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Series: Part 5 - Summations

Materials by:  
Andrew J. Smiley, Esq.



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# THE MENTOR ESQ

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## Episodes of the Mentor, Esq.

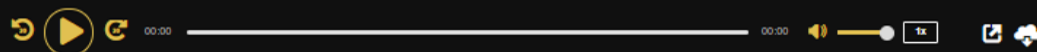
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### CLE: How to Successfully Litigate a Personal Injury Case Series Part 4

APRIL 13, 2021 / "LITIGATING A PERSONAL INJURY CASE" SERIES, CLE EPISODES, SEASON 2, VIDEO EPISODES / 01:22:36

-Video Episode - Andrew discusses properly preparing and conducting depositions. 1.5 CLE credits.



# Episodes

Check out the full list of Mentor, Esq. episodes below, or filter by category.

ALL

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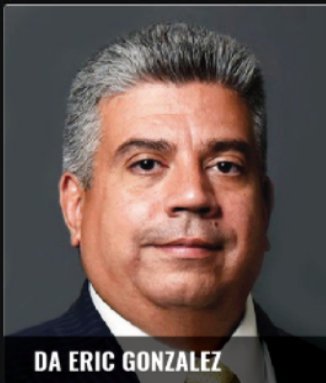
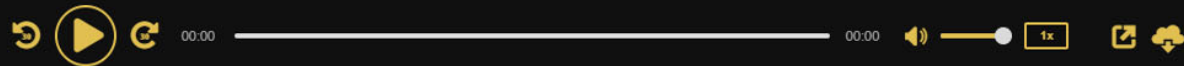
INTERVIEW

CHRIS PAIZ, ESQ

## Season 2 – Episode 9: Racing Cars with Chris Paiz

JANUARY 26, 2021 / ADMIN / INTERVIEW EPISODES, SEASON 2, VIDEO EPISODES

-Video Episode - Andrew interviews Chris Paiz, a fellow lawyer and car racing enthusiast.



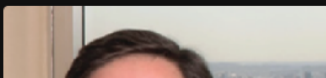
INTERVIEW

DA ERIC GONZALEZ

## Season 2 – Episode 8: An Interview with Brooklyn, New York's DA Eric Gonzalez

DECEMBER 29, 2020 / ADMIN / INTERVIEW EPISODES, SEASON 2, VIDEO EPISODES

-Video Episode - In this week's episode, Andrew welcomes the District Attorney of Kings County in Brooklyn, New York, Eric Gonzalez.



## Season 2 – Episode 7: Fighting Through the Dark

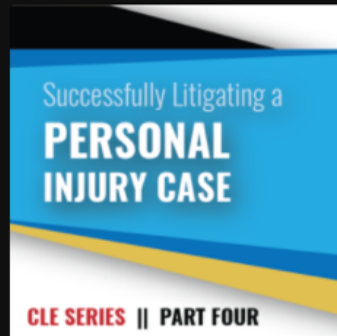


# Continued Legal Education (CLE) Episodes

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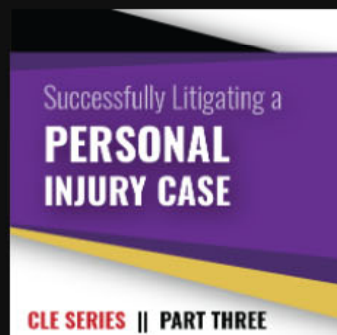
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## CLE: How to Successfully Litigate a Personal Injury Case Series Part 4

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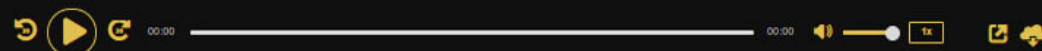
-Video Episode - Andrew discusses properly preparing and conducting depositions. 1.5 CLE credits.



## CLE: How to Successfully Litigate a Personal Injury Case Series Part 3

MARCH 9, 2021 / "LITIGATING A PERSONAL INJURY CASE" SERIES, CLE EPISODES, SEASON 2, VIDEO EPISODES

- Video Episode - Andrew discusses adversaries, the preliminary conference, and the initial discovery. 1.5 CLE credits.





## The Mentor, Esq.



Hosted By

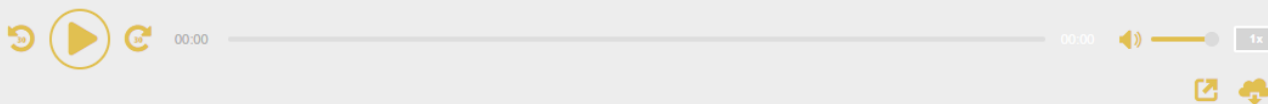
Andrew J. Smiley, Esq.

We hope you enjoy this highly rated podcast hosted by Andrew J. Smiley, Esq. and featuring interviews with other experts in law and litigation, CLE and educational series, and great legal advice.



## CLE: Taking the “Umm...” out of SUM/UM Coverage

FEBRUARY 23, 2021 / ADMIN / CLE EPISODES, SEASON 2, VIDEO EPISODES / COMMENTS OFF



In Andrew's current CLE series, “How to Litigate a Personal Injury Case”, the topic of SUM and UM coverage has come up several times. In fact, it came up so many times during the Q&A sessions that the Mentor, Esq. worked with the Academy to do an entire CLE on the topic!

If you are listening and would like to answer the poll in the program for **1.5** CLE credits, you can do so by emailing the Academy at [info@trialacademy.org](mailto:info@trialacademy.org).

Contact Andrew Smiley at [andrew@thementoresq.com](mailto:andrew@thementoresq.com).

<http://www.smileylaw.com/podcast>



### RECENT EPISODES

- › [CLE: How to Successfully Litigate a Personal Injury Case Series Part 4](#) April 13, 2021
- › [CLE: How to Successfully Litigate a Personal Injury Case Series Part 3](#) March 9, 2021
- › [CLE: Taking the “Umm...” out of SUM/UM Coverage](#) February 23, 2021
- › [CLE: How to Successfully Litigate a Personal Injury Case Series Part 2](#) February 9, 2021



CLE - Taking the “Umm” out of SUM/UM Coverage





**Andrew J. Smiley, Esq.**  
**Smiley & Smiley, LLP**  
**122 East 42<sup>nd</sup> Street, NYC 10168**  
**212.986.2022**  
**asmiley@smileylaw.com**  
**www.smileylaw.com**  
**www.thementoresq.com**

### ***CURRICULUM VITAE***

#### **Education:**

· Brooklyn Law School - Juris Doctorate 1996

Moot Court Honor Society - Vice President/Executive Board (Chair of Trial Division)  
Moot Court Honor Society - Competitor - National Appellate Trademark Competition  
Moot Court Honor Society – Coach, National Trial Team – Regional Champions  
CALI Excellence For The Future Award - Advanced Legal Research  
Judge Edward and Doris A. Thompson Award for Excellence in Trial Advocacy

· Tulane University, New Orleans, LA - Bachelor of Arts (Honors, Psychology) 1993

#### **Professional:**

· *Smiley & Smiley, LLP*

Managing Partner & Senior Trial Attorney, January 2001 - present

Associate, June 1996 - December 2000

Law Clerk, September 1993 - June 1996

Major verdicts and settlements in plaintiffs' personal injury, medical malpractice and wrongful death litigation.

**Andrew J. Smiley, Esq. *Curriculum Vitae*, Page 2**

· *Adjunct Clinical Instructor of Law - Brooklyn Law School, Trial Advocacy Program (1998-2004)*

· *New York “Super Lawyer”*

2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021

· Bar Admissions:

- The United States Supreme Court
- New York State Courts
- United States Eastern District, Southern District & Northern District of New York
- United State District Court of Vermont.

Organizations/Affiliations:

· New York State Academy of Trial Lawyers

- Immediate Past President (May 2018- May 2019)
- President (May 2017 – May 2018)
- President-Elect – (April 2016- May 2017)
- Vice President – 1st Dept. (July 2013-May 2016)
- Executive Committee ( May 2019 – present)
- Board of Directors (2013- present)
- Judicial Screening Committee (2013- present)

· New York City Trial Lawyers Alliance

- Chairman of Board of Governors (July 2017 – July 2019)
- President (July 2015 – July 2017)
- Vice President (June 2013 – July 2015)
- Treasurer (June 2011 – June 2013)
- Secretary (June 2009- June 2011)
- Board of Directors (2000-present)

· Judicial Screening Committee, Kings County Democratic Party (2013)

· New York State Bar Association

· Brooklyn Bar Association

- Medical Malpractice Committee
- Supreme Courts Committee

· The American Association for Justice

· American Bar Association

· Brooklyn Law School Alumni Association

· National Order of Barristers

· Friars Club - member



**Andrew J. Smiley, Esq. *Curriculum Vitae*, Page 3**

Continuing Legal Education (CLE) Presentations:

*How to Successfully Litigate a Personal Injury Case Series - Part 2: Early Settlement, Jurisdiction, Venue & Commencing The Lawsuit*, New York State Academy of Trial Lawyers, February 3, 2021

*How to Successfully Litigate a Personal Injury Case Series - Part 1: Getting the Case, Investigation and Ready to File*, New York State Academy of Trial Lawyers, January 6, 2021

*Brick by Brick: Building a Personal Injury Practice*, New York State Academy of Trial Lawyers, December 10, 2020

*Working with Experts to Build Your Case*, New York State Academy of Trial Lawyers, October 8, 2020

*Fitness Industry Liability: Gyms, Trainers and Waivers*, The Mentor Esq. Podcast, September 8, 2020

*Let's Make a Federal Case Out of It: Litigating Personal Injury Cases in Federal Court*, New York State Academy of Trial Lawyers, June 9, 2020

*Crisis Management - The Corona Virus Pandemic*, The Mentor Esq. Podcast, April 9, 2020

*Do You Have a Federal Tort Claims Act Case in Your Office*, New York State Academy of Trial Lawyers, December 10, 2019

*Auto and Truck Claims, Accidents and Litigation 2019 – Evaluating Damages and Use of Experts*, New York State Bar Association, September 9, 2019

*Thoughts and Strategies in the Ever-Evolving Product Liability Litigation – The Plaintiff's Perspective*, The Defense Association of New York, March 12, 2019

*Trial Techniques: Lessons on Dealing with Millennial Jurors; Summations; Requests to Charge and Post-Trial Motions*, The Defense Association of New York, January 31, 2019

*Trial Techniques: Interactive Lessons from the Plaintiff and Defense Perspectives*, The Defense Association of New York, September 17, 2018

*Punitive Damages – What to Plead, What to Prove: Medical Malpractice*, New York State Academy of Trial Lawyers, June 8, 2017 & June 21, 2017

Presenter on Evidence, *2016 Annual Update, Precedents & Statutes for Personal Injury Litigators*, New York State Academy of Trial Lawyers, September 30, 2016

**Andrew J. Smiley, Esq. Curriculum Vitae, Page 4**

Continuing Legal Education (CLE) Presentations Continued:

*Medical Malpractice in New York: A View from All Sides: The Bench, The Bar and OCA*, New York State Bar Association, October 11, 2015

*Effectively Using Experts in Personal Injury Cases*, Lawline, October 8, 2015

*Killer Cross Examination Strategies*, Clear Law Institute, April 21, 2015

*Powerful Opening Statements*, Clear Law Institute, January 13, 2015

*The Dram Shop Law: New York Liquor Liability*, Lawline.com, November 20, 2014

*Killer Cross Examination Strategies*, Lawline.com, November 20, 2014

*Trial Techniques: Tricks of the Trade Update*, Lawline.com, October 14, 2014

*Personal Trainer Negligence Update*, Lawline.com, October 14, 2014

*Trial Techniques – Part 2: Cross- Examination & Closing Arguments*, Brooklyn Bar Association, May 15, 2014

*Trial Techniques – Part 1: Jury Selection, Opening Statements & Direct Examination*, Brooklyn Bar Association, May 7, 2014

*Health, Fitness & Adventure Sports Liability*, New York State Bar Association, August 1, 2013

*Direct Exams: How To Make Your Witnesses Shine*, New York State Academy of Trial Lawyers, May 6, 2013

*Opening Statements: A Recipe for Success*, Lawline.com, August 7, 2012

*“You Had Me at Hello”: Delivering an Effective and Powerful Opening Statement*, New York State Academy of Trial Lawyers, April 1, 2012

*Preparing the Construction Accident Case*, New York County Lawyers Association, March 26, 2012

*The Nuts and Bolts of a Trial*, New York State Academy of Trial Lawyers, October 24, 2011

*Personal Trainer Negligence*, Lawline.com, March 22, 2011

*Effectively Using Experts in Personal Injury Cases*, Lawline.com, May 4, 2011

**Andrew J. Smiley, Esq. Curriculum Vitae, Page 5**

Continuing Legal Education (CLE) Presentations Continued:

*Trial Techniques: The Tricks of the Trade*, Lawline.com, February 16, 2011

*Practice Makes Perfect: Learn to Practice Like a Pro*, Lawline.com, January 18, 2011

*Jury Selection 101*, New York State Academy of Trial Lawyers, December 14, 2010

*Practical Guidelines for Getting Items into Evidence*, Lawline.com, March, 2010

*Winning Your Case: Trial Skills that Count*, Lawline.com, August 21, 2009

Television Appearances – Legal Commentary:

*Fox News Channel*

- The O'Reilly Factor
- What's Happening Now with Martha McCallum
  - America's News Room
  - Fox & Friends
- Fox Business Channel
- Neil Cavuto
- Money with Melissa Francis

*CNN -Anderson Cooper 360*

*ET – Entertainment Tonight*

*Bloomberg TV*

*Headline News*

*Tru TV*

*Court TV*

*The Morning Show with Mike and Juliet*

Interests, Hobbies:

Tennis, Porsche Club, Sim Racing, Yoga, Cooking

# Summer Break

## I. Intro

## II. $\Delta_5$

Doesn't make sense

Look at  
MIT  
Room

Why  
it  
PASS on  
left

## III. | Geneva

150k = \$150,000

50-100 k cost = 7k

350,000 - 700,000

Couldn't support her

Claims  
w/ Science!

## IV. Duccio

Supports

It's claims

w/ Science

500k - 850k!

low end Half Million!!

It said  $\Rightarrow$

Duccio  $\Rightarrow$  explained how makes  
sense

## V. Verdict Sheet

A  $\rightarrow$  Failure to see there to be seen - foreseeable  
not slowing, hanging wide left without looking  
it right in front of her - even Genie couldn't explain  
why she didn't see him  $\rightarrow$

Hit from behind - foreseeable knock down

Didn't even see impact! right in front  $\rightarrow$  recover him!



## Summary

### Intro

Intro may play in court ...

"I hit a motorcycle"

- Ted, Carol L. - ~~she~~ admitted it
- She admitted it to her husband on SLA right when she called him from the scene of the accident

"I hit a motorcycle"

- She didn't say, I was cut off by a motorcycle
- She didn't say a motorcycle tried to pass me and lost control and fell
- ~~she didn't say that~~
- She didn't say I "may have hit" a motorcycle or I "possibly" hit a motorcycle

"I hit a motorcycle is what she confided to her husband on the phone"

After  
time  
to  
reflect

~~Re A~~ Re A didn't just say this from scene but she re-iterated to husband the next day, because she was so upset about it.

Re A ~~answer~~ answer:



Wouldn't Admit It  
To You  
members of the jury


She took Stand  
Placed Hand on the Holy Bible  
Swore an Oath in Court of Law to  
tell the Truth

And when I asked her if she would  
acknowledge that she hit Oscar  
Amador this day =>  
She ~~didn't~~ didn't tell you  
until she told her husband  
She didn't tell you the  
Truth

I'm not saying A is a bad person -  
And, indeed she may be perfectly nice

But what I am saying is that she hasn't  
been straight with you.

When she testified that she possibly  
hit Oscar, she possibly collided, or  
he possibly just fell on his own  
when he came speeding by and cut her  
off - she wasn't being straight  
with you. She wasn't telling the  
Truth.

The evidence presented to you  
at this trial, establishes that she was  
which I  the sole cause  
... it Review with you failed to persevere  
are

Carol Lynch

~~Id break contrast to QSOA's testimony~~

Mrs. Lynch's ~~present testimony~~

testimony shows that she clearly  
was not paying attention  
was not acting reasonably  
and was not consistent

① Doesn't pay attention to what is around her  
30 years Doesn't look at street sign

② Impugn her and remind her of her  
deposition testimony

said no faster than 30  
precisely 40 mph

knowing she faced

20 mph & 25 mph limits

③ Said stopped at this light

113 → right lane - NO CARS  
in sight

not next or in front

light turns green and she goes

- told you ~~not~~ faster than 25

- prior ~~testimony~~ speeds of  
~~30 mph~~

- 25 coming down, 25 turning, 25 ~~impact~~  
accident

She didn't slow down

unreasonable



Doesn't see it on any  
eyes  
wide turn  
clear view  
scott down  
LWP

She came in too fast

And hung a wide turn that  
pulled her out to the left

116  $\Rightarrow$  look how far left  
she is

Reasonable operation of her car  
would be to stay to  
right when turning

not hang wide left

plenty of room

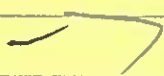
Look at car to her right

that's where she  
should have  
been

119

And if you gonna drift wide  
left, you better take reasonable  
care to look left, look over  
shoulder, she didn't do  
that

so what happened



She swings her turn  
right into the  
back right side  
of OSCAR's motorcycle

too fast -  
too wide -  
NOT paying attention -

LOOK @ SHADE

evidence shows that it was  
already there, perhaps shade  
perhaps inattention, by time  
she saw him it  
was too late



she hit him - just like  
she told her husband

even though she tells her husband,  
"I hit a motorcycle" she doesn't tell police?  
Why is that - <sup>it's not</sup> doesn't want to admit fault?

Tells police

10 PMC  $\Rightarrow$  Rear OSCAR tries to pass and  
the vehicles "collided"

First of all - Look @ It  $\Rightarrow$  why would it try to  
pass me on left  
mi - x comm



IT was ~~the~~ right  
in front as  
evidence  
Diagram shows

A

Why NOT See  
him before turn?  
even if you ~~can~~ consider her phantom  
ready that it came from behind why not see him  
on LNP - ~~Soft~~!

She didn't see him go down.

Impact

fall?

hit ground?

Slide  
to feet  
in

Didn't know where he went.

Front

Does this make sense if she  
was paying attention - driving in a  
reasonable manner?

Why  
to  
see  
what's  
there to  
be  
seen

Why Didn't she see him go  
down on slide along  
ground

He was right in front of her  
- ~~she probably knew~~

Look @ IT Follow

Snap mark = look @  
her view.

I'll tell you <sup>why</sup> she didn't see him go  
down and slide right in front of  
her eyes - Because she <sup>!!</sup>  
wasn't looking.

maybe she looked  
down @ phone / radio  
daydreaming  
I don't know

wasn't paying  
attention

→ But And reasonable driver  
isn't to see!



CALLS Husband first  
then "tells police  
- Collided pet's park!

why

TT  
my to  
pass her

- DOESN'T SAY motorcycle cut me off  
motorcycle lost control  
motorcycle just fell  
w/out contact.

TTIO

we know she tells Husband - hit  
Police Collided

← What she tell you?

← What is defense telling you?  
Gemma

Then we learn from A that she speaks  
to OSORE @ scene

only SAYS one thing

"I hope you feel better"

Doesn't say - why'd you my to pass me

"you cut me off"

"Are you crazy driving  
like that?"

It was your fault  
you lost control

NO - just "I hope you feel better"

Testified TT said why didn't you stop...

→ no response



Carol Lynch's version of  
Events Simple doesn't  
add up - ~~not her off~~

- The Science doesn't support her  
version
- ~~Refuses to accept~~  
~~responsibility and~~  
~~attempts to bolster~~  
~~her testimony~~

SO,

The Defense comes up with a phantom  
theory - only way defend case

- It speeding by her, loses  
control and ends with  
my control

Who do they bring so caret to promote  
this fantasy:

Robert Genna

7-3k = 10  
15k = 150k  
50-100 @ 7k  
300k-700k

500-850k!!

10 years  
50k-85k  
per  
year!

- Testimony was disrespectful to you
- Don't say that lightly
- he thought he could pull a fast one
- came in here with his 40 years of experience  
and reconstruct the accident to support
- Clearly evident (1) knew less about how this  
accident happened than anyone in this courtroom
- (2) opinions were not based on a shred of  
science or facts
- (3) Far from objective

Summation review

Genna

Genna →

NOT objective

wouldn't give a straight answer

- ask him if earth is

round - he'd say

"On I quality"

"It's possible"

couldn't concede

~~Gina~~ ~~we~~ we know why

Because he's basically an employee of

Δ's law firm

15 times

50-100 cases

Going back 10 years

~~50 figures of~~

Hundreds of thousands of dollars

That's why he wouldn't concede

give straight answer

even so → more telling

Lack of science

of proof for you to consider

let's look @ what he didn't do

he didn't provide for you

- all things he could have

Should have done

(1) no measurements



## Summation notes (C)

Genna can't

(1) NO measurements

- DIDN'T TAKE ONE measurement
- DIDN'T offer one measurement for you to consider
- OR upon which he could base any opinions w/ resp<sup>o</sup> credibility

How dare he attempt to provide his opinion that too narrow

- DIDN'T measure distance  
no evidence to conclude too narrow  
in fact  $\Rightarrow$  even his eyeball of photo was  $\approx 5$  feet

motor  
3 feet  
4 inches of tires - 1 foot on each side

DIDN'T take measurements of Audi motorcycle  
Scrape mark  
of resting positions of vehicles

How can he claim to have reconstructed w/out measurements

~~He~~ ~~the~~ ~~fact~~ ~~that~~ he didn't  
take measurements which is AS  
important for you to understand  
that he could have but  
didn't? why! B/C Any accurate  
Diagram based on science & evidence proves it's reasonable

## NO Inspection of motorcycle

- Didn't look @ it
- Didn't photo it
- Didn't measure it
- Didn't inspect it

Only looked @ photos - only saw scrape marks

What about Dent in saddle bag EX  
What about Push in of frame on RT rear

What about other damage (scrape pointed out in it, it??) headlights etc...

Didn't see it - Didn't want to see it

Why didn't he inspect?  
Why didn't he closely examine photos?

Wouldn't help a theory!!

Couldn't Acknowledge Contract - PMT

Wouldn't be good for law firm of  
P & S ⇒ big lucrative client

Had to stick to his guns, knowing  
- Claim of collision  
Knowing P & S "Struck", "Collided"



→ Can't just give opinion without science to back it up

(3) Judges charge is that you need not give weight

Accident Reconstructionist → <sup>where's his reconstruction?</sup> he didn't reconstruct the accident

(4) What else didn't he offer for you to consider

- ~~In ~~the~~ ~~reconstruction~~~~ his phantom theory

- Conjured out of thin air,

NOT based on 1 piece of objective science or fact or evidence in trial

TI speeding by her on left, NO ROOM!  
loses control!

Can't tell you how fast  
(cite)

SAYS him  
what evidence

(cite)

Orientation of  
motorcycle

why not fall  
on grass

Can't give you  
measurement

Approximates  
plenty of  
(cite) room  
minimum 1 ft each  
side

Experienced rider w/ bike for 16 years never fell

⑤ Side lines of  $\Delta$  / speed of  $\Pi$

Google ~~maps~~  $\Pi$  only

Didn't measure  $\Delta$ 's view

Couldn't tell you her distance

Didn't measure

- 500 ft??

Couldn't tell you where  $\Pi$  was when  $\Delta$  turned

How fast  $\Pi$  travelling on CNP

Couldn't refuse  $\Pi$  stopped / 54 turning

Speed  $\Pi$  had to travel to overtake  $\Delta$

Concedes she possibly should have seen  $\Pi$

Couldn't say how far away  $\Pi$  was when  $\Delta$  turned

Why?? with all his experience

\* Because if he actually reconstructed accident it would support  $\Pi$ 's version \*



⑥ No reconstruction based on a collision.

known evidence of collision

why not reconstruct based on impact

He and his brother

transcript  
he knew she  
admitted  
hitting motorcycle.

And use science working from point of impact and rest positions of car/bike to show what happened

S/C that wouldn't be helpful to law firm of P's - A

⑦ No diagram

He could have made a diagram

- Scale
- vehicle positions
- percept/rect
- Braking distance
- speeds

He didn't - know why

① Science doesn't support  
A phantom theory - passing,  
lost control

Crit came up w/ diagram

## Summ notes

GENNA

- b/c

### Diagram

A diagram that is based on facts, evidence, measurement, scale vehicle positions, speeds only shows

one thing  $\Rightarrow$  And you've seen what it shows

## Intro Diagram

Decileo - unchallenged!

- expertise not challenged
- measurements
- methods
- diagram
- sequence of events

- Supports consistent version of IT!

This Diagram is  
uncontradicted, unchallenged  
Scientific evidence  
proves how this accident  
occurred

Only evidence proves  
Scientifically



Decieco

Completely supports

It's version

let's look @ How Decieco went  
about his Reconstruction-

very different

than Genet

Actually based on science  
methods.

① went to scene

↓ cones

scattered

printed road

marked w/ scene photos

measured and

measured police

measure scrape marks

10 Scale Diagram

Speeds of 25  
20

Place vehicles working backwards

Uncharged / by Bill

- backing distances
- slide / friction values
- 1.7 ~~feet~~ perception / Reaction

△ Agreed accurate and asked Mike to  
use 20 stop distances

explained how happened!



## Deccido

Gave opinions w/ Ross Deq

(1) This is how happened

(2) A should have seen him

(3) Plenty of time distance  
to safely turn

(4) Completed turn straight  
ahead

(5) It struck in back right  
rear

(6) Intention was cause of accident

It makes Common  
Sense

Here's what happened....

You all told me could size people up

# I. Testimony of OSCAR AMADOR

60 yrs. old Handyman from Chile

→ Based on  
his testimony  
reasonable

Consistent

~~3 things he loves~~

~~(1) Animals~~

~~(2) Supporting causes to raise money~~

on his way on 9/23/17 to participate  
in a Benefit to raise money  
for autistic children @  
Atty Pond

w/ other  
motorcycle  
riders

Riding a 2001 Harley Davidson  
Dyna Super Glide

Exhibits  
1 & 2

Owned for 16 years

Bought new

Newer in accident

never hit ground

never suffered damage

only brought out in nice weather for  
good causes like this one he planned to  
attend

coming from visiting animals at a farm  
heading to GCP → LNP Northbound

Approached LNP & GCP he stopped b/c  
turning left

Explained why he stopped for a brief  
moment - left turn signal

Approach  
first  
coming  
down

Didn't see anyone in vicinity turned  
left → looking ahead → coming straight



Felt and impact from  
behind

Then a second impact

Then knocked to ground

~~Still~~ Std along the pavement  
for ~~approx 20~~ feet

Slipped under left side of bike  
until it came to rest

Looked back and saw

A Audi - for first  
time

Saw the mark on pavement running from  
where he came to rest and that  
mark led right to front ~~left~~  
driverside of Audi.

Show  
scratch  
mark

Straight line

EX. 9

NO Horn

NO brakes

NO warning before being struck

Nothing he did was unreasonable

unsafe

cause of accident

PNC

Spoke to Police → told him same exact  
thing he told you from the witness stand  
under oath:

PNC: "When he struck him on the side near"

EX. 10

## Damage

Showed me Damage to you

- Evidence, not just his words

EX. 11 Left Rear protects motor  
[And Ex 23]

- Scratches cause scrape  
mark on pavement

EX. 12 Showing saddle bag on right rear

EX. 14 Bent into frame

- His testimony of Impact  
- physical evidence on site of  
Impact

AC - 2 circles

No evidence refuting Damage  $\Rightarrow$  not one  
person testified in this trial that  
they inspected motorcycle and  
that there was no Damage

Review of his direct & cross shows he acted  
Reasonably that day  $\rightarrow$  NO INCONSISTENCIES  
in his  
testimony!

Let's look @  
[Signature]



# Verdict Sheet

1) Δ negligent → "I hit a motorcycle and he didn't hit me!"

- Diagram

- It's already turned

- looking ahead

- right in her sights

Even if just for sake  
you consider plan from  
behind - just as come  
she had obstructed self  
view - way not him?

Time she sees him it's too  
late → she's hit him

Didn't slow, didn't see what's there  
to be seen, turning wide and hit  
him - what credible evidence  
shows

- Diagram

- Contact damage

- Scrape marks

- It's consistent version

She admitted it ⇒

Prax cause

Inevitable  
Consequences

She admitted  
He didn't hit  
me!

1) Didn't see face to  
be seen

2) Didn't slow

3) Wide turn

4) Didn't look over  
left making  
wide turn

5) Hit it and didn't  
see impact

6) Didn't see him  
get knocked down!  
slide straight line  
20 ft in front



## Needlet Sheet

② NO negligence on IT

~~only~~ ~~only~~ ~~only~~  
Δ has burden - judge will instruct you

Virtually failed to meet this Burden

- Nothing IT said was proven to be inconsistent

- Fact that he didn't see Δ when she was, at best 220 ft away - and if going faster than 25-30 mph or more greater than a football field

how is it unreasonable to turn left when closest car is at least 220 feet away

plus what does IT have to do with this accident -

Δ makes

NO claim he unreasonably turned in front of her - it would be ~~one thing if Δ actually admitted she hit him~~

Δ didn't testify that IT turned in front of her → she says he came from behind

Δ requiring 2 phantom theories?

## NO negligence on TT

How did A prove it did  
Anything unreasonable

1. Did they prove he sped passed  
me? NO  
A had NO idea his  
Speed?
2. Prove he had NO room?  
Of course not?
3. Prove OSCAR, Rider with  
decades of experience and  
never in an accident  
just loses control

Please, if any of you fellow jurors  
~~can~~ have my doubts about answering  
NO to this question

- Challenge them to identify  
Any credible evidence presented @ this  
trial ~~that~~ it acted unreasonably - there  
just isn't any.

prox cause  $\Rightarrow$  and what evidence  
shows he acted  
unreasonably and cause accident

- even if you think he should have seen  
A football field away - 220 ft away  
that has nothing to do w/ accident



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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS- CIVIL TERM-PART 45

-----X  
NELL MELLON, :  
Plaintiff,: INDEX NO.  
-against- :  
CRUNCH, AGT CRUNCH ACQUISITION LLC, :  
Defendant.:  
-----X

S U M M A T I O N S  
360 Adams Street  
Brooklyn, N.Y. 11201  
February 21, 2012

B E F O R E:

HONORABLE ANN PFAU,  
Judge, And A Jury.

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

SMILEY & SMILEY, LLP.  
60 East 42nd Street  
New York, New York 10165  
BY: ANDREW J. SMILEY, ESQ.  
For the Plaintiff

MALPERO & PRISCO LLP  
295 Madison Avenue  
New York, New York 10017  
BY: ANDREW L. KLAUBER, ESQ.

For the Defendant

LISA L. DIMINO, RPR  
SENIOR COURT REPORTER

24

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1

Proceedings

2

2

(The following is a trial excerpt.)

3

MR. SMILEY: Thank you, your Honor. May it

4

please the Court, Judge Pfau, counsel, members of the

5

jury, hello. This case is brought against Crunch,

6

the company Crunch, as a result of the negligence of

7

its employee, Gavin Umeh. The judge will instruct

8

you that he is not responsible for his acts. Crunch,

9

big gym chain. We have heard, at least during this

10

trial, that they have twelve franchises or gyms on

11

the east coast alone, over 200 trainers, all that are

12

employed in the industry.

13

We bring this case against Crunch, and isn't

14

it so interesting that Crunch didn't bring one person

15

in here to sit on that stand before you, members of

16

the jury, to vouch for their trainer? You didn't

17

hear from one person from Crunch come in here and

18

say, yeah, if he was our trainer, we stand behind

19

him, he was trained properly, he followed proper



20 procedures, he picked proper exercises, he spotted  
21 properly. Not one to vouch. Interesting.

22 Now, we had Mr. Coker, you may recall William  
23 Coker, we called him to the stand to testify. I  
24 tried to ask him as much as I could about Crunch, the  
25 practices and policies. We learned a little bit  
26 about forms that have to be documented. When I got

1 Proceedings 3

2 into the area of spotting and toe-tapping, and all of  
3 that, objection--

4 MR. KLAUBER: Objection.

5 MR. SMILEY: Objection. Objection, when I  
6 went to ask him all that, objection, objection.

7 MR. KLAUBER: Objection. May we approach?

8 THE COURT: No. Overruled.

9 MR. SMILEY: And then after I was done asking  
10 the best I could, so you jurors can decide this case  
11 on the issues and the facts and have the proper  
12 information, it was then Mr. Klauber's opportunity.  
13 He had William Coker on the stand. Mr. Coker, who we  
14 learned was the head of personal training for the  
15 entire east coast of Crunch gym, he personally

16           oversaw personal training of all twelve gyms, all the  
17           ones in New York City, the one involved in Nell's  
18           accident in Brooklyn. He was in charge of over 200  
19           personal trainers, the training program, the personal  
20           training managers. He was sitting right here for  
21           you, members of the jury.

22                     And when it was time for the defense to ask  
23           him a question to vouch for his trainer --

24                     MR. KLAUBER: Objection.

25                     MR. SMILEY: --did you hear one question  
26           being asked?

1   Proceedings   4

2                     MR. KLAUBER: Your Honor, may we approach?

3                     THE COURT: Overruled. No.

4                     MR. SMILEY: No, you didn't. Ask yourselves  
5           why. Why not? Not only did they not ask Mr. Coker a  
6           question to vouch for their employee to say what the  
7           standards were or anything like that, but they could  
8           have brought an expert witness in here to testify  
9           before you, members of the jury.

10                     MR. KLAUBER: Objection, your Honor.

11                     THE COURT: Overruled.



12 MR. SMILEY: They could have brought an expert  
13 the same way we did. They didn't have to. But, they  
14 could have. Certainly, they could find an expert  
15 either within their own ranks, one of their 200 plus  
16 trainers or someone within the industry. It's  
17 Crunch. Certainly, they could reach out to someone  
18 in the sports and fitness industry with credentials  
19 like Mr. Nelson to come sit in this chair, take an  
20 oath to tell you folks the truth and tell you about  
21 proper standards and to vouch for the actions of  
22 Gavin Umeh, to tell you, yeah, it's okay that he had  
23 Nell do that toe-tap exercise, even though it was  
24 over twelve inches high with a bench and she'd never  
25 done it before, yeah, that was fine, yeah, he  
26 followed all the rules, it was okay, he didn't have

1 Proceedings 5

2 to break her fall or prevent her fall or be her  
3 safety net.

4 Not one person. Ask yourselves why not. You  
5 know why not. You know exactly why not. As you sit  
6 here, come on, you're from Brooklyn, you know why  
7 because if somebody could come in here and say that

8 under oath on the witness stand to lay their  
9 credentials on the line for you to say, yes, I'm an  
10 expert, I have been in this industry, I know the  
11 standards, I know how it works, he did everything  
12 right. If there was one person who could do that,  
13 maybe we would have heard that, but we didn't.  
14 That's because nobody could come to vouch for what he  
15 did, that's why, because he was negligent. That's  
16 why, members of the jury.

17 The only person we heard from from the  
18 defense case was Gavin, the trainer, himself who was  
19 responsible for this occurrence and accident. I'll  
20 submit to you he's probably not the most objective  
21 person to hear from about the standards and we didn't  
22 even hear that from him. He wasn't asked what the  
23 standards were at Crunch, how he was trained, what he  
24 was taught to do. We didn't hear any of that. His  
25 lawyer could have asked him. His lawyer could have  
26 brought out his credentials, his experience, his

1 Proceedings 6

2 training.

3 Was he even asked what certifications, where

4 he went to school, what kind of training they give  
5 him at Crunch, what experience or expertise, what  
6 qualifications he had to make sure Nell was trained  
7 properly? Nell didn't pick him out of a website or  
8 go to him in his own gym. She went to Crunch.

9 You heard from her she had an expectation  
10 that Crunch's trainers were qualified and knew what  
11 they were doing and she could be safe. We didn't  
12 hear any-- we don't know anything about that man.  
13 Certainly, we know he wasn't an expert. Could have  
14 gone through the same thing we did with Mr. Nelson,  
15 laid out his credentials here and asked Judge Pfau to  
16 recognize him in the field of personal training.  
17 That wasn't done.

18 So, what did we learn from Gavin? What  
19 pieces of information that are important for you  
20 folks to know in your deliberations in this case?  
21 Well, a few standard rules we did know about. We  
22 know he didn't follow -- he didn't fill out the PARKU  
23 (ph.) or the fitness assessment or the goal  
24 assessment forms. These things are important.

25 The defense may try to minimize it and say it  
26 didn't matter, it's part of the process of trying to



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get to know the client and part of the process of getting to train the clients. He didn't do any of that. He put her right to it, got right to work. And we know that on just the second day of training, the day that Nell told him she was sore, it was a different experience for her.

We know that he decided for whatever reason to pick this exercise out of a hat, this toe-tap exercise. And he told us, oh, she could do it, she did jumping-jacks, might as well have her do this. Didn't give you any explanation, any actual logic or reasoning for his training or experience to explain why he would choose an exercise like that for a woman like Nell. She wasn't there to train as a professional athlete. She wasn't training for a marathon or anything like that. She just want to get fit.

So, he picks this exercise out of thin air. He claims to have done a program progress and laid it all out. You think he did it? That's up to you. We didn't hear about it. We didn't see it. We didn't know it existed and he picks this exercise for her to do, knowing she's never done it before. That's

25 important, ladies and gentlemen, it's an exercise she  
26 hadn't done before. It doesn't matter what her

1 Proceedings 8

2 ability was, it doesn't matter if she could do it  
3 like a shining star athlete, doesn't matter if I  
4 could do it, if Mr. Klauber could do it, none of that  
5 matters.

6 Matters what her background was. Nell had  
7 trained with Telly Gethers, we heard, forty-eight  
8 times. Defense wants you to believe because she  
9 trained with her, that makes her an expert athlete.  
10 What we know is she went with a trainer. She put her  
11 trust in great experience, working safely, did her  
12 exercises that she felt confident in doing and that  
13 her trainer was there for her to establish that  
14 trust. That's all we know.

15 And what we do know is that she had never  
16 done a toe-tap before. For whatever reason, Telly  
17 didn't have her do it, not at an elevation, not even  
18 on the ground, she had never done it before. Gavin  
19 knew that. Knowing she had never done it, she didn't  
20 even do it just on the floor, just to get the

21 movement down or holding a ball or anything like  
22 this, he brought her over to a high bench to do it.  
23 He demonstrates it and he tells her to do it, knowing  
24 she had never done it before, okay?

25 It's not bad enough that he picks it in the  
26 first place, but then, knowing she's never done it

1 Proceedings 9

2 before, he's supposed to be there for her at the very  
3 least, let her know, Nell, listen, you may stumble,  
4 you may fall, this could happen, I'm here for you,  
5 I'm going to catch you, I'm right here, you get here,  
6 do the exercise, I'm right here for you, I'll grab  
7 you, I'll step in, I'll be there for you.

8 He purposefully didn't tell her any risks, he  
9 didn't tell her she could fall, he didn't tell her  
10 how to fall, he didn't tell her, I'll be there, I  
11 gotcha, knowing she never done it. He stands there,  
12 says, go for it, give me twenty. He could have held  
13 her hand, said, let's try the movement, let's do it  
14 on a floor, let's do it at a lower progress, all  
15 these things he didn't do.

16 And then, members of the jury, when it's time



17 for her to do it, proper standard of care, according  
18 to Delon Nelson, is to be there, be on it, have a  
19 hand, be ready 'cause you don't know what's going to  
20 happen, you don't know if she's going to be able to  
21 do it or not. You just don't know. And knowing what  
22 Gavin admitted on the stand, that she could fall  
23 backwards, he's there, he's watching her feet, he's  
24 ready, and sure enough, that's what happened. She  
25 couldn't do it right. Okay.

26 She never done the exercise before. I don't

1 Proceedings 10

2 know if anybody in this room could have done it.  
3 Right? If we all could have, some could, some  
4 couldn't. She couldn't. She tried and she failed.  
5 He set her up for failure. He gave her something  
6 difficult and challenging she had never done, wasn't  
7 there to aid her, hold her hand, make sure she could  
8 do it right, learn the moves right.

9 And then, even though he claims to have been  
10 here, he's standing there, sure enough, she falls and  
11 she falls backwards. She doesn't fall that way. She  
12 doesn't fall in some unusual way. His testimony was,

13 oh, it was unexpected. It wasn't unexpected. This  
14 is exactly what he knew could happen, that she could  
15 fall. I still don't get his explanation. I don't  
16 think anybody could, that she stepped up and she  
17 jumped up and jumped back like a Jackie Chan move or  
18 some catwoman thing where she does a somersault. You  
19 can't even get a hand on it.

20 It just doesn't make sense. It defies logic,  
21 defies common sense, if he's doing his job, he's  
22 right here for her. You heard him say, he's fit,  
23 works out regularly, he's a trainer, he's got fast  
24 reflexes. Actually, what you'd expect a trainer to  
25 be. He isn't some guy off the street who's never  
26 been in a gym before. He's supposed to be in shape

1 Proceedings 11

2 and know what to do. It's his job. He's right here.

3 And the very first move, she stumbles back,  
4 he doesn't step in, he doesn't grab her, he reach for  
5 her. Does that make any sense? Not only does he not  
6 catch her, which by the way, he said, oh, it's not my  
7 job to catch my client if she falls during an  
8 exercise, it's not my job. You think if he told Nell





5           showed. There's no dispute about that, members of  
6           the jury. And we heard about that from Delon Nelson,  
7           an expert who took the stand here and testified he  
8           laid his credentials on the line. He took an oath to  
9           tell you the truth.

10                   And what he said just makes sense. I mean,  
11           he's been in this industry, look at his credentials.  
12           He has a bachelor's degree in Physical Education and  
13           health science. He taught at City College, then he  
14           went out as a trainer at Crunch, of all places, for  
15           six years. He was promoted to personal training  
16           manager, position higher than Gavin has, someone who  
17           oversees the trainers. He told you for a while he's  
18           at a popular Crunch in Manhattan.

19                   He was the liaison with publications with the  
20           media to talk about fitness. He was the head trainer  
21           selected to work with Ms. USA pageant. He worked  
22           there. He knew his stuff. He had certification  
23           after certification. He trained kick-boxers. He  
24           kick-boxed. He went to Thailand. He's been around  
25           for seventeen years, training thousands of people.  
26           Okay. I think that's some good experience.

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Certainly, a lot more than anything else you heard.

What he said makes sense. Let's listen to what Delon Nelson said. First of all, he said that people come to a gym and they hire a trainer for their safety. That's the-- number one, of course, you hire a trainer to get you fit and get in shape, you want to be safe, you don't want to hurt yourself, you don't want to be one of those people who shows up to a gym and starts piling weights on a rack and does something and gets injured. You want to be safe.

That's the trainer's job, to pick proper exercises and to make sure your client doesn't get injured while doing them. That makes sense. When I asked him about the toe-tap exercise, he demonstrated, came down here and he showed you how to do it on the floor first and how a client can get exercise out of that.

And then he said if that's not enough just on the floor, give the client a physio ball, that makes it harder. And if that's too easy, let her raise it above her head. There's no risk of training or fall or getting injured on an apparatus. He doesn't consider any of that. Then you can increase the ball, you can increase the rate. And then if all





22 He didn't get in an explanation for it. Gavin didn't  
23 give a proper explanation and nobody from Crunch came  
24 in to say it was appropriate to advance her right to  
25 that.

26 Delon explained-- Delon Nelson said, our job

1 Proceedings 15  
2 as trainer is to give a safety net. He gave a great  
3 analogy. I want you to consider the trapeze analogy,  
4 if a client is going to go and swing from a trapeze  
5 and a client sees there's a net under there and sees  
6 somebody go first and swings and goes flying off,  
7 they don't catch-- they don't do the proper move, the  
8 net catches them, they bounce down, the client knows  
9 the net is there, says, okay, I'm going to give this  
10 a shot, looks kind of hard, kind of difficult, I know  
11 if I don't do it right, the net will catch me.  
12 That's the trainer's job, to be that safety net.

13 Then imagine going up on that trapeze,  
14 thinking the net's there, swinging and stumbling and  
15 falling off, falling down, and there's no net. You  
16 go crashing to the ground. That's what happened in  
17 this case, members of the jury, Gavin Umeh was

18 supposed to be Nell's safety net and wasn't there for  
19 her. That's what happened. That was his job.  
20 That's what the evidence showed. And there's been no  
21 dispute about it, frankly, no dispute, whatsoever.  
22 Gavin failed. Now he set her up for failure.  
23 He picked an exercise that was too advanced. And  
24 knowing she had never done it before, he should have  
25 been there and ready for her. He should have helped  
26 her. He should have progressed her. He should have

1 Proceedings 16  
2 caught her, prevented her from falling, gotten his  
3 hands on her.  
4 Members of the jury, we heard from Nell.  
5 Now, it's interesting that the defense wants you to  
6 think that Nell is negligent, Nell did something  
7 negligent. She did the exercise wrong. That's  
8 negligence? Haven't we all been in situations where  
9 we've been asked to try something and you try and you  
10 just don't do it right? Does that make her  
11 negligent? If anything, if you look at what Nell had  
12 to say about her experience and her background in  
13 selecting a trainer, everything was quite reasonable,

14 to say the least.

15 At the time, she was thirty-seven, bartender,  
16 she just wanted to get in shape. She wanted to lose  
17 a little bit of weight, feel good about herself and  
18 get a little bit fit. And she decided to do it by  
19 hiring a trainer. She paid for that safety net. She  
20 didn't go off half-cocked into the gym and say, let  
21 me mess around and try to get myself in shape.

22 When you hear about waivers and you know the  
23 risks and when you sign that form to join the gym  
24 with all the fine print in it, saying you don't know  
25 the risks of injury in the gym. That's not this  
26 case. We're not here saying if someone gets injured

1 Proceedings 17

2 while working out, they have a lawsuit, there's  
3 negligence. People get injured all sorts of ways,  
4 but not like this. Nell wasn't there messing around.  
5 She wasn't trying to do something.

6 She didn't say, oh, I'm going to try this  
7 exercise, I saw somebody do it on You Tube or TV, I'm  
8 going to see if I can do it. She didn't do it.  
9 She's not negligent. If anything, she was



10 reasonable. On a bartender's salary, she budgeted to  
11 have a trainer and she told you she went to the gym,  
12 if it wasn't for yoga, to work with a trainer to  
13 guide her through and work great with. That's what  
14 she had Gavin for when he asked her to do this  
15 exercise.

16 Oh, she's negligent. The defense will have  
17 you believe she should have said, oh, by the way, I'm  
18 not going to do that exercise, oh, you better get  
19 here close to me. She's negligent for not doing  
20 that. She put her trust in him. She was reasonable.  
21 Given her experience with Telly, it's her  
22 understanding you trust your trainer. Trainer says  
23 you can do it, say okay, it looks a little scarier,  
24 but I'll try it, knowing that the trainer's the  
25 safety net and there if you mess up.

26 That's reasonableness. That's not

1 Proceedings 18

2 negligence. Nell explained her reasoning. She said,  
3 I was tired, my legs were sore, he demonstrated,  
4 looked hard, I said, really? He said, yeah. I said,  
5 okay, I'll give it a try. She was trying her best.

6           It wasn't negligent. Think about that, members of  
7           the jury. He was a safety net. He failed her.

8                     She didn't do anything wrong in this case.  
9           The fact that she had been to a gym before or was  
10          there during the month of January, she explained she  
11          went for yoga, the month of January, she went to meet  
12          with the advisor to find out about switching her  
13          trainers. What did she do wrong here? She didn't  
14          do anything wrong.

15                    Now, the verdict sheet that you're going to  
16          get, I'm going to go through it, each question. The  
17          first question that you'll have is, were the  
18          defendants negligent? Yes or no. That's a decision  
19          that five out of six of you will have to make, yes or  
20          no. The answer to this-- there's really only one  
21          answer when you look at the real evidence that you  
22          heard is yes.

23                    We heard from Delon Nelson, the only expert  
24          testimony, you heard in this case that it is a  
25          departure from good and accepted training practice to  
26          have a client with any level ability do an exercise

2           like this, toe-tap like 12.4 inches high without  
3           first making sure she can do the movement at a lower  
4           level first and properly do the exercise, that's  
5           negligence. That's what you heard from the evidence.  
6           That means you check off yes.

7                     The other negligence is the failure to be  
8           there to spot her, so that if she did fail in trying,  
9           that you can catch her, prevent the fall. That was  
10          negligence. And we don't have to prove both. We  
11          only have to prove one. But, I feel we have clearly  
12          proven both. And you can pick one or both, either or  
13          all the above, any way or shape, he was negligent and  
14          there was no evidence to the contrary.

15                    After you check yes to the negligence part,  
16          the next one is: Was the defendant's negligence a  
17          substantial factor in causing the incident. The  
18          judge is going to instruct you on what that means,  
19          but basically, did it cause it, did his negligence  
20          cause her accident? The answer's yes. Again, check  
21          it. He shouldn't have had her doing the exercise.  
22          That was a substantial factor. He should have  
23          prevented her fall. That was a substantial factor.  
24          The answer's yes.

25                    The question after that is: Was the  
26          plaintiff negligent? Now, the judge will instruct



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you when you get to this part, the burden shifts just the same way. We have the burden to prove that the defendant, through Gavin, was negligent. The burden shifts to the defense.

MR. KLAUBER: Objection.

THE COURT: Sustained.

MR. SMILEY: And it's up to them to prove to you --

MR. KLAUBER: Objection, your Honor. He's continuing with the same --

THE COURT: No.

MR. KLAUBER: It's up to them.

MR. SMILEY: It's up to them to prove to you that she was negligent, just like some evidence for you to think there was some credible evidence here that she did something that wasn't reasonable. There is none. If you collectively, amongst yourself, think about this trial, there's nothing that says she's negligent. The answer's no, not even a piece of evidence to consider about.

And then you don't even get to the remainder,

23               which would be if her negligence was a substantial  
24               factor, you don't even get to that question, which  
25               would be no 'cause there was no negligence.

26                       Last question that's here that if you did

1   Proceedings   21

2               find that the defendant was negligent and Nell was  
3               negligent, then you're asked to divide up the pie to  
4               100 percent, okay? That's how the verdict works.  
5               And you all have this when you go to the jury room.

6                       Members of the jury, the evidence was clear  
7               here. Okay. And again, you've got to remember that  
8               it's not about who can and who can't do this  
9               exercise. Mr. Klauber wants you to think he can do  
10              the exercise and it's simple. That wasn't the case.  
11              He wasn't even sure. Even assuming he's the best  
12              athlete in the world, he's in great shape, he can do  
13              this exercise, that doesn't mean it's right for Nell.  
14              Doesn't mean a thing.

15                      You heard the example Delon Nelson gave to  
16              you, if he asked everybody in this room to do  
17              push-ups, some would be able to do it great, some  
18              would be on their knees, some, one arm, everybody

19 different levels. You have to know and you have to  
20 progress. Okay.

21 There's no doubt about the negligence. And  
22 if there is, this is what I ask of you, members of  
23 the jury, when you go into that jury room after her  
24 Honor instructs you and you're deliberating, if  
25 there's any doubt in any of your minds as to whether  
26 or not the answer's yes, consider two questions.

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2 And I'm not going to tell you the answer, I'm  
3 going to ask among yourselves, question number one:  
4 If Gavin Umeh was really following the proper  
5 standards of care in his profession in the industry  
6 of personal training, in selecting Nell, given  
7 everything he knew and didn't know about her, given  
8 these accidents, if it was proper, how come not one  
9 person took an oath to vouch for him? That's  
10 question number one.

11 Question number two, if he was really there,  
12 if he was really where he claims to be, if he was  
13 really where he was supposed to be, spotting her on  
14 this exercise, how come he didn't get a hand on her?

15            Forget about catching her, ready to fall, how come he  
16            didn't get a hand on her?

17                    On behalf of myself and on behalf of Nell,  
18            you've been extremely patient. I appreciate that.  
19            So does she. Very important matters to everybody  
20            involved in this action. And I thank you for your  
21            patience. I thank you for your attention that you've  
22            given to this case and continue to give. Thank you.

23                    (Summation concluded.)

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

24                    I hereby certify that the foregoing is a true  
25                    and accurate copy of the stenographic proceedings of  
26                    the hearing held in the above matter.

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LISA L. DIMINO, R.P.R.  
OFFICIAL COURT REPORTER



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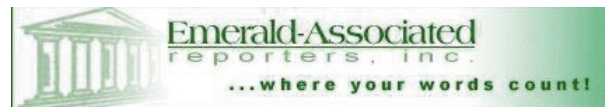
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