

24 Q What did you do at that point, sir?

25 A Well, I am not sure of exactly what point

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1 but --

2 Q After the rhizotomy didn't help, did you have  
3 any discussions with A1 concerning what his --

4 MR. TUMBARELLO: Objection to the form  
5 of the question.

6 THE COURT: Overruled.

7 Q After the rhizotomy did not help, did you  
8 have any discussions with A1 as to further treatment  
9 options for him?

10 A Yes, I did. I told the patient that we had  
11 tried several things, number one, to verify the origin  
12 of the pain, and I think the CAT scans and the  
13 temporary effect from the block, and I suggested that  
14 an option which potentially can benefit him would be to  
15 have a reoperation at that C-5-C-6 level to attempt  
16 again to fuse that level.

17 Q Can you share with us, sir, what that  
18 reoperation would involve?

19 A It would involve reopening the incision that  
20 had been made before, dissecting down to the spine to  
21 visualize the plate. We then have to unscrew the  
22 plate. We have special instruments that are designed  
23 to help us remove the plate.

24 We then examine the area. We want to  
25 see or want to establish for real whether there was

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1 actually any motion at that C-5-6 level. We would also  
2 look at the C-4-5 level, the one that I think is well  
3 fused. If we find that there is instability at  
4 C-5-C-6, and we are going in because we think we will,  
5 we would perform a procedure which would involve  
6 drilling out that irregular area. Basically doing a  
7 discectomy again.

8 Here we are going to be going more  
9 through fibrous tissue than actual disc material, but  
10 we would again clean that area out. We use the same  
11 distraction pins to try to open it up a little bit so  
12 we could see well. We freshen up the bone and put  
13 another piece of bone in there with the hope of again  
14 fusing.

15 We would then replace the cervical  
16 plate. We would use a new one. And it may only span  
17 that C-5-6 level. If the C-4-5 is solidly fused there  
18 is no need to go up that high. So it would be a redo,  
19 if you will, of what we had done before at the C-5-6  
20 level.

21 Q At this point as we stand here today, has  
22 Mr. Klein undergone that surgery?

23 A No, he has not.

24 Q Have you discussed the risk of that surgery  
25 with Mr. Klein?

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1 A Yes, I have.

2 Q Have you discussed with Mr. Klein the  
3 hoped-for result of that surgery?

Klein Trial Transcript, Dr. DiGiacinto.txt

4           A     Yes.

5           Q     And can you share the hoped-for result of

6     that procedure with the jury?

7           A     The hope is two-fold: One, that

8     radiographically we are able to establish a good

9     fusion. We want the pictures to look nice. But more

10    importantly, the hope is that it will significantly

11    reduce the amount of pain that the patient is having,

12    which I believe is coming from that weakness or

13    pseudarthrosis.

14          Q     Is it a realistic hope to expect that this

15    additional surgery, assuming it went well, would

16    eliminate his pain in the cervical spine?

17          A     Given the duration he has had pain, I suspect

18    there is always going to be some degree of discomfort.

19    If he has a successful two-level fusion, he doesn't

20    have a normal neck, but it should reduce it to the

21    point where it is much less of an issue than it is now

22    certainly.

23          Q     Now, sir, have you guaranteed success to

24    Mr. Klein with this procedure?

25          A     That would be impossible.

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1           Q     Why would it be impossible?

2           A     You can't guarantee success on even the

3    simplest operation in the world, whatever that would

4    be.

5                     You certainly have to worry that there

6    is a higher risk of failure to fuse in this setting

7    than there was in an initial patient. So that there is

Klein Trial Transcript, Dr. DiGiacinto.txt

8 no way to guarantee that the fusion will be successful.  
9 Thirdly, even with a successful fusion,  
10 there is no way to guarantee 100 percent, which means  
11 absolutely certain, that the pain will go away. So for  
12 two reasons you would be misleading the patient if you  
13 tried to guarantee them that.

14 Q Based on your 30 years experience as a  
15 neurosurgeon, do you think that this additional  
16 revisionary fusion would help Al Klein?

17 A I think there is a very good chance it would.

18 Q Can you give -- is that more than a  
19 50 percent chance that he would would do better with  
20 the surgery?

21 A You know, it probably is -- if I say 50/50 I  
22 may be being honest. It is more likely better than  
23 that. It certainly is well, well lower than a hundred  
24 percent but it is, you know, in the range of 50 plus  
25 percent.

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1 Q Now, sir, being a practicing neurosurgeon in  
2 the City of New York, I presume you are familiar with  
3 the costs of performing the surgeries that you perform.

4 A Generally, yes.

5 Q And the hospital costs attendant thereto?

6 A Yes.

7 Q Can you share with us what the approximate  
8 cost of the future surgery that you plan for Mr. Klein  
9 would be?

10 A It would be on the order of 60 or \$70,000.

11 Q Sir, the last time you spoke to --

12  
13 surgical and the hospital?

14 Q I am sorry, I wasn't clear.

15 A Total.

16 THE COURT: Total, about 60,000.

17 Q Sir, I believe in evidence your chart  
18 indicates that the last time you saw Mr. Klein was on  
19 5/5/08. Does that comport with your chart, sir?

20 A I believe that is correct, yes.

21 Q Can you share with us, sir, the discussion,  
22 if any, you had with Mr. Klein at that time relative to  
23 this future surgery?

24 A Well, he said he was in agony and he was very  
25 uncomfortable. He was taking a considerable amount of

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1 pain medication. And I use the term "planning surgery  
2 to treat pseudarthrosis." I can't say that any  
3 absolute final decision was made, but I strongly had  
4 the impression that Mr. Klein was deciding to go ahead  
5 with the surgery.

6 Q Now, sir, can you tell us what a prognosis  
7 is?

8 A It is an attempt to predict what will happen,  
9 looking into the future.

10 Q Sir, can you please share with the jury what  
11 your prognosis for Al Klein is within a reasonable  
12 degree of medical certainty.

13 A Before I can do that there are several  
14 assumptions I have to make.

15 My prognosis for the patient if no

Klein Trial Transcript, Dr. DiGiacinto.txt  
16 further surgery is done is that he will be in chronic  
17 pain, that he will always require pain medication to  
18 treat it and it will be incompletely treated. My  
19 prognosis for the patient if he undergoes surgery will  
20 be determined by the success of the surgery. I think  
21 there is a better than 50 percent chance that the  
22 patient will be happy he had the reoperation. It will  
23 be a better than 50 percent chance that he will have a  
24 significant reduction in the amount of discomfort he  
25 has. I don't prognosticate, I don't make the prognosis

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1 that he will have no pain. I think he will always have  
2 pain.

3 My prognosis also includes the fact that  
4 he will always have to be careful with his neck. He  
5 will have to limit activities, especially extremes of  
6 neck motion, and he should always for the rest of his  
7 life undergo ongoing physical therapy. More than  
8 likely, he will need pain medication because I again  
9 don't think that the pain will be resolved to the point  
10 that he would be off all of these things.

11 Q Is it reasonable for a patient who didn't  
12 have success the first time they had major neck surgery  
13 and who has expressed a fear of paralysis, is it  
14 reasonable for that patient to have some hesitance  
15 about going forward with an additional surgery?

16 MR. TUMBARELLO: Objection.

17 THE COURT: I am going to sustain. It  
18 calls for the operation of the mind of someone  
19 else.

Klein Trial Transcript, Dr. DiGiacinto.txt  
20 Q Has Mr. Klein expressed with you some  
21 hesitance to go forward with another surgery?  
22 MR. TUMBARELLO: Objection.  
23 THE COURT: Overruled.  
24 MR. TUMBARELLO: May we approach, your  
25 Honor?

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1 THE COURT: No.  
2 A Yes, he has expressed hesitancy.  
3 Q Can you share with us the source of that  
4 hesitation that he has told you about?  
5 A He is worried about having surgery, as he was  
6 the first time around. He is a little bit gun shy  
7 because he already had one that didn't work. And he  
8 would love to be a hundred percent sure that it can  
9 work and, as I mentioned, there is no way I can ever  
10 tell him that. He is worried about all the  
11 complications that I mentioned earlier, which are  
12 probably a little bit more potentially problems because  
13 it is a reoperation.  
14 Q Sir, do you have an opinion, to a reasonable  
15 degree of medical certainty, given either one of these  
16 two potential prognoses, whether Al Klein will require  
17 narcotic pain meds for the rest of his life?  
18 A I do have an opinion.  
19 Q And what is that opinion, sir?  
20 A That he will.  
21 Q Sir, do you have an opinion, within a  
22 reasonable degree of medical certainty, based on either  
23 one of these prognoses, the one that's pretty bleak

Klein Trial Transcript, Dr. DiGiacinto.txt  
24 where he is going to have chronic pain for the rest of  
25 his life that won't change at all and the one that you

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1 hope occurs, which is if he has the surgery --

2 THE COURT: Sustained as to phraseology.

3 MR. O'TOOLE: I am sorry, Judge. It was  
4 a terrible question. I apologize.

5 MR. TUMBARELLO: Thank you, your Honor.

6 Q Do you have an opinion, within a reasonable  
7 debris of medical certainty, using either one of these  
8 prognoses that you shared with us, whether or not Al  
9 Klein would require periodical physical therapy  
10 throughout the course of the remainder of his life?

11 A I do have an opinion.

12 Q Can you share it with us, sir?

13 A That he should undergo physiotherapy for the  
14 rest of his life.

15 Q Sir, since the fusion surgery, has Al  
16 undergone physical therapy?

17 A I believe we attempted it but it was too  
18 painful, and that pain was part of the reason we  
19 diagnosed the pseudarthrosis, so he hasn't recently.

20 Q But you think he would benefit from it;  
21 correct?

22 A At this point, no, because it causes too much  
23 pain. After a successful fusion, yes.

24 Q Sir, do you have an opinion, within a  
25 reasonable degree of medical certainty, under either

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1 one of these prognoses, whether Al would require  
2 periodic followup with a neurosurgeon for the balance  
3 of his life?

4 A I do have an opinion.

5 Q Can you share with us that opinion, sir?

6 A That he should be followed up long-term  
7 really for the rest of his life.

8 Q Sir, do you have an opinion, within a  
9 reasonable degree of medical certainty, using either  
10 one of these prognoses, whether Al will ever have a  
11 full range of motion in the cervical spine?

12 MR. TUMBARELLO: Objection, your Honor.  
13 May we approach?

14 THE COURT: Inside.

15 (The following takes place at side bar,  
16 outside the presence of the jury.)

17 MR. TUMBARELLO: I should have brought  
18 my records in, but it is my recollection that this  
19 doctor, Dr. DiGiacinto, in the reports and in the  
20 disclosure does not put in the prognosis of  
21 lifetime physical therapy, does not have a  
22 prognosis of lifetime narcotic --

23 THE COURT: Who does?

24 MR. TUMBARELLO: -- medication.

25 MR. O'TOOLE: Dr. Richter, and he is

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1 coming tomorrow morning.

2 MR. TUMBARELLO: Does not have a  
3 prognosis of lifetime neurosurgical followup, etc.  
4 All of this was not in this doctor's reports.

5 MR. O'TOOLE: I don't remember hearing  
6 an objection, Judge, at any time I was asking the  
7 questions, and that is my first position.

8 THE COURT: He is asking for, you know,  
9 a side bar on that issue.

10 MR. O'TOOLE: Pardon me?

11 THE COURT: That is why he asked for the  
12 side bar.

13 Okay. Anything else?

14 MR. O'TOOLE: No.

15 MR. TUMBARELLO: All of these things,  
16 all of these future prognoses --

17 THE COURT: You agree Richter can bring  
18 that in?

19 MR. O'TOOLE: Definitely.

20 THE COURT: So we will cut it off at  
21 that.

22 MR. O'TOOLE: I am not going to go  
23 further with the witness.

24 THE COURT: Okay. Are you almost done  
25 with him?

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1 MR. O'TOOLE: Yes, sir, I am.

2 THE COURT: Because we are going to  
3 break for lunch.

4 MR. O'TOOLE: I will finish up in three  
5 minutes, probably.

6 MR. TUMBARELLO: I can see I was a  
7 little slow on the trigger here, but I would ask  
8 for a curative instruction.

9 THE COURT: No.  
10 MR. TUMBARELLO: That the questions  
11 about future were not --  
12 THE COURT: No. No.  
13 MR. FARANDA: I join in the request.  
14 THE COURT: Not at this juncture.  
15 MR. WILSON: I join in the request.  
16 THE COURT: We are being tedious now.  
17 Inside.  
18 (The following takes place in the  
19 presence of the jury.)  
20 THE COURT: Let us continue, please.  
21 Q Doctor, can someone with a fused spine from  
22 C-4 through C-6 have a full normal range of motion?  
23 A No.  
24 MR. O'TOOLE: Thank you. I have nothing  
25 further of this witness.

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1 THE COURT: Jurors, it is ten of 1:00.  
2 We will probably break for lunch at this point.  
3 Please be back here by 2:00 o'clock.  
4 Thank you.  
5 Doctor, you can step down.  
6 (Jury leaves courtroom.)  
7 THE COURT: We will break at this time.  
8 (Luncheon recess taken.)  
9 \* \* \*  
10 (Whereupon, Susan Maydan was relieved by  
11 Stephanie Doran as official court reporter.)  
12

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

2 THE COURT: Bring the jury in, please.

3 THE COURT OFFICER: Jury entering.

4 (Whereupon, the jury enters the  
5 courtroom.)

6 THE COURT: Please be seated. Mr.  
7 Wilson, cross-examination.

8 MR. WILSON: Thank you.

9 THE COURT: Go ahead.

10 CROSS-EXAMINATION

11 BY MR. WILSON:

12 Q Good afternoon, Doctor.

13 A Good afternoon.

14 Q All right. My name is Greg Wilson. Have we  
15 ever met before?

16 A I'm not sure. I don't think so, but I could

Klein Trial Transcript, Dr. DiGiacinto.txt  
17 be wrong.

18 Q I don't think we have but if you tell me I  
19 am wrong, but I don't think I have ever met you before.

20 A No.

21 Q Doctor, I am not going to go through the  
22 whole entire thing that we did this morning with you.  
23 I will skip around. If you don't understand the  
24 context in which I am asking the question, please let  
25 me know and I will try to make it a little clearer.

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1 A Yes.

2 Q You talked about earlier what a history  
3 means and how important a history is to a doctor who is  
4 treating a patient, right? Do you remember that  
5 testimony?

6 A Yes.

7 Q And that is part of any medical doctor's  
8 examination, the past medical history, correct?

9 A Yes.

10 Q And without a history, no doctor could  
11 really assign a cause for a particular injury or  
12 illness. If the patient is unable to tell you what  
13 happened, it's very hard to tell, for a doctor to say  
14 what caused that, correct?

15 A Unless there is other information available,  
16 yes.

17 Q In the context of you meeting a patient for  
18 the first time, that's the primary way you do it,  
19 right, Doctor? You speak to the patient, say, what  
20 happened here and they tell you, correct?

21 A Yes.

22 Q And for that to be important, for that to be  
23 useful, that history, the person, the patient has to be  
24 truthful to you, right?

25 A Yes.

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1 Q All right. And you told this jury that the  
2 first time you saw Mr. Klein was in April of 2005?

3 A Correct.

4 Q And when you took a history from Mr. Klein,  
5 you asked him, have you ever been involved in  
6 surgery before, have you ever had surgery, that's one  
7 of the questions you asked?

8 A Yes.

9 Q And you found it important enough to write  
10 something in your first report about that issue, right,  
11 Doctor?

12 A Correct.

13 Q And what did you write, Doctor?

14 A Never had surgery.

15 Q Never had surgery?

16 A Correct.

17 Q Okay. Now, Doctor, I know there are a lot  
18 of records here. Have you had a chance to review some  
19 of the records regarding Mr. Klein besides the ones in  
20 your chart?

21 A Yes.

22 Q You did the surgery to Mr. Klein's neck at  
23 what hospital?

24 A St. Luke's Roosevelt, Roosevelt Division.

25 Q Okay. And looking at Plaintiff's Exhibit 18

DIGIACINTO - CROSS - WILSON

1 in evidence --

2 MR. WILSON: May I approach the  
3 witness?

4 THE COURT: Sure.

5 MR. WILSON: Thank you.

6 Q If you could take a look at that, Doctor.  
7 Can you tell our jury, after you have had an  
8 opportunity to look at that, what you are looking at?

9 A It's called a patient preanesthesia  
10 questionnaire, St. Luke's Roosevelt Hospital Center.

11 Q Is that a questionnaire that is given to all  
12 of your patients who are going to have surgery at your  
13 hospital?

14 A I believe it is, yes.

15 Q And is that particular document -- how many  
16 pages is it, Doctor?

17 A Two pages.

18 Q Can you tell me who signed that document,  
19 Doctor?

20 A It says Allison Klein.

21 Q Okay. And in the beginning of the document,  
22 Doctor, can you tell me whether there is a section  
23 relative to surgery, prior surgery?

24 A Yes.

25 Q And, Doctor, can you tell me what Mr. Klein

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1 put in that section as to whether he had had prior  
2 surgery?

3 A Under medical history, Question Number 1,  
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4 prior operations, there is a check in the "no" column.

5 Q And then how about --

6 MR. WILSON: I am sorry. I don't have  
7 a copy myself. If I could just approach,  
8 Judge.

9 THE COURT: Approach.

10 Q The next box, what does that say?

11 A Prior hospitalizations, it is checked "no."

12 Q And then there is a third box?

13 A Problems with anesthesia, "no" is checked  
14 off.

15 Q Okay. Now, Doctor, you indicated earlier  
16 that when you went ahead and did the surgery to Mr.  
17 Klein -- I could take that back if you like -- you  
18 discovered that, in fact, Mr. Klein had undergone some  
19 surgery prior to the date of your neck surgery; is that  
20 right?

21 A That's correct.

22 Q And have you ever reviewed any of the  
23 records from that surgery, the prior surgery?

24 A No, I have not.

25 Q And do you know whether or not in that prior

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1 surgery Mr. Klein had any adverse effects from  
2 anesthesiology?

3 A I don't know.

4 Q Anesthesia?

5 A I don't know.

6 Q And you indicated that perhaps after your  
7 surgery Mr. Klein had some vomiting?



8 A I think there was something about that in  
9 the chart.

10 Q Is that unusual to have some vomiting after  
11 surgery?

12 A Not terribly. It is not 50 percent of the  
13 times. It is probably a lower percentage in my  
14 experience with my patients.

15 Q About 50/50?

16 A No. Probably 10 percent, something like  
17 that.

18 Q Is one of the reasons why it's asked for in  
19 the presurgery anesthesia check list because you want  
20 to know, did this patient ever have a prior problem  
21 with anesthesia?

22 A That's primarily important for the  
23 anesthesiologist to know, not for the surgeon.

24 Q You don't want your patients on the  
25 operating room table to have a bad reaction to

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1 anesthesia, do you?

2 A But, again, that's really anesthesia  
3 territory to explore that, if there is any information  
4 that is necessary to gain.

5 Q It is important that the patient tell the  
6 anesthesiologist the truth so we don't have a bad  
7 outcome?

8 A Yes.

9 Q And can we both agree that when Mr. Klein  
10 spoke to you for the first time and told you he never  
11 had surgery, that was not true?

12 A That's correct.

13 Q Can we also say when he filled out the  
14 anesthesia questionnaire his responses were not true,  
15 Doctor?

16 A That's correct.

17 Q Doctor, did you ever have a chance to look  
18 at the hospital record immediately following this  
19 accident?

20 A I believe I have.

21 Q The one from Staten Island University  
22 Hospital?

23 A I believe I have, yes.

24 Q Okay.

25 A I do recall I have seen that, yes.

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1 Q Okay.

2 MR. WILSON: May I just approach to  
3 keep this moving?

4 THE COURT: Yes. You don't have to  
5 ask. Just do it.

6 MR. WILSON: Thank you.

7 Q I am sorry. For the record, this is  
8 Plaintiff's Exhibit 9 in evidence. Have you seen that  
9 before, Doctor?

10 A Yes. I have reread the page listed as  
11 discharge summary.

12 Q Okay. While Mr. Klein was at the hospital  
13 immediately following the motor vehicle accident, were  
14 there a number of tests that were run on him?

15 A Yes.

16 Q Can you tell our jury what tests were

17 Klein Trial Transcript, Dr. DiGiacinto.txt  
performed?

18 A Well, listed on this form, and I would have  
19 to go through the chart to be sure if this is  
20 everything, it included studies in the form of C-spine,  
21 cross-table, chest x-ray, pelvic x-ray, thoracic-lumbar  
22 spine x-ray, CT head, CT abdomen and pelvis, and  
23 cervical spine flexion/extension.

24 Q Now, Doctor, what were the results of those  
25 tests?

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1 A Report indicates all studies came back  
2 initially negative.

3 Q Did you have an opportunity to look at those  
4 films yourself?

5 A I have seen the plain x-rays of the cervical  
6 spine including flexion/extension films. I don't  
7 recall if I ever saw the CT of the head. I can't  
8 recall whether I have seen the rest of those. I know I  
9 have seen the cervical spine films.

10 Q We were told that Mr. Klein was brought to  
11 the Staten Island University Hospital because it is a  
12 trauma center. Is that your understanding?

13 A I don't know for sure.

14 Q Okay. When they say the films are initially  
15 negative, they are talking about for trauma; isn't that  
16 right?

17 A I can't answer that.

18 Q Doctor, what is a cervical spine  
19 flexion/extension study?

20 A It is an x-ray study in which the patient is  
21 asked to maintain a neutral position and bend the neck

22 forward within limits of comfort and then bend the neck  
23 backwards within limits of comfort. An x-ray is taken  
24 in each position.

25 Q In this particular case, Mr. Klein was able

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1 to do that and the film showed nothing, correct? It  
2 didn't show any damage?

3 A No major pathology was seen on the plain  
4 x-ray, that's correct.

5 Q Doctor, one more second with that and I  
6 promise I will move on.

7 A Okay.

8 Q Doctor, at the hospital can you tell whether  
9 the plaintiff was, his neck was cleared by the hospital  
10 staff?

11 A There is a statement in here which I saw.

12 Q It would be right below the studies, the  
13 next column was discontinued and her neck was cleared,  
14 correct? Neck was cleared. Didn't see anything wrong  
15 with her at that point?

16 A It says what it says. I can't go beyond  
17 that.

18 Q And the cervical collar was discontinued at  
19 the hospital, correct?

20 A Yes.

21 Q By the way, Doctor, did that discharge  
22 summary indicate whether Mr. Klein had lost  
23 consciousness at all?

24 A It states the patient denied loss of  
25 consciousness.

DIGIACINTO - CROSS - WILSON

1 Q Okay. Thank you.

2 Doctor, you testified earlier when Mr.  
3 O'Toole was asking you some questions about the June  
4 18, 2003 MRI of Mr. Klein's neck. Do you remember  
5 that?

6 A Yes.

7 Q And, again, forgive me for jumping around  
8 but I just want to keep it moving. You indicated that  
9 at C-5-C-6 there was an osteophytic ridge complex; is  
10 that correct?

11 A Correct.

12 Q And just so I am highlighting some point  
13 here, osteophytes is an overgrowth of bone?

14 A Correct.

15 Q And this takes months to years to  
16 accomplish, correct?

17 A Correct.

18 Q And also that osteophytic complex is an  
19 indicator of degenerative disease, correct?

20 A Yes.

21 Q It is also sometimes called osteoarthritis,  
22 correct?

23 A Correct.

24 Q And we know for a fact that that preexisted  
25 the motor vehicle accident on May 20, 2003, yes?

DIGIACINTO - CROSS - WILSON

1 A Correct.

2 Q Yes?

3 A Yes.

4 Q Okay. And one of the reasons why  
5 osteophytes are important is because when they are  
6 growing they can narrow the foramen. Is that the  
7 opening we talked about, correct?  
8 A Correct.  
9 Q It could put pressure on the information  
10 exiting over there?  
11 A It can.  
12 Q And it can cause pain?  
13 A Yes.  
14 Q I realize it didn't happen in every case but  
15 it can?  
16 A Correct.  
17 Q And you told us that Mr. Klein never told  
18 you that he had any prior problems, correct?  
19 A Correct.  
20 Q But he also never told you that he had  
21 surgery, did he?  
22 A Correct.  
23 Q You also indicated that the herniation that  
24 you saw at C-5-C-6 you could not with a reasonable  
25 degree of medical certainty attribute to the car

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1 accident, right?  
2 A Correct.  
3 Q That's the same level, correct me if I'm  
4 wrong, where the pseudarthrosis is?  
5 A Yes.  
6 Q Doctor, could you just tell us what  
7 scoliosis is?

8           A     It is a curvature of the spine.  
9           Q     And is that something caused by car  
10          accidents, generally, or is it something that you are  
11          born with or you develop it?  
12          A     There are a number of varieties of  
13          scoliosis. It can be long-standing; may develop over  
14          time; can be temporary if they are caused by muscle  
15          spasm; they can be chronic and totally asymptomatic.  
16          Q     And can they sometimes create pressure and  
17          wear and tear on the spine?  
18          A     It could contribute, yes.  
19          Q     And maybe even develop osteophytes over a  
20          long period of time?  
21          A     I think it might be a contributing factor,  
22          yes, over a long period of time.  
23          Q     Doctor, do you have a copy of your chart in  
24          front of you or no?  
25          A     Yes, I do.

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DIGIACINTO - CROSS - WILSON

1           Q     I will try to find it. I am going to show  
2          you this after I show counsel this.  
3                  Do you have this in the August 25, 2004  
4          report?  
5          A     Yes.  
6          Q     Just for the record, I am referring to  
7          Plaintiff's Exhibit 23 in evidence.  
8          A     I do have it in front of me.  
9          Q     Doctor, can you tell me in the second  
10          paragraph of this MRI report, do you see where it says  
11          the spinal canal is developmentally in the lower limits  
12          of normal?

13 A Yes.

14 Q What does that mean?

15 A There are standard numbers which I never  
16 recall off the top of my head, measuring what the  
17 normal space in the spinal canal is, what the caliber  
18 of the pipe is, if you will.

19 Below normal, if someone measured and found  
20 that, if you look at a chart it is less than the upper  
21 limits of normal and less than the middle limits of  
22 normal. I don't know if I could go beyond that.

23 Q And then the last sentence in this paragraph  
24 where it says, there is a mild counterclockwise  
25 rotation of the mid and upper cervical vertebral

DIGIACINTO - CROSS - WILSON

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1 bodies, do you see that?

2 A Yes.

3 Q Does that suggest a mild scoliosis?

4 A I don't know how to interpret that, sir. I  
5 don't know what they mean. Scoliosis is a curve to the  
6 side. Rotation is rotation of the spine, which can be  
7 secondary to spasm.

8 I think the rotation does not -- this  
9 description doesn't strike me as saying scoliosis. If  
10 the radiologist thought it was, the radiologist would  
11 describe scoliosis.

12 Q Doctor, if you could just go to the West  
13 Side Radiology Associates.

14 A Okay.

15 Q I will show it to you. October 12th, 2005.

16 A That will be tough to find.



17 Q This one here.  
18 A It might be easier if I read it off this.  
19 Q Let me just find it. This is it down here.  
20 Doctor, do you see that sentence where it says the head  
21 is tilted?  
22 A Yes.  
23 Q Can you just read that one sentence?  
24 A It states, AP lateral views of the cervical  
25 spine compared with the study of 7/27 again demonstrate

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DIGIACINTO - CROSS - WILSON

1 an ACDF, anterior cervical discectomy with fusion,  
2 anterior plate and screws, C-4 through C-6 with disk  
3 prosthesis. The head is again slightly tilted to the  
4 right with minimal right curve.  
5 Q Doctor is a right curve scoliosis?  
6 A It may or may not be, but also represented  
7 tilting of the head from muscle spasm.  
8 Q So it could be one or the other?  
9 A It is not described as scoliosis. I would  
10 interpret it as more being a tilt of the head secondary  
11 to spasm rather than a scoliotic curve in the neck.  
12 Q When was the first time, Doctor, that you  
13 made a differential diagnosis that the plaintiff's  
14 cervical spine had not fused? And this is subsequent  
15 to your surgery, obviously.  
16 A Yes.  
17 Q It might be March 6, 2006, but feel free to  
18 check.  
19 A That's the first time I specifically mention  
20 it in a note, that's correct, March 6, 2006.  
21 Q That's more than two years ago?

22 A Yes.

23 Q And since that time, Mr. Klein has not  
24 decided to undergo that surgery; is that correct?

25 A That's correct.

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DIGIACINTO - CROSS - WILSON

1 Q And you have had conversations with him on a  
2 couple of months throughout the two-year period where  
3 you suggested that he have surgery, correct?

4 A I don't know that I have suggested that he  
5 have surgery. I have said to him, I think that's where  
6 the problem is coming from. We need to figure out what  
7 to do about it.

8 Q When was the first time that you suggested  
9 that he have surgery?

10 A You know, the possibility of surgery came up  
11 maybe even once we firmed up the diagnosis on the CT  
12 scan. You might help me with the specific notation.

13 Q I would if I could help myself with that,  
14 Doctor.

15 A I don't see that I use the term surgery. I  
16 know I have discussed it on and off with the patient.  
17 I did see --

18 Q January 2007 --

19 A Uhm --

20 Q -- at the very end.

21 A Yes. I did say if he fails to improve he  
22 will require fusion at C-5-6. That's January 2007.

23 Q Okay.

24 A I am not sure if that's the first time we  
25 discussed it, but I think that's the first time.

DIGIACINTO - CROSS - WILSON

1 Q You have had this discussion with Mr. Klein  
2 throughout the period of March 2006?

3 This is always something that came up as a  
4 possibility and started to grow to the present time, am  
5 I right?

6 A Yes.

7 Q And throughout that period he has not been  
8 willing to undergo that, correct?

9 A That's correct.

10 Q All right. You indicated earlier that a  
11 revision of a pseudarthrosis is 50/50?

12 A It's approximately that, hopefully higher,  
13 but it's very difficult to predict when you have had  
14 one failed fusion that you might not have another.

15 Q You indicated to this jury that you have  
16 done a number of head surgeries and you have done a  
17 number of neck surgeries, right?

18 A Yes.

19 Q How many revisions of pseudarthrosis have  
20 you performed?

21 A One or two.

22 Q Okay. And what was your success rate on  
23 those?

24 A The two I can think of were both successful.

25 Q And, Doctor, did you always do those

DIGIACINTO - CROSS - WILSON

1 anteriorly through the front?

2 A If you want to attack the area that is  
3 specifically not fused, you have to do it through the

4 front. There is an alternative approach that can be  
5 used to do a fusion posteriorly which could be another  
6 option.

7 Q Doctor, does the posterior surgery have even  
8 a higher success rate according to your information?

9 A The frequency of posterior fusions is pretty  
10 high. They both have pretty high success rates.  
11 Primarily, you don't really do posterior revision  
12 fusion surgery.

13 Q Isn't it true that the success rate for that  
14 type of revision surgery is somewhere around 75 to 80  
15 percent?

16 A I don't know if I know a specific number  
17 that high. I wouldn't argue with it a whole lot,  
18 though. It could be that high.

19 Q Doctor, isn't it correct that you are  
20 convinced that the plaintiff's pseudarthrosis is  
21 causing most of his discomfort?

22 A I think it is a high probability, yes.

23 Q So if he were to choose to undergo this  
24 revision surgery and it was successful, we can assume  
25 most of his discomfort would go away?

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DIGIACINTO - CROSS - WILSON

1 MR. O'TOOLE: Objection to the form on  
2 the grounds.

3 THE COURT: Yes. Restate it, Counsel.

4 Q Within a reasonable degree of medical  
5 certainty, do you suspect if Mr. Klein would undergo  
6 revision surgery the vast majority of his discomfort  
7 would evaporate?

again.

THE COURT: Overruled.

A I don't know how to answer the question with a vast majority. The goal of successful surgery would be defined by a significant reduction in his pain. whether that meets that criteria or not, I am not sure.

Q One last question for you, I want to make sure it's clear. As long as the plaintiff chooses not to undergo this surgery, you do not recommend that he undergo physical therapy, correct?

A He can try physical therapy any time. If it hurts, he should stop it.

In the past it has made him uncomfortable. My prediction is it would make him uncomfortable. If he could do it and tolerate it, I would have him do it.

Q My question is, you would not recommend it for him?

DIGIACINTO - CROSS - FARANDA

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A No. I would recommend it if he could tolerate it.

Q But he hasn't been able to?

A That's my understanding.

Q Since he hasn't been able to would you recommend it still?

A I would recommend him to try it and stop as soon as it hurt.

MR. WILSON: Thank you, Doctor.

THE WITNESS: You are welcome.

THE COURT: Counsel?

MR. FARANDA: Thank you.

13 CROSS-EXAMINATION

14 BY MR. FARANDA:

15 Q Doctor, I represent Ms. Revolorio. I, too,  
16 have a few follow-up questions.

17 The first radiological or diagnostic review  
18 that anyone had concerning Mr. Klein's neck was at the  
19 emergency room immediately after the accident; is that  
20 correct?

21 A Yes.

22 Q Neither the emergency room staff nor you had  
23 any preaccident radiographs or CAT scans or MRIs of the  
24 plaintiff's neck, did they?

25 A No.

DIGIACINTO - CROSS - FARANDA

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1 Q Is it fair to say, then, that neither the  
2 emergency room staff nor yourself could compare the  
3 condition that you saw at the accident and later on to  
4 any preexisting films?

5 A That's correct.

6 Q And isn't it fair to say that some of the  
7 conditions which existed on the post-accident films  
8 could have existed on the preaccident films, Doctor?

9 MR. O'TOOLE: Objection, your Honor.  
10 I demand an offer of proof. He is  
11 suggesting that there are preaccident films.  
12 If he has them, let's see them.

13 THE COURT: Sustained.

14 MR. O'TOOLE: May we have an  
15 admonition?

16 THE COURT: The jury, you will

Klein Trial Transcript, Dr. DiGiacinto.txt  
disregard any comments made to preaccident  
films.

17  
18  
19 Q The first time that you saw Mr. Klein after  
20 the accident was approximately two years afterwards,  
21 correct?

22 A I believe that's correct, yes.

23 Q And when you took your history of Mr. Klein,  
24 you essentially were covering that two-year period from  
25 the time of the accident, correct?

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DIGIACINTO - CROSS - FARANDA

1 A I would say so, yes.

2 Q And looking at your chart, Doctor, do you  
3 have a notation that Mr. Klein informed you that he was  
4 suffering from unremitting pain?

5 A I don't know if he used that terminology,  
6 no.

7 Q Well, if Mr. Klein used the term unremitting  
8 pain, would you have written that down?

9 A I may or may not. I don't really quote  
10 everything the patient says.

11 Q Would you consider the word unremitting to  
12 be a significant complaint?

13 A Yes.

14 Q But you would not have written down  
15 unremitting pain if you had heard it?

16 A I may or may not have.

17 Q You don't see it in your records, do you,  
18 sir?

19 A I do not.

20 Q Did you make a notation in your records that  
21 Mr. Klein was unable to sleep, was repeatedly awakened

22 at night for the two-year period between the time of  
23 the accident and the time he gave you a history?

24 A I don't see that notation, no.

25 Q Do you have any notation in your records

DIGIACINTO - CROSS - FARANDA

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1 that Mr. Klein was totally unable to work for that  
2 two-year period between the time of the accident and  
3 the time he gave you the history?

4 MR. O'TOOLE: Objection, assumes facts  
5 not in evidence. That's not the contention.

6 THE COURT: Restate, sustained.

7 Q Do you have any information in your records  
8 indicating that Mr. Klein told you that it was  
9 impossible for him to do any work?

10 MR. O'TOOLE: Objection, your Honor.  
11 Never been contended. He knows it.

12 THE COURT: Overruled. Can you  
13 answer the question?

14 A I am not aware that the patient -- my  
15 recollection is the patient never told me that he could  
16 not work during that period of time, at least for  
17 extended periods, that I recall.

18 Q Do you have any notation in your file  
19 indicating the patient told you that he could not stand  
20 for long periods of time?

21 A No.

22 Q Do you have any notation in your history  
23 that Mr. Klein told you that he could not sit for long  
24 periods of time?

25 A No.



1 Q Do you have any notation in your file that  
2 he told you that he couldn't walk for long periods of  
3 time or for long distances?

4 A No.

5 Q So you were in the position of accepting the  
6 truthfulness of what Mr. Klein told you; is that  
7 correct?

8 A Yes.

9 Q And what he didn't tell you, you were not  
10 able to use in your diagnosis of his condition; is that  
11 correct?

12 A Correct.

13 Q Now, you became aware at some point in time  
14 that he had had a prior surgery?

15 A Correct.

16 Q Given the condition as you understood Mr.  
17 Klein's condition to be in the several years between  
18 the accident and the time that you saw him, were you  
19 surprised at that?

20 A No.

21 Q The fact that he was unwilling to undergo  
22 major surgery -- would you describe a double mastectomy  
23 as a major surgery?

24 A Without specific knowledge, I think I would.  
25 I didn't understand the question.

1 Q I am sorry. would you describe a double  
2 mastectomy surgical procedure as a major surgery,  
3 Doctor?

4 A Yes.

5 Q But you weren't surprised when you learned  
6 from Mr. Klein later on that he had had that procedure  
7 during a period of time when he was allegedly suffering  
8 from this condition?

9 A No.

10 Q Was it soon after the April 11th, 2005 first  
11 examination by you of Mr. Klein that you came to the  
12 conclusion that he required the surgery that you  
13 ultimately performed?

14 A I think we discussed that possibility or I  
15 felt that was a possibility just around that time, yes.

16 Q And do you recall Mr. Klein telling you that  
17 he was pretty convinced he was going to want to go  
18 ahead?

19 A I don't recall specifically if he said that  
20 or not. I just don't recall.

21 Q Do you have your April 11th, 2005 report,  
22 Doctor?

23 A Yes, I do.

24 Q Would you look at the last sentence, please?

25 A I did say that. I apologize, I forgot that.

DIGIACINTO - CROSS - FARANDA

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1 Q Now, you testified earlier that there were  
2 two vertebrae that you were concerned with, the C-4-C-5  
3 and C-5-C-6?

4 A Correct.

5 Q And, Doctor, it was either the C-4-C-5,  
6 C-5-C-6, which you said you couldn't relate to the  
7 accident?

8 A I said the changes seen on radiological  
9 studies seemed before the accident. I couldn't be sure  
10 which of the two levels or whether both levels were  
11 contributing to the pain syndrome that the patient  
12 suffered from.

13 What I said was the radiographic evidence  
14 made me feel that most or all of the pathology seen at  
15 C-5-C-6 predated the accident, but that does not say  
16 the same thing as the problem the patient had was or  
17 wasn't related to that level.

18 Q If the radiograph indicated to you the C-5-6  
19 pathology predated the accident --

20 A Correct.

21 Q -- if that pathology, if it had not been an  
22 accident and you had been confronted with the C-5-6  
23 pathology, would you have recommended surgery for that  
24 condition?

25 A That would depend completely on the

DIGIACINTO - CROSS - FARANDA

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1 patient's symptoms. It is not something that  
2 necessitates surgery just because it's there.

3 Q But you were not informed of whether or not  
4 there were prior symptoms there, correct?

5 A I was told there were not prior symptoms.

6 Q And you relied on that representation,  
7 correct?

8 A Correct.

9 Q You also had a second set of MRIs performed  
10 prior to the surgery?

11 A I believe --

12 Q You reviewed a second set of diagnostic  
Page 117

13 films --

14 A I think --

15 Q -- between the hospital and the surgery that  
16 you performed, correct?

17 A I believe that there were two sets of MRIs,  
18 yes, prior to the surgery, yes, both of which were done  
19 before I saw the patient.

20 Q And I recall this morning when you were  
21 testifying from those radiographic films, you described  
22 the difference between them as slight?

23 A Yes.

24 Q Since you use the word slight, couldn't you  
25 have also said that there really was not a difference

DIGIACINTO - CROSS - FARANDA

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1 from one to the other?

2 A No. I used the word slight because I  
3 thought there was a slight difference.

4 Q What does slight mean? A one percent  
5 difference, a five percent difference?

6 A One would not quantify it in that matter. I  
7 could not quantify it in that matter.

8 Q You wouldn't use a word more than slight?

9 A Correct.

10 Q That slight difference you observed could  
11 easily have been the function of a degenerative  
12 condition?

13 A Yes.

14 Q And that degenerative condition could have  
15 existed prior to this accident?

16 A Since we had two studies to compare, this

Klein Trial Transcript, Dr. DiGiacinto.txt  
17 time I have two points in time, I could say there is a  
18 change from time A and time B. You can tell the base  
19 of the two scans.

20 I have two scans to compare and say, there  
21 is a change from May 2004. I don't want to make up the  
22 dates, I apologize. I don't recall the dates.

23 The interval was around a year and there was  
24 a change. I could look at A and B and say A is here  
25 and B looks slightly worse. It is different than

DIGIACINTO - CROSS - FARANDA

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1 speculating what might have been there.

2 Q You can only speculate as to the cause of  
3 the slight change that occurred between the first and  
4 the second set, correct?

5 MR. O'TOOLE: Objection to form.

6 THE COURT: Sustained.

7 Q Aren't you unable to place a reason for this  
8 slight change from the first set to the second set,  
9 Doctor?

10 A In my mind I felt that it was progression of  
11 pathology that had been shown on the first set which  
12 had started with the accident. So I had an idea that  
13 it was a progression of something which began with the  
14 first accident and increased until the second accident.

15 Q Or began prior to the first accident?

16 A I have no information to know that, sir.

17 Q Now, you were discussing osteophytes  
18 earlier?

19 A Yes.

20 Q As a condition which takes months, sometimes  
21 years to develop?

22 A Correct.

23 Q Correct?

24 A Correct.

25 Q And if that condition continues, there is

DIGIACINTO - CROSS - FARANDA

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1 the possibility of a narrowing of the foraminal canal  
2 with the possibility of impingement on nerve endings,  
3 correct?

4 A Correct.

5 Q Where you see osteophytic changes in  
6 vertebrae, isn't it your expectation that those  
7 osteophytic changes will continue?

8 A May or may not. They can stay the same for  
9 years or they may progress.

10 Q Do you have any statistics on what that  
11 progression may be and how many it progresses and how  
12 many it doesn't?

13 A No.

14 Q But in any individual case it can progress,  
15 can it not?

16 A Correct.

17 Q Now, as far as his condition exists now,  
18 that is Mr. Klein's condition, you feel that the  
19 majority of the pain is emanating from C-5-C-6?

20 A I believe so, yes.

21 Q Was that the word you used, majority? Or  
22 did you say substantially all or most of or 95 percent?  
23 I don't quite remember your assessment.

24 A Other than saying 95 percent, which I am  
25 pretty sure I didn't, I may have used substantial or

DIGIACINTO - CROSS - FARANDA

1 majority. I think my diagnosis is a good portion of, a  
2 substantial portion of, the majority of the pain is  
3 coming from that level.

4 Q From the postoperative films that you saw --  
5 you are not focusing on C-4-C-5, are you?

6 A I am aware there is a fusion there. As I  
7 think I stated earlier, radiographically it appears  
8 that that has fused. It is still possible that that  
9 has not fused. I would only know that at the time of  
10 surgery, but my suspicion is I am not focusing on  
11 C-4-C-5.

12 Q Have you conveyed to Mr. Klein all the  
13 information you have conveyed to us today in terms of  
14 his prosthesis?

15 A I think we have discussed pretty much  
16 everything we have talked about.

17 Q On how many different occasions have you had  
18 those conversations?

19 A Three or four, probably. Something in that  
20 order.

21 Q Were you asked by Mr. Klein whether or not  
22 you had ever performed a second redo fusion, if you  
23 will?

24 A A second redo fusion?

25 Q well, you did one fusion, it didn't work.

DIGIACINTO - CROSS - TUMBARELLO

1 Have you ever expressed to him that you've done at  
2 least two other fusions where the first one failed?

3 A I don't remember if we specifically

4 discussed that. I just don't recall.

5 Q Did you ever tell him that this had happened  
6 twice before where the fusion didn't take the first  
7 time and on those two occasions you had to refuse, if  
8 you will, and it worked?

9 MR. O'TOOLE: Objection. Asked and  
10 answered.

11 THE COURT: I will let him answer.

12 A I don't recall if I did or did not.

13 Q Is it your intention to provide him with  
14 that information?

15 A I think if we get down to the point of  
16 scheduling surgery we will have an extensive discussion  
17 about all the possibilities.

18 MR. FARANDA: Thank you, sir. I have  
19 nothing further.

20 THE WITNESS: Thank you.

21 THE COURT: Counsel?

22 MR. TUMBARELLO: Thank you.

23 CROSS-EXAMINATION

24 BY MR. TUMBARELLO:

25 Q Good afternoon, Doctor.

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DIGIACINTO - CROSS - TUMBARELLO

1 A Good afternoon.

2 Q Do you know my name?

3 A I heard it, I don't recall it.

4 Q My name is Phil Tumbarello. Do you know  
5 what firm I work for?

6 A No.

7 Q I work for Mr. Wilson Elser.



8 In response to Mr. O'Toole's questions you  
9 mentioned from time to time you did consulting work  
10 with other lawyers in my firm?  
11 A Yes.  
12 Q You never did work for me?  
13 A Not to my recollection.  
14 Q The fee you are charging today, is that your  
15 customary fee if you were working for my firm or Leahey  
16 & Johnson or Block & O'Toole?  
17 A Yes, it is.  
18 Q And typically -- you mentioned today is an  
19 office day for you?  
20 A Correct.  
21 Q As opposed to other days which would be  
22 surgical days?  
23 A Correct.  
24 Q And earlier today when Mr. O'Toole was  
25 speaking to you, you indicated that you average 150 to

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DIGIACINTO - CROSS - TUMBARELLO

1 200 neck or back surgeries a year?  
2 A That's about right now, yes.  
3 Q And how many of those are fusions?  
4 A In the cervical spine we almost always do a  
5 fusion. Of the lumbar it is probably 50/50. If I said  
6 about 75 percent that would be close. It is a guess  
7 but close.  
8 Q About 75 percent of the neck and back  
9 surgeries you do involve a fusion procedure; is that  
10 correct?  
11 A I believe that's a pretty good  
12 approximation.

13 Q Then if you just do rough math, would you  
14 agree with me that you do over 100 fusion surgeries a  
15 year?

16 A Easily, yes.

17 Q You do these surgeries easily, because you  
18 are looking to obtain a positive medical benefit on  
19 behalf of your patient?

20 A That's correct.

21 Q One positive medical benefit you are seeking  
22 to obtain is alleviation of symptoms?

23 A Correct.

24 Q Primarily pain?

25 A Pain and neurological deficits.

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DIGIACINTO - CROSS - TUMBARELLO

1 Q And neurological deficits. And also it  
2 helps the patient feel better, correct?

3 A Yeah.

4 Q If it didn't make him feel better you  
5 wouldn't be doing it, right?

6 A Correct.

7 Q And of these hundred plus fusions you do a  
8 year, I think you said you have had to do two revisions  
9 of your fusions?

10 A Of cervicals, yes.

11 Q Of cervical fusions?

12 A Yes.

13 Q So if you do 100 a year, at least two  
14 revisions you have done in the last ten years; is that  
15 correct?

16 A The last three or four.

17 Q If in the last ten years you have done over  
18 100 fusions during that period of time and you've come  
19 in to revise two of them, if you have done over 100 a  
20 year for over ten years that would be over a thousand,  
21 correct?

22 A Correct.

23 Q And you have gone back on two other  
24 occasions to revise the fusion that you have done,  
25 correct?

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DIGIACINTO - CROSS - TUMBARELLO

1 A That's correct.

2 Q And if Mr. Klein agrees to have you do  
3 further surgery that would make three, correct?

4 A That's correct.

5 Q And if he does do the surgery and you go in  
6 and find what it is you've indicated you expect to  
7 find, that the fusion that was done at the C-4-C-5  
8 level took, it was successful --

9 A Yes.

10 Q -- the medical result was what you had been  
11 hoping for?

12 A The radiographic appearance is what I was  
13 hoping for, yes.

14 Q That's how you make your assessments, right?

15 A Well, I wouldn't agree completely. You can  
16 have perfectly great looking x-rays and the patient can  
17 still have terrible pain.

18 So the x-ray and CT and MRI are all  
19 important parts of it, but the most important is how  
20 the patient feels.

21 Q True. But, Doctor, in the almost three  
Page 125

22 years now since you did the surgery on Mr. Klein,  
23 you've seen Mr. Klein on a number of occasions,  
24 correct?  
25 A Correct.

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DIGIACINTO - CROSS - TUMBARELLO

1 Q And during this period of time you have  
2 ordered a number of diagnostic studies be made with  
3 respect to Mr. Klein's neck, correct?  
4 A Correct.  
5 Q And those diagnostic studies include x-rays,  
6 correct?  
7 A Correct.  
8 Q And those diagnostic studies include CT  
9 analysis, correct?  
10 A Correct.  
11 Q And those diagnostic studies include MRI  
12 analysis, correct?  
13 A Correct.  
14 Q And you've reviewed all of those diagnostic  
15 studies, correct?  
16 A Correct.  
17 Q And you have reviewed them also in  
18 consultation with your own clinical examination of Mr.  
19 Klein on the occasions when Mr. Klein has come to your  
20 office, correct?  
21 A Correct.  
22 Q And is it your opinion based on your  
23 clinical examinations of Mr. Klein and the x-rays and  
24 CT scans and the MRI studies that have been done at  
25 your behest, that the fusion surgery with respect to

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1 the cervical repair at the C-4-5 level has been  
2 successful?

3 A It appears radiographically to be  
4 successful, yes.

5 Q And radiographically is consistent -- okay.  
6 Thank you. So C-4-5 looks radiographically to have  
7 been a successful fusion?

8 A Yes.

9 Q And I think it is your testimony that your  
10 only real way to know for absolute certainty is to  
11 actually go in and look?

12 A Correct.

13 Q And if you were going in to address the  
14 issue at C-5-6, you are in the neighborhood and you  
15 will check out 4 and 5?

16 A Correct.

17 Q And now, Doctor, when was the earlier time,  
18 post-surgery, that you diagnosed the problem with the  
19 fusion surgery that you did at C-5-C-6?

20 A I think we talked about that a moment ago.

21 MR. O'TOOLE: Objection. Asked and  
22 answered, your Honor.

23 THE COURT: Yeah, it has been asked.

24 MR. TUMBARELLO: I believe I am  
25 entitled to my examination.

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1 THE COURT: You don't have to go over  
2 everything.

3 MR. TUMBARELLO: I am not going to go  
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