SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS - CIVIL TERM - PART 44

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MELIUS DANIEL,

Plaintiff,

-against-

JOHN E. BURKE,

Defendant.

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Index # 47310/97

Trial Excerpt

360 Adams Street
Brooklyn, New York 11201
May 2, 2001

B E F O R E:

HONORABLE L. PRISCILLA HALL,
Justice, and a jury.

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

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CYNTHIA AIELLO, RPR
Senior Court Reporter

(T R I A L E X C E R P T)

THE COURT: Counsel.

MS. NEUMUNZ: Yes, your Honor.

THE COURT: Call your witness.

MS. NEUMUNZ: Subject to connection, your Honor, I call Dr. Guy.

THE CLERK: Remain standing and raise your right hand.

Do you solemnly swear or affirm to tell the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Please be seated.

THE WITNESS: Okay.

THE CLERK: State your name for the record.

THE WITNESS: My name is Dr. Ali Guy, A-L-I, last name is G-U-Y.

THE CLERK: And your address?

THE WITNESS: Seven Gramercy Park, New York, New York 10003.

THE CLERK: The witness has been so sworn.

THE COURT: Counsel, you may inquire.

MS. NEUMUNZ: Thank you, your Honor.

DIRECT EXAMINATION

BY MS. NEUMUNZ:

Q Good afternoon, Dr. Guy.

A Good afternoon.

Q Doctor, are you actually licensed to practice medicine in the State of New York?

A Yes, I am.

Q Okay. Why don't you -- When did you receive the licensing?

A 1985.

Q And why don't you tell the jurors briefly your educational background?

A Medical school, I graduated from University of North-East Dominican Republic. I graduated in June of 1981.

Thereafter I did three separate residencies.

I did my first training in the field of internal medicine at Mount Sinai School of Medicine for a period of 18 months.

Then I did one year of general surgery at Cabrini Medical Center.

Then I did three years of physical medicine and rehabilitation at Mount Sinai School of Medicine.

I'm board certified in the field of physical medicine and rehabilitation. I'm the director of the department of rehabilitation medicine at Maimonides Medical Center in Brooklyn where my duties are to be in charge of

all inpatient and outpatient rehabilitative services providing teaching to the orthopedic residents, internal medicine, residents provide teaching to the students from Toreau College, both physical therapy and physician assistant students to render quality assurance to the other doctors in my department and to do other consultations to other doctors in my hospital.

I'm also in charge of the neuromuscular equipment clinic at Hospital for Joint Disease. I'm also a clinical instructor to the residents from NYU rotating through this hospital.

Q Doctor, are you board certified?

A Yes, I am.

Q What does that mean?

A Board certification is the highest degree of specialization you can obtain within your specialty. In order to be board certified in my specialty you have to fulfill the following prerequisites. You have to have training in the field other than physical medicine and rehabilitation, preferably two years in another specialty. That was met by doing internal medicine and general surgery. You have to safely complete a three year program, obtain 70 percent or higher on the yearly examinations given by the department. You then have to take your boards. Part one, which is an eight hour written

examination which covers everything from the beginning to the end. You then have to prepare for your boards part two.

You have to be in private practice for a period of no less than 18 months.

You then apply to the Mayo Clinic in Minnesota where all of the research and text books are written.

Then you take the boards -- part two of your boards, which is a half a day oral examination. They test you on principles of orthopedic neurology, interpretations of x-rays, CAT scans, MRIs, EMGs.

If you prove to these doctors that your knowledge is up to par, they pass you and give you the title of diplomate of American Board of Physical Medicine and Rehabilitation.

Q I'm just going to ask you, could you please briefly just tell us what physical medicine and rehabilitation is?

A Yes, it is a medical specialty that was founded shortly after World War II. It deals with traumatic injuries to the body. It covers the whole body, head to toe. It deals with the internal medicine organs; the heart, the lungs. It deals with birth defects. It deals with orthopedic and neurological rehabilitation. It deals

with slip and falls, traumatic injuries, neck, back, shoulder, knee problems. And it's very similar to orthopedics and neurology.

How it differs from these two specialties is orthopedic surgery concentrates on the bony system and the surgical aspect. The neurologist concentrates on central neurology which is neurology of the brain; Lou Gherrig's disease, Parkinson's.

A physiatrist, a doctor of physical medicine and rehabilitation, concentrates more on peripheral neurology, which is neurology of the nerves going into the arm, the neck, and lower back, the spinal problems. And it is very similar to orthopedics in a sense that we don't do surgery. We try to avoid surgery and we deal with muscles, nerves, and internal organs.

Q Okay. Thank you, Doctor. Now have you been deemed an expert in the courts of the State of New York, federal courts?

MR. COLLINS: Objection.

THE COURT: What's the objection?

MR. COLLINS: "Have you been deemed an expert"?

THE COURT: Yes. Has he testified as an expert?

Q Have you testified before in the courts of New

York State?

A Many times, yes.

Q Okay. Are you being compensated for your time here?

A Yes, I am.

Q If you weren't here with us what would you be doing?

A I would be seeing my patients.

Q As a result of coming here to testify what did you have to do?

A Schedule my patients to be here.

Q Okay. Now when you testified do you testify for plaintiffs, defendants?

A I testify primarily for patients I treat. I guess that would be plaintiffs. I have testified in court on a small number for defense as well.

Q Okay. All right, Doctor. Now did you -- Did you bring the file from Melius Daniel there?

A Yes.

Q If you need to refresh your recollection, please, please?

A Okay.

Q First off, can you tell us when was it that you saw Melius Daniel?

A April 9th, 1997, four days after his accident.

Q All right, Doctor. Is there -- Did you memorialize that in some manner in notes or things of that nature?

A Yep, I have a typed report of that first initial encounter.

Q Do you know who referred the patient to you?

A I have no indication in my records. I'm not sure.

Q Okay. Well, why don't you tell us what you do when a patient comes to you, what did you in this case -- in Melius Daniel's case?

A I take a history and do a physical examination. I formulate a diagnosis and treatment plan.

Q Okay. Let's go through that then.

A Okay.

Q Can you tell us, Doctor, well, medical history, what was the medical history that you received?

A That he was 28 years of age at the time. He had no prior injuries to his neck, back, or his knees.

That on April 5th, 1997, he was a passenger in the back of a van. The van was hit from the rear with a very hard impact. He injured his head, his neck, his back, and his right knee.

There was no reported loss of consciousness. He went on his own to Methodist Hospital in Brooklyn. He was treated and released. X-rays were taken. When he came

to see me he complained of headaches, localized neck pain, lower back pain with radiation into the bilateral buttock area. That was essentially the history. Then I conducted a physical exam.

Q Okay. Doctor, and how -- how important is the history actually for you?

A Well, history is very important because a doctor obtains 70 percent of his working diagnosis from the history. The remaining ten percent comes from physical exam and the remaining ten percent is confirmed by the diagnostic studies of CAT scans, MRIs and EMGs.

Q After you took the history you did a physical examination; is that correct?

A That's correct.

Q Why don't you tell us what that consisted of?

A I took his blood pressure. I took his pulse, respiration, examined his head, lungs, heart. I examined the areas of chief complaint; the right knee, the neck, and the back. The right knee was tender with crepitation, that means grinding sensation when you flex and extend the knee. There was full range of motion.

I examined the neck. It was diffusely tender. Diffuse means the whole area. There was spasm. Spasm defined as a prolonged involuntary contraction of a muscle fiber.

Q I'm going to stop you right there, Doctor. Is that something that you personally can detect?

A Yes.

Q Why don't you tell us how that is?

A Spasm is found clinically normally when you touch a normal muscle it is soft to touch. When you turn it, it is soft. It gives back and forth. When it goes into spasm it becomes hard. The fibers shorten and you lose range of motion. In his neck there was spasm. There was diffused tenderness. Range of motion was diminished to one-half of lateral rotation. That's this movement. The neck has four basic range of motions; forward flexion, backward extension, left, and right. And left and right lateral rotation, everything was normal except lateral rotation. That was diminished by 50 percent of lateral rotation.

I then examined his back. The back was diffusely tender with spasm. Range of motion was normal. In every direction except for the backward extension was one-half normal.

Whenever the backward extension is diminished, it indicates there is a probability of nerve damage or disc problem in the lower back and later on by your physical exam and diagnostic study you believe there is or isn't a problem with the discs and nerves. The rest of the examination was normal, unremarkable.

Q Doctor, what was the significance of the inability to backward extend?

A Well, as I explained, it indicates possibility of a disc problem or a nerve root problem, disc bulge or disc protrusion or disc herniation.

Q Doctor, what other exams did you do? What other tests did you do after the range of motion?

A I did a straight leg raising which was diminished. It was 75 degrees with complaints of bilateral lower back pain. Normally a 28 year old person should be able to be a 90 or 110 degree of straight leg raising so when you go to 75 degrees this is two-thirds normal. It indicates again the possibility of a problem in the lower back with the discs or the nerve roots.

So now we have two problems, two tests that indicate abnormality, loss of range of motion of backward extension and straight leg raising. The sensory exam was normal. The muscle power exam was normal as expected because it takes minimum two to three weeks for neurological deficits to manifest themselves clinically.

Q Doctor, I would like to stop you there. You've been talking about the lower spine and I would like to ask you whether or not this --

MS. NEUMUNZ: Your Honor, may I have something marked for identification?

THE COURT: Yes.

MS. NEUMUNZ: We can deem mark this plaintiff's --

THE COURT: They need something marked.

THE CLERK: This will be Plaintiff's Number 1, for Identification.

(Whereupon, a model is of the spine, so marked Plaintiff's Exhibit #1, for Identification, at this time.)

Q Doctor, would this that's been marked as Plaintiff's 1, for identification, first off, is that basically anatomically correct?

A Yes, it is.

Q And would that assist you in testifying to the jury, in your explanations?

A Yes, it would.

Q Okay. Would you please describe for the jury or explain to the jury the anatomy of the spine, the entire spine, if you can?

A Yes. First of all in the spine we have three segments. We have the first segment, the cervical spine known as the neck. Second section is the mid-back known as the thoracic spine. The lower back is known as the lumbar spine. The lumbar spine ends with the tail bone, known as the coccyx and sacrum and the cervical spine there were

seven vertebrae. Thoracic spine there are 12 vertebrae. In the lumbar spine there are five vertebrae. Each area is labeled and named according to its anatomic location. For example if I say C5-C6, it means the space between the fifth and sixth cervical vertebra. "C" stands for cervical. "L" stand for lumbar. "T" stand for thoracic. So if I said C7-T1, it means the space between the seventh cervical vertebra and the first thoracic vertebra. If I said L3-L4, it means the space between the third and the fourth.

Now between each vertebra we have a disc. The function of a disc is to serve as a shock absorber and to assist in range of motion. A disc has two components. It's analogous or similar to a jelly doughnut. It has two components outside. It is cartilage and inside it is a gelatinous material called nucleus pulposus, P-U-L-P-O-S-U-S.

Inside that gelatinous material is filled with water. That water-filled gelatinous cavity is what allows us to have this range of motion of forward flection and backward extension.

There are three abnormal conditions to a disc. The mildest form is a bulge. The most severe form is a herniation. In between is a protrusion.

The definition of a bulge means that you have

an extension of a disc or tear and it has not yet passed a disc margin. It is a partial tear of a disc.

The definition of a herniation is a complete tear of the outer fibril cartilage material with a disc material passes the disc margin and it usually goes backwards and backwards is what a nerve roots exit off the spinal cord. All of the nerves that go down our arms originate in the neck. All of the nerves that go down our leg originate in the lower back. If the pain shoots into the hip and buttock area it indicates the origin is in the lower back. The buttock is supplied between the nerve roots of L5 and S1. This is an example of a disc herniation. This should not be sticking out here. It should be in its place, not passed the disc margin.

Once it sticks out, what's behind it, it is a nerve root. It hits the nerve root. Once you have a herniation or a complete tear of a disc you have certain release of chemicals. You have the release of nitric oxide, N-I-T-R-I-C O-X-I-D-E. You have the release of prostaglandins, leukotrienes, and other inflammatory substances. These substances irritate the surrounding structures; the nerve roots, tendons, and ligaments, and cause pain. You can have nerve damage without compression just by the release of these chemicals and toxins.

So the cervical spine also has a curvature

similar to the lower back and the thoracic spine is in the exact opposite direction to the cervical and lumbar spine.

When you have a problem with the discs, sometimes you have muscle spasm and you lose the normal lordotic curvature; that is, the normal curve of the back and lower back and nerve roots exit on both sides. That's the anatomy of the spine.

Q All right, Doctor. Now you told us your examination and testing that you performed. After you completed that, what's the next thing you did for Melius?

A I started him on a course of physical therapy. I referred him to a neuropsychologist, Dr. Prodder, for neuropsychological assessment. And I saw him periodically to see how he was doing.

Q Now, neuropsychological, why was that?

A Well, because he had a closed head injury. When you have a closed head injury you have symptoms of headaches, trouble concentrating, the whole battery of symptoms and most tests are normal in a closed injury. You could do a CAT scan or MRI. It almost always comes back normal 98 percent of the times, but you still have a problem. The only way to elicit what problem is through a neuropsychological testing.

Q Doctor, I'm going to ask you to assume, and this is subject to connection, that as a result of the impact to

the rear of the pickup truck that Melius was in, that he didn't have any contact with his head, but his neck was thrown forwards and backwards. Could you please explain to the jury how you account for that in a close head injury?

A Yes, picture the brain as a jello in its container. It always would be going forwards and backwards. The brain sits in a bony skull area filled with water all its perimeter. When you have a hit from the rear, the same force that causes the flexion-extension injury forces the brain to shoot forwards and backwards. They were sharing forces on the brain, irritate the neurons on the superficial portions of the brain. And depending on what part of the brain that gets involved depends what symptoms you have.

For example, the frontal lobe causes memory and causes abstract thinking and also can cause headaches.

The occipital lobe controls vision and balance.

And the temporal lobe controls hearing and higher intellect.

So depending on what part of the brain is involved controls the symptoms. In this case the patient had very, very, very, very bad headaches. So that's usually the frontal lobe.

Q Now, Doctor, just with respect to the complaints

of the neck and the back that were given to you by Melius, I want you to assume he was sitting, subject to connection to his testimony, that he was sitting in the back of the pickup truck, that he was on the floor of the --

MR. COLLINS: Objection, Judge.

THE COURT: What's the objection?

MR. COLLINS: May we approach?

THE COURT: Surely.

(Whereupon, a bench conference was held off the record at this time.)

MS. NEUMUNZ: I withdraw the question.

Q Doctor, I want you to assume that Melius was in a vehicle, that he was sitting on the floor of the vehicle facing the rear, and that there was a tool box behind him, that he was unrestrained because he was sitting on the floor in this vehicle, that the impact as he was facing the rear of the vehicle happened to him, he was thrown forward as a result of that impact, the vehicle he was in, because stationary, was thrown forward, backward, and there was another impact to the vehicle in front.

How you account for those symptoms or the injuries that you saw in Melius when he came to you, could you please just explain that?

A Yes, usually you have a force working on a spine.

Either it is a flexion-extension injury, flexion-extension injury, or rotational force working on his spine and that's enough to cause the disc pressure to increase. When a disc pressure increases, it tears. It either tears partially or it tears completely. If it tears completely we have the herniation. If it tears partially we have the bulge. If the head also is pushed forwards and backwards with the neck, as in most cases, you get a post-concussion syndrome. The hallmark is feeling headaches, feeling tired, sometimes nausea, sometimes you have difficulty in concentration, mood swings, anxiety, depression, so on and so forth. So he had most of these symptoms.

Q Now, Doctor, and with respect to the question I just previously asked you, can you please tell me what you just told the jury about what happens to the discs? Could you tell us what happened to the ligaments and tendons in the neck and the back as a result of this type of injury?

MR. COLLINS: Objection, your Honor.

Q To this patient?

MR. COLLINS: Objection. To this patient?

Q To this patient?

A First of all, when you have spasm, spasm is a reflex posture which the body maintains to protect itself from further recurring injury. When the body goes into spasm, the muscles protect the injured area and you have a

microscopic bleeding in the muscle fibers.

It then heals over time with permanent scarring and this permanent scarring causes trigger points inside the muscle fibers. Trigger points are described as area of pinpoint tenderness with a palpable nodule caused by trauma which causes muscle fibrosis, muscle ischemia, and muscle degeneration.

Q That was in Melius; is that correct?

A That's correct.

MR. COLLINS: Objection.

THE COURT: Overruled.

Q Now, Doctor, after your examination, your referral out of the neuropsychiatrist and physical therapy, did you refer my client Melius to any other specialist or for any other diagnostic test?

A Yes.

Q In 1997?

A Yes, he was referred for MRI of the brain, the cervical spine, and the lumbar spine.

Q And when was that done, Doctor?

A He had the MRI of his brain performed on November 19th, 1997. That was normal. He had his MRI of his cervical spine and lumbar spine performed on --

MR. COLLINS: Objection.

THE COURT: Overruled.

A He had his MRI of cervical and lumbar spine performed on November 11th, 1997. The MRI of the cervical spine performed revealed three disc herniations at C5-C6, C6-C7, C7-T1 with fecal sack neurocompromised. The MRI of the lumbar spine revealed a disc bulge at L3-L4 with the left neural foraminal compromise.

Q I'm going to take you back. First all, you sent Melius for a MRI, all right, Doctor, and you received a report; is that correct?

A Yes, I did receive a report.

Q Okay. And, um, did the reports assist you in your diagnosis?

A Yes.

Q And did you rely on these reports?

A Yes, I did.

Q They were generally relied upon by other doctors in the field?

A That's correct.

Q Doctor, did you receive the MRI films?

A Yes.

Q Did you review the MRI films?

A Yes.

MS. NEUMUNZ: Your Honor, may I have something marked?

MR. COLLINS: Judge, I'm going to stipulate

that they can go into evidence.

THE COURT: All right. Then mark it as Plaintiff's 2. How many films?

THE CLERK: Four, no?

THE COURT: 2-A through 2-G.

THE CLERK: There are seven, Judge.

THE COURT: Mark it 2-A, B, C, D, E, F, and G, in evidence, on consent.

(Whereupon, MRI photograph is so marked as Plaintiff's Exhibit #2-A through 2-G, in evidence, at this time.)

Q Doctor, with respect to the --

MS. NEUMUNZ: Your Honor, may we use the shadow box?

THE COURT: Surely.

Q In the middle there, Doctor, I believe it is the one in the middle, all the way to the left -- No. No. Yes, that one -- and I would like you to look at that.

MS. NEUMUNZ: And I would like something else marked, for identification.

MR. COLLINS: Your Honor?

THE COURT: Yes.

MR. COLLINS: Can I go approach the shadow box?

THE COURT: Surely.

MR. COLLINS: Thank you.

THE CLERK: You want me to mark this for identification?

MR. COLLINS: Please.

THE COURT: This is Plaintiff's 3, for identification.

(Whereupon, photograph is so marked Plaintiff's Exhibit #3, for identification, at this time.)

Q Doctor, I would like to show you 3, for identification, and ask you if that is an enlargement of the film that you have that's marked as 2-D, an enlargement of I believe 5-1?

A That is correct.

Q Would this assist you in talking to the jury?

A Yes.

Q Okay. If you could, you use some words with respect to the herniation an of fecal sack and things of that sort?

A Yes.

Q If you would use what's now marked as 3, for identification, and just explain to the jury what the significance of that is, if any?

A Um, do you want me there?

THE CLERK: I have an easel.

MS. NEUMUNZ: Great.

THE CLERK: You can step down.

THE WITNESS: Yes.

(Whereupon, the witness exits the witness stand and stands next to Exhibit 3.)

A This is the brain. This is the spinal cord all the way down. Okay. This is the --

Q Doctor, could you move your body a little bit so everybody over here and so Mr. Collins can see?

A Okay.

MR. COLLINS: Your Honor, could we have a question?

MS. NEUMUNZ: Okay.

Q Doctor, you explained the findings of the MRI with respect to the exhibit in front of you. Can you now show the jurors where those findings are and what they represent?

A Yes. First of all the normal curvature of the neck should be concaved or look something like this, like so. As you can see, that curvature is lost. It is almost straight. This indicates severe muscle spasm. It is the first thing. This is the second vertebra, third, fourth, fifth, sixth, seventh, and the first thoracic spine begins here. This is the spinal cord. As you can see, the discs end way before -- The discs end way before the spinal cord.

They should not be in direct contact with the spinal cord. At the level of C2, they were not. At the level of C3, they were not. At the level of C4, they're not. However, once we go between C5-C6, you see small indentations on the spinal cord. That's the fecal sack. It is the membrane that covers the nerve root right when it exits the spinal cord. Here there is an indentation. Here again you see another indentation and here again another one. These are the three herniations. They are central herniations. They herniate right from the middle. The herniations can go backwards, sideways, frontways, centrally, and in this way they were going central.

Q What's the significance of going centrally?

A The symptoms could be on both sides. If it only goes on the right side backwards, shooting pain down the right side. But if it is central, you can have shooting symptoms down both sides and the problem can go from right to left.

Q Doctor, could you just comment on the hydration of the discs at this point?

A The hydration at the level of C5-C6, the three herniated levels, the hydration has diminished because once a disc herniates, the water content leaks out. Herniation is a permanent complete tear. Since it is a tear of this fibrocartilage material to the disc, it is a permanent,

irreversible injury. The disc does not have the ability to repair itself once it is torn. Bone does. Muscle does to a degree, not a disc. Fiber cartilage cannot be sutured back together, cannot be glued back together, cannot be surgically corrected back together. So it becomes a permanent injury. And once this happens the hydration of a disc diminishes and over time the disc becomes more and more desiccated. Here it is very minimally.

Q And what's the significance of that? It is minimally?

A That this was not a preexisting problem. If it was there, would have been severe desiccation or loss of a disc there would be bony osteophytes, O-S-T-E-O-P-H-Y-T-E-S. If there was bony osteophytes, it would indicate a longstanding chronic old problem. A 28 year old person should not and would not have three disc herniations and not know about it. So this was caused by some traumatic event.

Q Okay. Doctor, I want you to assume, subject to connection, that my client was in a vehicle, that the vehicle was rear ended with great force, that he was thrown forward and backward, and as I previously described for you, that initially in the hospital he did not have significant stiffness, subject to connection?

MR. COLLINS: Objection to this line, your

Honor.

THE COURT: Overruled.

Q But he appeared in your office some four, five days after the accident with the symptoms, and the complaints and any symptoms that you were able to detect. You've taken the MRI. You found the findings. I need to know within a reasonable degree of medical certainty as to whether or not those herniations that are depicted in that MRI were caused by the accident --

MS. NEUMUNZ: And I may have that reversed, your Honor. I'll do it again.

Q -- but were they caused by the accident based upon that?

A Based on the history and the physical exam, and in my opinion, yes, ma'am, they were caused by that episode.

Q I want you to further assume, that subject to connection, that my client has never had any injury to his neck before this accident and since the accident and the time this MRI, subject to connection, he never had any other trauma or injury to his neck. I now need to know, within a reasonable degree of medical certainty as to whether or not that accident caused those findings of herniations?

A Yes, based on the history, based on the physical exam findings, based on the lack of osteophytes, and based

on the lack of significant degeneration, it all points to something less than six to seven months old.

Q Now, Doctor, did you have an occasion to review -- look at the MRIs of the lumbar spine?

A Yes, I did.

THE CLERK: Should we mark this?

MS. NEUMUNZ: Oh, yeah.

THE CLERK: This is Plaintiff's 4, for identification.

(Whereupon, a MRI photograph, is so marked Plaintiff's 4, for identification, at this time.)

Q With respect to the lumbar spine, you read the results of the MRI report concerning L3-L4 and the fact that there was a bulge at that level. Doctor, I would like you to, if you can, with what has been marked as Plaintiff's 4, for identification, just, you know, show the jury what we're talking about?

A This is the sacral. That's S1, L5, L4, L3. Between L3 and L4 this disc is slightly bulging this way. And as you could see, this portion of it is lost in the picture. That's part of the bulge that is found. So there is a bulge at L3-L4. You can also see that the axial view.

Q Okay.

MS. NEUMUNZ: May I have this marked?

THE CLERK: Plaintiff's 5, for

A Standing or sitting?

Q Sitting, I guess.

(Whereupon, the witness resumes his seat on the witness stand at this time.)

Q After you initially saw my client, Melius, your patient --

A Yes.

Q -- did you formulate a diagnosis?

A The first time?

Q Yes.

A Yes.

Q All right. Why don't you tell the jurors just basically what that was?

A Multiple trauma status, post-cranial contusion, internal derangement of the cervical lumbar spine and right knee. Rule out cervical and/or lumbar disc bulge versus herniation.

Q I'm sorry. What does "rule out" mean?

A That means there is or isn't a disc problem by way of diagnostic testing.

Q Okay.

A Rule out lumbosacral radiculopathy. Radiculopathy is nerve root on -- this is injury to a nerve root, rule out nerve root damage.

Lastly, traumatic myofacial, that's damage to

the soft tissue injuries, the muscles, tender spots into two or more parts of the body, you meet the criteria, traumatic myofacial pain syndrome.

Q Melius went for therapy?

A Yes.

Q What was that for?

A To diminish pain, diminish spasm, improve his range of motion, and abolish spasm and trigger points.

Q Now did there come a time when you saw him again after the initial visit?

A Yes, he was, then he had physical therapy. He was then seen again on June 18th, 1997, and July of 1997.

Q What was the status in June of 1997?

A He still had right knee pain. He complained of lower back pain shooting down his right leg with numbness. He complained of neck pain and he was taking extra strength Tylenol for pain.

Q Okay. Now with respect to the back complaints and the shooting down the leg, what does that indicate to you, Doctor?

A A nerve root problem.

Q Is that consistent with your diagnosis?

A Yes.

Q Continue, Doctor. What were your findings in July?

A He had moderate neck and back spasm. He had numerous trigger points present. The range of motion of his neck pain was becoming normal with pain because of the physical therapy that he was getting. The right knee muscle power was three grades weaker than normal with pain and muscle tightness.

Q Okay. So this was several months after the accident you were still finding spasms; is that correct?

A Yes, this is approximately two and-a-half months after the accident.

Q All right. And when was the next time you saw him?

A He was then seen November 3rd, 1997. At that time he was complaining of constant headaches, getting worse, progressive, complaining of constant neck and lower back pain. At that time his neck revealed again tenderness, spasm, many trigger points, range of motion was one-half normal. His back revealed diffused tenderness and spasm, multiple trigger points. His range of motion was one-half normal and his straight leg raising was 90 degrees with complaints of lower back pain.

Q Now, Doctor, what are the trigger points briefly for us?

A Damage to muscle fibers, muscle fibrosis, muscle degeneration caused by trauma.

Q Doctor, when did you see him again?

A At that time he was sent for the MRI. He was seen again 11-12-97.

Q And?

A He still had the neck pain and the back pain and he still had the headaches. At that point he was given prescription for Fioricet for his headaches which was helping him somewhat and the physical exam showed his neck and back had tenderness and the spasm, but his range of motion was improving from the therapy.

Q Now, Doctor, at any point did you give Melius any exercises to do at home?

A Always from the very onset from the first therapy session every patient is shown and taught exercises to do at home.

Q And now, Doctor, did there come a time when you saw him again?

A He was then seen again on December 10th, 1997. He still had his neck and back pain. At that time the results of the MRIs were back they were discussed with the patient. He was given a stronger pain medication for his headache, Eschick Plus, and he was advised to continue with his therapy and to be scheduled for EMGs.

Q Doctor, could you tell us how a neck injury and head pain can be interrelated?

A Yes. The neck muscles start from the mid-back. The trapezius muscles start from the upper portion of your back. They go all the way up on top of the mid-head area. So if there is tightness anywhere along that area and the insertion inserts right over the occipital area and that muscle is tight, it will cause tension, contraction, headaches, and the post-concussion syndrome also causes headaches that flexion-extension injury to the neck causes headaches as well as trigger points causes headaches as well.

Q Doctor, this was how many months post-accident?

A December is about seven and-a-half months later.

Q Okay. And Doctor, continued spasm and complaints of pain, what does that indicate to you over this period of time?

A That the problem is ongoing at this point is a serious problem because it is not going away.

Q Now, Doctor, when was the next time you saw Melius?

A After December 10th, 1997, he was not seen again until 1999.

Q Okay. What -- Again briefly, if you could, just tell us what the complaints were and what your examination revealed in 1999?

A He still had his neck pain on and off. He still

had lower back pain shooting down the right leg. The pain was made worse by walking and he wanted to come back and continue therapy again because it was helping him in the past.

Q Okay. Do you know whether or not he was able to come back for therapy?

A Tell you in a second. In 1999, no, there was a question of medical coverage.

Q I guess the answer is --

A No. That's a no.

Q Now, Doctor, tell us when was -- when did you see Melius again?

A He was then seen again December 4, 2000.

Q All right. What were the complaints at that time?

A A complaint of neck pain with radiation down both his upper trapezius muscle to shoulders. He still had lower back pain and bilateral knee pain with the right knee clicking when walking fast or running. And he was still doing his home exercises.

Q Okay. Now, Doctor, what other diagnostic tests at that time did you do or have performed?

A At that point I examined him again. He still had the tenderness and the spasm. Range of motion to his neck was one-half lateral flexion. That's side bending. His back was again with tenderness and spasm and trigger

points. Range of motion was one-half normal extension. Because of the radiating pain and because of the persisting radiating pain of the neck, I scheduled him for an EMG test that was performed December 20th, 2000, and revealed bilateral --

MR. COLLINS: Objection. Did you do the EMG?

THE WITNESS: I did the EMG, yes.

MR. COLLINS: I object.

THE COURT: Step up.

(Whereupon, a bench conference was held off the record at this time.)

THE COURT: Objection overruled.

Q Doctor, could you explain to the jury the testing that you did on Melius, the EMG that you did?

A Yes, an EMG, standing for electromyography, it is similar to an EKG of the heart, only EMG checks muscle and nerve problem.

The test has three components. The first two components checks the motor and sensory branch of a nerve and the last part of the test, the actual needle EMG checks the actual nerve roots.

The first two parts you place electrodes on the patient's arms. You will stimulate various nerves in the patient's wrists and forearms to make sure the problem is not coming from the peripheral nerves, the nerves of the

hands and forearms.

In a radiculopathy the first two components are almost always normal such as is the case here. The last part I insert the tip of a small sterile needle into various muscles in the arms and neck. The bycep is a muscle supplied by nerve root from the C5-C6. And then I insert the needle into various muscles in the neck to see if there is any abnormality. Then I obtain the tracings. The right C5-C6 shows two downward spikes. These indicate positive sharp waves which are abnormal. The left C5-C6 reveals three downward spikes. These are all abnormal. Abnormal motor unit should go up, come down to midline, then straight back to midline. If it goes straight down first, this is abnormal and it indicates a nerve damage. So there was a bilateral C5-C6 surgical radiculopathy.

Q How does that relate to your prior diagnosis that the MRI made?

A It shows that the C5-C6 herniation is causing nerve root compression, nerve root damage.

Q Okay. Now, Doctor, based upon your examination and the EMG that you did, did you formulate a diagnosis?

A I did.

Q What was that? Go ahead.

A That the patient had multiple disc herniations in his neck, mainly C5-C6, C6-C7, C7-T1, bilateral C5-C6,

cervical radiculopathy, L3-L4, disc bulge status post-cranial cerebral contusion with a post-concussion syndrome and traumatic myofacial pain syndrome.

Q Now, Doctor, aside from the EMG, did Melius have any other diagnostic tests?

A Yes, ma'am, Dr. Barry Prodder performed a battery of neuropsychological tests on him.

Q Only that was earlier 1997?

A Yes.

Q I see. I'm sorry. Did you want to briefly tell us what that is?

MR. COLLINS: Object to any testing by that doctor.

MS. NEUMUNZ: I'll withdraw the question.

Q Did you receive report from the doctor?

A Yes.

Q Did you rely on the information contained in that report?

A Yes.

Q And is it -- is that report and the testing done normally one in which physicians in your field would rely on?

A Yes.

Q Did that -- Did you rely on that to assist you in formulating your diagnosis?

A Yes.

MR. COLLINS: Objection.

THE COURT: Overruled.

Q Why don't you just tell us briefly, Doctor? It is getting a little late.

A He was finding the patient was having post-concussion syndrome symptoms such as headaches, trouble concentrating, trouble sleeping, trouble getting along with his normal activities, he was anxious and slightly depressed.

Q That was in 1997; is that correct?

A That is correct.

Q Okay. I'm going to jump back to 2000 when you saw any -- Moving along, did you have another diagnostic test performed?

A Just an EMG.

Q And an MRI?

A MRI was repeated on the cervical spine.

Q And Doctor --

THE CLERK: 6-A through D, in evidence.

(Whereupon, MRI photographs are so marked 6-A through 6-D, in evidence at this time.)

THE CLERK: Plaintiff's 7 is marked for identification.

(Whereupon, an MRI photograph is so marked

Plaintiff's 7, for identification, at this time.)

Q If you could, Doctor, did you have an opportunity to look at the MRIs that were taken in December?

A Yes. Yes.

Q If you could, maybe you could come back down and explain to the jury what, if anything, has occurred to those levels of the discs that were injured as a result of the '97 accident?

A First of all, these MRI films were taken April 4th, 2001. Okay. As you could see, the normal curvature is starting to come back from a lot of therapy and home exercises. If you compare this to the old one, where is the old one?

Q It's up there.

A Thank you. Look how straight this cervical spine is. Look at this one. The curvature is starting to come back. That's the release of the muscle spasm and the improvement in range of motion. The discs that were herniated before, this is C2, C3-C4, C5-C6, C6-C7, C7-T1. You're starting to see more desiccation or more degeneration of these discs because traumatic arthritis is now setting in and the discs are wearing out faster than usual.

Q What about the sides of the disc space, Doctor, has that changed?

A Yes, it has diminished.

Q Okay. And what is that? What is the cause of that?

A The trauma -- traumatic arthritis and once a disc gets injured, the water content starts to come out over time and the disc starts to wear out faster than usual. That process is called degeneration or desiccation. It is caused by trauma.

Q So just so we understand, the discs that are dark -- that were almost dark there, that's a continued effect of the trauma?

A Yes, ma'am. As you can see, over here is a little white. In the middle here there is not. Here there is some, but these two discs are clearly dark as compared to the other discs above it. This indicates its water content has significantly leaked out.

Q Okay. How does that relate to a herniation?

A That's what a herniation looks like several months or years after an injury.

Q This was several years?

A The injuries took place in '97. So this is about four years later.

Q Okay. Is that what you expect to see knowing the injury and the type of the MRI findings on the earlier one?

A Yes.

Q Doctor, how is that process stopped?

A You cannot stop this process. You could slow it down by exercise, therapy, and medications. Okay.

Q Okay. What is the prognosis for an injury like that for the neck?

A This is a permanent injury. Over time the condition progressively and slowly worsens itself by this traumatic arthritis setting in and by this disc space becoming more and more desiccated.

Q Now with respect to the herniation and the mass effect that that is causing in those MRIs, could you just tell the jury what that indicates?

A You still have the mass effect on C7-T1. You still have some on C6-C7. The C5-C6. 2, 3, 4, 5, 6, this is C5-C6. This is C6-C7, and this is C7-T1. C7-T1 is not as bad as the other two. The other two still have a mass effect, not as much as the first time, because now the disc became shriveled up. It is not as much sticking out as it was before, but it still is sticking out.

Q Is that a competent producing cause of pain?

A Yes, once the disc is herniated or torn those chemicals continuously leak out and as long as it is touching the fecal sack it still causes pain and the EMGs that were performed in December 2000 indicates the C5-C6 were still damaged.

Q I want you to assume, Doctor, that subject to connection, that Melius actually had the stiffness and spasm that you found, his neck seemed to have gotten better for a period of time. But in the past year and-a-half, close to a year, he started having increased symptoms, subject to connection, down his -- into his shoulders and actually into one arm on the right side. I just want you to assume that within fairly recent time and based upon your examination, how do you account for that?

A This condition is subject to remissions and exacerbations. You're going to have good and bad days. Law of physics, in the cold wintery months cold contracts the muscles, makes everything more stiff. In the warm summer months heat expands, relaxes the muscles more, you have less pain. Humidity and cold water aggravates this condition. Stress aggravates this condition. Lifting, pulling, or pushing, or doing anything to stress the muscles and/or these areas causes increased pain. So depending on the time of the year, the month, the temperature, and what he is doing depends on how much he will or he will not have.

Q Thank you, Doctor. Just a few more questions to wrap this up. I would just like you to refer to the report of the radiologist for 2001, Doctor, and again, is this something that you rely upon in your diagnosis?

A I don't believe I have that report with me. I don't have that report with me.

Q Okay.

MS. NEUMUNZ: May I, your Honor?

THE COURT: Officer?

(Handing)

Q I would just like to have you address, um, the findings of the encroachment on the right neural foramina?

MR. COLLINS: Objection.

THE COURT: Repeat that.

MS. NEUMUNZ: I'll withdraw that, your Honor, then I'll rephrase it.

THE COURT: Yes.

Q Doctor, the report that you have just been handed, have you seen that report before?

A Yes.

Q Okay. And is that a report of something that you referred the patient out for?

A Yes.

Q Is that report something that you relied upon in your diagnosis?

A Yes.

Q All right. Is it customary and usual that doctors of your type would rely on an MRI report of a radiologist?

A Yes.

Q Doctor, could you discuss for us any findings with respect to the right neural foramina?

A Yes.

Q Briefly explain to the jury what that indicates with the model in front of you?

A Yes.

MR. COLLINS: Objection, your Honor, reading from a document not in evidence.

THE COURT: He's not reading. He's going to discuss it. He's not reading.

Doctor, you're not going to read from it?

THE WITNESS: No, I'm not going to read from it.

A In the MRI section in the cervical spine the space where the nerve roots exit is called neuro foramen. When this space becomes small it indicates nerve root compression. On the most recent MRI it showed narrowing of this neuro foramen on the right side at the level of C5-C6. This is the same level where the EMG performed four months earlier showed radiculopathy on both sides.

Q Okay. Doctor, with respect to the diagnosis that you made, I would like to know which elements of the diagnosis are permanent? Could you please tell us?

A All of the herniations are permanent.

Q All right. Doctor, with respect to your diagnosis

of Melius and those things that you found, and the herniations and such with respect to the cervical spine, my question to you is: Do you have an opinion within a reasonable degree of medical certainty as to whether or not those herniations constitute a permanent, partial loss --

MR. COLLINS: Objection, leading the witness.

THE COURT: Sustained.

Q Do you have an opinion within a reasonable degree of medical certainty as to whether or not the herniations that you diagnosed on your clinical observation as well as the MRI, whether or not they do or not constitute a permanent partial loss of use of a body of the spinal system?

MR. COLLINS: Objection, may we approach, your Honor?

THE COURT: Yes, ma'am.

(Whereupon, a bench conference was held off the record at this time.)

Q Doctor, do you have an opinion within a reasonable degree of medical certainty as to the significance of the findings of the herniations of the cervical level with respect to the loss at that level, if any, loss at that level?

A Yes, there are serious problems at that level as I explained earlier. Once you have a disc herniation it is a

permanent irreversible injury. This has caused trigger point. It has caused loss of lordosis, loss of the normal cervical curvature, which by the way is still diminished on the recent MRI, but it is still better than day one, loss of range of motion cause severe spasm, has caused trigger points and nerve root damage. And as of 3-5-2001, when I examined the patient most recently, he still had loss of range of motion to his cervical spine in the lateral flexion and lateral rotation. It is 50 percent normal. So this still indicates a permanent injury.

Q Okay. With respect to the loss of motion, Doctor, do you have an opinion within a reasonable degree of medical certainty as to whether or not that represents some form of limitation -- a significant limitation --

MR. COLLINS: Objection.

Q -- to my client?

THE COURT: Overruled.

A Obviously, yes, in the medical field anything that lasts for more than one year is considered permanent. Anything that causes 50 percent loss of range of motion after four years, it is considered permanent and is considered serious. A disc herniation is considered a permanent and serious injury and nerve damage is considered a permanent and serious injury especially when it is still detected four years after an injury.

Q Doctor, what can Melius expect in the future with respect to his neck?

A As time goes on the traumatic arthritic process sets in and over time this process gets progressively worse. The discs will become more and more desiccated. Osteophytes will form. They will crowd this neural foramen more. Disc space will become less and less. It will become more and more crowded and the nerve root will become more and more compressed over time as a result of this traumatic arthritis. This indicates more pain, more radiation of pain, more stiffness, more loss of range of motion.

Q And with respect to the lumbar spine, when you saw my client in 2001, what was your diagnosis with respect to the lumbar spine?

A His lumbar spine had improved, the range of motion was still one-half normal extension, but the radicular pain had stopped. There was some improvement to his lower back.

Q But what you found, is that a permanent condition?

A The loss of range of motion is permanent again after four years.

Q Okay. Now, Doctor, do you have an opinion as to whether or not -- whether or not my client would require future medical care as a result of the findings that you have told this injury?

A Absolutely, yes.

Q Okay. With respect to physician treatment, what, in your opinion, is required of my client in the future?

A He would require periodic supervision, physical therapy sessions, minimally 20 to 30 sessions person year on an as-needed basis on an ideal situation, and pain medications when it is called for, and surgical intervention is a last, last resort.

MR. COLLINS: Objection, your Honor.

THE COURT: What's the objection? Step up.

(Whereupon, a bench conference was held off the record at this time.)

Q Doctor, just to go back and make this brief. Periodic physicians approximately how many times a year?

A Minimum 12 times per year.

Q What is a fair and reasonable cost of physicians such as yourself?

MR. COLLINS: Objection.

THE COURT: Overruled.

A The cost for reexamining is approximately a hundred dollars for each visit.

Q And, Doctor, you mentioned physical therapy. What would you -- what -- I'm sorry. It is late in the day. Do you have an opinion within a reasonable degree of medical certainty as to what the requirements would be for Melius

in order to maintain as best a cervical spine and lumbar spine?

A Physical therapy is required two to three times per week for approximately four to six months. If you add that up, that would come to more than 20 to 30 visits that I mentioned earlier.

Q Okay. And, Doctor, you also mentioned that there may be, um. Well, Doctor, do you have an opinion within a reasonable degree of medical certainty knowing the progress of Melius' spine from 1997 to 2000, actually 2001, in April, knowing the progress, do you have an opinion within a reasonable degree of medical certainty as to whether or not Melius would require a future discectomy?

MR. COLLINS: Objection.

THE COURT: Step up.

(Whereupon, a bench conference was held off the record at this time.)

THE COURT: Objection sustained.

Q And, Doctor, do you have an opinion within a reasonable degree of medical certainty as to whether or not Melius would require any further diagnostic testing such as MRIs in the future?

A If his condition continues to worsen, yes, every so often two or three years he will need continued MRIs to see how the disc herniations are doing.

Q What is the fair and reasonable cost of an MRI?

MR. COLLINS: Objection.

THE COURT: Overruled.

A Approximately nine hundred to twelve-hundred dollars.

Q Okay.

MS. NEUMUNZ: Just one second, your Honor.

MS. NEUMUNZ: Thank you, your Honor. I have nothing further.

THE COURT: Mr. Collins?

MR. COLLINS: Yes, Judge. May I have a moment to look at his records, please?

THE COURT: Yes.

MS. NEUMUNZ: May we take a break, your Honor?

THE COURT: Take five minutes.

THE CLERK: Follow me, jurors.

(Whereupon, the jurors exit the courtroom and there is a brief recess at this time.)

THE CLERK: Jurors entering. Entering courtroom, jurors, please.

(Whereupon, the jury returns to the courtroom at this time.)

THE CLERK: Please be seated. All jurors present, all parties present, case on trial.

Doctor, you were previously sworn in and you are still under oath.

THE WITNESS: Yes.

CROSS EXAMINATION

BY MR. COLLINS:

Q Doctor, you were asked on direct examination who recommended the patient to you?

A That's correct.

Q You don't recall that?

A I have no indication in my notes as to who referred the patient to me, no.

Q Did you meet with plaintiff's lawyer prior to testifying?

A This young lady?

Q Yes.

A Yes.

Q Did you go over your testimony?

A She had some questions about the medical aspects. We discussed the medical aspects of the case, yes.

Q When was that?

A It was on two separate occasions, once was sometime late March, early April, and the other time was Monday, Monday night.

Q This week?

A Yes.

Q Do you realize she's working for Rubenstein & Rynecki, correct? Do you realize that?

A I don't know if she's working for him. She works for herself if I'm correct.

Q No. No. Do you know in this case -- I'm sorry.

A In this case, yes.

Q You knew of that?

A Yes.

Q And you get cases from Rubenstein & Rynecki?

A In the past I have, yes.

Q And you're not aware that you got this case from that law firm?

A I have no idea where this patient came from.

Q It did not come up in your discussion preparing for this trial?

A No. No.

Q How many patients do you get from Rubenstein & Rynecki?

A Very little.

Q Doctor, you testified that you had to schedule some patients today?

A Yes.

Q How many did you schedule?

A I have no idea. I don't go and count in the book how many patients were scheduled, but I can tell you it was

more than 10, 15 patients.

Q What are you being compensated for your testimony today?

A 3,000 for half a day until whatever time I finish and 1,000 for pre-trial preparation; altogether 4,000.

Q And does that 1,000 encompass the two visits you had with her?

A Yes. Yes.

Q You prepared reports for that law firm; did you not?

A Yes, I did.

Q Were you compensated for those reports?

A One report, yes.

Q How much were you compensated?

A 300.

Q Did you prepare more than one report?

A I did not. Just one report.

Q And the date of that report was April 9th, 1997?

A No, that's not a report. I mean it is not a narrative report. It is a defining of my initial evaluation which is always typed up.

Q Okay. How many typed up findings were made by your office?

A Typed reports?

Q Yes.

A Three.
Q And you had more than three visits with this patient, correct?
A That is correct.
Q You only had three reports. How many visits did you have?
A The patient had approximately 18 to 20 visits with me altogether including his therapy.
Q When he came to therapy did he always see you?
A No.
Q How many times would you say you saw him?
A Approximately seven to eight times.
Q Total, correct?
A Total, yes.
Q You testified this morning that you saw him, let's say, December of 1997, correct?
A What year?
Q I'm sorry, December 10th, 1997?
A Last time was in December, yes of -- of this year, '97.
Q Then you did not see him again for two full years; is that correct?
A That is correct.
Q And there was no therapy for two full years to your knowledge; is that correct?

A That is correct, yes.

Q And, Doctor, when you prepared the report in April of 1997, your narrative, correct?

A That's not a narrative.

MR. COLLINS: I strike that. The typed-written report.

A Yes.

Q What would you like to call it?

A Initial evaluation.

Q Okay. At that time did you have it, the April 9th report, in your records?

A I did.

Q You noted you did range of motion tests to all four extremities; is that correct?

A Yes.

Q The four extremities would be your two arms and two legs; is that correct?

A That is correct.

Q And all of the range of motions to his arms and legs were completely normal?

A Normal as expected.

Q And the manual motor strength testing, all normal; is that correct?

A That is correct, yes.

Q And when you did the testing of the neck, there

are four; am I right?

A Different range of motions.

Q Range of motion. Would it be safe to say that three of them were normal?

A Yes.

Q Only one that was not normal was the lateral rotation?

A Yes.

Q That was half, correct?

A That is correct.

Q And when you saw him in December of 2000 --

A Yes.

Q -- when you hadn't seen him in two years, correct?

A Three years.

MS. NEUMUNZ: Objection.

MR. COLLINS: I'll take that back.

MS. NEUMUNZ: Okay.

Q In 1997 you saw him in December, correct?

A Yes.

Q You did not see him again until 1999, correct?

A That is correct.

Q In the '99 visit did you prepare a narrative report?

A No.

Q Okay. Did you just take notes?

A Yes.
Q Can I see those notes, please?
A Yes.
Q Now did you recommend a course of treatment after this February of '99 visit?
A Can I see my note?
Q Sure.
(Handing)
A Yes.
Q What did you recommend?
A I recommended continuation of therapy twice per week.
Q Did he go for that therapy?
A No, did not.
Q That's February '99, correct?
A That is correct.
Q The last time he had therapy before that February '99 visit was when?
A Was June 24th, 1997.
Q From June 24th, 1997, to February 1999, no therapy, correct?
A That is correct.
Q Then he comes to you and you recommend therapy February 1999?
A Yes.

Q No therapy, correct?
A Correct.
Q You then had -- Did you see him again after February 1999?
A December 4th, 2000.
Q Doctor, is that in preparation for your potential testimony?
A That was just for the evaluation of the patient's complaints. He came to see me and when a patient comes to see me I don't ask, are you here for preparation of your case? He came to me with complaints of severe increased neck pain.
Q Did you go over the fact that you had seen him in February of 1999 and recommended therapy? Did you go over that?
A I sure did. Would you like to know what he said?
Q No, I don't. Did you then recommend that he go back to therapy in December?
A I did.
Q Okay. Did you continue any therapy with him?
A Yes, he did. He continued with some treatments.
Q At your office?
A Yes.
Q How many treatments did he go from December 2000 to today?

A He had two sessions.
Q Two total sessions; is that correct?
A Yes, sir, that's correct.
Q Did you supervise those sessions?
A Meaning was I there when it was going on? I was in the office, but not particularly present in that room.
Q Now, Doctor, when you did the December of 2000 visit, did you memorialize that in writing?
A That was typed up, dictated.
Q The same -- similar to what you did in the last time you did, this typed-up report was in April of 1997, correct?
A That's correct, yes.
Q You hadn't done no other typed-up reports?
A I did a medical report typed up for his MRIs.
Q Other than the summary of your visits, you made one in April of 1997 and you did one in December of 2000, correct?
A That's correct.
Q And in the area of the physical examination you did the same range of motion tests for the neck, correct?
A Which date?
Q December of 2000.
A Correct, yes.
Q The same ones you did back in April when you first

saw him?

A That is correct, yes.

Q Again, there are four tests for the neck, correct?

A Correct.

Q And after all of this time you still had the same exact findings, correct?

A No. The first time he had 50 percent normal lateral rotation. This time it is normal. What was diminished was lateral flexion.

Q But you say it is 50 percent?

A Yes.

Q The straight leg raising was still 75 percent?

A That is correct. That's been waxing and weaning from 75 to 90.

Q In 90 it would be normal?

A Correct.

Q And 75 is two-thirds of normal; is that correct?

A Correct.

Q Straight leg raising, you sit them down, you lay them down, and lift their leg?

A Correct.

Q You ask him to lift it as high as he can?

A The patient doesn't do it. I do it.

Q You lift it as high as you want?

A I lift until I feel resistance to my hands.

Q He can resist, correct?
A I feel the resistance from the tightness and the problem in his back.
Q Now when you did the range of motions for the arms and the legs?
A Yes.
Q Again in December of 2000 like you did in April of 1997?
A Yes.
Q Same thing, no problems, correct?
A It's all been normal as expected.
Q And sensation was okay?
A Sensation was diminished to pin pricking touch to both bycep areas.
Q How was his gate, normal?
A Gate has always been normal.
Q No problem walking, correct?
A No problem.
Q Now, Doctor, you took a history when he came in, correct?
A Yes.
Q Do you know what kinds of work he did when he came in?
A No, I don't know.
Q Doctor, would not an important part of a patient

history be what kind of work he does?

A That's usually not part of their history.

Q It's not -- It's not important whether he does construction?

A I did not say that.

Q Is it important?

A It can be important, yes.

Q Did you ever find out what he did for a living?

A I believe he's a student.

Q That's what you believed, correct?

A Yes.

Q You have that anywhere in your records to tell you what he does for a living?

A No, that's from my memory.

Q Doctor, how many patients do you see?

A Many patient.

Q Is he a full-time student?

A I'm not sure.

Q Let's say your memory from 1997 that he was a student?

A No, my memory is from the year 2001.

Q That he's a student in 2001?

A Correct.

Q What is your memory? Tell us where he's a student?

A I'm not sure where.
Q In 2001 did you have any memory of where he works?
A No.
Q Doctor, are you telling us you have no idea what kind of work he does or has done since April 1997, correct?
A Correct.
Q You can not tell us if he's disabled from doing the work that he used to do, correct?
A He was disabled. I wrote down, give him disability note for the first few months.
Q Do you know if he's disabled from the type of employment he used to do?
A In the early stages he was disabled from any type of work.
Q How long of a period of time?
A As of June of 1997 he was still disabled.
Q Doctor, he had no therapy from June 1997?
A He had therapy in June of 1997.
Q June '97, after this he had no therapy?
A That is correct. He showed some improvement and there was some problems with his medical coverage. He had no more medical coverage.
Q Doctor, do you know where -- how he goes to school? How he travels to your office? Do you know any of that?

A No.
Q Do you know if he drives a car?
A I don't know.
Q Do you know if he's able -- if he could be able to drive a car, turn his neck driving a car?
A Short distance, yes.
Q Do you know anything about his driving habits?
A No.
Q Do you know how he gets to your office?
A No, I see him walking in.
Q Did you ever prescribe any back brace of any kind?
A There was no indication for a back brace.
Q Any neck braces?
A No.
Q Doctor, do you know what his complaints were in the emergency room?
A Other than what he told me, no, just from by history.
Q Do you know if he made any complaints about neck pain?
A I do not know.
Q Did you ever review the emergency room record of Methodist Hospital?
A No, I did not.
Q Would it surprise you if I told you he had no neck

pain?

A No, it wouldn't surprise me. Would you like to know why?

Q No, I get to ask the questions. You give the answers.

A Okay. I just thought you wanted to know.

Q Do you know what parts of his body he x-rayed in Methodist Hospital?

A If I didn't see the hospital records, obviously I would not know that.

Q Doctor, you said that he had headaches; is that correct?

A Yes.

Q Were they started right away?

A They started when he first saw me on my initial assessment.

Q Okay. Would that be important to put in your report?

A Yes, it is in my report.

Q Doctor, look on your April 9th, 1997, report.

A Okay.

Q On the first page you have "Review of Systems"; is that correct?

A Yes.

Q Would that -- Would you have meant "Review of

Symptoms"?

A "Review of Systems" not "Symptoms".

Q But in there you put the patient complaints, right?

A Some of them. And the other ones are listed in the first two or three paragraphs.

Q And in the first two paragraphs you say he sustained injuries to his head, neck, waist, right knee, and back; is that correct?

A That's correct.

Q You don't say anything about headaches there; is that correct?

A Not in those exact words, no.

Q You say nothing about headaches; is that correct?

A That's correct.

Q So your report doesn't say anything with headaches; is that correct?

A Just that he injured his head.

Q But there is no --

A No mention of the word "headache", that is correct.

Q You testified on direct he was suffering from severe headaches; is that correct?

A Yes.

Q That's not in this report; is that correct?

A It is present in my other follow-up notes.

Q Your other follow-up notes on what day?

A I'll tell you exactly. On 11-3-97 he makes mention of severe constant headaches and he does it again on 11-12-97.

Q Now, Doctor, you stated on -- Now that's a good seven months following the accident; isn't that correct?

A Yes.

Q So your direct testimony about him suffering from severe headaches on the first visit is nowhere proven or justified in any of your records; is that correct?

A Not on my initial record, that is correct. On subsequent records, yes, it is. He received medication for it and he had an MRI for it.

Q And the MRI was normal?

A As expected, yes.

Q The first MRI that you sent him for was in November of 1997, correct?

A That's correct.

Q And it wasn't until then that he had headaches; is that correct?

A Based on my notes there is no real complaints of headaches until November 3rd, '97.

Q Now, Doctor, you talked about medication; is that correct?

A That's correct.

Q For how long a period of time did he take medication?

A I prescribed Fioricet for him on November of 1997. Then again on December 10th, 1997, helped him somewhat. He got better. Then he took Tylenol and Advil on his own over the counter.

Q That was as far as your records show in November of '97, correct?

A November and December, yes.

Q That's as far as prescription medication, those are the only two instances that you have that you prescribed any?

A That's correct.

Q You didn't prescribe any immediately following the accident; is that correct?

A That's correct.

Q Doctor, would you look at your notes for the July visit of 1997, there was a July visit the year of the accident?

A He saw one of the other doctors in my office in July of 1997, a Dr. Risby.

Q Can I see that record, please?

A Yes.

Q Is that part of your records?

A It is part of my records for an unrelated problem, for his axilla and his lump in his axilla.

Q No problem of pain for neck or back pain, correct?

A No.

Q Doctor, before that July visit, when was the last time that you saw him?

A Before July?

Q Of '97?

A June 18, 1997.

Q When was the next time you saw him?

A November 3rd.

Q Did he have other visits to your facility between July of 1997 and November of 1997?

A After July of '97 to December, no, did not.

Q Now, Doctor, I hate too belabor the point, but in June '97 he stops therapy with your office, correct?

A That's correct.

Q He shows up in July of 1997, the year of the accident, correct?

A No, he shows up in July 10, '97, and after that in November of '97.

Q Correct. And for that July visit while he's in your facility he doesn't see you, correct?

A Correct.

Q Makes no complaint of neck or back pain at that

time, correct?

A Correct.

Q Has no -- Makes no appointment for any therapy at that time or for the future, correct?

A He didn't have any therapy.

Q Okay. And until he went back to you in November 1997, no treatment of any kind?

A In my office, that's correct.

Q Now, Doctor, your history that you took of him, very important, on how this accident happened, correct?

A I didn't elaborate on how the accident happened. I elaborated on what his injuries were.

Q Is it important the mechanics on how the accident happened?

A In some cases, yes.

Q In this case was it important?

A The fact that it was important was that --

Q Was it important?

A I'm explaining your answer.

Q Yes or no, was it important, the history of how this accident happened?

A To some degree, yes, it was important.

Q Did he tell you he was sitting in a van?

A Yes.

Q Do you realize now if he was sitting in the back

of a pickup truck?

A Told me a van.

Q He did, right?

A Yes.

Q He didn't tell you he was sitting facing the traffic in the back; is that correct?

A That was not discussed.

Q He told you it was some big impact; isn't that correct?

A That's correct.

Q He told you he was able to walk around at the scene of the accident, correct?

A That was not discussed. But yes, he walked himself to Methodist Hospital, so he was able to walk.

Q He walked from the scene to Methodist Hospital?

A No, I'm saying later he walked himself into Methodist Hospital. He wasn't taken by an ambulance. He wasn't taken by anyone else. He went by his own.

Q Doctor, you sent him for MRIs, correct?

A Yes.

Q That's to a facility that you have some relationship with?

A I refer some patients to that facility, yes.

Q Do you have a financial arrangement with them?

A None whatsoever.

Q Doctor, there were MRIs done in '97 and recently, correct?

A Yes.

Q For example -- for instance --

MR. COLLINS: Strike that.

Q You did send him to a radiologist, correct, because a radiologist is an expert in reading x-rays, MRIs, CAT scans; is that correct?

A Also the MRI is a big machine for me to have in my office. It is a big machine.

Q As you testify today, you rely on the reports of the radiologist in reaching your conclusion, correct?

A To some extent I also see them and I also can read MRI films myself, but I do rely on a radiologist report, yes.

Q And, Doctor --

MR. COLLINS: Judge, can I walk up to the easel?

THE COURT: Yes.

MR. COLLINS: Thank you.

Q In looking at, for instance, the cervical MRI?

A Uh-huh.

Q Conducted in 2001, correct?

A Right.

Q The presence of the darkened images, correct?

A Right.
Q Indicate some dehydration, correct?
A That's correct.
Q And dehydration is a cause of degeneration, correct?
A It is not sign of degeneration and/or trauma.
Q And aging; is that correct?
A Yes.
Q And it would not -- And the aging process of the disc can be seen in the darkened area of the disc, correct?
A That's correct.
Q And the herniations that you saw and the radiologist saw were in this area, correct?
A Yes.
Q And these 2000 readings?
A 2001.
Q 2001, I stand corrected, show much more darkening than the ones back in 1997, correct?
A That is correct, yes.
Q What level is this?
A Which level is where?
Q I'm sorry. Right here.
A Count. The first one is C2-C3. Next one is C4, so on and so forth.
Q This level was not herniated, correct?

A Which level are you pointing to?
Q This one right here?
A C3-C4 was not herniated.
Q Right here, correct?
A That's correct.
Q Not herniated, correct?
A Correct.
Q Not herniated back in '97, correct?
A That's correct.
Q And this has darkened markedly; has it not?
A Slightly, yes.
Q Okay. This darkening? This darkening?
A Is not as darkened as the other two levels are.
Q But it is darkened?
A Slightly darkened, yes.
Q It is starting to degenerate; is that correct?
A Yes, that's correct.
Q That degeneration is occurring without regard to trauma or without regard to a tearing; is that correct?
A But there was trauma.
Q Was there -- There was no finding of a herniation or a bulge at that level; is that correct?
A At that level, correct. However --
Q I'm not finished with my question.
THE COURT: Let him finish.

A There was trauma to the entire cervical spine as you can see from the loss of the lordosis. When you have an injury to two or three disc herniations, over time you weaken the levels above it and the levels below it and Dr. Kolb found a new herniation at C4-C5 not detected previously. It shows the domino effect that once your foundation is damaged, the levels above it become more unstable and more prone to injury and/or herniation and that I'm agreeing that was also part of the whole entire spine that was injured. So that process of desiccation may affect one, two, three, four, or all of the discs because they were all injured in a cervical spine.

Q Doctor, your testimony on direct examination was that the aging process is precipitated by the tearing, the bulging, or the herniation of the discs?

A That's correct.

Q This aging process at that level is unrelated to any tearing of any discs in that area, correct?

A I cannot tell you with certainty, yes, ma'am, or no with certainty or neither can any other doctor tell you.

Q Doctor, the radiologist that read that MRI in 2001 found no herniation, no bulging at that level; is that correct?

A Correct. There is no herniation at that level.

Q That's correct, but the disc is desiccating and

degenerating at that level as we stand today?

A Slightly, yes.

Q And there is no tearing or bulging of that disc?

A That's correct.

Q And you say that the tearing and the bulging of the other discs that were herniated precipitated the aging process; is that correct?

A They --

Q Yes or no.

A I have to explain what I'm saying.

Q Yes or no.

THE COURT: You can say yes or no. If you can't say yes or no, just say so.

A I can't answer with a yes or no.

Q Okay. The bulging at the herniation found in the cervical area were minimal; is that correct?

A Which level?

Q In the generally, in the cervical area.

A Which level?

Q C5-C6.

A On which MRI? The recent one or the '97 one?

Q '97.

A Yes, that was minimal.

Q Now, Doctor, the purpose of your therapy was to help the patient; is that correct?

A The purpose of any therapy is to help a patient.

Q Was your therapy helping this patient?

A While he was getting it, yes.

Q Now, Doctor, with respect to the lumbar area, the back, how many different ranges of motion do you take the patient through?

A Same as the cervical spine.

Q That would be four, correct?

A Correct.

Q In 1997, other than the extension, the back was okay; is that correct?

A The range of motion was normal except for extension, yes.

Q And in 2001 did you take him through a range of motion of the back?

A Yes.

Q And in 2001 you had the same exact finding?

A That is correct.

Q Did you recommend any medication at that point for this patient?

A No, did not recommend medication.

Q Did you recommend any decrease in certain activities to this patient?

A I explained to him all of the do's and don'ts. Avoid stress to the neck and to the lower back.

Q Doctor, if I told you before this accident he had a job where he did lifting, bending, picking up boxes, would that not be a contributing factor to some of his back and neck problems?

A If you asked about his lower back, maybe not his neck. Lifting has no effect on your neck. If you're lifting, you're using your back muscles, arm muscles, and your leg muscles, not your neck, unless you lift with your head.

Q Doctor, but you don't know what kinds of lifting he did; is that correct?

A That's correct.

Q Because you didn't find out what kind of work he did?

A That's correct. But you could ask him.

Q And, Doctor, would the force of the impact be important?

A It can be.

Q On these types of flexion injuries?

A It can be, yes.

Q Doctor, did he make a lot of complaints to you about knee pain?

A Recent examinations, yes. And initially it was the right knee.

Q And you made no findings with respect to that,

correct?

A Anything significant, not too much.

Q And you didn't even send him for MRIs of the knee or anything because your findings were not significant enough, correct?

A Correct.

Q And, Doctor, you're aware, Doctor, that there is medical opinion that bulging discs are not normally caused by trauma, correct?

A That is not completely correct. Every case is different. It depends on the facts, depend on the age. If in a 50, 60 year old age group, yes, I'm aware of that, not in the 28 year old age group.

Q In this 28 year old man, you see evidence of -- you see evidence of aging of the spine in the cervical?

A In 2001.

Q Correct?

A Obviously so, of course, there was injury there.

Q Doctor, there is no -- there was no injury to the area I pointed to; is that correct?

A There was injury to an entire cervical spine as confirmed by the loss of lordosis and as confirmed by my clinical examination and as confirmed by loss of range of motion.

Q That type of injury has not caused the disc to

degenerate?

A Are you telling me or asking me?

Q I am asking you. Isn't that true?

A It sounded like you are telling me.

THE COURT: Don't argue, Doctor. Just answer the question.

A Again, when you have an injury, the injury is to the whole entire area. One area takes the focal point of the injury and sometimes two or more areas, but the whole cervical spine was injured.

Q Doctor, one of your premises on direct was that the tearing the herniation of the cervical disc leads to an aging process to degeneration?

A Correct. Yes.

Q And there was no -- no tearing or bulging of the disc at C2-C3?

A That is correct.

Q And that disc has begun to age; is it not true?

A That is correct, yes.

Q There is an a sign of degeneration?

A That is a sign of degeneration.

MR. COLLINS: Thank you. No further questions.

THE COURT: Redirect?

MS. NEUMUNZ: Doctor, just a few.

REDIRECT EXAMINATION

BY MS. NEUMUNZ:

Q Doctor, how do you account for the loss of --

A Lordosis.

Q How do you account for any desiccation that's occurring at a different level four years after the accident? Could you explain to the jury?

A I believe I explained it, at least I was trying to. When you have an injury to the cervical spine the whole neck gets injury. Sometimes one gets injured more than the other because that area becomes weak or the focal point and the problem extends to levels above it and below it because the C5-C6 was injured, the C6-C7 was injured, the C7-T1 was injured. The last three levels was injured. That's the foundation. So if the foundation was injured, the MRI shows also that the upper levels was injured as well.

Q And, Doctor, a whiplash injury does that?

MR. COLLINS: Objection.

MS. NEUMUNZ: I'll withdraw that, your Honor.

Your Honor, excuse me. I'm so confused. I apologize.

Q Doctor, an injury such as my client had, the forward and backward motion, can you tell me how does that relate to the trauma of the entire cervical spinal?

A Because the lower portion gets injured and the

upper portion of each of the segments gets injured. The most common level of injury in a cervical spine is the C6-C7, followed up by C5-C6, followed by C7-T1.

Q How does moisture -- How does a disc lose moisture without the herniation? Could you explain that to the jury?

A Once you have an injury to the area, the whole entire area is injured, it undergoes a degenerative process or traumatic arthritic process and the water content starts to leak out faster than usual.

Q Doctor, the injury that my client had back in 1997, was there a trauma to the disc at L3-L4?

A Yes.

Q Was there trauma to L2-L3?

A Throughout the whole entire lumbar region.

Q I want to refer very briefly to your examination in 2000. You mentioned you were asked about some findings and you referred to loss of sensation in the upper extremities. Could you just explain that finding to the jury and how it relates to the process?

MR. COLLINS: Objection.

THE COURT: Overruled.

A The loss of sensation to both biceps, that's a nerve root. The area that covers this area is the C5-C6 nerve root. That was the area that was picked up by the

EMG earlier in December, three months earlier. That's the same area that the MRI, past and present, shows problems at that level. So when you put it all together, that C5-C6 is where most of the nerve problem exists today.

Q And, Doctor, what, if any, area on the body does that encompass?

A C5-C6 controls the biceps, controls the medial or inner portion of the forearm, and part of the finger, the thumb.

Q Okay. Doctor, one more question. I want you to assume, subject to connection, that my client is going to testify, that originally he had primarily back pain and knee pain, and when he went to the hospital he didn't have any complaints with respect to his neck. That it was over the course of the next few days until he got to -- that the neck pain came about.

How do you account for that, Doctor?

A Yes, the full impact of the inflammatory process begins 24 to 48 hours later after an injury, the full tail end of it. The nerve injury shows itself no sooner than two to three weeks. It is very normal for a patient to go to the emergency room and have neck pain and knee pain and then another part of the body starts to ache. And a good example would be when boxers fight, the massive swelling is shown two to three days later, not the first few hours.

That's why boxers go into hiding after the first day until all of the swelling comes down.

Q Something I never knew. Anyway, thank you very much, Doctor. I have no further questions.

RECROSS EXAMINATION

BY MR. COLLINS:

Q Just a few questions. Doctor, you said it takes a couple of weeks for those injuries to manifest themselves?

A The nerve injury, it takes minimum two to three weeks to manifest itself, yes.

Q So if this is an April accident it would take until May, correct?

A Generally two to three weeks. Calculate the number of days it happened; April 5th, 21 days will be April 26th.

Q And by June he stopped therapy a month after that?

A He stopped therapy, yes.

Q Doctor?

A For a very good reason.

Q Doctor, when you looked at the cervical MRI done in 2001, did you say that the disc spaces, the discs were --

A Shriveled. Desiccated.

Q How about their height?

A Slightly decreased.

Q Did you say -- You did not have Dr. Kolb's report?
A I did not. I had the films.
Q You claim you didn't have it in your records?
A I didn't have the report. I had the films.
Q But you testified on direct that you saw that report?
A The attorney showed me the report and I had the films. I did not get the report at that time.
Q So today was the first time you looked at that report?
A Yes.
Q And, Doctor, did you read the report where it says the discs are of normal height, the ones she just handed to you?
A No, I'll read it careful. There says there is mild desiccation of the C5-C6 and C6-C7 discs.
Q What does the sentence before it say?
A There could be a normal height, but some desiccation.
Q What does the sentence before it say?
THE COURT: Counsel. Counsel.
A It says the discs are of normal height.
MR. COLLINS: Thank you. No further questions.
MS. NEUMUNZ: I have nothing further, your

Honor.

THE COURT: Thank you, Doctor. You may step down.

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(Whereupon, proceedings adjourned to May 3, 2001.)

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It is hereby certified that the foregoing is a true and accurate transcript of the proceedings.

CYNTHIA AIELLO

Senior Court Reporter