

Lee / Green - A

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS: CIVIL TERM: PART 5

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CANDITA DIEGO and ROBERTO DIEGO,  
Plaintiffs,

-against- Index No. 20252/05  
TRIAL

LIN ZHU, L.L.C., PANDA STORE FRONT & GATE,  
NEW YORK HOSPITAL MEDICAL CENTER of QUEENS,  
Defendants.  
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Supreme Courthouse  
88-11 Sutphin Boulevard  
Jamaica, New York 11435  
September 24, 2008

B E F O R E: HONORABLE JAMES P. DOLLARD,  
Supreme Court Justice  
(and a jury of six plus one alternate.)

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AUDREY KEISER  
NORA CAMPISI  
Official Court Reporters

## Proceeding

1 THE COURT CLERK: All rise. Part 5 is now in  
2 session. The Honorable James P. Dollard presiding.  
3 The jury is not present. The attorneys are present.

4 THE COURT: Good morning. I understand  
5 there is an application at this time?

6 MR. RUSSOTTI: Well your Honor, the defendant  
7 submitted a memorandum of law yesterday with respect  
8 to the issue of precluded two parts of PA Lau's  
9 testimony that he has departed from proper emergency  
10 practice and that departure was a cause of the  
11 deviation of the emergency room. So since Lau is here  
12 to testify, I would ask to be heard on that issue. I  
13 ask your Honor to make a ruling before Lau gets on the  
14 stand.

15 THE COURT: All right. Proceed.

16 MR. RUSSOTTI: First of all, it is clear and  
17 basic law and I have the case. I am sure your Honor  
18 is familiar with McDermott against Manhattan Eye and  
19 Ear, a seminole case, Court of Appeals. It says that  
20 a defendant is allowed to be asked questions, expert  
21 questions about whether or not the defendant departed  
22 from proper medical practice. The Court explained  
23 that even though this was a medical doctor, the  
24 questions really were not expert but really matters  
25 of "fact", as are the diagnosis and examination he made

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1 or the treatment upon which he settled. Even though  
2 such questions call for the expertise of an expert  
3 opinion, the Courts do no more than conform to the  
4 obvious purpose underlying adverse parties rule. That  
5 purpose of course is to permit the production of in  
6 each case, of all pertinent and relevant evidence that  
7 is available to the parties in the action. In the  
8 community still quoting there is a surety. The issue  
9 of whether the defendant deviated from proper practice  
10 customarily adopted by physicians in communities to be  
11 sure of the pertinent and relevant malpractice acts.  
12 They go on to say nothing fair about the practice of  
13 asking a defendant which Lau is. He is the employee  
14 and person whose conduct is under--

15 THE COURT: I don't think there is any  
16 dispute what the general rule is with regard to a  
17 physician, but it seems to me the argument being made  
18 by defendant that PA Lau is not qualified by his  
19 training or duties to testify.

20 MR. RUSSOTTI: There could be nothing more  
21 wrong about that, your Honor. First of all, the cases  
22 they cite say that you have to lay a foundation for an  
23 expert to testify regarding deviation. If he is  
24 testifying in an area other than his expertise, those  
25 are the cases. They don't quote that in the

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1 memorandum of law. That is the rule. Even if an  
2 expert or doctor or a nurse or whatever is going to  
3 testify within their area of expertise, no foundation  
4 is necessary.

5 Now, let me just tell you the background  
6 here. Under the Education Law of the state of New  
7 York a physician's assistant this is Section 6542 of  
8 the Education Law: Performance of "medical  
9 services". Notwithstanding any other provision of law  
10 a physician's assistant may perform medical services  
11 when it is under supervision of a physician, and when  
12 it is within the scope of practice, the supervising  
13 physician. It goes on to Paragraph 3: Supervision  
14 shall be continuous but shall not be construed as  
15 necessarily requiring the physical presence of a  
16 supervising physician at the time and place where such  
17 services are performed.

18 So a physician's assistant can perform  
19 medical services on his own. That is the Education  
20 Law. The rules and regulations in the state of New  
21 York. 10, New York Code Rules and Regulations 94.2.  
22 That talks about what a physician's assistant can do.  
23 A registered physician's assistant may perform without  
24 medical services", but only under the supervision of a  
25 physician. They talk about what physician's assistants

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1 can do. He can prescribe medications.

2 He can write medical orders, prescriptions  
3 and medical orders may be written by a physician's  
4 assistant as provided in this subdivision. That is 10  
5 New York Code Rules and Regulations, 94.2. 94.2E6  
6 says: A register physician's assistant employed or  
7 extended privileges by a hospital as we have here if  
8 permissible under the by rules and regulations of the  
9 hospital can write medical orders, including things  
10 for controlled substances. Countersignature orders  
11 may be required if deemed necessary by the hospital  
12 but in no event shall countersignatures be required  
13 prior to execution.

14 So a physician's assistant can issue an  
15 order and the order be executed before the supervising  
16 physician only countersigns the order. That is how  
17 much authority is given to a physician's assistant for  
18 the practice of without " medical laws". Finally is  
19 that physician's assistants and doctors do the same  
20 thing the disciplinary rule, Public Health Law Section  
21 230 sets up the state Board of Professional Conduct.

22 That has a committee on professional  
23 conduct, that committee. 230 of the Public Health  
24 Law. That adheres to the charge of professional  
25 misconduct against doctors and physician's

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1 assistants. Nurses are handled elsewhere but doctors  
2 and physician's assistants are specifically, there is  
3 a charge of professional misconduct handled under the  
4 committee of professional conduct.

5 Now that goes to show how a physician's  
6 assistant and medicine is related. Now the issue is  
7 the physician's assistant in this case acting within  
8 his area of expertise. He certainly is. He is acting  
9 as an emergency room physician. If you look at--

10 MR. HOLOHAN: Objection, your Honor. He is  
11 not acting as an emergency room physician.

12 MR. RUSSOTTI: As emergency room physicians  
13 assistant. Let's look at his experience. He graduated  
14 school in 1990. He obtained a Bachelor's of Science.  
15 Then he went on and got a degree as a physician's  
16 assistant. He has been working and this is in his  
17 deposition by the way and I intend to elicit it when  
18 he testifies. He has been working in the emergency  
19 room as a physician's assistant specifically since  
20 1990. That would be 14 years before the incident in  
21 this case. He worked in four different hospitals. He  
22 testified at Page 178 of the deposition that he was  
23 trained, part of his training medical diagnosis and  
24 treatment. That he prescribed medicine, diagnosis and  
25 orders tests. Now, that was his education and

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1 background. He testified here that he ordered the CAT  
2 scan. Now, in this case which is the subject of the  
3 lawsuit at Page 112. He testified about his knowledge  
4 of why he ordered the CAT scan and the physical  
5 conditions for which he was trying to prevent. The  
6 reason he ordered the CAT scan of the brain is  
7 because:

8 QUESTION: Were you concerned about bleeding  
9 in her brain?

10 ANSWER: Yes.

11 QUESTION: Because you had a woman who had  
12 fallen down 12 flights of stairs?

13 ANSWER: Yes.

14 QUESTION: You know about bleeding in the  
15 brain what potentially can happen with that, correct?

16 ANSWER: Yes.

17 QUESTION: As an emergency room doctor, you  
18 know that bleeding in the brain is a medical  
19 emergency, right?

20 ANSWER: Yes.

21 QUESTION: And that bleeding in the brain can  
22 cause death of brain tissue, right?

23 ANSWER: Yes.

24 QUESTION: It can cause death of brain tissue  
25 in a number of cases?

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1 ANSWER: Correct.

2 QUESTION: It can cause death of brain tissue  
3 of the blood. That is in and of itself, right?

4 ANSWER: Yes.

5 QUESTION: Or it can cause death of  
6 circulating edema, correct?

7 ANSWER: Yes.

8 QUESTION: And that is swelling in edema can  
9 cause increased pressure of the brain, correct?

10 ANSWER: Yes.

11 QUESTION: And that can cause death of brain  
12 tissue, correct?

13 ANSWER: Yes.

14 QUESTION: And this process goes on. It can  
15 cause mass effect of the brain, correct?

16 ANSWER: Yes.

17 QUESTION: It can. There are two hemispheres  
18 in the brain?

19 ANSWER: Yes.

20 QUESTION: There is a midline?

21 ANSWER: Yes.

22 QUESTION: And that mass effect can cause the  
23 shift mass effect can cause midline of shift over to  
24 the other side of the brain, right?

25 ANSWER: Yes.



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1 QUESTION: That can cause death of brain  
2 tissue?

3 ANSWER: Yes.

4 QUESTION: That is called midline shift?

5 ANSWER: Yes.

6 QUESTION: And if that were allowed to  
7 continue, that can cause herniation of the part of the  
8 brain, correct?

9 ANSWER: Yes.

10 QUESTION: You have heard of unco  
11 herniation?

12 ANSWER: Yes.

13 QUESTION: That is a very common type of  
14 brain herniation, correct?

15 ANSWER: Yes.

16 QUESTION: That is where part of the brain  
17 that is next to the temporal lobe gets pushed into the  
18 midbrain, right?

19 ANSWER: Yes.

20 QUESTION: It can cause if that happens that  
21 can cause a patient to become unconscious?

22 ANSWER: Yes.

23 QUESTION: It can cause ultimately if allowed  
24 to go on the patient could die?

25 ANSWER: Yes.

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1                   QUESTION: And you are not in a position to  
2                   evaluate when that might happen in any given patient,  
3                   correct?

4                   ANSWER: Yes.

5                   QUESTION: That might happen very quickly,  
6                   correct?

7                   ANSWER: Yes.

8                   QUESTION: Or it might take some period of  
9                   time?

10                  ANSWER: Yes.

11                  QUESTION: If it took a period of time a  
12                  patient can deteriorate very quickly, right?

13                  ANSWER: Yes.

14                  QUESTION: There is no way to predict that.  
15                  I understand.

16                  ANSWER: Yes.

17                  QUESTION: So you were rightfully concerned  
18                  about this bleed, potential for bleeding in the brain,  
19                  right?

20                  ANSWER: Yes.

21                  QUESTION: Because of all these things that  
22                  we have just gone over, right?

23                  ANSWER: Yes.

24                  QUESTION: Because this was potentially a  
25                  deadly situation for this woman, right?

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1 ANSWER: Right. Yes.

2 QUESTION: Despite the fact that she appeared  
3 normal to you?

4 ANSWER: Yes.

5 QUESTION: Right. The fact that she appeared  
6 normal did not mean she could not have a process going  
7 on in the brain that later in the afternoon could have  
8 killed her, correct?

9 ANSWER: Yes.

10 QUESTION: The only way to tell if she had a  
11 bleed in the brain was to do a CAT scan?

12 ANSWER: Yes.

13 QUESTION: If there was a bleed in the brain,  
14 can either be treated if it was small or be treated  
15 medically, right?

16 ANSWER: Yes.

17 QUESTION: Or if it was larger, it could be  
18 treated surgically by a neurosurgeon, correct?

19 ANSWER: Yes.

20 QUESTION: And the only way to tell what  
21 needed to be done was to get the CAT can?

22 ANSWER: Yes.

23 QUESTION: And the pressure that gets built  
24 up in the brain, the way to treat the pressure is to  
25 relieve it, right?

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1 ANSWER: Yes.

2 QUESTION: That is the only way to deal with  
3 this, right?

4 ANSWER: Yes.

5 QUESTION: This intercranial pressure?

6 ANSWER: Yes.

7 QUESTION: And the way to deal with it as  
8 soon as possible, right?

9 ANSWER: Yes.

10 QUESTION: Because that gives the patient the  
11 best outcome to relieve the pressure as soon as  
12 possible, right?

13 ANSWER: Yes.

14 QUESTION: And to relieve the pressure as  
15 soon as possible you have to get a CAT scan done?

16 ANSWER: Yes.

17 Your Honor will recall this is exactly what the  
18 expert testified to, the neurosurgeon. He has just  
19 demonstrated his knowledge. PA Lau, his knowledge of  
20 bleeding in the brain, how it works, the potential  
21 complications and whether he is there to look out for  
22 and why he ordered the CAT scan.

23 So that shows that he knows about the  
24 process. Page 117, he continues and explains what he  
25 found in his examination that was consistent with this

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1 process developing. I can read it to your Honor or  
2 show it to your Honor.

3 THE COURT: Are you objecting to the  
4 testimony that has been read?

5 MR. HOLOHAN: Yes, your Honor.

6 THE COURT: Let's break it down into  
7 pieces.

8 MR. HOLOHAN: All right. Your Honor, PA Lau  
9 is just that, a physician's assistant. He is not a  
10 physician first of all. His education primary care  
11 and medicine, physician's assistant medicine. In this  
12 case, the testimony in the case is that when he  
13 ordered the CAT scan, he went and talked to Dr. Green  
14 thereafter and got the supervisor's--

15 MR. RUSSOTTI: No testimony that happened,  
16 only the custom and practice. Nobody knows if there  
17 was a conversation in this case. No documentation of  
18 that in the record and nobody has any recollection.

19 MR. HOLOHAN: It is their custom and practice  
20 to go and speak to Dr. Green. Dr. Green would make  
21 the determination whether the CAT scan had to be done  
22 any quicker or not. The semiole question your Honor,  
23 it is not the fact that whether PA Lau can order a CAT  
24 scan or not.

25 The question is: Can he render an opinion

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1           how soon it can be done. There is nothing in the  
2           testimony. He is not qualified to give that opinion.

3                   THE COURT: We have not gotten to that. He  
4           hasn't given the opinion in the testimony. He just  
5           read. I am trying to break it down into elements.  
6           Just as to--

7                   MR. HOLOHAN: You are right, your Honor. I  
8           apologize.

9                   THE COURT: Pages 112 to 117.

10                  MR. HOLOHAN: I move to strike the  
11           testimony. That should be asked by a physician, not a  
12           PA.

13                  MR. RUSSOTTI: There couldn't be anything  
14           further from the truth, your Honor.

15                  THE COURT: All right. That objection is  
16           overruled. You have an exception.

17                  MR. RUSSOTTI: Next issue. Page 130, PA Lau,  
18           Line 23.

19                  QUESTION: Whose responsibility was it to  
20           make sure that this CAT scan got done right away, you  
21           or Dr. Green?

22                  ANSWER: Me and Dr. Green both.

23                  QUESTION: Both of you?

24                  ANSWER: But me primarily. I saw the patient  
25           and wrote the chart. Me.

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1 QUESTION: Well, he was a supervisor, wasn't  
2 he?

3 ANSWER: Yes.

4 QUESTION: So I am just trying to understand  
5 the protocol. Whose responsibility was it, was it  
6 yours or was it his to make sure this got done STAT?

7 ANSWER: It is my responsibility and he  
8 supervised me.

9 QUESTION: So it is his responsibility too?

10 ANSWER: Some, yes but I primary. It is my  
11 patient. I saw the patient.

12 QUESTION: So you were telling us then that  
13 primarily it was your responsibility to make sure this  
14 got done STAT?

15 ANSWER: Yes.

16 QUESTION: Done within 15 minutes, right?

17 ANSWER: Yes.

18 So he is there working in the emergency  
19 department which they have hired him to do. He has  
20 been there for 12 years at that point. He told us  
21 under oath that it was his primary responsibility to  
22 get this thing done STAT. It can't be any clearer. I  
23 am entitled to elicit testimony from him. That  
24 thereafter I asked him at Page 133, Line 21.

25 QUESTION: You know what the standard of care

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1 in an emergency room is right, emergency room  
2 practice?

3 ANSWER: Yes.

4 That came after these questions, your Honor. I  
5 started this line of questioning at Page 132, Line  
6 23.

7 QUESTION: PA Lau, wasn't it a departure from  
8 proper emergency room practice and I specifically used  
9 the term emergency room practice, not medical practice  
10 because that is what we are dealing with in this case  
11 emergency room practice as it is conducted by doctors  
12 and physician's assistants which is what he was paid  
13 to do, trained to do?

14 THE COURT: Reading from the transcript or  
15 are you extrapolating?

16 MR. RUSSOTTI: All right. Page 132, Line 23.

17 QUESTION: PA Lau, wasn't it a departure from  
18 proper emergency room practice not to get the CAT scan  
19 done STAT?

20 ANSWER: From my examination she was  
21 neurologically stable. From my examination the pupils  
22 were equal, reactive. She was conversing with me and  
23 moving her extremities. From my examination she was  
24 neurologically stable.

25 QUESTION: I understand. You told us earlier



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1           that you couldn't rule out she could have had a bleed  
2           in the brain, that could have killed her later that  
3           afternoon, right?

4                     ANSWER: Right.

5                     QUESTION: You knew that?

6                     ANSWER: Yes.

7                     QUESTION: So that was the most serious thing  
8           that this woman potentially had, right?

9                     ANSWER: Right.

10                    QUESTION: Wasn't it a departure from proper  
11           emergency room practice not to get the CAT scan done  
12           within 15 minutes of this woman?

13                    ANSWER: You have to rephrase your question.

14                    QUESTION: Let me rephrase it this way. You  
15           know what the standard of care in the emergency room  
16           is, right, emergency room practice?

17                    ANSWER: Yes.

18                    QUESTION: Wasn't this a deviation from the  
19           standard of care in a patient with a head trauma  
20           patient with a potential bleed in the brain can kill  
21           her not to get this done STAT. Wasn't that a deviation  
22           from the standard of care?

23                    ANSWER: She was getting a CAT scan done.

24                    QUESTION: Wasn't it a deviation not to get  
25           it done sat within 15, 20 minutes?

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1 ANSWER: Yes.

2 QUESTION: It was, right?

3 ANSWER: Yes.

4 Now, it can't be any clearer that under the law  
5 he is practicing within his specialty. He is  
6 authorized under the law to practice " medicine under  
7 the education law". He wrote the order. He told us  
8 it was his responsibility to make sure that the order  
9 got done. He testified that he was familiar with the  
10 standard of care for emergency room practice. He had  
11 been practicing in the hospital for 12 years. There  
12 is no question that I can ask him under McDermott or  
13 any of the other cases: Did he depart from a standard  
14 of care? If he says yes, they are stuck with that  
15 answer. I have a right to elicit that.

16 THE COURT: Mr. Holohan on this?

17 MR. HOLOHAN: Again it is our position that  
18 PA's that physician's assistants, he works under the  
19 supervision of a physician. That he does not  
20 establish the standard of care in the emergency room.  
21 That is done by the primary attending physician in the  
22 facility at that particular time. His expertise not  
23 at the level where he can give this jury what time  
24 that CAT scan should have been done. I have no  
25 objection that he could have ordered one. How quickly

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1           it would have been done. The expert said half an  
2           hour. He said 15 minutes. Not the same standard of  
3           care. He is mistaken in the testimony. He should not  
4           be able to testify because he is not at that level of  
5           expertise. He is not a physician, emergency room  
6           physician board certified to come in here and give you  
7           the standards of care. I move that this issue be  
8           stricken.

9                       THE COURT: He testified as to his own  
10           standard of care, standard of care of a PA?

11                   MR. HOLOHAN: That is not what he was asked.  
12           He was asked in this case the standard of care in the  
13           emergency room. That is not what his standard of care  
14           is.

15                   MR. RUSSOTTI: That is ridiculous. He was  
16           asked about emergency room practice, what he was  
17           doing. He testified it was his responsibility. He  
18           knew what the standard of care was.

19                   MR. HOLOHAN: There is no foundation offered  
20           in this case as to this PA being qualified to testify  
21           to give this opinion. There is no foundation  
22           whatsoever. He didn't go through his education with  
23           him.

24                   MR. RUSSOTTI: He worked there for 12 years.

25                   MR. HOLOHAN: That is a different situation.

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1 He worked under the supervision of a physician. He is  
2 not there to establish a standard of care in the ER.  
3 He can't testify to the standard of care in the ER  
4 with regard to timing of the CAT scan.

5 THE COURT: What about his only personal  
6 standard of care here than the general standard of  
7 care? Then he is--

8 MR. HOLOHAN: Only if it is established that  
9 that is what it is. We never established that. We  
10 have no foundation in this case of this PA ever taking  
11 standard of care of practice. He never did this.

12 MR. RUSSOTTI: This is absurd, your Honor.  
13 He worked there in this emergency room for 12 years.  
14 He is licensed by the state of New York to order  
15 tests, prescription medications. They employed him to  
16 practice emergency room medicine. For them to stand  
17 up and say that he is not qualified as to what goes on  
18 in the emergency room, the standard of care is clearly  
19 not necessary. Where he is saying that we can't say  
20 that he is committing malpractice. That is what he is  
21 saying. That we can't show that the PA committed  
22 malpractice which we can which was done here and we  
23 can have the PA admit to malpractice under his own  
24 mouth, by his own mouth. The fact that he did is just  
25 they are trying it avoid it. We have the right to do

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1 it.

2 MR. HOLOHAN: There is no foundation for this  
3 individual being qualified to testify as an expert in  
4 this case. It is not done in this case, your Honor.

5 THE COURT: I am not going to strike that  
6 testimony. The only part I would consider striking is  
7 his testimony as a responsibility of Dr. Green. I  
8 think he is qualified to talk about his own  
9 responsibility, not Dr. Green.

10 MR. HOLOHAN: But your Honor, that is an  
11 interesting issue. What he is saying is that he does  
12 not work independently. It is, he and Dr. Green  
13 decides when to do the CAT scan. It is he and Dr.  
14 Green decides when, what time to do the CAT scan. He  
15 is not working independently. You can't get them  
16 apart on this issue. The ER doctor sets the standard  
17 of care. He does not.

18 MR. RUSSOTTI: Maybe he is talking about a  
19 different case, your Honor. I just read so it is his  
20 responsibility to, referring to Dr. Green, Page 131.

21 ANSWER: Some yes, but I primary.

22 He said he had the primary responsibility to  
23 determine when the CAT scan should be done.

24 MR. HOLOHAN: It goes back and forth.

25 MR. RUSSOTTI: No. Listen to the testimony

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1 of your witness. Some yes, but quote I primary. It  
2 is my patient. I saw the patient.

3 QUESTION: So you are telling us that  
4 primarily it was your responsibility to make sure this  
5 got done STAT?

6 ANSWER: Yes.  
7 I don't know what could be any clearer.

8 THE COURT: I am not going to strike the  
9 testimony. I will if you wish I will tell the jury to  
10 disregard the statement by PA Lau as to Dr. Green.

11 MR. HOLOHAN: Thank you, your Honor. I take  
12 exception.

13 THE COURT: Now the second part had to do  
14 with causation. Tell me how he is qualified to give  
15 causation.

16 MR. RUSSOTTI: I have read his knowledge of  
17 bleeding in the brain and what bleeding in the brain  
18 can do, how it can cause damage.

19 THE COURT: He testified as to his  
20 knowledge.

21 MR. RUSSOTTI: He testified as to his  
22 knowledge. That is the basis.

23 THE COURT: Now make it specific to this  
24 case.

25 MR. RUSSOTTI: I will. Well, he testified

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1 about everything that he testified to was corroborated  
2 by the expert neurosurgeon who explained that that was  
3 the physiology of how bleeding can affect the brain.  
4 The neurosurgeon and emergency room medicine expert.  
5 You know my point is--

6 THE COURT: You are specific as to this case,  
7 not as to what generally happens.

8 MR. RUSSOTTI: Well, specifically as to this  
9 case the neurosurgeon testified---

10 THE COURT: The neurosurgeon was called to  
11 offer an opinion. I will let that stand. You are  
12 talking about whether PA Lau is qualified to offer an  
13 opinion.

14 MR. RUSSOTTI: I know, your Honor. I am  
15 showing you that his fund of knowledge is sound. That  
16 he knows what he is talking about in this context.  
17 Then I asked him about the particulars of the  
18 examination.

19 Page 150, Line 18.

20 QUESTION: The chart notes she went into a  
21 coma and had to be intubated at about 4:10 that  
22 afternoon?

23 ANSWER: I wrote the patient to be  
24 intubated.

25 QUESTION: You wrote that?

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1 ANSWER: Yes.

2 So obviously it was there when this event  
3 happened.

4 QUESTION: That was at 4:10?

5 ANSWER: I didn't write a time.

6 QUESTION: Well, the nurse wrote the time  
7 right, 1615 patient intubated?

8 ANSWER: Yes.

9 QUESTION: So that is 4:15 in the afternoon?

10 ANSWER: Yes.

11 QUESTION: She was in a coma, right?

12 ANSWER: Yes.

13 THE COURT: This is all information.

14 MR. RUSSOTTI: You asked me specifically in  
15 this case. We know he knows what a coma is.

16 QUESTION: That coma, referring to this  
17 examination, this is what can happen if the pressure  
18 is allowed to build up in the brain, right?

19 ANSWER: Yes.

20 QUESTION: This is exactly what you were  
21 trying to prevent, right?

22 ANSWER: Yes.

23 QUESTION: Later on were you aware that later  
24 on she was rushed to the operating room for  
25 neurosurgery?



## Proceeding

1 ANSWER: Yes.

2 QUESTION: She deteriorated further at that  
3 time?

4 ANSWER: Not from my recollection.

5 QUESTION: Not from your recollection. Dr.  
6 Levine, I am reading from Dr. Levine's note: Glasgow  
7 coma scale 3 to 4 with a pupil of 8 millimeters on the  
8 left, right pupil 5 millimeters.

9 ANSWER: Yes.

10 QUESTION: Pupils are asymmetric?

11 ANSWER: Yes.

12 Talking about this case.

13 QUESTION: That is an indication of  
14 herniation in the brain?

15 ANSWER: Yes.

16 We have heard it from other witnesses. We know  
17 it is right.

18 QUESTION: This is a herniation that was  
19 caused from the increase in the pressure in the brain,  
20 right?

21 ANSWER: Yes.

22 Same thing with what the neurosurgeon said.

23 QUESTION: This is a herniation you were  
24 trying to avoid?

25 ANSWER: Yes.

## Proceeding

1 QUESTION: That is why she had to be rushed  
2 to the operating room, right?

3 ANSWER: Yes.

4 MR. RUSSOTTI: Your Honor, this is exactly  
5 what the neurosurgeon explained.

6 QUESTION: At that point a Glasgow Coma Scale  
7 of 3 to 4 that is near death, right?

8 ANSWER: Yes.

9 QUESTION: So what you are concerned about  
10 deterioration and possibly from a bleed going from a  
11 Glasgow Coma Scale of 15 to having a bleed that can  
12 kill you. That is what happened to this woman?

13 ANSWER: Yes. Exactly.

14 THE COURT: I will hear you on this.

15 MR. HOLOHAN: Your Honor, this is so far  
16 fetched. PA testified as to causation of neurological  
17 injury. His expert didn't testify to this. He  
18 brought in a neurosurgeon to testify to this. This is  
19 so far fetched.

20 THE COURT: I am going to strike the  
21 testimony of causation.

22 MR. RUSSOTTI: Your Honor, he explained that  
23 he knows how this works. He explains that he knows the  
24 process.

25 THE COURT: He may know the training as to

## Proceeding

1           what can happen at different times. I don't find that  
2           he is qualified to say that is what happened in this  
3           case.

4                   MR. RUSSOTTI: What about he has been in the  
5           emergency room for 12 years?

6                   THE COURT: Or offer an opinion or knowledge  
7           either way. I don't think he is qualified to say. I  
8           think that is up to the neurosurgeon.

9                   MR. RUSSOTTI: What about, that since  
10          everything he said is exactly what the neurosurgeon  
11          said. We know that he is right.

12                  THE COURT: He may be right but he is not  
13          qualified.

14                  MR. RUSSOTTI: How can he not be qualified?  
15          He testified earlier he was trying to prevent it. He  
16          knew this could happen. He knew the potential  
17          complications in the earlier testimony. If he said:  
18          Gee, I don't know what happened to the bleed or  
19          increased pressure. He said he knows from his years  
20          of experience in training. Now we have in this case  
21          with this patient and what he said can happen  
22          happened. How could you say he is not qualified? He  
23          has explained his knowledge. We show him what  
24          happened in this case and he says: Yes.

25                  THE COURT: I am going to strike that. You

## Proceeding

1 have an exception.

2 MR. HOLOHAN: Thank you, your Honor.

3 THE COURT CLERK: Come to order.

4 THE COURT: All right. Let's bring down the  
5 jury.

6 THE COURT OFFICER: All rise. Jury  
7 entering.

8 THE COURT CLERK: Case on trial continues.  
9 The attorneys are present. The jury is present. You  
10 may be seated.

11 THE COURT: Good morning. Mr. Holohan, do  
12 you have a witness?

13 MR. HOLOHAN: The defendant calls David Lau.

14 THE COURT CLERK: Step up, please.

15 D A V I D L A U, P A, having been duly sworn,  
16 was examined and testified as follows:

17 THE COURT CLERK: State your full name.

18 THE WITNESS: David Lau.

19 THE COURT CLERK: Give us your address.

20 THE WITNESS: 86-09 Wexford Terrace, Queens,  
21 New York, 11432.

22 THE COURT CLERK: You may be seated.

23 THE COURT: You may inquire.

24 DIRECT EXAMINATION

25 BY MR. HOLOHAN:

David Lau - Defendant - Direct - Mr. Holohan

1 Q. Good morning, Mr. Lau. Please keep your voice up  
2 and talk to the jury so they can hear what you have to  
3 say.

4 A. Yes.

5 Q. In this case you ordered the CAT scan, correct?

6 A. Yes.

7 Q. After you ordered the CA scan, what did you do  
8 next with regard to a conversation with Dr. Green? What is  
9 your custom and practice?

10 A. I discussed the case with Dr. Green.

11 Q. Why would you do that?

12 A. He is my supervising doctor.

13 Q. In a decision to have a CAT scan done within 30  
14 minutes ultimately who makes the decision?

15 A. Dr. Green.

16 Q. Why is that?

17 A. He is my supervising doctor.

18 Q. Mr. Lau on Monday you testified " Wasn't it a  
19 deviation not to get it done STAT within 15, 20 minutes.  
20 Do you remember answering that question?

21 A. Yes.

22 Q. Have you ever been to Court before?

23 A. No.

24 Q. Have you ever been cross-examined before?

25 A. No.

David Lau - Defendant - Direct - Mr. Holohan

1 Q. Could you tell the jury why you gave that  
2 answer?

3 A. I was confused. STAT could mean any there are  
4 more than 30 minutes.

5 Q. Are there certain types of brain trauma  
6 presentations that require CAT scans within 30 minutes?

7 A. Yes.

8 Q. What type are they?

9 A. Patients have dilated pupils, unequal pupils.  
10 People cannot move their extremities, or patients have  
11 incontinence.

12 Q. Did Mrs. Diego have any of those signs or  
13 symptoms when you saw her at 1:30?

14 A. No.

15 MR. HOLOHAN: Nothing further, your Honor.

16 MR. RUSSOTTI: Can I have a moment, your  
17 Honor? I am just looking for one thing, your Honor.  
18 Please bear with me.

19 THE COURT: Yes.

20 CROSS-EXAMINATION

21 BY MR. RUSSOTTI:

22 Q. PA Lau, just with respect to your last testimony  
23 about the word STAT.

24 A. Yes.

25 Q. You testified last week. When you testified last

David Lau - Defendant - Cross - Mr. Russotti

1 week and I asked you about the meaning of STAT you weren't  
2 confused about that, were you?

3 A. I was confused.

4 Q. You were confused by that. Well, let me read  
5 your testimony and ask you to tell us where you were  
6 confused. Now before I do that, you have been an emergency  
7 room PA since 1990, right?

8 A. Yes.

9 Q. You graduated school I think that year?

10 MR. HOLOHAN: Your Honor, objection. We have  
11 done this before.

12 THE COURT: It is a preclude to a question.  
13 Go on. Overruled.

14 Q. You worked in emergency rooms from 1990 up to  
15 2004, right?

16 A. Yes.

17 Q. You worked at four different hospitals before--

18 A. Yes.

19 Q. Before 2004, right?

20 A. Yes.

21 Q. You have seen thousands of head trauma patients  
22 before 2004?

23 A. Yes.

24 Q. Probably more than thousands of patients, right?

25 A. Possibly.

David Lau - Defendant - Cross - Mr. Russotti

1 Q. And there are a lot of different situations in  
2 emergency rooms where the term STAT is used, right?

3 A. Yes.

4 Q. Mr. Lau, could you look at me and not look at  
5 your counsel, please.

6 A. All right.

7 Q. Please so you have a lot of experience before  
8 2004 and before you testified here about the meaning of the  
9 word STAT, didn't you?

10 A. Yes.

11 Q. STAT is a common word. In the emergency room  
12 things need to be done quickly, right?

13 A. Yes.

14 Q. So STAT is a common word in the emergency room,  
15 right?

16 A. Yes. Right.

17 Q. Now tell me what you were confused about, Page  
18 127, Line 7.

19 QUESTION: Now in this case this CAT scan  
20 needed to be done STAT, correct?

21 ANSWER: Yes.

22 So you understood that right, Mr. Lau?

23 A. Yes.

24 Q. QUESTION: And STAT, excuse me. STAT is a specific  
25 medical term, right?



David Lau - Defendant - Cross - Mr. Russotti

1 ANSWER: Yes.

2 You understood that question PA Lau?

3 A. Yes.

4 Q. All right.

5 QUESTION: Okay. STAT means to do something  
6 right then, right?

7 ANSWER: Yes.

8 You understood that question, PA Lau?

9 A. Yes.

10 Q. QUESTION: In a hospital when orders are given or  
11 they are done in a hospital some can wait longer than  
12 others, right?

13 ANSWER: Yes.

14 QUESTION: But when a doctor or PA like  
15 yourself gives an order for something to be done STAT,  
16 that means drop everything, do it right now, right?

17 ANSWER: Yes.

18 You understood that question, Mr. Lau?

19 A. I was confused about the question.

20 Q. That question you were confused about?

21 A. Yes.

22 Q. You didn't say you were confused, did you?

23 MR. HOLOHAN: Objection.

24 THE COURT: Overruled.

25 Q. Did you PA Lau?

David Lau - Defendant - Cross - Mr. Russotti

1           A.    No, I did not.

2           Q.    When a doctor or PA like yourself gives an order  
3   for something to be done STAT, that means drop everything  
4   do it right now, right?

5                    ANSWER: Yes.

6                    What was confusing about that question to you  
7   with your 14 years of experience, PA Lau?

8           A.    STAT the word can mean more than 30 minutes. I  
9   was confused because the question was phrased in a way that  
10   you know STAT means right away.

11          Q.    In your experience STAT does mean right away,  
12   right?

13          A.    STAT can mean up to more than 30 minutes.

14          Q.    You didn't say that last week?

15          A.    Yes, I did not.

16          Q.    QUESTION: That is the, that is test response time  
17   you can get in a hospital, right?

18                    ANSWER: Yes.

19                    That was correct Mr. Lau?

20          A.    Yes.

21          Q.    So this CAT scan because of the potential for  
22   bleed in the brain being high risk for bleeding needed to  
23   be done right away, right?

24                    ANSWER: Yes.

25                    Were you confused about that question too?

David Lau - Defendant - Cross - Mr. Russotti

1 A. No.

2 Q. So you were correct about that question?

3 A. Yes.

4 Q. Now you said your custom and practice was to  
5 discuss this with Dr. Green. You don't have any  
6 recollection of discussing the case with Dr. Green, do you?

7 A. No, I do not.

8 Q. All right. There are times when you may not  
9 discuss something with Dr. Green right away, right?

10 A. Possible.

11 Q. You don't know if that was one of the times in  
12 this case, right?

13 A. Possible.

14 Q. Now you said today it was Dr. Green's  
15 responsibility to get this CAT scan done, right?

16 A. Yes.

17 Q. Let me ask you if you remember being asked these  
18 questions and giving these answers last week, PA Lau.

19 MR. HOLOHAN: Your Honor, can you ask the  
20 attorney to go behind the podium, please?

21 MR. RUSSOTTI: I think I can stand right  
22 here, your Honor.

23 THE COURT: Please move back counsel. Don't  
24 approach the witness.

25 MR. RUSSOTTI: All right, your Honor.

David Lau - Defendant - Cross - Mr. Russotti

1 Q. Page 130, Line 25.

2 QUESTION: Whose responsibility was it to  
3 make sure that this CAT scan got done STAT, right away  
4 you or Dr. Green?

5 ANSWER: Me and Dr. Green both.

6 QUESTION: Both of you?

7 And did you understand that question, PA Lau?

8 A. Yes.

9 Q. I asked both of you?

10 ANSWER: But me primarily. I saw the patient  
11 and wrote the chart. Me. Now you volunteered that  
12 answer, didn't you?

13 A. Yes.

14 Q. You said you volunteered. You said that you were  
15 primarily responsible, didn't you?

16 A. Yes.

17 Q. I didn't put that word in your mouth, did I?

18 A. No.

19 Q. Now you are changing that or do you want to stick  
20 with that testimony that you were primarily responsible for  
21 getting a CAT scan done?

22 A. A CAT scan is ordered by the physician in charge,  
23 Dr. Green. I ordered the CAT scan.

24 Q. PA Lau, I am asking you a question about your  
25 testimony last week. Today you are telling us it was Dr.

David Lau - Defendant - Cross - Mr. Russotti

1 Green's responsibility. I am reading your testimony of  
2 last week.

3 A. But on the first question---

4 Q. Listen to the question.

5 QUESTION: Whose responsibility was it to  
6 make sure that this CAT scan, this case, this CAT scan  
7 got done STAT, right away you or Dr. Green?

8 ANSWER: Me and Dr. Green both.

9 QUESTION: Both of you?

10 ANSWER: But me primarily.

11 MR. HOLOHAN: Objection. Asked and  
12 answered.

13 Q. ANSWER: I saw the patient and wrote in the  
14 chart.

15 THE COURT: He answered the question.

16 MR. RUSSOTTI: He answered the question?

17 Q. Didn't you say last week that you were primarily  
18 the one that was responsible for making sure it got done  
19 STAT?

20 MR. HOLOHAN: Objection, your Honor. He  
21 asked that five minutes ago.

22 THE COURT: Overruled.

23 A. Yes.

24 Q. And then I even pressed you on it.

25 QUESTION: Well, he was the supervisor,

David Lau - Defendant - Cross - Mr. Russotti

1           wasn't he?

2                   ANSWER: Yes.

3                   QUESTION: So I am just trying to understand  
4           the protocol. Whose responsibility was it, yours, was  
5           it his to make sure this got done STAT?

6                   ANSWER: It was my responsibility. He  
7           supervised me.

8                   That was the correct answer, wasn't it?

9           A.    Yes.

10          Q.    QUESTION: So it is his responsibility too?

11                   ANSWER: Some.

12                   That is you are answer. Yes, but I primarily.  
13   It is my patient. I saw the patient.

14                   QUESTION: So you are telling us then that  
15           primarily it was your responsibility to make sure this  
16           got done STAT?

17                   ANSWER: Yes.

18                   QUESTION: Done within 15 minutes, right?

19                   ANSWER: Yes.

20                   These questions and answers were correct when you  
21   gave them, weren't they?

22          A.    Yes. STAT was confusing, about the word STAT.

23          Q.    Well this morning you said it wasn't your  
24   responsibility. It was Dr. Green's you said?

25          A.    If the patient needs to get the CAT scan right

David Lau - Defendant - Cross - Mr. Russotti

1 away, Dr. Green would have to bring the patient to or Dr.  
2 Green would have to call the radiology technician or the  
3 radiology attending to help the patient go right away.

4 Q. Last week you told us you could do all that too,  
5 right?

6 A. Yes.

7 Q. Last week you told us that was your primary  
8 responsibility to make sure that the CAT scan got done,  
9 right?

10 A. Yes.

11 Q. So you accept the responsibility for that last  
12 week, right?

13 A. Right.

14 Q. Did something change between last week and this  
15 week, PA Lau?

16 A. No.

17 Q. Now you last said in response to your attorneys  
18 questioning that you were confused. I think you said  
19 that. You answered the question about whether or not it  
20 was a deviation from standard of care not to get this CAT  
21 scan done within 20 minutes, right? I think that is what  
22 you told your attorney?

23 A. Greater than 30 minutes.

24 Q. You were confused about that question and answer?

25 A. Yes.

David Lau - Defendant - Cross - Mr. Russotti

1 Q. That you have never been in Court before, you  
2 have never been crossed. Well that is a good thing PA  
3 Lau.

4 MR. HOLOHAN: Objection, your Honor.

5 THE COURT: Sustained.

6 Q. Now, you have had a lot of experience. You told  
7 us that you have seen thousands of minor head trauma  
8 patients in four hospitals that you worked in 14 years  
9 prior to this, right?

10 A. Right.

11 Q. So you know what the standard of care is in  
12 dealing with minor head trauma patients, right?

13 A. Yes.

14 Q. I am talking about emergency room standard of  
15 care. You know that as a PA what the standard of care is  
16 from your experience in 14 years dealing with the thousands  
17 of minor head trauma patients. You know the standard of  
18 care?

19 A. Yes, but I am not an expert.

20 Q. You know the standard of care of what a PA is  
21 supposed to do, right?

22 A. Yes.

23 Q. You have seen what doctors do in hospitals?

24 A. Right.

25 Q. With respect to minor head trauma patients?



David Lau - Defendant - Cross - Mr. Russotti

1 A. Right.

2 Q. You know minor head trauma patients what is  
3 supposed to be done right?

4 A. Yes.

5 Q. That what is what you get paid to do?

6 A. Yes.

7 Q. That is what New York Hospital is paying you to  
8 do, right?

9 A. Yes. Right.

10 Q. Now since you know what the standard of care is,  
11 then you know when there is a deviation from the standard  
12 of care, correct?

13 A. Yes.

14 Q. Now I am going to read from your testimony of  
15 last week. Page 132. You tell me what you were confused  
16 about, Line 23. PA Lau, last week PA Lau my voice is  
17 loud. I was talking very softly to you, wasn't I?

18 MR. HOLOHAN: Objection, your Honor.

19 THE COURT: Sustained.

20 Q. Page 132, Line 23.

21 QUESTION: PA Lau, wasn't it a departure from  
22 proper emergency room practice not to get this CAT  
23 scan done STAT?

24 ANSWER: From my examination she was  
25 neurologically stable. From my examination the pupils

David Lau - Defendant - Cross - Mr. Russotti

1           were equal reactive. She was conversing with me. She  
2           was moving her extremities. I mean from my  
3           examination she was neurologically stable.

4           So you understood my question, right?

5           A. Yes.

6                       (Whereupon, the following was transcribed by  
7           Official Court Reporter Nora Campisi.)

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1 Q The next question: "I understand. You told us  
2 earlier that you couldn't rule out she could have  
3 a bleed in the brain that could have killed her  
4 later that afternoon, right?

5 "Answer: Right."

6 You understood that question, didn't you?

7 A Yes.

8 Q "Question: You knew that?

9 "Answer: Yes.

10 "Question: So that was the most serious thing  
11 that this woman potentially had, right?

12 "Answer: Right."

13 You understood that question, didn't you?

14 A Yes.

15 Q "Question: Wasn't it a departure from proper  
16 emergency room practice not to get the CAT scan done  
17 within 15 minutes in this woman?

18 "Answer: You have to rephrase your question."

19 So you asked me to rephrase that, right?

20 A Okay.

21 Q Okay, and then I said: "Question: Let me  
22 rephrase it this way, you know what the standard of  
23 care in the emergency room is right, emergency room  
24 practice?

25 You said "yes," right?

1 A Yes.

2 Q Just like you said yes a couple of minutes ago,  
3 right?

4 A Right.

5 Q "Question: Wasn't this a deviation from the  
6 standard of care in a patient that, a head trauma  
7 patient with a potential bleed in her brain that could  
8 kill her, not to get this done stat, wasn't that a  
9 deviation from the standard of care?

10 "Answer: She was getting a CAT scan done."

11 You understood that question, didn't you?

12 A Yes.

13 Q And then I said: "Question: Wasn't it a  
14 deviation not to get it done stat, within 15 or  
15 20 minutes?

16 "Answer: Yes."

17 You understood that question, didn't you?

18 A Yes, possible, yes.

19 Q "It was, right?

20 Answer: Yes."

21 Two times you said to yes to that question,  
22 right, P.A. Lau?

23 A Yes.

24 Q P.A. Lau, you are an honorable man, aren't you?

25 MR. HOLOHAN: Objection, your Honor.

## Lau - Defense - Redirect

1 THE COURT: Sustained.

2 Q You took an oath to tell the truth, didn't you,

3 P.A. Lau?

4 A Yes.

5 Q You believe in that oath to tell the truth?

6 A Yes.

7 Q When you testified here last week you told us the  
8 truth, didn't you?

9 A Yes.

10 MR. RUSSOTTI: I have no further questions,  
11 thank you.

12 REDIRECT EXAMINATION

13 BY MR. HOLOHAN:

14 Q In Mrs. Diego, in this case, is -- withdrawn.

15 All of the head trauma cases you have seen, minor  
16 head trauma cases you have seen in your years of  
17 experience, Mrs. Diego fits in that experience, correct?

18 A Yes.

19 Q With her presentation to you, did this CAT scan  
20 have to be done within 30 minutes?

21 MR. RUSSOTTI: Objection to the form.

22 A No.

23 THE COURT: Overruled.

24 Q And why not?

25 A She was neurologically stable. We examined the

1 patient, what we call SOAP, subjective, what the patient  
2 tell us, objective, how we examine the patient, physical  
3 exam, vital signs, and assessment and plan. Assessment is  
4 what we think the patient had, and plan is what we are  
5 going to do.

6 MR. RUSSOTTI: I move to strike this as  
7 beyond the answer to the question.

8 THE COURT: No, motion denied.

9 A I examined the patient, patient comes in, her  
10 vital signs were stable, she was conversing with me, from  
11 reading the chart that she spoke Spanish, and probably I  
12 will say translator available, I don't have the chart in  
13 front of me, there was a translator in front of me to  
14 translate. She was moving her extremities, pupil was  
15 equal from examination, I mean she was neurologically  
16 stable, she does not require a CAT scan in 30 minutes.

17 MR. HOLOHAN: Nothing further, thank you.

18 RECROSS EXAMINATION

19 BY MR. RUSSOTTI:

20 Q How about an hour, within an hour?

21 MR. HOLOHAN: Objection, your Honor, it is  
22 beyond the scope of the examination.

23 MR. RUSSOTTI: You just --

24 THE COURT: No, overruled.

25 Q How about within an hour, is she required within

1 an hour?

2 A Sure.

3 Q Wasn't done within an hour either, was it?

4 A No.

5 Q No; that was a deviation from proper emergency  
6 room practice, correct, not to get it done within an hour?

7 MR. HOLOHAN: Objection.

8 THE COURT: Overruled.

9 Q It was, wasn't it?

10 A Possible.

11 Q You could have told this jury last week what you  
12 just said now in response to your attorney's questions,  
13 couldn't you?

14 MR. HOLOHAN: Objection, your Honor, beyond  
15 the scope of direct.

16 THE COURT: Sustained.

17 Q Did you have -- was there any pressure exerted on  
18 you to change your testimony, P.A. Lau?

19 A Absolutely not.

20 MR. RUSSOTTI: All right, I have no further  
21 questions.

22 THE COURT: You may step down, thank you.

23 (Whereupon, the witness stepped down)

24 THE COURT: You have your next witness?

25 MR. HOLOHAN: At 3:00 o'clock.