

PROCEEDINGS

1 SUPREME COURT OF THE STATE OF NEW YORK
 2 COUNTY OF WESTCHESTER

3 ----- x
 4 ANNMARIE FLANNERY and DAVID FLANNERY
 Plaintiffs,

5 - against -

INDEX NO.
 11230/06

6 JOHN MARZANO, D.P.M. & WESTCHESTER
 7 PODIATRIC MEDICINE, P.C.

Defendants.

8 ----- x

9
 10 111 Dr. Martin Luther King, Jr. Blvd.
 11 White Plains, New York 10601
 July 22, 2010

12 B E F O R E:

HON. MARY H. SMITH,
 Justice of the Supreme Court.

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

15 THE LAW OFFICE OF GERALD M. OGINSKI, LLC
 16 Attorney for Plaintiff
 25 Great Neck Road - Suite 4
 17 Great Neck, NY 11021

18 BY: GERALD M. OGINSKI, ESQ.

19 VOUTE, LOHRFINK, MAGRO & COLLINS, LLP
 Attorney for Defendant
 170 Hamilton Avenue
 20 White Plains, NY 10603-1789

21 BY: MARK McANDREW, ESQ.

22
 23 CYNTHIA M. HILLS,
 24 Senior Court Reporter.
 25

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1 THE COURT: Be seated, everyone. All
2 right. At this time, ladies and gentlemen,
3 Mr. Gerry Oginski, who is the counsel for
4 Mr. and Mrs. Flannery, will give a closing
5 argument for Plaintiffs.

6 MR. OGINSKI: Thank you, your Honor.

7 This is a case about improperly performing
8 foot surgery. It is a case about a doctor
9 removing too much bone. It is a case about the
10 first metatarsal being placed in too far down a
11 position, it is a case involving a discussion
12 that should have been had with the podiatrist
13 and the patient about what will happen in the
14 event that this procedure does not work to solve
15 the problem that she was having underneath the
16 bottom of her foot and addressing it during the
17 first surgery.

18 Let us come together and reason, and let
19 me explain to you why we are more likely right
20 than wrong when I tell you that there was a
21 departure from good and accepted care here. You
22 will see during the course of my discussion that
23 you will have not one, not two, but three
24 separate concepts and opportunities to come to
25 the conclusion that Dr. Marzano departed from

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1 good and accepted podiatric care. Any one of
2 which will be sufficient for you to answer and
3 give us a verdict in our favor that there was a
4 departure and that that departure was a
5 substantial factor in causing Annmarie injury.

6 I want to talk to you first about
7 something we saw yesterday. Dr. Edwin Wolf
8 yesterday was here on the stand as Defendant's
9 expert. And he was shown these photographs of
10 Annmarie. The photographs were taken on
11 March 22, 2006 in my office. And what was most
12 remarkable to me about showing Dr. Wolf these
13 photographs is that he made a comment that this
14 is not showing that her toe sticks up
15 90 degrees.

16 Now, why is that even significant and why
17 do I even bring that up?

18 It is significant because at the beginning
19 of my questioning to him, I asked him the
20 question and I said, Doctor, you are coming in
21 here, giving objective testimony, that's your
22 goal, and you would agree that if the records
23 that you are reviewing are inaccurate, that your
24 testimony may be inaccurate? Now, why is that
25 important? It is important because we know that

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1 Dr. Marzano's records are awful. We know that
2 they are careless. We know that they are
3 sloppy.

4 Well, what does that show? It shows a
5 lack of attention to detail.

6 Now, when I asked Dr. Wolf about these
7 photographs, and he made that comment, that
8 Annmarie Flannery's toe is not sticking up
9 90 degrees, do you know where he got that
10 information from, from Dr. Marzano's own records
11 about the range of motion of her toe. And it
12 was Dr. Marzano --

13 MR. MC ANDREW: Objection, your Honor.

14 THE COURT: Well, again, this is an
15 evidentiary fact. Again, this is up to you to
16 decide.

17 MR. OGINSKI: It was Dr. Marzano's
18 testimony, and even he was confused when
19 questioned by his own counsel as to whether that
20 90-degree issue was because it happened when he
21 pushed it up himself or whether Annmarie was
22 able to get it up. So, nobody is saying that
23 her toe is sticking up 90 degrees. He only got
24 that information from the incorrect reading of
25 Dr. Marzano's own record that he himself was

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1 confused about as to which is active and which
2 is passive motion.

3 So, why do I bring this up? I bring this
4 up because it is important for you to know, and
5 her Honor is going to tell you tomorrow morning,
6 something about a concept which says that if you
7 find that a witness has testified falsely about
8 one statement, you have the right to disregard
9 that entire statement. You also have the right
10 to disregard that witness' entire testimony if
11 you find that a witness has been less than
12 truthful in this case.

13 Now, let me ask you another question.
14 During my questioning of their expert, when I
15 asked Dr. Wolf, and I said to him: Doctor, the
16 materials that you were sent by the defense
17 attorney, that piece of paper, that cover
18 letter, and he told us, yes, I remember reading
19 it, it's sitting on my desk. Okay. Well, then,
20 Doctor, you wouldn't mind if you could have
21 somebody in your office fax it over here to the
22 Court so I could take a look at it? All of a
23 sudden, no, no, it's not on my desk, it's in the
24 car in the trunk in my office. We can't see it.

25 Again, remember this concept. If you find

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1 that a witness has testified falsely about one
2 thing, you have every right to disregard that
3 witness' entire testimony regardless of their
4 credentials.

5 Let's take a look at the very first
6 concept that we need to talk about. And that is
7 whether Dr. Marzano removed too much bone from
8 Annmarie Flannery's foot during the course of
9 the surgery on March 25th. How do we know that
10 too much bone was removed? Well, take a look at
11 Dr. Joseph when she came in here. And
12 Dr. Joseph, a board certified podiatrist, with
13 22 years' experience, tells us that 1 centimeter
14 of bone was removed. And she said that that is
15 one-sixth of the bone that you have. And as a
16 result of that, you have a marked shortening
17 and, in fact, Dr. Marzano, in his own words, in
18 his own record, said that there was a
19 significant shortening.

20 Now, this is not just Dr. Joseph saying
21 this, this is Dr. Marzano, using his own words,
22 describing the shortening that he achieved on
23 Annmarie's surgery.

24 I did not use the word significant, it's
25 in his record. But Dr. Joseph was the only one

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1 how much bone was removed. Because he did not
2 want to, right? When I asked him about
3 pathology, whether there is some way to show how
4 much bone was removed, he came up with lots of
5 reasons and excuses as to why that specimen is
6 simply not sufficient for him to judge and
7 determine how much bone was removed. Instead,
8 we get what is called conclusory answers,
9 meaning just giving an answer without a real
10 reasonable explanation.

11 Now, I will tell you that when I was
12 listening to Dr. Wolf initially, some of his
13 explanations sounded pretty reasonable. But
14 when I got up to question him and I asked him,
15 Doctor, would you agree that it is good
16 podiatric practice to keep accurate records, do
17 you remember what he said? He said, Well, I
18 would not necessarily agree, it all depends on
19 how you define "accurate."

20 What?

21 Doctor, would you agree that it is good
22 podiatric practice to keep complete records?

23 Well, not necessarily, Mr. Oginski, it all
24 depends on how you define "complete."

25 Same question with detail. Ask yourself,

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1 is that the type of doctor that you can place
2 your trust and reliance in, in order to help you
3 answer the question as to whether or not there
4 was a departure from good and accepted care.
5 You decide. I will tell you, in my opinion, and
6 you know that your opinion is what guides you,
7 but based upon Dr. Wolf's testimony in responses
8 to my questions, these are simple questions,
9 there is no possible way that you can give
10 credence to what he says, no matter his
11 credentials.

12 So, remember at the beginning during jury
13 selection I said to you not only would we show
14 you that we're more likely right than wrong that
15 there were departures, Dr. Joseph herself told
16 us that this was a departure from good and
17 accepted care. That too much bone was taken
18 out. And not only that, but she told us that
19 beyond a doubt, without a doubt, it was a
20 departure from good and accepted care with the
21 amount of bone that was removed.

22 I found something else that Dr. Wolf said
23 to be quite remarkable.

24 When he was drawing up here on the easel
25 with the stuff that he had with the markers, he

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1 said something that caught my attention. He
2 said, you know, if too much bone is taken out,
3 it means that the first metatarsal will not bear
4 enough weight and that will shift the forces to
5 the second and third metatarsals.

6 I thought to myself, and I said, wait a
7 second, isn't that exactly what happened here?
8 That's exactly what we are claiming, that too
9 much bone was taken out, and as a direct result
10 of that, she now had a cascade, or what I called
11 a ripple effect, and now the forces of her foot
12 shifted to the second and third metatarsals.
13 That's exactly what I was saying.

14 And Dr. Joseph indicated that that would
15 be a departure from good and accepted practice
16 to do that. Even Dr. Wolf agreed when I got him
17 to answer the question whether that would be a
18 departure if you take out too much bone, whether
19 that's a departure from good care? He said yes.

20 So, remember, you have to decide whether
21 we are more likely right than wrong that there
22 was a departure from good care here in removing
23 too much bone. And according to the testimony
24 that we have here, there is no doubt whatsoever
25 that not only are we more likely right than

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1 wrong, but we have shown you far more than that
2 to establish that in and of itself.

3 And you then have to answer the question,
4 well, as a result of taking out too much bone,
5 was that departure a substantial factor in
6 causing Annmarie injury? And Dr. Joseph has
7 told us that the answer is yes. Yes, that we
8 are more likely right that it caused and was a
9 substantial factor. And, again, without a
10 doubt, that it caused injury.

11 And I'm going to go into injuries a little
12 more in detail. But just to give you an
13 understanding, the injuries is that over the
14 next couple months after her surgery she now had
15 pressure and pain and discomfort under the
16 second and third metatarsals when she walked.
17 So that, ultimately, by December, when she last
18 saw Dr. Marzano, she now finally is told, hey,
19 you need a second surgery, a corrective surgery
20 to shorten those second and third metatarsals.
21 And then again, obviously, the injury involving
22 the corrective surgery and the problems she had
23 afterwards.

24 So I will go into that a little bit later.
25 Which brings me to the second concept that we

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1 talk about in order to also show you that there
2 was departures from good care. The second
3 concept is the improper positioning of the first
4 metatarsal. Now, this is a very interesting
5 concept that we heard a lot of things about
6 during this trial. Dr. Marzano said it is in
7 the right position. Dr. Wolf said it is in the
8 right position.

9 We are going to turn to a doctor who has
10 absolutely no interest in the outcome of this
11 case. We are going to look to see what a board
12 certified orthopedist who has five years of
13 orthopedic surgery training and a year of
14 fellowship training in foot and ankle surgery
15 had to say. Somebody who has no interest in the
16 outcome of this lawsuit. Not hired by me, not
17 hired by my adversary. To come and evaluate and
18 give testimony about what he thinks.

19 Instead, he tells you what he sees and
20 what he is trying to do to help Annmarie in
21 January of 2006. This is significant. Because
22 here you have no one advocating for anybody
23 else. There is no lawsuit at that time. He is
24 trying to help her. And here is what
25 Dr. Roberts says. And this is important to

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1 remember.

2 As far as the positioning of the
3 metatarsal. At page 21 of his transcript, he
4 says: The metatarsal was too far down. It
5 healed in a position further down than you would
6 want it to be. This is not my expert,
7 Dr. Joseph, saying this. This is not their
8 expert from Central Park West saying this. This
9 is a board certified orthopedist who is a
10 specialist in this type of surgery who says
11 this.

12 At page 27 of his transcript he says: Now
13 the union of the first ray healed, but in the
14 wrong position.

15 He then says at page 74: Our goal is not
16 to plantarflex the first metatarsal. So what do
17 we learn from this? What information can you
18 get from Dr. Roberts' observations? Well, when
19 you put it together with Dr. Joseph who is
20 telling you that the first metatarsal is in a
21 very downward position, almost 40 degrees, she
22 tells us that that position is clearly a
23 departure from good and accepted care. And by
24 doing so, we are more likely right than wrong
25 that there was a departure here in placing it in

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1 too far down.

2 Again, I ask her: Do you have any doubt
3 whatsoever that there was a departure here?

4 Her answer was: There is no doubt
5 whatsoever.

6 Now, I have to comment on something that
7 was just brought up to you by my adversary. My
8 adversary said that there is no one and nothing
9 that says that the metatarsal, the second and
10 third metatarsals, were long.

11 Dr. Marzano came in and said the
12 metatarsals, the second and third, were not
13 long. Their expert, Dr. Wolf, came in and said
14 that the second and third metatarsals were not
15 long.

16 Well, let's get an unbiased view of a
17 board certified orthopedic surgeon and see what
18 he has to say. And this is what he says in his
19 January 23rd, 2006 exam. Again, there is no
20 lawsuit contemplated at this time. Nothing else
21 is going on except the patient is going to get
22 treated by a doctor for help. He is trying to
23 help her and this is what he observes.

24 She has got a long second and third
25 metatarsal.

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1 How do you like that? It didn't just grow
2 overnight.

3 MR. MC ANDREW: I object. That's
4 postoperative.

5 MR. OGINSKI: It is in the evidence.

6 THE COURT: Well, it is an evidentiary
7 exhibit, I believe.

8 MR. OGINSKI: Yes.

9 THE COURT: And I believe it speaks for
10 itself.

11 MR. OGINSKI: He also writes: She also
12 has pain in the second and third metatarsal
13 region, which is related to that being too long
14 and the first ray is relatively shortened.

15 This is somebody who is unbiased, who
16 doesn't have a stake in the outcome of this
17 case, who is telling you that she has long
18 second and third metatarsals.

19 Do you think that a board certified
20 orthopedic surgeon, a specialist in foot and
21 ankle surgery, would not know the difference
22 between a long second and third metatarsal?

23 In his transcript, Page 13, he says: So
24 the other thing I noticed is that she had what
25 looked like a long second and third metatarsal.

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1 "Question: Are you talking about the
2 second and third toes now?

3 "Answer" -- page 14.

4 "Answer: Well, I want to make the
5 distinction. Toes are what you see and flex.
6 Your metatarsals, you can't move. That's
7 actually what you walk on. So, yes, you can say
8 second and third toe, but it's actually, it's
9 where the toe meets the foot. That's what I was
10 talking about as being long. Not that she had
11 long toes, but the metatarsal bones themselves
12 were long."

13 So where do they come off saying the bones
14 are not long? Think about that when you decide
15 whether or not there is a departure from good
16 and accepted podiatric care here. When you
17 shorten a relatively short first metatarsal
18 without addressing the second and third
19 metatarsals, it now brings me to the third
20 concept. And by the way, I have to go back for
21 a second.

22 When you have an improperly positioned
23 metatarsal, what happens? You now take weight
24 off that first metatarsal and now, again, it is
25 going to shift the forces to the second and

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1 third metatarsal.

2 Was that departure a substantial factor in
3 causing Annmarie injury? The answer is yes.
4 Because by putting that bone too far down, you
5 now are going to have the pressure and the pain
6 and the pounding on that second and third
7 metatarsal. That's the whole point of this
8 claim. That's why we are here. And according
9 to Dr. Joseph, doing that was a clear departure
10 from good and accepted practice. Not only are
11 we more likely right than wrong that that
12 occurred, but without a doubt, according to her,
13 that was a departure from good care that caused
14 her injury and the need for further surgery and
15 complications that arose after that.

16 That leads me to the third part of what
17 was done in this case and why we believe that
18 there was a departure as well.

19 Now, remember any one of these elements
20 that I am talking about will lead you to the
21 same conclusion because the first question you
22 have to answer is whether Dr. Marzano departed
23 from good and accepted care.

24 If you find that he did, you will then go
25 on and answer the next question. Did that

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1 departure, was that a substantial factor in
2 causing and bringing about her injuries? And
3 the answer is yes. And in just a moment, I'm
4 going to go to the third and fourth questions.

5 So one of the other elements that we have
6 been discussing during this case is, we have
7 been suggesting, we have been telling you, if
8 you know at the outset that there is a good
9 chance that this surgical procedure is not going
10 to work to address the second metatarsal, Dr.
11 Wolf agreed that you have an obligation, even
12 Dr. Marzano agreed that you have an obligation
13 to talk to the patient and tell her, Annmarie,
14 look, I know that this may not work. It has not
15 happened to me, but it may not work. You have
16 an obligation to tell the patient, Here is
17 another solution. We can try and reduce the
18 second and third metatarsals during that same
19 first surgery in an attempt to avoid this
20 problem. Look, I already know that you had to
21 cancel surgery in the first place because you
22 did not have child care, it was going to be
23 disruptive. I know you are a stay-at-home mom.
24 And I know you want to get this all done at
25 once. You don't want to have to come back here

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1 months later, have to go through another surgery
2 to try and shorten the second and third
3 metatarsals. Because now your life will be
4 disrupted again.

5 So we have been claiming throughout this
6 case, hey, plan properly, plan effectively and
7 make sure that you tell the patient about that
8 option.

9 Now, there has been a lot of discussion
10 that Dr. Marzano claims that I told the patient
11 about it. Annmarie says, no, you didn't. And
12 again, there was a lot of discussion about this
13 consent form.

14 Well, we all know and we have seen what
15 Dr. Marzano's records are really like. Austin
16 bunionectomy. Austin bunionectomy, left foot,
17 right foot. Weightbearing, not weightbearing.
18 Walking, not walking.

19 What do you make of these records? And
20 what do you make of Dr. Marzano's attention to
21 detail as a board certified podiatrist. That
22 will play a part in determining whether or not
23 what he is telling us is credible and
24 believable.

25 Because, again, when Dr. Marzano performed

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1 this procedure, before doing it, he had an
2 obligation to tell Annmarie, This is what can
3 happen. I'm going to offer you this option.
4 And if he had done that, great. That part of
5 the claim would not be here. But, guess what?
6 He did not. And do you know why he did not?
7 Because the fact that he never had that
8 experience and did not have enough of these
9 surgical procedures under his belt to know that
10 this could happen. And why do we know that this
11 could happen? Because we have heard it
12 repeatedly that Dr. Marzano has said, Look, I
13 knew that she had a problem under the second
14 metatarsal.

15 Dr. Wolf said, sure, we knew this.
16 Dr. Joseph told us that. Well, if you know
17 this, and you know that there is a chance that
18 this Lapidus bunionectomy is not going to solve
19 the problem, then tell the patient, Look, I
20 don't think this is going to solve your problem
21 under the second metatarsal. Here is a solution
22 that I could pose. We will fix the bunion in
23 the first surgery. And guess what? We are
24 going to shorten the second and third bones too
25 at the same time to take the pressure off. We

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1 are going to prevent this from happening. Is
2 that okay with you? If she says, yes, great, do
3 it all at once, your done. But that's not what
4 happened.

5 So here we are in Court five years and
6 some months after this occurred, and we are here
7 asking you and showing you that we are more
8 likely right than wrong that there were multiple
9 departures from good care. But you only have to
10 decide one question. Out of all of those
11 different concepts and elements, did Dr. Marzano
12 depart from good and accepted care? The answer
13 undoubtedly has to be yes. And did that
14 departure -- was that departure a substantial
15 factor in causing Annmarie's injuries? The
16 answer is yes.

17 Now, once you get to that point, you will
18 now begin to ask the question of how much you
19 are going to award Annmarie for her injuries.
20 And I have to tell you something. I have to
21 tell you that in order to evaluate her injuries,
22 you need to -- I just wanted to remind everybody
23 about some of the things that she had. In the
24 last visit with Dr. Marzano in December 15,
25 2005, she had complained of right foot pain.

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1 The second and third metatarsals for the
2 first -- I'm sorry, she had right foot pain
3 under the second and third metatarsals. And it
4 was at that time that Dr. Marzano recommended
5 this corrective surgery.

6 Now, when Annmarie went about a little
7 more than a month later to Dr. Matthew Roberts
8 at the Hospital for Special Surgery, Dr. Roberts
9 wrote, "Patient complains of right foot pain on
10 the bottom of the right foot. Aching and
11 cramping worse with activity."

12 In March, March 8th of 2006, patient still
13 complains of pain in the bottom of her foot
14 relating to the second and third metatarsals.
15 At the end of April of '06, we know that she had
16 the corrective surgery with Dr. Roberts.

17 December of 2006, now months later
18 recuperating, she is walking, putting pressure
19 on her foot. She comes back to him, what
20 complaints does she have? She is complaining of
21 her big toe being stiff, main complaint was pain
22 on the bottom of the foot. This is all related
23 to the original surgery and what occurred. She
24 complained of being unable to stand or walk for
25 prolonged periods. And at this point,

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1 conservative treatment had been exhausted. She
2 used orthotics, she had done what Dr. Roberts
3 said. And that was finished. And here at this
4 time he recommended additional surgery. That
5 surgery was two different types. You can either
6 shorten the second and third metatarsals more or
7 you can do something that he called destructive
8 surgery, which literally destroys part of the
9 bone, fuses them together and tries to help it
10 at that point.

11 Annmarie said, Do you know, what I'm going
12 to step back. I'm going to try my best to live
13 with what I have because nobody is going to give
14 me that guarantee that it is going to improve my
15 condition. Reasonable? Fair. Why put yourself
16 through all of that knowing at the outset that
17 it may not work. Okay.

18 So, almost a year later, November 12th,
19 she goes back to Dr. Roberts and, again, he
20 notes she has persistent pain. Same pain as
21 before. Primarily on the bottom of her foot.
22 She still has callousing.

23 So now she has a decision to make. What
24 do I do? Do I go ahead and have surgery? Do
25 I -- as my adversary said on his opening, he

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1 said, does she try and grin and bear it? Does
2 she try and live with it? Well, as we know,
3 Annmarie has tried to live with it throughout
4 the time that we are talking about. From the
5 time of the second surgery up until today. And
6 she has told us that she still has not made a
7 decision as to whether or not to have the
8 surgery. That may come in the future if it gets
9 worse and if she can't live with it. So these
10 are all injuries that relate to the original
11 wrongdoing and the departures.

12 Now, remember, if she decides to have
13 surgery, that means a disruption of her life
14 again, being a stay-at-home mom, her husband,
15 Dave, is going to have to come and take off work
16 and help out at home again. She is now going to
17 have to be off her feet for about three months,
18 and again, she is faced with that uncertainty as
19 to whether or not it is going to help. And
20 that's not an easy thing for her to consider.

21 The other issue is that if she does not
22 have surgery and fix this problem, she is going
23 to have to live with this condition for the rest
24 of her life. We know, and I never like asking a
25 woman on the witness stand their age, but she is

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1 43 years old. And according to the statistical
2 life expectancy, Annmarie Flannery is expected
3 to live for another 32.6 years. Okay.
4 According to the statistics. And nobody has a
5 crystal ball. But you have to consider when you
6 decide how much to award her, for the future,
7 I'm going to get to that in a moment, you will
8 have to decide over how many years the award is
9 going to be for.

10 Let me talk for a moment about the
11 surveillance video. You must have been as bored
12 as I was watching this stuff, like watching
13 paint dry. But it was instructive and
14 informative for more than one reason. They had
15 a right to go ahead and try to catch my client
16 doing something that she said she could not do.
17 The reality was, there was nothing on the video
18 that she said she couldn't do. But here's why
19 this surveillance video, the surreptitious
20 secret video, the guy following her on a couple
21 different days is so interesting. It is
22 interesting because of not what is on the video,
23 but what they don't show. Do you remember I
24 asked Annmarie, I said, Tell us what is not seen
25 on there. What do we hear from your husband?

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1 we see in the video. Her answer is no. But who
2 said that she would limp? Her husband.
3 Sometimes she told us she uses a cane. Now
4 again, she is not in here with a cane or crutch
5 or anything like that. Why? Because this is a
6 quality of life issue. This is something that
7 is not so simple to visualize. It is not like
8 somebody had a leg cut off. It is not like
9 somebody's eye was taken out. But this is a
10 quality of life issue. And this is something
11 that affects her every single day because every
12 time she walks, she has pain and pressure and
13 discomfort on the bottom of her foot.

14 Now, one thing that I have to tell you
15 about that I have learned from cases involving
16 foot surgery and women. Guys, you may not
17 understand this, but we have a limited shoe
18 wardrobe. Our extent of our shoes consists
19 primarily of a pair of shoes to wear to work,
20 sneakers and maybe work boots. That's pretty
21 much the extent of a guy's wardrobe for shoes.
22 For a woman, it is an entirely different planet.
23 And if you don't believe me, the next time you
24 go out on a date, the next time you take your
25 spouse or significant other out to a restaurant

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1 or to a bar or club, pay attention to what kind
2 of shoes she is wearing. Because I guarantee
3 you, the woman that you are with likes to wear
4 stylish shoes. Likes to wear high heels.
5 Because to a woman, nice shoes are an accessory.
6 They are a big part of their life. There are
7 shoes for every type of occasion, for every type
8 of clothing.

9 Okay? That explains why so many spouses
10 complain about their wives that have 30 and 40
11 pairs of shoes. It is a big deal to them. And
12 what does it mean when a woman can no longer
13 wear those fashionable shoes? It is a big deal.
14 The next time you go to a party, a fancy party
15 where everybody is all dressed up and you see
16 the women wearing beautiful dresses, I guarantee
17 you that they are not wearing sneakers, they are
18 wearing high heels, they are wearing pumps,
19 something to make them feel good about
20 themselves, feel sexy, gives them good
21 self-esteem.

22 What do we know about this self-esteem
23 issue that we heard briefly. We heard Dave
24 Flannery tell us that she comes home and she is
25 depressed sometimes. And Annmarie told us that

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1 she can't wear high heels.

2 Now, we recognize that at the beginning
3 before this March surgery she had a pretty bad
4 bunion and she had difficulty wearing any real
5 nice shoes. We understand that. But Annmarie
6 was lulled into a false sense of security when
7 she went to Dr. Marzano, that he could get her
8 back into this active lifestyle that she wanted.
9 And that she would be able to wear the type of
10 shoes that she used to be able to wear that she
11 still had sitting in her closet. To a woman,
12 this is a big deal. Guys may not understand
13 this. But this is significant. And it is part
14 of her quality of life issue that we have to
15 consider when you evaluate how much to award
16 Annmarie for what has occurred here.

17 Now, I have to tell you that, you know,
18 you heard her, you heard Annmarie talk about the
19 fact that she can wear sneakers, sometimes a
20 sandal and a boot, if I recall correctly. And
21 you know that we know that she has the pain and
22 the discomfort, the slight limp in the evening.

23 And you now reach the point in the
24 questionnaire, in the questions of how much to
25 award Annmarie Flannery. State the amount of

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1 money for pain and suffering from the time of
2 the surgery, March 25th, up until today. That's
3 five years and three months and change.

4 Well, you know, it would be really easy if
5 this was a case involving a Picasso painting
6 that was valued at \$5 million. A painter came
7 to your house and while painting accidentally
8 spilled a whole can of paint on your \$5 million
9 painting. Then it would be easy to say, okay,
10 the painter is responsible for my \$5 million
11 painting. If you were a basketball player
12 earning \$16.9 million before being transferred
13 to another team and he was in a car accident and
14 now he could not use his arms for an entire
15 year, it would be easy to say how much money he
16 lost during that entire year. But here we have
17 a different scenario. There is no claim here
18 for lost earnings. Instead, we have a claim for
19 the loss of enjoyment of life. That's part of
20 the claim for the suffering and what she endured
21 over the last five years.

22 So how can you reasonably come to a
23 decision as to how much money Anmarie Flannery
24 should be entitled to? Let me give you a
25 suggestion that was relayed to me back when I

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1 was in lawsuit from an old professor. Imagine
2 for a moment that we took out an advertisement
3 in the newspaper and that said, \$375,000. The
4 first person who comes to our door tomorrow
5 morning gets it free. No strings attached.

6 What do you think would Happen?

7 Everybody, the moment they saw that would run to
8 try and be the first one to our door, right?

9 Without a doubt. It would be mayhem, it would
10 be crazy. But what if we said, hang on one

11 second, before you have the ability to get that
12 \$375,000, what if, instead, there were certain

13 conditions that you would have to meet? What
14 if, instead, you had to undergo a Lapidus

15 bunionectomy? And during the course of that
16 Lapidus bunionectomy, too much bone was taken

17 out. And what if during the course of that

18 surgery, the metatarsal, the first metatarsal,
19 was placed in too far downward of a position?

20 How many people do you think would still think

21 would go ahead and wait in front of our door to
22 get that \$375,000? I bet you a lot would not.

23 But I bet you some would. There are some

24 diehards who would do that.

25 But wait a second. What if we said there

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1 is still more conditions. The other condition
2 is that, hey, in addition to that, as a result
3 of taking out too much bone and putting the
4 metatarsal too far down, what if we said, you
5 have to now have the forces of your foot shifted
6 so now you have pressure under the second and
7 third metatarsals and now every time you walk,
8 it is going to feel like a rock in your shoe; it
9 is going to feel pain and discomfort and you are
10 going to hurt day after day? Okay. How many
11 people do you think would still show up at that
12 door? Not a lot. Maybe one or two. Maybe a
13 couple. I'm not sure.

14 But, wait, what if we said there are more
15 conditions. That you have to have this problem
16 exist for months and months that leads you to
17 another doctor who tells you you need another
18 surgery, how many people do you think would
19 still be waiting at that door if you told them
20 they had to have another surgery to correct the
21 problem? Not a lot of people.

22 What if you said, hang on, you still can't
23 get that \$375,000 because there is still more
24 conditions? You now have to continue after that
25 corrective surgery, which did not solve the

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1 problem, you now have to live with it. And you
2 now have to try and bear weight as best you can
3 and go about your daily activities like that.
4 How many people do you think would show up? How
5 many people do you think would show up if you
6 told them, wait, there is still one more
7 conditions? Because your foot has not improved
8 and you still have the pain, you have a choice
9 now. You can have door number one, which is
10 more surgery, we can shorten two bones, or, next
11 to door number one is door number 2, which is,
12 we can do destructive surgery, destroy the
13 joints in your bones, in your foot, to see if
14 that will help; or, door number three, which is
15 do nothing and live with it. How many people do
16 you think would still be standing at that door
17 waiting for that \$375,000? I suggest to you
18 nobody.

19 The sad reality is that there is one
20 person who is standing at that door. That's
21 Annmarie Flannery. She is standing at the
22 courthouse door, here, asking for you to make an
23 award to fully and fairly compensate her for the
24 injuries that she suffered as a result of
25 Dr. Marzano's departures from good care. She is

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1 standing here. This is her one and only
2 opportunity to come to you for justice. And the
3 important thing is that when you go back to
4 deliberate to discuss how much compensation to
5 award, you have to remember that this is her one
6 and only opportunity for justice. Because if
7 you only give half justice, that's injustice.
8 And she can't come back to court a year from
9 now, two years from now, five years from now and
10 say, hey, folks, it simply was insufficient
11 compensation because we know that when you cause
12 harm to somebody else, not intentionally, but
13 through negligence, through carelessness, you
14 have a debt that must be repaid. That's what
15 compensation is all about. And that's why we
16 are here. Seeking compensation. We can't go
17 back in time and put the pieces back together.
18 We are here doing the only thing that we can.
19 And that's asking you to award Annmarie
20 compensation for those injuries.

21 So for the past pain and suffering that
22 she endured, from March 25, 2005 up until today,
23 a little more than five years, we ask you to
24 compensate her in the amount of \$375,000.

25 Now, you then go to the next question

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1 which asks how much do you award to her, if any,
2 for the future? Well, we know what is going to
3 happen to her in the future in the sense that
4 she can either live with it, live with this
5 problem she has told us about, or she can try
6 and have surgery. And we know that if she has
7 surgery, it is going to be, again, an upheaval,
8 no guarantee that this is going to improve her
9 condition.

10 So, if she ultimately goes ahead and has
11 that, it is an entire recuperative period. Now
12 she has to go through the same healing process
13 as she did in the past. She has to make that
14 decision.

15 Or she is going to have to grin and bear
16 it and live with these problems for the rest of
17 her life, which is 32 and a half, 32.6 years,
18 and you have to decide and ask yourselves
19 whether \$125,000 for the rest of her entire life
20 is sufficient to compensate her for that injury.

21 And remember, the whole goal of you
22 awarding compensation is not to compile and add
23 up what the total is because each individual
24 question rests on its own. So even though you
25 may find that, added together, it may come to a

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1 significant number, my suggestion is, and you
2 cannot, you have to look at it individually.

3 Once you make a decision that
4 Annmarie Flannery is entitled to be compensated,
5 you have to go to the next question to see
6 whether or not her husband, Dave, is also
7 entitled to be compensated for his part of the
8 claim. And that's loss of services. What
9 happened because Annmarie was not able to do the
10 things that she used to do? Well, Dave told
11 you, and you know he was not up here long, but
12 he told you, look, I'm a contractor, I had to
13 come home and I had to do the things that I
14 normally don't do. Annmarie does this, she
15 takes care of all of this stuff, she takes care
16 of the kids. He now had to come in and help out
17 and do everything that he possibly could to help
18 her while she is recuperating and getting
19 better. You heard him say that they can't go on
20 long trips. Why not? Because it hurts her a
21 lot when they -- you know, she has her foot on
22 the accelerator for a long time and can't go to
23 Pennsylvania to Great Wolf Lodge.

24 All of this forms what he -- what is
25 called a loss of services claim. And the

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1 question that you have to answer is how much to
2 award Dave Flannery for his loss of services.
3 And I ask you to consider whether \$50,000 is
4 sufficient enough to compensate him for those
5 loss of services from the time of the wrongdoing
6 in March of 2005 up until the present time.

7 And I have one more question that you
8 have -- I have. There is one more question that
9 you have to consider. When you answer that
10 question about the compensation for Dave
11 Flannery, you then have to answer the question
12 about what you are going to award Dave for the
13 future, from today for the foreseeable future,
14 about the loss of services that his wife has as
15 a result of her injuries.

16 Now, I asked him about their social life.
17 You heard him say that his wife does not like to
18 bring up here feet when they go out because she
19 does not want to make her feet the entire focus
20 of the conversation socially.

21 So she keeps it in. I asked him how do
22 you know that she is in pain? His answer, I see
23 it in her face. They are married 18 years.
24 When you are married that long, you only have to
25 look at your spouse to know what they are

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1 thinking. You can see it in their face. And
2 for the future, for Dave's loss of services
3 compensation, I ask you to consider whether
4 \$35,000 is sufficient for his loss of services
5 claim.

6 You know, we have reached the point where
7 we have been here for just about two weeks now.
8 And at the very beginning during jury selection,
9 I asked you to consider whether if we show you
10 that we are more likely right than wrong that
11 there were departures from good care, that those
12 departures caused Annmarie injury, whether you
13 could award compensation? And each one of you
14 said you could. I asked you and I looked at
15 you, each one of you, and you looked at me, and
16 I said, Do you have any hesitation awarding a
17 particular amount that you could not award more
18 than or less than? And each one of you looked
19 at me and told me that you had no preset ideas
20 of how much you could or could not award.

21 It is now at this point that I come to you
22 and ask you to consider the compensation that
23 Annmarie is entitled to. As a result of
24 everything that has occurred, the departures,
25 the substantial factor in causing these injuries

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1 and the injuries that she is going to live with.

2 And now in just a moment I am going to sit
3 down and I know her Honor is going to instruct
4 you on what we are doing for the rest of the
5 day. And tomorrow you are going to get
6 instructions on the law. And after that, you're
7 going to go back into the jury room to
8 deliberate. And remember what I told you in
9 jury selection. I said, even if you are not
10 sure, absolutely sure about a particular issue
11 in this case, you don't have to be here for days
12 and days trying to be absolutely sure. You only
13 have to believe that we are more likely right
14 than wrong that what we are saying is correct.
15 And when you do that, you will have absolutely
16 no difficulty awarding a verdict in our favor
17 reflecting that Annmarie Flannery is entitled to
18 be compensated for her injuries.

19 On behalf of Annmarie and Dave Flannery
20 and myself, I really want to thank each of you
21 for being here taking time away from your
22 families because you are doing your civic duty
23 and we appreciate that.

24 Thank you and thank you, your Honor.

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I, Cynthia M. Hills, do hereby certify
that the within proceedings are a true and accurate
transcript of the original stenographic record.

Cynthia M. Hills, RPR, CRR

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