

1 CIVIL COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CIVIL TERM: 108

2 -----X
ROBERTO B. TOMALA,

3
4 PLAINTIFF,

5 -against- Index No. 300815/15

6 JUSTO HERRERA,

7 DEFENDANT.

8 -----X

9 Civil Courthouse
89-17 Sutphin Boulevard
10 Jamaica, New York 11435
May 17, 2017

11 B E F O R E:

12 THE HONORABLE TERRENCE C. O'CONNOR,

13 J U S T I C E

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

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Attorneys for the Plaintiff
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21
22 PATRICIA GARCIA - SPANISH INTERPRETER FOR THE A.M.
23 RICARDO MENENDEZ - SPANISH INTERPRETER FOR THE P.M.

24 ILIANA PEREZ,
25 Official Court Reporter

1 THE COURT: At this time we had opening
2 statements. We will proceed to the plaintiff's case.

3 MR. BREITNER: Plaintiff calls Roberto Tomala to
4 the stand.

5 THE COURT: Madam Interpreter, give us your
6 appearance for the record.

7 THE INTERPRETER: Patricia Garcia, Official
8 Spanish interpreter.

9 THE COURT: As always, thank you. Thank you so
10 much for your help, we appreciate it. And we are always
11 grateful. Officer, if you will.

12 COURT OFFICER: Will you raise your right hand.
13 R O B E R T O B. T O M A L A, called as a witness by and on
14 behalf of the Plaintiff, after having been first duly sworn, was
15 examined and testified as follows:

16 THE COURT: Please be seated.

17 COURT OFFICER: In a loud clear voice state your
18 name address for the record.

19 MR. TOMALA: My name is Roberto Tomala, 3466 107th
20 Street Corona, New York 11368.

21 THE COURT: Mr. Breitner.

22 MR. BREITNER: Thank you, your Honor.
23 I can't tell if it's morning or afternoon, but good day. Keep
24 your voice up. We know we just finished the liability portion
25 of the case. Now, we are going to damage portion of the case.

1 I don't know if you understood Counsel's statement, he said you
2 look much younger than you are.

3 A. Thank you.

4 Q. I want to take you back to the months leading up to
5 your accident of July 2, 2013.

6 During the period of time, let's say from May 1st to
7 July 1st, were you under the care of an orthopedist?

8 A. No.

9 Q. During that same time frame, were you under the care
10 of a physiatrist; a rehabilitation doctor?

11 A. No.

12 Q. During that period of time May 1st to July 1st of
13 2013, were you experiencing any neck pain?

14 A. No.

15 Q. During that same time frame, were you experiencing any
16 pain along your back?

17 A. No.

18 Q. And again, during that same time frame, were you
19 experiencing any difficulty with your right shoulder?

20 A. No.

21 Q. Am I correct at some time before that you had an
22 injury to your left shoulder that had been operated on?

23 A. Yes.

24 Q. And as you know, as Counsel knows, we are not making
25 any claim for injury to your left shoulder in this case.

1 A. Yes.

2 Q. Prior to the accident of July 2, 2013, were you able
3 to play sports?

4 A. Yes.

5 Q. What sports did you play?

6 A. Soccer and basketball.

7 Q. At that point, did you have grandchildren?

8 A. Yes.

9 Q. Were you able to lift your grandchildren?

10 A. Yes.

11 Q. In terms of marital relations with your wife, were you
12 able to engage in that pain free?

13 A. Yes.

14 Q. Would you say basically that you were in good general
15 health prior to the accident of July 2, 2013?

16 A. Yes.

17 Q. Now, we had testimony and we had a verdict concerning
18 the accident July 2, 2013, I just want you to explain to the
19 Court and Jury after the impact what happened to your body?

20 A. Yes.

21 Q. I'll rephrase the question. You're driving along
22 Northern Boulevard, you're approaching 72nd Street, your
23 involved in an accident with Mr. Herrera, when there was an
24 impact that you described previously; what happened to your body
25 within the car?

1 A. When I heard the impact, my body shook all over and my
2 back twisted and my neck twisted. I hit my right shoulder
3 against the hard seat, and my left shoulder hit against the left
4 door.

5 Q. Could you describe how severe the impact was?

6 A. Strong.

7 Q. Now, during opening statements defense Counsel
8 mentioned and the record bears this out that you did not make
9 any complaints of injuries to the police, why was that?

10 A. Well, as a result of the impact, I felt nervous and
11 that's the reason why I didn't give any report to the police.

12 Q. What did you do when you got home that day?

13 A. I got home. I spoke to my wife of what had happened.
14 And I told her that I was going to bed. I was feeling pain.

15 Q. At that point, were you feeling pain?

16 A. All of my body.

17 Q. Now, eventually you went for medical care at Best
18 Care; is that correct?

19 A. Yes.

20 Q. And at that point when you went to Best Care, were you
21 feeling pain?

22 A. Yes.

23 Q. Where were you feeling pain?

24 A. The neck, the middle of my back and lower back and my
25 right shoulder.

1 Q. During the period of time from July 2, 2013 until the
2 time that you first went to Best Care, did you continue to go to
3 work?

4 A. Yes, because I did not want to loose the days of work.

5 Q. When you were at work, were you working with the pain?

6 A. A lot.

7 Q. As the week to ten days went on, did that pain
8 increase?

9 A. Yes.

10 Q. Now, how was it that you were referred to Best Care
11 for medical treatment?

12 A. My lawyer gave me information to go for therapy.

13 Q. Why did you see a lawyer?

14 A. Because it was a permanent damage that I had.

15 MR. SCAHILL: Objection. Move to strike, your
16 Honor.

17 THE COURT: Please disregard that. It is stricken
18 from the record.

19 Q. At the time that you saw the lawyer, were you in pain?

20 A. Yes.

21 Q. And did you go to that facility that had been
22 recommended by that attorney?

23 A. I went alone.

24 Q. Could you tell me where is or was Best Care located?

25 A. 108 and 42nd Street Corona.

1 Q. And when you went to Best Care, what did they do for
2 you?

3 A. They started giving me treatments for my neck, my
4 back, my right shoulder and stretching and massage.

5 Q. How often per week did you go to Best Care for
6 treatment?

7 A. Four times a week.

8 Q. And for how long a period of time did you go to Best
9 Care four times a week?

10 A. During one year.

11 Q. Now, during that time, what did they do specifically
12 with respect to your neck?

13 A. They gave me electricity, massage, hot compresses and
14 they did stretching.

15 Q. And anything else?

16 A. Dr. Vora gave me injection.

17 Q. It is Dr. Vora. V as in Victor. What was done with
18 respect to your back?

19 A. They gave me steroids to the back and the lower back.
20 They did do surgery.

21 Q. What kind of surgery?

22 A. Nominal (sic) lumbar surgery.

23 Q. Who did that surgery?

24 A. Dr. Auerbach.

25 Q. We are just sticking with Best Care and what was done

1 for you at Best Care.

2 What was done for your back while you were being
3 treated at Best Care?

4 A. Injections, steroid injections in my back, in my neck
5 and also in my shoulder.

6 Q. What was done for you with respect to your right
7 shoulder at Best Care?

8 A. Treatments.

9 Q. What kind of treatments?

10 A. Stretching, massages, hot compress with electricity.

11 Q. With respect to your neck, did any of these treatments
12 help?

13 A. Just for the moment.

14 Q. What about with respect to your back, did any of those
15 treatments at Best Care improve your condition?

16 A. No.

17 Q. And with respect to your right shoulder, did any of
18 the treatments rendered at Best Care improve your shoulder?

19 A. No.

20 Q. Now, during the course of your visits to Best Care,
21 did you also come under the care of Dr. Vora?

22 A. Yes.

23 Q. For how long a period did you see Dr. Vora?

24 A. About a year and a half.

25 Q. Was he the doctor who administered the injections to

1 you?

2 A. Yes.

3 Q. Did you do anything else for you?

4 A. No.

5 Q. Did you have a discussion with him at some point

6 concerning your lower back?

7 A. Yes.

8 Q. And prior to that conversation, was any of the

9 treatments that were being rendered to your lower back improving

10 you?

11 A. No.

12 Q. As a result of that conversation, did you seek the

13 professional help of Dr. Auerbach.

14 A. Yes.

15 Q. Why did you see Dr. Auerbach?

16 A. Because I needed a second opinion and the pain was

17 increasing.

18 Q. As a result of your consultation with Dr. Auerbach,

19 did you have surgery?

20 A. Yes.

21 Q. And do you remember the date of the surgery?

22 A. December 11th, 2013.

23 Q. And where was that done?

24 A. The lower portion of the hip.

25 Q. Let me ask you first. Which hospital was that done?

1 A. Lebanon hospital.

2 Q. Did Dr. Auerbach operate on your back?

3 A. Yes.

4 Q. Up until the time Dr. Auerbach operated on your back,
5 did you have any numbness or tingling in your legs?

6 A. A lot.

7 Q. And had you had the numbness, the tingling or the pain
8 in your leg prior to the automobile accident on July 2, 2013?

9 A. No.

10 Q. Up until the time that you saw Dr. Auerbach, did you
11 have to take time off from work?

12 A. Yes.

13 Q. And this time off was it recommended by your doctors?

14 A. Dr. Vora.

15 Q. How much time did he tell you to take off, that is the
16 time prior to the surgery by Dr. Auerbach?

17 A. Two weeks.

18 Q. Did anyone else either at Best Care or the
19 chiropractor other than Dr. Auerbach tell you to take time from
20 work?

21 A. Yes.

22 Q. Who is that?

23 A. The chiropractor recommended a week off.

24 Q. And did you take that week off?

25 A. Yes.

1 Q. And with respect to Dr. Auerbach following the
2 surgery, did he tell you to take off from work as well?

3 A. Yes.

4 Q. Am I correct, you took over three months off of work?

5 A. Correct.

6 Q. How were you compensated at your job by the Board of
7 Ed and Flushing Hospital during this period of time that you
8 took off?

9 A. I had to use my sick days.

10 Q. Now, in 2013 what was your compensation on a yearly
11 basis from Flushing Hospital and from the Board Of Education?

12 A. Can you repeat your question.

13 Q. In terms of the amount of money that you earned, and
14 we could use the year before because that was a complete year;
15 what did you earn from your two jobs in 2012?

16 A. I earned \$36,000 in the Board of Ed and \$26,000 in
17 Flushing hospital.

18 Q. As a result of this accident and the time that you had
19 to take off, did you lose sick days and vacation days?

20 A. Yes, of course.

21 Q. During the period of time from the accident and up
22 until the time that Dr. Auerbach did surgery on your back, were
23 you engaging in your normal daily activities?

24 A. The surgery helped, but afterwards the pain continued.

25 Q. What I'm asking is, during the period of time before

1 Dr. Auerbach surgery, were you in pain?

2 A. Yes, correct.

3 Q. And did that pain effect your activities?

4 A. Yes, from the point of the accident until the surgery

5 100 percent.

6 Q. How did it effect your activities?

7 A. I could not do the usual activity, what I did before.

8 I couldn't lift anything. I couldn't help my wife. I couldn't

9 carry or lift my grandchildren because of the pain.

10 Q. We will get to what happened after Dr. Auerbach's

11 surgery. I want to focus on your right shoulder.

12 In addition to Dr. Vora, did you see another doctor

13 with respect to your right shoulder?

14 A. Dr. McCullough.

15 Q. What type of Dr. is Dr. McCullough?

16 A. He is a shoulder specialist.

17 Q. When did you see him for the first time?

18 A. Around November or December.

19 Q. Now, during the period of the time from the time of

20 the accident, during the time the surgery was performed by

21 Dr. Auerbach, were X-rays, CAT scans or MRIs taken of your body?

22 A. Yes.

23 Q. And what areas of your body were X-rayed, CAT scanned

24 or MRIs?

25 A. The neck, the middle of the back, lower back and right

1 shoulder.

2 Q. Did Dr. Auerbach tell you prior to the surgery what
3 your condition was?

4 A. Yes.

5 Q. What did he tell you?

6 MR. SCAHILL: Objection to what the doctor told
7 him.

8 THE COURT: Sustained. It's hearsay.

9 Q. How many times did you see Dr. McCullough?

10 A. Around three to four times.

11 Q. And after your consultation with Dr. McCullough and
12 after MRIs were taken of your shoulder, was there any treatment
13 that was recommended?

14 A. He told me that I had to have surgery.

15 MR. SCAHILL: Objection to what the doctor told
16 him.

17 THE COURT: Sustained.

18 Q. Was surgery recommended after your consultation with
19 Dr. McCollough?

20 MR. SCAHILL: Objection.

21 THE COURT: Sustained.

22 Q. Have you had surgery on your right shoulder since your
23 last visit to Dr. McCollough?

24 A. No.

25 Q. Why not?

1 A. I didn't want to lose any more days from work.

2 Q. Now, you had mentioned that you had surgery by

3 Dr. Auerbach on December 11, 2013; correct?

4 A. Yes.

5 Q. Were you told of risk of undergoing the surgery that

6 you had?

7 A. Yes.

8 Q. And despite those risk you wanted to go ahead with the

9 surgery?

10 A. Correct.

11 Q. Why did you want to go ahead with the surgery?

12 A. Because I couldn't sustain the pain and I couldn't

13 bend down. I couldn't do anything.

14 Q. After Dr. Auerbach surgery, did you have improvement

15 with your back?

16 A. Yes.

17 Q. And has that improvement continued up until today?

18 A. No, no.

19 Q. What happened, tell us?

20 A. After about three months after the surgery, I started

21 feeling cramps in my back, in my neck and also I couldn't bend

22 down very much.

23 Q. What did you do with respect to all those problems?

24 A. I continued to see Dr. Vora.

25 Q. And what did Dr. Vora do?

1 A. He continued giving me therapy and painkillers.

2 Q. In terms of painkillers, what painkillers did you take

3 back in 2013?

4 A. Ibuprofen.

5 Q. Any other medication did you take?

6 A. For muscular pain, I don't remember.

7 Q. Did you take any anti-inflammatory medications?

8 A. Yes.

9 Q. Do you continue to take those medications today?

10 A. Yes.

11 Q. As you sit here today, are you experiencing pain?

12 A. Yes.

13 Q. Where are you experiencing that pain?

14 A. Lower back and the shoulder and my neck.

15 Q. Let's go with respect to your neck, is that pain all

16 the time or is it pain when you make a movement or something

17 else?

18 A. The pain is permanent.

19 Q. On a scale of one to ten, with ten being the most

20 painful, how will you rate the pain that you have in your neck?

21 A. An eight.

22 Q. Now, with respect to your back, are you experiencing

23 pain now?

24 A. Yes.

25 Q. And do you experience the pain when you make certain

1 movements or is it painful all of the time?

2 A. It's permanent.

3 Q. On a scale of one to ten, how will you rate that pain
4 in your lower back?

5 A. A ten.

6 Q. With respect to your right shoulder, is the pain
7 constant or is it brought on when you make certain movements?

8 A. It's permanent.

9 Q. On a scale of one to ten, how will you rate that?

10 A. An eight.

11 MR. BREITNER: Your Honor, may we approach?

12 THE COURT: Yes. It is 12:25. Let's break for
13 lunch. We will see you back at two p.m. sharp.

14 (Whereupon, a luncheon recess was held in the
15 proceeding.)

16 THE COURT: On the record, it's been brought to my
17 attention by three of the members of the jury that they
18 don't feel that the interpreter is interpreting properly
19 and we are planning on getting a new interpreter. What
20 would you like to do? Do you want to bring them in and
21 question them.

22 MR. BREITNER: Yes.

23 THE COURT: We will bring the jury in. You can
24 inquire on whatever you want.

25 COURT OFFICER: All rise. Jury entering.

1 THE COURT: Okay. Everybody can be seated.
2 Members of the jury, I have communicated your concern about
3 the translation process. Plaintiff's counsel has some
4 questions he will like to ask you.

5 MR. BREITNER: Thank you, your Honor. Thank you
6 for brining the issue to our attention. My concern is
7 number one that part of the jury heard one version, and the
8 rest of the jury heard another part. Was the interpreter
9 paraphrasing my questions and paraphrasing the answers, was
10 there any particular area that was most problematic? Does
11 anyone have anything to answer that.

12 JUROR NO. FIVE: There were a couple of questions
13 that were being paraphrased that could have effected his
14 testimony.

15 MR. BREITNER: You are at liberty. What area and
16 what question?

17 JUROR NO. FIVE: Well, there was one about his
18 pain, I believe he mentioned it was consistent and she used
19 the word increase. There was one that you mentioned to him
20 what happened before 74th Street, she actually said 72nd
21 Street.

22 MR. BREITNER: That's not going to effect the
23 deliberations. You all know what was being referred to.
24 The first thing is there something for me to go over again
25 or was there anything else that comes to anyone attention.

1 JUROR NO. FIVE: No.

2 THE COURT: Please bring the plaintiff back on the
3 stand and we have a new interpreter. You may be seated. Go
4 ahead, Counsel.

5 CONTINUING DIRECT

6 EXAMINATION BY MR. BREITNER:

7 Q. Good afternoon, Mr. Tomala. There is an area that I
8 want to go over either my question or your answer was not
9 interpreted or translated accurately, and I want to ask you
10 questions concerning pain.

11 I want to first ask you about the pain in your neck,
12 can you describe your pain in the neck?

13 A. The pain that I cannot turn it to the right or to the
14 left or up and down.

15 Q. And should you do those motions, is it productive of
16 pain?

17 A. Correct.

18 Q. And if you're sitting here without moving your head,
19 do you have pain in your neck?

20 A. I feel that the neck is stiffened, hardened.

21 Q. In terms of pain, when you move your neck on a scale
22 of one to ten, with one being the least pain, and ten being the
23 most pain, could you tell us at what level the pain is when you
24 move the neck?

25 A. 1.8 percent.

1 Q. Is that eight out of ten?

2 A. Yes.

3 Q. Let's go to your back; is your back hurting now?

4 A. Yes.

5 Q. And can you describe the pain on a scale of one to

6 ten?

7 A. Ten.

8 Q. Is it always ten or is it ten sometimes and less other

9 times?

10 A. Always ten.

11 Q. Now, I want to go to your right shoulder, as you sit

12 here now, do you have pain in your right shoulder?

13 A. Yes.

14 Q. And can you tell us on a scale of one to ten, what

15 that pain is?

16 A. Eight.

17 Q. Is there anything that makes it feel worse, in terms

18 of movement or motion with your arm?

19 A. Yes, every time I move it and when I'm sitting for a

20 long time.

21 Q. Does it increase the pain level from eight to

22 something else or is it a consistent eight?

23 A. It's a consistent eight.

24 Q. Now, in terms of the pain in your neck, when you move

25 it, can you describe the pain; is it a sharp pain, a dull pain

1 or something else?

2 A. It's a pain that consequentially strong and it hurts
3 lot.

4 Q. And are you unable to move your head to a full range
5 of motion?

6 A. With difficulty.

7 Q. Now, in terms of your back, can you describe the back?

8 A. The pain is intense.

9 Q. Is there something that makes it worse?

10 A. Yes.

11 Q. And what is that?

12 A. When I stoop over, when I turned, when I grab
13 something heavy, when I walk for a long time my back hurts.

14 Q. Are you wearing any kind of device to support your
15 back?

16 A. Yes.

17 Q. What device are you wearing?

18 A. It's a belt. Support belt.

19 Q. Do you wear that everyday or sometimes?

20 A. Everyday.

21 Q. Is there another type of apparatus or equipment that
22 you wear in addition to that belt?

23 A. Previously, I used a cane.

24 Q. Let me just go back a little bit. Where did you get
25 the cane?

1 A. At the therapy.

2 Q. For how long a period of time did you use it?

3 A. For around one year.

4 Q. Did you receive any equipment when you left Bronx
5 Lebanon hospital?

6 A. Yes.

7 Q. What equipment did you receive?

8 A. A walking chair, and something to be able to sit in
9 the bathroom and a cane.

10 Q. Did you utilize those items after you were discharged
11 from Bronx Lebanon?

12 A. Yes.

13 Q. For how long a period of time?

14 A. Around a month and a half to two months.

15 Q. I want to go back to a couple of things that I didn't
16 get to this morning. Were you wearing a seatbelt in the
17 automobile at the time of accident?

18 A. Yes.

19 Q. During the course of treatment at Best Care and under
20 the care of Dr. Vora, you testified that you received certain
21 injections?

22 A. Yes.

23 Q. Did those injections cause you pain?

24 A. A lot.

25 Q. You also mentioned that you had physical therapy?

1 A. Yes.

2 Q. Did that physical therapy cause you pain?

3 A. Yes.

4 Q. Now, I want to go to the way things are now, you had
5 mentioned that you have pain and restrictions of motion in your
6 neck, in your back, and in your right shoulder?

7 A. Yes.

8 Q. And your right handed; aren't you?

9 A. Yes.

10 Q. I want to ask you how the pain and the restriction of
11 motion effected your activity with your children and
12 grandchildren?

13 A. Yes.

14 Q. Tell us.

15 A. Now, everything that I do is now limited. Now, I have
16 to take more time to do things around the house, to help my
17 wife, to take out the garbage. Now, I have to take my children
18 to the supermarket, to do laundry and everything is limited.
19 When I'm playing with my grandchild and to carry my
20 grandchildren. My job, my work, is also limited now. I can't
21 just stoop or lean over like I did before.

22 Now, I can't carry anything more than ten pounds. I
23 cannot reach for something. I can't lower the curtain or paint
24 and there is something personal about me. My sexual relations
25 are not the same.

1 Q. I know it is a delicate subject, can you tell us why
2 it is not the same?

3 A. The back pain and the neck pain and the shoulder is
4 there.

5 Q. You've mentioned before certain activities of daily
6 living. And I want to ask you what things that you are able to
7 do before the accident that you can't do now?

8 A. Before I would go to play baseball and basketball. I
9 would go out running, and do many things liking buying things in
10 the supermarket.

11 Q. Are those things that you cannot do at all now or you
12 need help now?

13 A. Now, I need help to do those things.

14 Q. In terms of playing basketball and baseball --

15 A. -- except that.

16 Q. Why can't you run?

17 A. Because of the pain in my back, neck and shoulder.

18 Q. Why can't you play basketball?

19 A. Because there is too much pain when I raise my hands.

20 Q. Why can't you play soccer?

21 A. Because of the pain in my back and I cannot run.

22 Q. Are you able to lift your grandchild?

23 A. No.

24 Q. Has your job changed in any way?

25 A. Too much.

1 Q. Tell us how?

2 A. Because it is not the same as before. Now, I have to

3 take my time to be able to accomplish my work.

4 Q. Are you doing something different now than what you

5 did before the accident?

6 A. I'm still doing the same thing.

7 Q. Your job in Flushing Hospital, has that changed?

8 A. Yes.

9 Q. How has that changed?

10 A. I'm in a different department now.

11 Q. What do you do now that is different than what you did

12 before?

13 A. Before I would work in the cafeteria. Now, I am

14 working for the surgery department.

15 Q. How does that differ; if it does, in terms, of how

16 strenuous the job is?

17 A. Before I had to put the food in the trays for the

18 patients, so now in the new department I have to compose the

19 rooms after the surgery is done.

20 Q. Could you tell us does your wife help you in your

21 activities of daily living?

22 A. Yes.

23 Q. In what form?

24 A. She helps to tie my shoes. Sometimes she helps me put

25 on my underwear.

1 Q. How come you need help putting on your shoes?

2 A. Because I wake up with pain in my back and I can't

3 stoop over.

4 Q. How come occasionally she helps you put on your

5 underwear?

6 A. She lives there with me and she is next to me.

7 Q. Are you able to put on your underwear by yourself?

8 A. Not always.

9 Q. Under what circumstances aren't you able to put on

10 your underwear?

11 A. If I have to stoop over, when I stoop over my back

12 hurts.

13 Q. Do you do any exercises at home?

14 A. Yes, in the morning, when I wake up I have

15 difficulties, so I go to the bathroom and I do my therapy in the

16 bathroom.

17 Q. What kind of therapy do you do?

18 A. I give myself massages on my back, shoulder and on my

19 neck.

20 Q. Do you do that once a day or twice a day?

21 A. Two times per day.

22 Q. What do you do at night assuming that you do the

23 therapy as well?

24 A. I bathe. I do my therapy and I take some pills to go

25 to sleep.

1 Q. Does your wife assist you in your therapies?
2 A. Yes, a lot.
3 Q. What does she do?
4 A. She gives massages from my neck and to my lower back.
5 Q. Is that painful?
6 A. Very.
7 Q. Am I correct that if you would attempt to tie your
8 shoes it will be very painful?
9 A. I do it with difficulty.
10 Q. And is it something that your wife assists you more
11 often than not?
12 A. Less often.
13 Q. Is there a device that you utilized to help you put on
14 your shoes?
15 A. Yes.
16 Q. What do you use?
17 A. It's a stick, so that I could put my foot inside my
18 shoe.
19 Q. Is that so that you don't have to bend down?
20 A. Correct.
21 MR. BREITNER: Nothing further at this time.
22 Thank you.
23 THE COURT: Mr. Scahill.
24 MR. SCAHILL: Thank you, your Honor.
25 CROSS EXAMINATION

1 BY MR. SCAHILL:

2 Q. Good afternoon, Mr. Tomala.

3 A. Good afternoon.

4 Q. You told us this morning that you went to Best Care
5 Medical Facility upon referral of your attorney; is that
6 correct?

7 A. Correct.

8 Q. Do you recall being asked questions about that
9 referral to Best Care Facility at your deposition on May of
10 2014?

11 A. Say it again.

12 Q. Were you questioned under oath about the facts of this
13 case in May of 2014?

14 A. I don't remember.

15 Q. Do you recall appearing for a deposition with your
16 lawyer on May 14, 2014?

17 A. Yes.

18 Q. And at the time you were questioned about the facts of
19 this case and the circumstances of the accident?

20 A. Yes.

21 Q. And you had an interpreter present to translate for
22 you the same way that an interpreter is present today?

23 A. Yes.

24 Q. And do you recall being asked questions about that
25 referral to the Best Care facility?

1 A. I didn't understand.

2 Q. I am going to read to you questions that were asked in
3 your deposition and ask if you recall giving these answers.

4 MR. SCAHILL: On page 23, starting at line 19.

5 You were asked these following questions:

6 "QUESTION: And do you know where Best Care is
7 located at?

8 "ANSWER: 108 and 42nd Avenue.

9 "QUESTION: That's Corona, right?

10 "ANSWER: Correct.

11 "QUESTION: Were you referred to that facility by
12 somebody?

13 "ANSWER: No.

14 "QUESTION: Have you ever been to that facility
15 previously?

16 "ANSWER: No.

17 "QUESTION: How did you come to choose that
18 facility then?

19 "ANSWER: It's nearby home."

20 Do you recall being asked those questions and
21 giving those answers in May of 2014?

22 A. I don't remember.

23 MR. SCAHILL: Counsel, will you stipulate I read
24 that correctly.

25

1 MR. BREITNER: Yes, I will.

2 Q. Sir, when you gave that testimony, were you sworn to
3 tell the truth as you are sworn to tell the truth today?

4 A. Yes.

5 Q. Your lawyer has just admitted that the questions that
6 were asked and the answered that I read were accurate?

7 A. Yes.

8 Q. My question to you is, did you give false testimony
9 under oath on May 2014?

10 MR. BREITNER: Objection.

11 THE COURT: Overruled.

12 A. No.

13 Q. So when you were asked in May of 2014, were you
14 referred to that facility by someone and you said no; that
15 answer was true?

16 A. I don't remember exactly.

17 Q. I am asking if that answer was true. You stated in
18 2014 under oath that no one referred you to Best Care; was that
19 answer true?

20 A. I don't remember.

21 Q. That's not my question. My question is, was the answer
22 true.

23 MR. BREITNER: Objection, your Honor. If he
24 doesn't remember, he doesn't remember.

25 THE COURT: You're not going to get an answer.

1 Why don't you move along. He chooses to tell you he doesn't
2 remember.

3 Q. Were you involved in another accident with that
4 Windstar Van that you were driving on July 2nd 2013?

5 MR. BREITNER: Objection, your Honor. Relevance.
6 On the same day.

7 MR. SCAHILL: Not on the same day. At any other
8 time, were you involved in an accident?

9 THE COURT: Why do you ask it again.

10 Q. Were you involved in another accident while driving
11 the same Windstar that you were driving on July 2, 2013?

12 MR. BREITNER: Objection.

13 THE COURT: Overruled.

14 A. After the accident, no.

15 Q. How about before?

16 A. Neither.

17 Q. I'm sorry.

18 A. Neither.

19 MR. SCAHILL: Can I have a document marked for
20 identification or deemed mark for identification, your
21 Honor.

22 THE COURT: Defendant's A for identification.

23 (Whereupon, the document was marked as
24 Defendant's Exhibit A for identification by the
25 Reporter.)

1 THE COURT: Let the record reflect Defendant's A
2 is marked.

3 Q. If you can look at the document that has been marked
4 Defendant's A for identification. Do you recognize what is shown
5 on that photograph? Is that the back of your Ford Windstar?

6 A. Yes.

7 Q. Was that vehicle involved in another accident?

8 A. After the accident that I had with that man.

9 Q. Is the damage that you see -- withdrawn for a moment.
10 Does that photograph fairly and accurately depict your
11 vehicle after the accident?

12

13 MR. BREITNER: Objection. In which accident.

14 MR. SCAHILL: The July 2, 2013 accident.

15 A. No.

16 Q. Was the damage that's shown in that photograph to the
17 back of your vehicle done in the accident July 2, 2013?

18 A. That was not the accident that I had with the man.

19 Q. When did the damage that is shown in the photograph
20 happen?

21 MR. BREITNER: Objection.

22 THE COURT: Overruled.

23 Q. August 1st or 2nd in 2013.

24 Q. Were you driving at the time?

25 A. Yes.

1 Q. And were you struck in the back and did that damage
2 occur?

3 A. When the accident took place, I was not there.

4 Q. Were you driving the vehicle at the time of the
5 accident?

6 A. Yes.

7 Q. And does that photograph accurately depict the damage?

8 A. Yes.

9 MR. SCAHILL: Move that into evidence, your Honor.

10 MR. BREITNER: Objection, your Honor. It is after
11 the accident. It has no probative value.

12 THE COURT: I disagree that will be Defendant's
13 Exhibit A for the defendant.

14 (Whereupon, the document was marked as Defendant's
15 A Exhibit in evidence by the Reporter.)

16 MR. SCAHILL: Can we have that published to the
17 jury?

18 THE COURT: Officer, if you be so kind.

19 Q. Mr. Tomala, when in August did that accident take
20 place, the damage that is shown on the photograph; when in
21 August?

22 A. Roosevelt Avenue and 80th street.

23 Q. When? What date?

24 A. August 1st or 2nd of 2013.

25 Q. So, within approximately a month of the accident

1 involving Mr. Herrera, you were involved in a second accident
2 that caused the damage to the back of your car; is that correct?

3 A. Yes.

4 Q. You neglected to tell the jury about that this
5 morning. Why did you not reveal that to the jury?

6 MR. BREITNER: Objection, your Honor.

7 THE COURT: Overruled.

8 Q. Why did you not reveal to the jury that you were
9 involved in a second accident within a month after the accident
10 of Mr. Herrera that caused the damage to the car?

11 MR. SCAHILL: I'll withdraw the question.

12 THE COURT: Okay.

13 Q. Is it true, sir, that you did not reveal to the jury
14 that you were involved in a second accident a month after the
15 accident with Mr. Herrera?

16 A. I was not involved in it.

17 Q. Sir, you had prior to July of 2013, you had other
18 incidents, where you were injured at work; is that fair to say?

19 A. Yes.

20 Q. As a result of those incidents at work you had surgery
21 to your left shoulder?

22 A. Yes.

23 Q. Does your left shoulder still cause you pain to the
24 degree that you are claiming your right shoulder now has pain?

25 A. My left shoulder hurts more than my right shoulder.

1 Q. Let me ask you, at the time of the accident you had
2 your own doctor, correct?

3 A. At the moment, no I did not have a doctor.

4 Q. Who is Dr. Gomez?

5 A. My primary doctor.

6 Q. Was Dr. Gomez your primary doctor at the time of the
7 accident?

8 A. At work, yes.

9 Q. Am I correct that you never went to Dr. Gomez about
10 this accident involving Mr. Herrera?

11 A. No.

12 Q. No, I am not correct or no you never went to
13 Dr. Gomez?

14 A. No, I did not go to Dr. Gomez.

15 Q. And was that a doctor that treated you on a regular
16 basis prior to the accident?

17 A. Pardon me. How was that?

18 Q. Was that a doctor that treated you on a regular basis
19 prior to the accident?

20 A. Of what accident?

21 Q. We are referring to the accident involving Mr. Herrera
22 that you're suing for?

23 A. No.

24 Q. Was he your trusted family physician?

25 A. Very much.

1 Q. But you did not choose to see your trusted family
2 physician before this accident.

3 A. Yes.

4 Q. Instead you went to your lawyer first; is that
5 correct?

6 A. No, first I saw the attorney.

7 Q. You didn't go to Dr. Gomez first, you went to the
8 lawyer first, is that fair to say?

9 A. Correct.

10 Q. How many days after the accident, did you go to the
11 lawyer?

12 A. The third day I called him.

13 Q. How many days later did you go see the lawyer?

14 A. I saw him about a week after.

15 Q. And during that week you went to work to both jobs,
16 the way that you did prior to the accident, correct?

17 A. I went to work with some pain.

18 Q. I didn't ask you that, sir. I asked you did you go to
19 work the same way that you did before the accident? Everyday
20 you got up went to work and then you went to the second job?

21 A. Yes.

22 Q. And you did that up until the time that you went to
23 the facility that your lawyer referred you to?

24 A. Yes.

25 Q. And even after you went to the facility the lawyer

1 referred you to you went to work everyday in the morning, The
2 Board of Education and in the afternoon to Flushing Hospital,
3 and you did that week after week through October of 2013; is
4 that correct?

5 A. I went to work with difficulty.

6 Q. I didn't ask you that, sir. I asked you if you went
7 to work day after day even after you went to the facility your
8 lawyer referred you to?

9 A. Yes.

10 Q. Let me ask you about the accident. You're in the
11 driver's seat of that Windstar Mini van, correct?

12 A. Yes.

13 Q. And you were wearing a seatbelt at the time of the
14 accident; is that correct?

15 A. Yes.

16 Q. And that seatbelt went over your left shoulder and it
17 went across your lap and locked in?

18 A. The left shoulder, yes.

19 Q. And your lap, correct?

20 A. Correct.

21 Q. And you were seated in a cushioned driver's seat,
22 correct?

23 A. Yes.

24 Q. And that cushion seat also had a head rest behind you
25 to prevent your neck from snapping back, correct?

1 A. Yes.

2 Q. Did that seatbelt restrain you in this accident?

3 A. Very much.

4 Q. It prevented you from moving inside the vehicle,
5 correct?

6 A. Yes.

7 Q. And did that vehicle have air bags?

8 A. Yes.

9 Q. And the air bags did not deploy?

10 A. No. They did not work.

11 Q. So the seatbelt prevented you from twisting and
12 turning or striking anything inside the vehicle; is that
13 correct?

14 A. The seatbelt was a little bit loose.

15 Q. I asked you a moment ago if it restrained you in the
16 accident and I believe you said it did. You said very much. You
17 in fact said "mucho" which is very much.

18 A. Yes.

19 Q. The seatbelt held you back in the cushion seat to
20 prevent your moment, within the vehicle, at the time of the
21 accident?

22 A. Yes, sorry.

23 Q. So after the accident, you said you moved up 20 feet
24 and you pulled over; is that correct?

25 A. After the accident, I moved 20 feet and I then parked.

1 Q. And you got out of your vehicle and you spoke to
2 Mr. Herrera?

3 A. Yes.

4 Q. Did you tell Mr. Herrera at any time while you were at
5 the scene that you were in pain or you were injured?

6 A. What I told him was why didn't you see me when I
7 crossed.

8 Q. That wasn't my question, Mr. Tomala. I asked you while
9 you were in the scene at any time why didn't you tell
10 Mr. Herrera that you were in pain or injured?

11 A. No.

12 Q. You were with him over an hour before the police
13 arrived?

14 A. Yes.

15 Q. Did you call your wife or any family members that day
16 to report that you were injured in an automobile accident?

17 A. Yes, I called my house.

18 Q. Did you speak to anyone at your house while you were
19 at the scene?

20 A. Yes, I spoke with my son.

21 Q. How old is your son?

22 A. 21.

23 Q. Did you tell your 21 year old son that you were
24 injured in an auto accident?

25 A. I told him that I got crashed into.

1 Q. I didn't ask you that. I asked you did you tell your
2 21 year old son that you were involved in an accident?

3 THE COURT: Mr. Tomala, answer the question that
4 you are asked.

5 Q. When you spoke to the son, while you were at the
6 scene, did you tell him that you were in an accident?

7 A. Yes.

8 Q. Did he come to the scene?

9 A. No.

10 Q. You live within two miles where the accident happened?

11 A. Approximately.

12 Q. So you told your 21 year old son, who was at the
13 house, you were injured in an accident and he did not come to
14 the scene; is that correct?

15 A. Yes.

16 Q. Did any other family member come to the scene of the
17 accident?

18 A. No.

19 Q. What about when the police arrived, did they ask you
20 if you were injured?

21 A. At that moment of the impact, I did not tell them
22 anything.

23 Q. The police didn't get there for over an hour later. I
24 am asking you when the police arrived, did you report to the
25 police that you were injured?

1 A. No.

2 Q. Did they ask you if you were injured?

3 A. Yes.

4 Q. And you told them I was not, correct?

5 A. Yes.

6 Q. Were you telling the police the truth?

7 A. Yes.

8 Q. But you just told us a moment ago that while you were

9 at the scene before the police arrived, you called your 21 year

10 old son to tell him you were injured in an accident. And now

11 when the police arrive and they asked you if you were injured in

12 the accident, you told them no; is that your testimony Mr.

13 Tomala?

14 A. Yes.

15 Q. Let me ask you the time you were at work up until the

16 time that you got a note to stay out, that was all the way

17 through of October of 2013; is that right?

18 A. I don't remember.

19 Q. We have your record from the Board Of Education, it

20 indicates that your first sick day after the accident with a

21 medical certificate was September 25, 2013, approximately 90

22 days after the accident; is that correct? Is that the first

23 time you got a medical certificate to stay out of work?

24 A. Yes.

25 Q. And that medical certificate is from the doctor that

1 the lawyer sent you to?

2 A. Of the therapy, yes.

3 Q. That's the doctor your lawyer sent you and that is the
4 same doctor that gave you the medical certificate to stay out of
5 work?

6 A. Yes.

7 Q. And when you were out of work, you got paid your
8 regular pay; correct?

9 A. I had to use my sick days.

10 Q. I didn't ask you that. When you were out of work, you
11 were paid your regular pay?

12 A. Yes.

13 Q. And you had no loss wages as a result of this
14 accident? I understand you're claiming sick days, but you have
15 no loss wages?

16 A. Correct.

17 Q. And you have no medical expenses. All your medical
18 expenses were paid?

19 A. Yes.

20 Q. All the therapy and all the treatment, the surgery
21 that you just described was paid for?

22 A. Correct.

23 Q. And by the way that surgery that was done on a one-day
24 procedure where you went in this the morning and left in the
25 afternoon; correct?

1 A. Pardon me, what surgery.

2 Q. You talked about Dr. Auerbach, did a procedure on your
3 back. You went to Bronx Lebanon that morning and left that
4 afternoon?

5 A. The surgery was in Lebanon Hospital one day to the
6 next. I don't remember exactly. No, no I did not spend the
7 night. I left that same day.

8 Q. You went in the morning and left in the afternoon?

9 A. Yes.

10 Q. I want to ask you about your level of pain after the
11 surgery.

12 A. You went back to see Dr. Auerbach about five weeks
13 after the procedure; is that right?

14 A. Yes.

15 Q. And you went back to see him several months after
16 that?

17 A. A month or three weeks after.

18 Q. Dr. Auerbach's records that have been admitted into
19 evidence contain the following entry: Mr. Tomala is about five
20 weeks after lumbar laminectomy and is doing exceptionally well.
21 He has no leg pain and no back pain with the exception of a
22 small scab that is after the incision, it is not infected. Home
23 exercises. Not even taking pain medications. Is that an
24 accurate description of your physical condition when you went
25 back to see Dr. Auerbach five weeks after the surgery? That's a

1 yes or no?

2 A. Yes.

3 Q. Dr. Auerbach has another note in January 28. "The
4 patient is here several months after lumbar decompression
5 laminectomy. He has done beautifully. No back pain and leg pain.
6 He is very happy." Is that also an accurate description of your
7 physical condition as documented by Dr. Auerbach on January 28,
8 2014?

9 A. Yes.

10 Q. So you told the jury this morning that you're in
11 constant pain eight out of ten for your neck and ten out ten for
12 your back and eight out of the ten for your shoulder. But within
13 months of the surgery your own doctor is describing your
14 condition as doing beautifully. No back pain and no leg pain.
15 He is very happy. Were you involved in another accident after
16 you went to see Dr. Auerbach?

17 A. No.

18 Q. When was the last time you saw Dr. Auerbach?

19 A. 2015.

20 Q. When was the last time you saw Dr. Vora, V-O-R-A?

21 A. Three months after the surgery.

22 Q. When was the last time you saw Dr. McCullough?

23 A. In 2015.

24 Q. And that was earlier in 2015?

25 A. Approximately.

1 Q. For the rest of 2015 and all of 2016 and 2017, up
2 until today, you haven't been back to any of the doctors that
3 were treating you after the accident?

4 A. Correct.

5 Q. But yet you continued to claim that you're in constant
6 pain as a result of the accident?

7 A. Yes. Because there is no doctor can fix my pain.

8 Q. Withdrawn. How about Dr. Gomez, did you go back to
9 Dr. Gomez?

10 A. No.

11 Q. When you went back to work, after you were cleared to
12 go back to work, you worked more hours at Flushing Hospital?

13 A. No.

14 Q. You told me yesterday when you were testifying or the
15 day before, that your Flushing Hospital job involves more hours
16 than it did before the accident?

17 A. Since 2016, I had been working extra hours.

18 Q. That's what I'm asking you.

19 A. Yes.

20 Q. So when you went back to Flushing Hospital, after the
21 accident, you now worked more hours than you did before the
22 accident?

23 A. When I returned after the surgery, no. I was just
24 working part-time then.

25 Q. Now, you're working more hours?

1 A. Yes.

2 Q. You switched from food service to housekeeping on a
3 surgical floor?

4 A. Yes.

5 Q. Am I also correct that housekeeping position is more
6 physically tactic and more physical than the job in food
7 service?

8 A. The same.

9 Q. As a job in a hospital for housekeeping you have to
10 strip the beds, clean the room, make sure that the bed is safe
11 for the next patient, correct?

12 A. I work in the surgical department. It is just to pick
13 up the aprons and the plastic. I don't clean the beds and I
14 don't sweep.

15 Q. By the way, when you went back to Flushing Hospital,
16 the day after the accident, the week after the accident, before
17 you went to your lawyer, did you ask any of your friends at
18 Flushing Hospital, any medical personnel to be checked out or to
19 be examined physically?

20 A. No.

21 Q. You do have a lot of friends in Flushing hospital,
22 correct?

23 A. Co-workers.

24 Q. You know the nurses, you know the staff, you know the
25 doctors, correct?

1 A. No.

2 Q. You didn't go up to any of the medical personnel and
3 say I was in an accident, I am in a lot of pain, can I be
4 examined?

5 A. No.

6 Q. You know that Flushing Hospital has an emergency room,
7 correct?

8 A. Yes.

9 Q. And you had medical benefits from your job at the
10 Board of Ed that will pay for your treatment, if you decided to
11 go there, correct?

12 A. Yes.

13 Q. But you neglected and decided not to get any treatment
14 at Flushing hospital?

15 A. No.

16 Q. You decided to go to your lawyer and go to the doctor
17 that a lawyer referred you to?

18 A. Correct.

19 Q. How about since you said you haven't seen any of the
20 doctors that treated you since early 2015, you're at the
21 hospital everyday, did you mention to anyone there on the
22 surgical floor that I have pain eight out of ten in my neck, ten
23 out of ten in by back and eight out of ten in my shoulder; did
24 you mention that to anybody at the hospital?

25 A. No.

1 Q. They have an orthopedist department at the time
2 hospital?

3 A. Yes.

4 Q. They have a physical medicine department?

5 THE INTERPRETER: I am sorry.

6 Q. Physical medicine.

7 A. Yes.

8 Q. Did they have a therapy department?

9 A. Yes.

10 Q. Yet you've gone to none of those facilities to avail
11 yourself of any treatment?

12 A. No.

13 MR. SCAHILL: I have no further questions, your
14 Honor.

15 THE COURT: Any redirect?

16 MR. BREITNER: Yes, your Honor.

17 RE-DIRECT EXAMINATION

18 BY MR. BREITNER:

19 Q. Mr. Tomala, was there a reason why you didn't seek
20 care for your pain at Flushing Hospital?

21 A. For reasons that I did not wish to loss my job. I
22 didn't want to mix the case that I had Mr. Herrera with my
23 insurance.

24 Q. Did there come a time after the surgery by
25 Dr. Auerbach that you felt better?

1 A. Around the six weeks after seeing him.

2 Q. And did there come a time when the pain return to your
3 lower back?

4 A. Pardon me.

5 Q. Was there a time when the pain in your lower back came
6 back?

7 A. The pain returned much later.

8 Q. Could you tell us when the pain came back?

9 A. The pain return around six months after the operation
10 up to now.

11 Q. Mr. Scahill, showed you the photograph of your vehicle
12 and that's the vehicle with the -- I guess it's a tarp on the
13 back window?

14 A. Yes.

15 Q. And you said that that vehicle was involved in an
16 accident in August?

17 A. Correct.

18 Q. Were you in the vehicle at the time of the accident?

19 A. No.

20 Q. But you told Mr. Scahill that you were driving it?

21 A. At the time of the accident, I was not there.

22 Q. Who was driving that vehicle?

23 A. I was.

24 Q. If you were not driving -- if you were not there, how
25 could you be driving the vehicle at the time of the accident?

1 A. When I drove the car, I arrived there. I parked the
2 car and left the car to buy soda.

3 Q. And then what happened?

4 A. When I returned to the car on the sidewalk on the
5 other side I saw that a truck was behind the car and got on top
6 of the car.

7 Q. On top of your car, so then you had been driving the
8 car, but you weren't there at the time of the accident?

9 A. No.

10 MR. SCAHILL: Do you have a police report to
11 verify that you weren't there at the time of the accident?

12 MR. BREITNER: Objection.

13 THE COURT: He said he was driving.

14 MR. BREITNER: He had been driving that day, but
15 he was not there at the time of the accident.

16 THE COURT: He said five different things. That's
17 up to you folks to decide which is accurate. Do you have a
18 police report is the question in front of you.

19 A. Pardon me.

20 RE-CROSS EXAMINATION

21 BY MR. SCAHILL:

22 Q. Do you have a police report to verify that you were
23 not driving?

24 A. My attorney has it.

25 Q. Can you produce?

1 THE COURT: Can you produce it?

2 MR. BREITNER: I will check your file tonight
3 and bring it to you tomorrow.

4 Q. Do you have any witnesses to back you up in that
5 statement?

6 A. My family was inside the car.

7 Q. And you weren't?

8 A. No.

9 MR. SCAHILL: Nothing further.

10 THE COURT: You're excused.

11 MR. BREITNER: Your Honor, as I informed the
12 Court my next witness is Dr. Vora. He will be available
13 tomorrow at 2:00.

14 THE COURT: Let's get another doctor in the
15 morning.

16

17 (CONTINUED ON NEXT PAGE FOR CERTIFICATION.)

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1 MR. BREITNER: That is the best I can do as far
2 as getting him in. I can't get him in the morning. All I
3 have is Dr. McCullough for Friday afternoon.

4 THE COURT: Jury is supposed to sit around and do
5 nothing.

6 MR. BREITNER: My apologies.

7 THE COURT: See you at 2:00 tomorrow morning.

8

9 *****
10 CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE ORIGINAL
11 STENOGRAPHIC MINUTES TAKEN OF THIS PROCEEDING.

12

13 _____
14 ILIANA PEREZ
15 Official Court Reporter

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