you have any
17 fear of where you were walking about cars coming in and
18 out?

19 A. Yes. I was alert about them.

20 Q Now, I'm going to show you something, Carol, in
21 this photograph, which again is Plaintiff's Exhibit
22 Number 13. I want you to take a look at this piece of
23 asphalt right here. Are you familiar with that?

24 A. Yes.

25 Q Now, on any time, any time, prior to you pulling

Tutone - Plaintiff - Direct

1 your car into this lot, did you ever see that piece of
2 asphalt right there?

3 A. Yes.

4 Q Yes, right?

5 A. Asphalt, yes.

6 Q How many times would you say you saw it in those
7 six, seven months before the accident?

8 A. It was there quite a while.

9 Q There was no doubt you saw it before?

10 A. No.

11 Q Okay. Now, so you started walking. Tell us the
12 path that you started walking.

13 A. When I exited the car, I started to walk straight
14 ahead.

15 Q All right. So now if you're walking straight
16 ahead, so we're clear for the jury because the jury has to
17 understand this, your car is in this spot (indicating),
18 right?

19 A. Yes.

20 Q Which means that your driver's side would be on
21 this side (indicating)?

22 A. Right.

23 Q Which way did you start walking?

24 A. I started to walk that way (indicating).

25 Q Do me a favor. With this, very carefully, show

Tutone - Plaintiff - Direct

1 the jury which direction you started walking. You got to
2 hold the front and do it carefully.

3 A. Got out of the car and started to walk this way,
4 towards the lot. In fact, there's a truck coming in there
5 right now. Walking towards that.

6 Q Towards the entrance or --

7 A. Towards the entrance where the garbage pail was.

8 Q Now, at any point, do you see in this photo the
9 area that you tripped on?

10 A. Yes.

11 Q Can you show us what it was?

12 A. Right there (indicating).

13 Q Okay. Now --

14 MR. BISOGNO: Frank, do you have your
15 pictures that are marked?

16 MR. SCAHILL: (Indicating.)

17 Q At some point, Carol, we had a deposition on this
18 case. I wasn't your attorney at that point, but you went
19 with Mr. Pomerantz; do you remember that?

20 A. Yes.

21 Q And you had a chance to circle the exact area
22 where you fell, okay.

23 A. Yes.

24 Q And I'm going to show you that, see if you
25 remember this photo.

Tutone - Plaintiff - Direct

1 A. Yeah, this way (indicating).

2 Q Okay.

3 THE COURT: For the record, counsellor, what
4 exhibit; what number?

5 MR. SCAHILL: I was just about to do that.
6 This is Defendant's Exhibit F.

7 Q And so you circled the exact area where you
8 believed your foot got caught, correct?

9 A. Right.

10 Q Now, when you started walking --

11 MR. BISOGNO: I'm going to publish this to
12 the jury, if I may.

13 THE COURT: You may.

14 COURT OFFICER: Let me.

15 MR. BISOGNO: You want to do it, you can do
16 it. I'm not union. I don't want to get you --

17 (Exhibit published to the jury.)

18 COURT OFFICER: Your Honor, the jury's
19 finished looking at the exhibit.

20 THE COURT: Please continue, counsel.

21 Q Okay. So -- you can hold that. So is it fair to
22 say that based on that photo, if I may have it, thank you,
23 that you fell more towards the fence line than in the
24 middle, by this cap?

25 A. Can I see that?

Tutone - Plaintiff - Direct

1 Q Here, you can look at it.

2 A. Right by the --

3 Q Well, I'm going by what you marked.

4 A. Yes, in that vicinity right there.

5 Q Now, can you tell the jury which foot, if any
6 one, got caught?

7 A. My right foot.

8 Q And after your foot got caught --

9 A. Jammed.

10 Q Sorry, it got jammed.

11 A. It got jammed into something. I didn't know at
12 the time what.

13 Q And what happened after you fell?

14 A. I stumbled and went so many feet ahead, and my
15 body swayed left and right, and I was waving my hands and
16 I went right into that steel bar.

17 Q All right, I'm going to get a close-up of that
18 steel bar.

19 A. I don't know if it's a steel bar.

20 Q So, now, at any point did your body hit that bar?

21 A. My head did.

22 Q Okay. And that's the bar right there in the photo?

23 A. That's it.

24 Q Now, do you recall what happened to your head
25 after your head hit that metal bar?

Tutone - Plaintiff - Direct

1 A. My head hit, my face hit the concrete, and then I
2 blanked out for a couple of minutes, I believe.

3 Q At any point after that, did you speak to anyone
4 at the scene?

5 A. No. I was bleeding and a woman -- I couldn't
6 move. I was paralysed on one foot.

7 Q Don't talk about --

8 A. Oh, you asked me what happened.

9 Q What I want to know, did you speak to anybody?

10 A. Somebody says to me, "Don't worry, Honey, I'm
11 here. I'm going to call an ambulance. Can you move your
12 legs?" I said no.

13 Q All right, that's where I was going to come to
14 next.

15 At any point, did you get up and identify the
16 area that you fell to anybody?

17 A. No, I was unable to get up.

18 Q Were you taken away from the scene? Just say yes
19 or no.

20 A. Yes.

21 Q All right. And were you taken to a facility?
22 Just say yes or no.

23 A. Yes.

24 Q Now, Carol, how did you ever identify the area,
25 because you pointed to it, you circled it. How did you

Tutone - Plaintiff - Direct

1 ever identify if you actually never saw it that day?

2 A. I saw it when my son brought pictures to me when
3 I was in the hospital, and he showed me. He says, Mom,
4 show me exactly what you fell on or what you think you
5 fell on, and I showed him, and that's exactly where I fell.

6 Q And these are the pictures that we have here in
7 court?

8 A. Yes, they are.

9 Q So, Carol, is there any doubt in your mind that
10 you fell on this defect, and I'll give you the picture,
11 which is Plaintiff's Exhibit -- Plaintiff's Exhibit 10.
12 Is there any doubt in your mind that you fell on the
13 defect that's shown in Plaintiff's Exhibit 10?

14 A. No.

15 Q Now, Carol, at all the times that you were in
16 that lot for the many years, 22 years, and then you went
17 there as a parishioner just to go pray, did you ever see
18 this particular defect before?

19 A. No.

20 Q The defect that you fell on?

21 A. No.

22 Q Now, Carol, were you familiar with the area had a
23 problem, though, correct?

24 A. Oh, yes, because of the asphalt.

25 Q So when you say the asphalt, that would be the

Tutone - Plaintiff - Direct

1 asphalt that we saw in this photo?

2 A. Yes.

3 Q Which would be Plaintiff's Exhibit 13.

4 So you were familiar with the asphalt. At all
5 the times that you walked passed that, I mean, how many
6 times do you think you walked in and out of that lot
7 throughout the course of the years?

8 A. Many times. I drove into the priests' spot, but
9 I haven't really walked through there.

10 Q Right, but you had to get out of the lot?

11 A. Oh, yes.

12 Q Did you ever see this raised, from your
13 perspective?

14 A. No.

15 Q Can you tell us why?

16 A. Cause I didn't park in the handicapped spot, and
17 you can't -- that is not visible if you're looking
18 straight ahead.

19 Q So if you're walking in and out of the
20 entrance --

21 A. No, if you're walking in and out, you won't see it.

22 Q The entrance, as shown here, let's say right
23 here, the entrance is all the way to the left of that.
24 Are you able to see that lip or that raised walking in and
25 out?

Tutone - Plaintiff - Direct

1 A. No.

2 Q Now, did you see it the day that you fell?

3 A. No.

4 Q Never?

5 A. No.

6 Q Okay. Now, at any point afterwards, did you see
7 that lady again? Did you know who she was?

8 A. No, I never knew who she was and she never told
9 me her name. I didn't even know what she looked like. My
10 eyes were closed.

11 Q Do you remember being taken away from the scene?

12 A. Yes.

13 Q Were you able to look at the area when you were
14 being taken away?

15 A. No way, no.

16 Q Let me see if I have anymore questions for you.
17 I think I'm pretty much done with you.

18 Oh, by the way, do you know how long that asphalt
19 has been there, just off the top of your head? If you
20 don't know, that's fine.

21 A. It's there for years.

22 Q I'm sorry?

23 A. It's there for years.

24 Q It's been there for years?

25 A. Yes.

Tutone - Plaintiff - Direct

1 Q And you've seen it those years?

2 A. Yes. You can see it from outside.

3 Q Okay.

4 A. As you pass the block.

5 Q By the way, how did your car get taken away?

6 A. Till today, I have no idea. I believe my son --
7 somebody picked it up.

8 Q All right, so you don't know.

9 Now, you told us that -- which son took the
10 photos?

11 A. My Joseph.

12 Q And he brought them to you?

13 A. Yes, to the hospital.

14 Q All right. I don't think I have anymore
15 questions for you.

16 Carol, is there any doubt in your head that you
17 backed your car in and not pulled in?

18 A. No, no doubt whatsoever.

19 MR. BISOGNO: All right. All right, I have
20 no further questions for you.

21 THE COURT: Let's take a five-minute recess
22 before we continue with the examination.

23 COURT OFFICER: All rise. Jury exiting.

24 (Whereupon, the jury exited the courtroom
25 and a recess was taken.)

Tutone - Plaintiff - Direct

1 COURT OFFICER: Come to order.

2 MR. BISOGNO: Frank, I just have two questions.

3 COURT OFFICER: Excuse me, your Honor, are
4 you ready for the jury?

5 THE COURT: Yes.

6 COURT OFFICER: All rise. Jury entering.

7 (Whereupon, the jury enters the courtroom.)

8 THE COURT: Please be seated. I understand
9 you have a question?

10 MR. BISOGNO: Yes.

11 DIRECT EXAMINATION (Continued)

12 BY MR. BISOGNO:

13 Q Carol, I forgot to ask you several questions.

14 The baby was in a car seat at the time?

15 A. Yes.

16 Q What happened to the baby?

17 A. He was picked up by my friend.

18 Q By the woman -- by who?

19 A. My friend.

20 Q Talk. What friend?

21 A. Pat Brannick.

22 Q Who contacted Pat?

23 A. The nurse, the lady who was speaking to me.

24 Q How -- that was the nurse, the woman?

25 A. She said she was a nurse.

Tutone - Plaintiff - Cross

1 Q Okay, so she took care of the baby?

2 A. Yes.

3 Q And I didn't ask you this question; I apologize.

4 When you started walking, approximately -- when
5 you left Max in the back of the car and you started
6 walking, approximately how many steps did you take before
7 you actually fell, if you know?

8 A. I took a few steps. The exact number, I can't
9 say. I said one or two at one time, but it was more than
10 that.

11 Q Well, one or two steps from the back would have
12 left you where if you only took two steps from Max's --

13 A. No.

14 Q From Max's window?

15 A. I started to walk, I took a couple of steps and
16 went flying.

17 Q Okay, fair enough. Thank you.

18 THE COURT: Counsel, you may inquire.

19 MR. SCAHILL: Thank you, your Honor.

20 CROSS-EXAMINATION

21 BY MR. SCAHILL:

22 Q Good afternoon, Miss Tutone.

23 A. Good afternoon.

24 Q My name is Frank Scahill and I represent
25 St. Anselm's Church.

Tutone - Plaintiff - Cross

1 A. Yes.

2 Q And I'm going to ask you a few questions this
3 afternoon.

4 Did you ever see the area where the accident
5 happened in the same condition that it was on the date of
6 accident prior to that occurrence?

7 A. No.

8 Q Do you remember testifying at a deposition in
9 this case?

10 A. Yes, I do.

11 MR. SCAHILL: Judge, I have a copy for the
12 Court, and I'd ask the Court to instruct the jury on
13 the use of depositions at trial.

14 THE COURT: Please.

15 Under our rules of practice, an examination
16 taken before trial of certain witnesses is taken under
17 oath and is entitled to equal consideration by you,
18 notwithstanding the fact that it was taken prior to
19 today's court date.

20 You may continue, counsellor.

21 Q Did you testify at a deposition on October 4, 2013?

22 A. That's the date you have, that's the date. I
23 don't really remember those dates.

24 Q At the deposition, you were sworn to tell the
25 truth as you were this morning?

Tutone - Plaintiff - Cross

1 A. Yes.

2 Q And at that deposition, you were asked certain
3 questions by me and you gave answers that were under oath?

4 A. Yes.

5 Q I'm going to read to you a question and answer
6 and ask you if you gave that testimony under oath back in
7 October of 2013.

8 Question: Did you ever see --

9 MR. BISOGNO: Page and line?

10 THE COURT: Page and line?

11 MR. SCAHILL: Page 26. Sorry, your Honor.

12 Q Page 26, line 17, Question: Did you ever
13 see the area where the accident happened in the
14 same condition that it was on the date of the
15 accident prior to that occurrence?

16 Answer: Yes.

17 Do you remember being asked that question and
18 giving that answer under oath back in 2013?

19 A. I remember referring to the time --

20 Q I'm sorry, Miss Tutone --

21 THE COURT: Please respond to the question.

22 Q My question was to you, I just read --

23 A. I remember the question.

24 Q I just read to you the question that was asked
25 and the answer you gave.

Tutone - Plaintiff - Cross

1 A. Yes.

2 Q My question now is, did you give that testimony
3 under oath back in 2013?

4 A. Yes.

5 Q So you just told the jury a second ago that you
6 never saw the area in the same condition that it was on
7 the date of the accident prior to the occurrence. That
8 testimony that you just gave to the jury a moment ago was
9 not correct; is that fair to say?

10 A. No.

11 Q Is it true, Miss Tutone, that you just told the
12 jury that you never saw the area in the same condition
13 where it was on the date of the accident, but yet in 2013,
14 you gave testimony under oath that you did see the fact?

15 MR. BISOGNO: Objection. She never said --

16 MR. SCAHILL: Judge, we don't have speaking
17 objections.

18 MR. BISOGNO: If there's no speaking
19 objections, then it's an objection. That's not what
20 she said.

21 THE COURT: Overruled. Please answer the
22 question.

23 A. I never saw the accident I fell on. I saw the
24 tar.

25 Q Okay, I'm going to read again --

1 A. But if I answered that way, I'm sorry.

2 Q I'm going to read again to you what you said
3 under oath in 2013, on page 26, line 17:

4 Question: Did you ever see the area where
5 the accident happened in the same condition that
6 it was on the date of the accident prior to the
7 occurrence?

8 Answer: Yes.

9 Did you give that answer under oath in 2013?

10 A. If that's what it says, that's what I did.

11 Q Was that answer truthful that you gave in 2013?

12 A. At the time I believe it was true, but I have
13 never seen the spot I fell on.

14 Q I'm asking you about your testimony.

15 Would you agree with me that your recollection of
16 the events of the accident on April 25, 2012, was clearer
17 to you and more fresh in your mind when you gave the
18 testimony back in October of 2013 than it was -- than it
19 is today five years after the accident?

20 A. I'm looking at pictures now.

21 Q I'm asking you, was your --

22 A. That's why it's clearer to me.

23 Q Was your recollection of the events of April 25,
24 2012, clearer to you in October of 2013 than it is today,
25 five years later?

Tutone - Plaintiff - Cross

1 A. No.

2 MR. BISOGNO: Objection. I'm going to
3 object, and if we can have a sidebar, there's a reason
4 why I'm objecting.

5 THE COURT: I'm going to sustain. Rephrase.
6 Let's move on.

7 THE WITNESS: I don't understand, your Honor.

8 THE COURT: Please move on, counsellor.

9 Q Did you have the opportunity to read over your
10 testimony after you testified under oath on October 14,
11 2013?

12 A. No.

13 Q Were you given a copy of the deposition
14 transcript by your attorney?

15 A. Yes.

16 Q And were you asked to read it over?

17 A. I went over it.

18 Q Were you asked to correct any areas or any
19 answers that were incorrect?

20 A. Maybe. I don't know. I don't know. This is
21 going on five years. I don't know.

22 Q Did you make any changes to that testimony that I
23 just read?

24 A. Did I make any changes?

25 THE COURT: Respond yes or no.

1 A. No.

2 Q When you pulled into the lot that day and parked,
3 was the front of your car facing Fourth Avenue?

4 A. The front of my car came into Fourth Avenue, yes.

5 Q And when you parked, was the front of your car
6 facing Fourth Avenue?

7 A. No, I didn't park. I made a turn and backed into
8 the spot.

9 Q I'm asking you, when you parked, was the front of
10 your car facing Fourth Avenue?

11 A. No.

12 Q I'm going to read to you again what you said
13 under oath back in 2013, and I'll ask if you remember
14 being asked this question and remember being -- giving
15 this answer. This is on page 32 of your deposition,
16 starting at line 24:

17 When you parked in the parking lot, were you
18 facing 82nd Street or were you facing Fourth
19 Avenue or something else?

20 A. Facing Third Avenue.

21 Q Can you please wait, if you can, ma'am, until --

22 A. Well, I thought your question was finished; I'm
23 sorry.

24 Q I'm reading to you a question and answer that you
25 gave back in October, '13, and I'm asking you whether you

Tutone - Plaintiff - Cross

1 gave these answers to these questions.

2 The question is, on page 32, line 24:

3 When you parked in the parking lot, were you
4 facing 82nd Street or were you facing Fourth
5 Avenue or something else?

6 Mr. Pomerantz -- by the way, Mr. Pomerantz
7 was your lawyer at the time, correct?

8 A. Yes.

9 Q Mr. Pomerantz --

10 MR. BISOGNO: Objection as to colloquy.

11 THE COURT: I'm sorry?

12 MR. BISOGNO: Objection as to colloquy.

13 Q Mr. Pomerantz stated: After she parked the
14 car?

15 Mr. Scahill, myself: Yes.

16 Mr. Pomerantz, asking you, Where was the
17 front of the car facing?

18 Answer: Fourth Avenue.

19 Did you give that testimony under oath back in
20 October, '13?

21 A. I may have some confusion, yes.

22 Q Was this testimony that you gave back in October
23 of 2013 true?

24 A. I may have given it.

25 Q Was it true, my question is?

Tutone - Plaintiff - Cross

1 A. No, it wasn't true.

2 Q Are you admitting to the jury that you gave false
3 testimony under oath back in October of --

4 MR. BISOGNO: Objection.

5 THE COURT: Sustained.

6 MR. BISOGNO: She corrected it five pages
7 later.

8 THE COURT: Counsel, sustained. Rephrase
9 your question.

10 Q Did you understand that question when it was
11 given to you by your lawyer, Where was the front of the
12 car facing and you answered Fourth Avenue? Did you
13 understand that question?

14 A. No.

15 Q And you misunderstood the question by your own
16 lawyer that said, Where was the front of the car facing,
17 and your answer was, Fourth Avenue. You misunderstood
18 that question, Where was the front of the car facing; is
19 that what you're telling the jury?

20 A. Yes.

21 Q Let me go back, if I can, Miss Tutone.

22 You testified that you worked at the church for
23 22 years, correct?

24 A. Yes.

25 Q You retired at the age of 70 from that church?

Tutone - Plaintiff - Cross

1 A. Yes.

2 Q And you've always worked for the Catholic church?

3 A. Yes.

4 Q And you've worked for the Catholic church? You
5 worked at another church prior to this?

6 A. St. Athanasius.

7 Q On Bay Ridge Parkway, correct?

8 A. Bay Parkway.

9 Q On Bay Parkway, sorry.

10 In the 22 years that you worked at the church, at
11 St. Anselm's Church, was the parking lot always there?

12 A. Yes.

13 Q Was it also always used by the parishioners, the
14 parents of the schoolchildren, and by the people that came
15 to the church?

16 A. Yes.

17 Q And during the 22 years that you worked there,
18 you also used that parking lot? You said you parked in a
19 different area, but you came into that lot every day that
20 you worked, correct?

21 A. No, I never went in there every day. I parked on
22 the rectory.

23 Q Now, prior to this accident happening, after you
24 retired, in the six months prior to this accident, how
25 often would you go to the church?

Tutone - Plaintiff - Cross

1 A. I would go to Bay Ridge maybe five -- five or six
2 times within the year.

3 Q So in the six months prior to the accident, how
4 many times were you there?

5 A. Maybe four times. Four, five times.

6 Q Did you ever testify that you were there more
7 than four times?

8 A. To my recollection, I was there four, five times,
9 that's it.

10 Q I'm going to read to you again your testimony
11 under oath back in 2013, and I ask you, were you asked
12 these questions and did you give these answers.

13 Page 23, line 21: In the year prior to the
14 accident, how often would you use that parking
15 lot?

16 Answer: Not often, because I parked on the
17 rectory.

18 Mr. Pomerantz: He's not asking you for an
19 explanation. The question is, how often did you
20 use the parking lot?

21 Answer: Not often.

22 Question, page 24, line 6: When you say not
23 often, did you park in that area once per month,
24 once per year, once per week, or something else?

25 Answer: Maybe twice a month.

Tutone - Plaintiff - Cross

1 Do you recall being asked those questions under
2 oath and giving those answers back in October of 2013?

3 A. Yes.

4 Q And were those answers that you gave back in
5 2013, were they true?

6 A. That was correct, 100 percent.

7 Q So it's fair to say within the six months prior
8 to the accident, you were there on at least 12 occasions?
9 Approximately twice a month, you went to the same parking
10 lot; is that fair to say?

11 A. 12 times a month?

12 Q Well, you said back in 2013, under oath, twice a
13 month, and you just told me that that was true. So within
14 six months prior to the accident, that would be 12 times
15 that you visited the church and were in that parking lot;
16 is that fair to say?

17 A. If it was visiting or if it was while I was
18 working and parked there? If it was while I was working,
19 it could be true.

20 Q Well, I didn't ask you that. The question was,
21 if you recall, how often did you use the parking lot in
22 the six months prior to the accident or in the year prior
23 to the accident, and you testified twice a month. Was
24 that answer true?

25 A. Five years -- it may have been true; I don't

Tutone - Plaintiff - Cross

1 know. I answered but -- I'm so confused, it's unbelievable.

2 Q Well, I'd ask you to pin it down. How many times
3 did you see the area where the accident happened in the
4 same condition that it was on on the date of the accident
5 prior to the occurrence?

6 A. I never saw the part I fell on. I never saw it.

7 Q I'm going --

8 A. I saw the asphalt. To me, that was damaged
9 property and I saw it every day.

10 Q Okay, I'm going to ask you the same question
11 about your deposition, and I'm going to read to you
12 testimony that you gave previously under oath back in 2013.

13 Page 26, Question, line 17.

14 MR. BISOGNO: Hold it.

15 (Pause in proceedings.)

16 Q Did you ever --

17 MR. BISOGNO: It was asked and answered
18 already. He read the same thing. She gave an answer.
19 Objection.

20 THE COURT: Sustained.

21 Q On page 27 -- well, page 26, line 22.

22 Question: How often would you see the area
23 where the accident happened in the same condition
24 as it was on April 25, 2012, prior to this
25 occurrence?

Tutone - Plaintiff - Cross

1 Answer: Not often.

2 Page 27, line 2: When you say not often,
3 did you see it in the same condition five times,
4 ten times, 20 times, or something else?

5 Answer: Seven times.

6 Were you asked those questions under oath back in
7 2013?

8 A. Yes.

9 Q And did you give those answers?

10 A. Yes.

11 Q Were the answers that you gave back under oath in
12 2013, were they truthful?

13 A. Yes. To my knowledge, they were true.

14 Q So is it fair to say that you saw the area in the
15 same condition that it was on the date of the accident at
16 least seven times prior to the accident?

17 A. Yes.

18 Q Now, you talked about going to the church with
19 the intention to park in the handicapped spot. You had
20 the handicapped permit for your car, correct?

21 A. Yes.

22 Q You had that for many years, correct?

23 A. Yes.

24 Q And you had that because you were in fact
25 handicapped; that's why you had the handicapped permit,

1 correct?

2 A. I don't think I was handi -- I wasn't handicapped
3 enough to work. I worked.

4 Q But you had the handicapped --

5 A. I couldn't -- yes, yes.

6 Q You had the handicapped permit because you were
7 handicapped?

8 A. Because of not being able to breathe right, asthma.

9 Q You had other conditions besides that --

10 A. I had a touch of sciatica.

11 Q You had other conditions that made you qualify to
12 have that handicapped permit, correct?

13 MR. BISOGNO: Objection. Where is this
14 going? It's getting into a damages question.

15 THE COURT: I'm going to allow this question
16 and then we'll move on. You may answer the question.

17 THE WITNESS: I don't know what he's asking
18 me.

19 Q My question was, you had other conditions that
20 qualified you for that handicapped permit for twenty --

21 MR. BISOGNO: Judge, objection. She had the
22 handicapped spot. Do we really want to get into why?
23 New York legal --

24 THE COURT: Objection sustained. We're
25 going to move on, counsellor.

Tutone - Plaintiff - Cross

1 Q You remember what day of the week the accident
2 happened on?

3 A. April the 25th.

4 Q Do you remember what day of the week that was?

5 A. No, I don't.

6 Q Did the accident happen approximately 3 P.M.?

7 A. It was around 3:00.

8 Q And there were -- the parents that are lined up
9 outside the gate, were they lined up outside the gate when
10 you parked in that spot?

11 A. No, there was nobody there.

12 Q There was nobody there?

13 A. No. There may have been --

14 Q Was it a school day that afternoon?

15 A. Yes, it was, but that's not a same picture of the
16 same day, I don't believe. That's not the same day.

17 Q But it was a school day when you pulled up that
18 day?

19 A. Yes, it was a school day.

20 Q You said your great grandchild was in the car
21 seat, in the rear seat, correct?

22 A. He was in the backseat, right.

23 Q Was he seated behind the passenger's side or
24 behind you?

25 A. My side.

Tutone - Plaintiff - Cross

1 Q He was behind the driver's side?

2 A. Right.

3 Q Now, how far did you park from where the accident
4 happened?

5 A. Meaning?

6 Q How far did you park from where the accident
7 happened?

8 A. Not far. I was in the handicapped spot.

9 Q And is that where the accident happened?

10 A. I got out of the car, took so many steps, which I
11 thought were two but I believe they were a little bit
12 more, and just went flying.

13 Q When you backed over that spot, did you back all
14 the way into that gate? Did you back all the way into the
15 fence?

16 A. Almost to the gate. I backed over the
17 handicapped picture.

18 Q I'm going to show you what's marked in evidence
19 as Plaintiff's Exhibit 12, and I'd ask you --

20 MR. SCAHILL: Can I approach, your Honor?

21 THE COURT: Yes, you may.

22 Q I'd ask you, is that the handicapped picture that
23 you parked over?

24 A. Yes.

25 Q Was the front of your car over that handicapped

Tutone - Plaintiff - Cross

1 picture?

2 A. It was when I backed in.

3 Q I'll show you again another exhibit, Plaintiff's
4 Exhibit 11.

5 Is the handicapped picture that you parked over
6 shown in that photograph?

7 A. Handicapped mark is there.

8 Q Was the front of your car over that handicapped
9 marker?

10 A. My front of the car was right up to it.

11 MR. SCAHILL: Okay, can we have those both
12 published to the jury, your Honor?

13 THE COURT: You may.

14 MR. SCAHILL: I'm sorry, your Honor, one
15 more photograph as well; Exhibit 13, Plaintiff's
16 Exhibit 13.

17 (Exhibits published to the jury.)

18 MR. SCAHILL: Thank you, your Honor.

19 THE COURT: You may continue, counsellor.

20 MR. SCAHILL: Thank you, your Honor.

21 Q When you got to the lot that afternoon,
22 Miss Tutone, how many cars were in the lot?

23 A. I think about six or eight cars. It wasn't full.

24 Q And did you park in that first handicapped spot
25 right by the fence?

Tutone - Plaintiff - Cross

1 A. Yes.

2 Q I'm going to show you what's been marked in
3 evidence as Defendant's Exhibit B. Can you tell me, does
4 that depict the spot you backed into?

5 A. This one (indicating).

6 Q Is that the spot you backed into?

7 A. Yes.

8 Q That's the first handicapped spot that's shown in
9 the photograph that's marked as Defendant's Exhibit B.

10 Now, I'll show you what's marked as Defendant's
11 Exhibit C. Is that the entrance to the church parking lot?

12 A. Yes, it is.

13 Q And the garbage pail that you were walking to, is
14 it on the -- as you're driving in, is it on the left side?

15 A. On the left-hand side.

16 Q Of the entrance?

17 A. Yes.

18 Q Is that shown in the photograph?

19 A. Yes.

20 Q Right --

21 A. Right there (indicating).

22 Q Now, you left your car door open when you got out
23 of the car, correct?

24 A. Yes.

25 Q And you left your door open because you wanted to

Tutone - Plaintiff - Cross

1 get back to --

2 A. To the baby.

3 Q To your great grandson who was in the rear of the
4 car, correct?

5 A. Yes.

6 Q When you left your car door open, were you able
7 to swing it out freely or did you get caught by the fence
8 from that -- from that --

9 A. I wasn't that close to the fence.

10 Q You testified on direct examination that you took
11 two steps and then you fell, correct?

12 A. That's what I thought it was, two steps, but it's
13 more.

14 Q And you never saw the area on the ground before
15 the accident, before you fell, correct?

16 A. No, never did.

17 Q And you never looked at the ground before you
18 walked, correct?

19 A. No.

20 Q And is it fair to say that you did not know what
21 caused you to fall?

22 A. Yes.

23 Q Those pictures that were shown to the jury, those
24 were taken by your son the day after the accident, correct?

25 A. He brought them to me in the hospital.

Tutone - Plaintiff - Cross

1 Q But the pictures, I'm asking you, were they taken
2 by your son the day after the accident?

3 A. Yes.

4 Q And the reason that you -- did you ask him to do
5 that or he did that on his own?

6 A. I was not conscious. I didn't ask him anything.

7 Q But the pictures that were taken, those
8 pictures --

9 A. He took them on his own, if that's what you're
10 asking me.

11 Q Those pictures were taken in contemplation of a
12 lawsuit, correct?

13 MR. BISOGNO: Objection. She didn't ask him
14 to take the pictures. How can she --

15 THE COURT: Sustained. Continue, counsellor.

16 MR. SCAHILL: If we're going to give
17 speeches --

18 THE COURT: The last statement after the
19 objection is stricken from the record as well. Please
20 continue.

21 Q Did you ever go back to verify that that's -- did
22 you ever go back to that parking lot after the accident to
23 verify where exactly you fell?

24 A. No. I was hospitalized for two months.

25 Q That wasn't my question.

Tutone - Plaintiff - Cross

1 A. Oh.

2 THE COURT: The last statement from the
3 witness is stricken from the record as well.

4 Please focus.

5 THE WITNESS: He asked me if I went back.

6 THE COURT: Please focus on the question,
7 and then --

8 THE WITNESS: Okay, I'm sorry, but --

9 THE COURT: No need to apologize. Please
10 continue, counsellor.

11 Q Do you need the question read back?

12 A. Excuse me?

13 Q Do you need the question read back?

14 A. Yes, please.

15 MR. SCAHILL: Can we read back the question,
16 your Honor.

17 (Whereupon, the requested portion was read
18 back.)

19 Q Did you ever go back to the parking lot after
20 your accident to verify where you fell?

21 A. No.

22 Q And is it fair to say that the area where you
23 fell, what you're claiming caused you to fall, that that
24 was an open and obvious condition?

25 MR. BISOGNO: Objection. That calls for a

Tutone - Plaintiff - Cross

1 legal conclusion.

2 THE COURT: Sustained.

3 Q You were aware of that spot, that exact spot --

4 MR. BISOGNO: Objection, asked and answered.

5 THE COURT: Counsellor, I'm going to allow
6 that question. Please continue.

7 Q You were aware of that exact spot that you said
8 caused you to fall?

9 A. No.

10 MR. SCAHILL: Nothing further, your Honor.

11 THE COURT: We'll have to break for lunch.

12 Jurors, we're going to break for lunch at
13 this time. Please return back at 2:15. I do inform
14 you and I do ask you, please do not start discussing
15 this case among yourselves. You'll have all the time
16 in the world when we start deliberations. Enjoy your
17 lunch and I'll see you all back at 2:15.

18 COURT OFFICER: All rise. Jury exiting.

19 (Whereupon, a luncheon recess was taken.)

20 * * * * *

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

22 * * * * *

23 THE COURT: Counsel, I received your
24 requests to charge you sent me.

25 MR. SCAHILL: (Nodding head.)

Proceedings

1 THE COURT: I have from --

2 MR. BISOGNO: From the previous one, your
3 Honor, yes. The only thing I have to supplement on
4 that, Judge, is the Americans with Disabilities Act,
5 and I will give you the sections tonight. I want to
6 see how today panned out.

7 THE COURT: Sure.

8 MR. BISOGNO: Before I started doing that.

9 THE COURT: All righty.

10 (Whereupon, Ms. Caroline Tutone, after
11 having been previously duly sworn, resumed the witness
12 stand and continued to testify, as follows:)

13 THE COURT: Good afternoon again.

14 THE WITNESS: Good afternoon.

15 THE COURT: Jurors, please.

16 COURT OFFICER: All rise. Jury entering.

17 (Whereupon, the jury enters the courtroom.)

18 THE COURT: Please be seated.

19 Good afternoon, jurors, welcome back. Just
20 before we begin, I just wanted to point something out.
21 I noticed when you came up, I was speaking with the
22 attorneys. Just to let you know that many times prior
23 to the trial, in the middle of the trial, during the
24 trial, I speak to both sides in hopes of sort of
25 narrowing some of the issues.

Tutone - Plaintiff - Redirect

1 As I mentioned before the trial started,
2 when it comes to issues of fact, that's solely a part
3 for you to decide. Questions of law or procedures are
4 for me to determine, so I speak to both sides just to
5 get the case moving. Just wanted to clarify that.

6 I believe we finished with the
7 cross-examination, counsellor.

8 MR. SCAHILL: Yes, your Honor.

9 THE COURT: I believe redirect, briefly.

10 MR. BISOGNO: Yes. Yes, Judge.

11 COURT CLERK: Witness is reminded, you are
12 still under oath.

13 THE COURT: You may continue.

14 MR. BISOGNO: Okay.

15 REDIRECT EXAMINATION

16 BY MR. BISOGNO:

17 Q Now, Carol, you were asked a number of times by
18 counsel, did you see the area where you fell before the
19 accident?

20 A. No.

21 Q Now, I'm going to read a portion of the
22 deposition which was not read in by Mr. Scahill, okay.

23 Did you ever see the area --

24 THE COURT: I'm sorry, page and line, please.

25 MR. BISOGNO: Yes, I apologize. 26, line 17.

Tutone - Plaintiff - Redirect

1 THE COURT: Okay.

2 Q Did you ever see the area where the accident
3 happened in the same condition that it was on the
4 date of the accident prior to that occurrence?

5 Your answer was yes.

6 Could you explain your answer, because you
7 weren't allowed to do it earlier.

8 MR. SCAHILL: Objection, your Honor.

9 Q All right, can you explain your answer.

10 MR. SCAHILL: Objection.

11 THE COURT: I'm going to allow it.

12 A. Can I speak?

13 Q Yes. I'm going to repeat the question for you.

14 Did you see the area where the accident
15 happened in the same condition that it was on the
16 date of the accident prior to the occurrence?

17 A. I saw the area. All I saw was asphalt. I never
18 saw a raised sidewalk. You couldn't see that from the
19 street.

20 Q And I'm going to read another portion. This was
21 on page 39, line 23:

22 Question: Is it fair to say that you were
23 aware of the condition of the lot, including,
24 including the spot where you fell prior to the
25 accident?

''

Tutone - Plaintiff - Redirect

Page 40, line 2, Answer: No.

I don't think that's fair.

And your continued answer was: Yes, I was aware of the spot but, you know, it wasn't my spot. I would say -- I would -- I'd say it was unexpected.

MR. SCAHILL: Judge, Mr. Bisogno did not read the entire question and answer.

THE COURT: Yes.

MR. BISOGNO: I will try it again.

Q Yes, I was aware of the spot but, you know, it wasn't my spot. I -- how would I say -- it was unexpected.

Continuing on with the same answer: You -- you were aware of the condition of -- actually, that's -- that's a question.

Question: You were aware of the condition of the parking area before the accident happened? Not on the day of the accident but prior to the accident? Prior to the date of the accident?

Answer: No, I really wasn't, you know. Had it in my head, no.

Question: You saw the lot in the condition that it was on -- that it was on the date of the accident prior to, and I think you said

Tutone - Plaintiff - Redirect

1 approximately seven times during the last months
2 before the accident, correct?

3 Answer: That's through the years.

4 So let's go back. When you say you saw the area
5 of the accident, in any way, shape or form, did you
6 actually mean the raised --

7 (Pause in proceedings.)

8 MR. BISOGNO: Who has the photos?

9 Thank you.

10 Q Did you actually mean the misleveled sidewalk,
11 the misleveled area?

12 A. No.

13 MR. SCAHILL: Objection.

14 THE COURT: Overruled. I'm going to allow
15 it.

16 Q Is that what -- did you ever see that area, and
17 I'm going to show you a picture instead of using this.

18 Did you ever see this area in Plaintiff's
19 Exhibit 10 prior to the date of the accident?

20 A. No.

21 Q When you say you had saw the condition, what did
22 you mean?

23 A. The asphalt.

24 Q I'm going to show you what's been marked as
25 plaintiff's Exhibit 8. Is that the area that you saw

Tutone - Plaintiff - Redirect

1 prior to the date of the accident?

2 A. Yes.

3 Q All right. Now, I'm going to show you something
4 else. I'm going to show you plaintiff's Exhibit 9, okay.

5 Plaintiff's Exhibit 9. From Plaintiff's
6 Exhibit 9, are you able to see the actual raised where you
7 fell?

8 A. No.

9 MR. BISOGNO: I'd ask this be published to
10 the jury.

11 (Exhibit published to the jury.)

12 THE COURT: You may continue, counsellor.

13 Q This is the very same picture. So, as you're
14 walking out on the many times that you've walked in and
15 out of this lot, which there is no dispute, were you able
16 to see the raised from the area where you were walking in
17 and out?

18 A. Not from the walking in, you could never see it.

19 Q What about walking out?

20 A. No.

21 Q So is it my understanding, just so we're clear,
22 you saw the defect, meaning the asphalt?

23 A. Yes.

24 Q Now, let's talk about your car being backed in
25 and/or being pulled in. Just so we're clear, do you

Tutone - Plaintiff - Redirect

1 understand the difference -- I don't mean to be insulting,
2 yes or no -- between backing your car in and pulling your
3 car in?

4 A. Yes, I do.

5 Q Okay. Now, page 38 -- by the way, at some point,
6 you did say you pulled the car in, right?

7 A. I did pull the car in.

8 Q And at any point in this deposition, did you
9 correct it?

10 A. Yes, I did.

11 Q In fact, how many times later on in this
12 deposition did you say you backed into the spot?

13 A. I think twice.

14 Q I'm going to read those.

15 Page 38, line 7: When you went into the
16 lot, did you back into the spot?

17 Line 9, Answer: Yes.

18 Now, that's not what he read, was it?

19 MR. SCAHILL: Objection, your Honor.

20 THE COURT: Sustained.

21 Q In fact, you said it again, page 45, line 18.

22 Question: Then you backed into the
23 handicapped spot that's shown in Defendant's
24 Exhibit A?

25 Answer: Right.

Tutone - Plaintiff - Redirect

1 A. Right, yes.

2 Q And then you said it again. You said it again,
3 45, 24.

4 Question: Did you back all the way up to
5 Fourth Avenue?

6 Answer: To the fence.

7 So, is it fair to say that you did in fact
8 correct and change your answer --

9 MR. SCAHILL: Objection, Judge.

10 Q -- at some point?

11 A. Yes, I did.

12 Q Two times in that deposition. It wasn't read in
13 front of this jury?

14 A. Yes, I did.

15 MR. SCAHILL: Objection, your Honor.

16 THE COURT: I'm going to allow it.

17 MR. BISOGNO: Now, let me just make sure,
18 Judge. That may be it.

19 Q By the way, during the deposition, did anyone
20 ever once ask you, did you ever see that raised, not the
21 area, but the raised before the date of your accident?

22 MR. SCAHILL: Objection.

23 A. No.

24 THE COURT: I'm going to allow the question.
25 You may answer.

Tutone - Plaintiff - Redirect

1 A. No.

2 Q Not once, right?

3 A. Right.

4 Q I don't believe I have anything else for you.

5 Oh, by the way, just so the jury gets an
6 understanding of your car, I know you call it your baby.

7 Is that your car that you were --

8 A. That's my baby, yes.

9 Q Do you still have that car?

10 A. Yes, I do.

11 Q In fact, where is that -- where is that actually
12 parked?

13 A. In my parking space where I live.

14 Q All right. And it's a pretty big car; it's not a
15 small car?

16 A. No, it's not a small car.

17 Q Okay. And that's marked as Plaintiff's
18 Exhibit --

19 MR. BISOGNO: It is in evidence, Judge.

20 A. Very little mileage.

21 Q These are all out of order, but... this is
22 Plaintiff's Exhibit 15.

23 THE COURT: Very well. Anything further?

24 Q So that's the car you backed in?

25 A. Yes.

Tutone - Plaintiff - Recross

1 Q All right. And you won't get rid of that car,
2 right?

3 A. Never.

4 MR. BISOGNO: All right, I have no further
5 questions.

6 MR. SCAHILL: Thank you, your Honor.

7 RECROSS-EXAMINATION

8 BY MR. SCAHILL:

9 Q Miss Tutone, good afternoon.

10 A. Good afternoon.

11 Q Just want to go over that deposition testimony
12 once again. And I ask you again, did you understand these
13 questions and answers when you gave them in October of
14 2013? This is on page 26, line 17.

15 MR. BISOGNO: Hold on, hold on. Page 26 --
16 okay.

17 Q Question: Did you ever see the area where
18 the accident happened in the same condition that
19 it was on the date of the accident prior to the
20 occurrence? Your answer is yes.

21 Do you remember giving that answer to that
22 question?

23 A. Yes, I remember giving that answer.

24 Q Is that answer truthful?

25 A. I didn't really understand that question.

Tutone - Plaintiff - Recross

1 Q Ask you again, on page 26, line 22:

2 How often would you see the area where the
3 accident happened in the same condition as it was
4 on April 25, 2012, prior to this occurrence?

5 Answer: Not often.

6 Page 27: When you say not often, did you
7 see it in that same condition five times, ten
8 times, 20 times, or something else?

9 Answer: Seven times.

10 Question: The seven times that you saw the
11 area where the accident happened prior to
12 April 25, 2012 on those occasions were over what
13 period of time? Six months, a year, five years,
14 or something else?

15 Answer: Six months.

16 Did you give those answers to those questions
17 under oath back in 2013?

18 A. I may have.

19 Q And --

20 MR. BISOGNO: I'll stipulate.

21 A. I must have.

22 Q And were those answers truthful when you gave
23 them in 2013?

24 A. They were true by me, but they were very
25 confusing questions to me.

Tutone - Plaintiff - Recross

1 Q I'd ask you another question with respect to your
2 deposition. This is on the issue of how you parked your
3 car.

4 On page 32, line 24: When you parked in the
5 lot -- when you parked in the parking lot, were
6 you facing 82nd Street or were you facing Fourth
7 Avenue or something else?

8 Mr. Pomerantz: After she parked the car?

9 Mr. Scahill: Yes.

10 Mr. Pomerantz: Where was the front of the
11 car facing?

12 Answer: Fourth Avenue.

13 Did you give that answer to that question under
14 oath in October of 2013?

15 A. I may have been confused. I was parked with the
16 nose facing Third Avenue.

17 Q Okay. When you answered, Where was the front of
18 the car facing when your own lawyer asked you that
19 question and you answered Fourth Avenue, what part of that
20 question did you not understand?

21 MR. BISOGNO: She didn't say she didn't
22 understand it. She said she got confused.

23 A. I'm confused.

24 MR. BISOGNO: Objection. No, no.

25 THE COURT: Overruled. You may answer.

Tutone - Plaintiff - Redirect

1 Q What part of that question did you not
2 understand, Where was the front of your car facing and you
3 answered Fourth Avenue? What part of that question did
4 you not understand?

5 A. Probably the whole question, because I was very
6 confused since the accident.

7 Q You were confused when your own lawyer asked you,
8 where was the front of the car facing and you answered
9 Fourth Avenue; that was confusing to you?

10 A. Yes.

11 Q Is that correct?

12 A. Yes.

13 MR. SCAHILL: Nothing further, your Honor.

14 MR. BISOGNO: I just got to clear this up.

15 REDIRECT EXAMINATION

16 BY MR. BISOGNO:

17 Q When he asked you the area of the accident, in
18 your head, did that include the actual raised or just the
19 general area?

20 MR. SCAHILL: Objection.

21 A. I didn't hear you.

22 THE COURT: I'm going to sustain.

23 Counsellor, move on.

24 Q Okay, let me ask you this. Anywhere in this
25 phrase on page 26, line 17, Did you ever see the area

Tutone - Plaintiff - Redirect

1 where the accident happened in the same condition that it
2 was on the date of the accident prior to the occurrence?
3 Your answer was yes. Were you talking about the defect
4 that you tripped on, yes or no, or the overall area?

5 MR. SCAHILL: Objection, your Honor.

6 A. The whole area, not the defect.

7 THE COURT: I'll allow it.

8 Q The whole area?

9 A. The whole area.

10 Q And the area, aside from that defect, had the
11 asphalt, correct?

12 A. Right. Anybody could see it. It's very visible
13 from the street.

14 MR. BISOGNO: I have no further questions.

15 THE COURT: You may step down.

16 (Whereupon, Ms. Caroline Tutone was excused
17 from the witness stand.)

18

19

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