SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS: CIVIL TERM : PART 4

GUSTAVO TAPIA and AMPARO TAPIA : Plaintiff(s) : - against - :IND.# 3096 OWNERS CORP., SUNSHINE DAY CARE, :25724/07 MS SUNSHINE INC., AND MY SUNSHINE II. INC : Defendant(s) :

360 Adam Street
Brooklyn, New York, 11201
March 11, 2013

B E F O R E : HONORABLE DAVID B. VAUGHAN,
Justice (and a jury)

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

FOR THE PLAINTIFF:

DINKES & SCHWITZER, P.C.
112 Madison Avenue
New York, New York 10016
BY: WILLIAM SCHWITZER, ESQ.

FOR THE DEFENDANTS:

BRODY, O'CONNOR, O'CONNOR, ESQS.
1350 AVENUE OF THE AMERICAS, 24TH FLOOR
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By: SCOTT A. BRODY, ESQ.

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By: HENRI A. DEMERS, ESQ.

Nadonna Ferguson, RPR
Official Court Reporter

COURT OFFICER: Ready, judge.

THE COURT: Yes. All rise. Jurors are entering.

(Whereupon, the jury is entering the courtroom).

THE COURT: All right, counsel. Doctor, you can resume the witness stand.

MR. BRODY: We will have Dr. Merola continuing on cross-examination.

D O C T O R A N D R E W M E R O L A, after having previously been duly sworn by the Court Clerk, was examined and testified as follows:

CROSS-EXAMINATION

BY MR. BRODY:

MR. BRODY: Your honor, I just have the doctor booting that disk up and we will start once it is booted up.

THE COURT: Okay.

Q Doctor, do we have that booting up?

A Yes.

Q So while we have that booting up and before we return to where we finished when you were here last week. Let's cover some general ground.

You had testified last Monday that generally you testify about three to four times per year; is that correct?

A I would say on of an average, that is about correct.

Q Is that more or less than you testified back in say

2007, 2008, and 2009?

A I think it's an average of all of the years I have been in practice. So as a practicing surgeon for 16 years as an attending, I think it's an average of three or four times a year.

Q You had testified in 2009 that you testified about four or five times a year, that's not really inconsistent? It's just an approximation?

A It is an approximation, yes.

Q And what do you charge when you come to court?

A I charge $650 an hour.

Q Now, that is less than you said that you charge back in 2009 when you testified that you charged $750 an hour. Has your rate gone down?

A Yes. In fact one of the things we have done when I started working on my own away from the University Orthopedics is we put out a rate that's on an hourly basis depending upon what we are basically losing in the office for any given hour.

Q Now, you wrote a narrative report in this particular case in November of 2012 for Dinkes & Schwitzer; is that correct?

A Yes.

Q And what was the purpose of you writing that report?

A Well, the purpose of a narrative as requested by an attorney's office is to provide a summary of my treatment of the patient and then to answer specific questions that they may have regarding treatment prognosis, etc.

Q Do you remember what specific questions you were requested to answer with regards to Mr. Tapia?

A Not specifically but I would have to take a look at the narratives to tell you what was in there and what was answered.

Q Did you bring the narrative with you today?

A I don't have a copy of the narrative with me.

Q You brought the same file that you brought last time, correct?

A Yes.

Q Now, in a year, how many narratives reports do you write?

A In any given year, I don't know. It is hard to keep track of. I don't track the narratives so much. But, maybe seven or eight.

Q Do you track when you go to court?

A No.

Q Do you have any records that would tell you when you last testified for Mr' Schwitzer's firm?

A No.

Q Do you have any records to tell you how many different Dinkes & Schwitzer patients you have performed surgery on?

A No.

Q Do you have any records that would indicate how many patients that Dinkes & Schwitzer firm has referred to you?

A No.

Q Have you looked at your trial schedule for the next 12 months.

A I don't have a trial schedule.

Q Have you discussed with Mr. Schwitzer's firm the cases that they have coming up for trial in the next few months?

A No.

Q Do you know whether or not any of them are your patients?

A I'm sorry, I don't understand that question.

Q Do you know if any of the cases that the Dinkes & Schwitzer firm has coming up for trial involve your patients?

A I have no idea.

Q So, you are not aware that they have a case coming up for trial called is Segundo Paredes. You know Mr. Paredes, correct?

A I am not allowed to talk about patient in a public forum base on federal regulation regarding patient's privacy.

Q You know Mr. Paredes, he is your patient?

A Once again, I can't disclose any patient base information in public.

THE COURT: Counsel.

Q Okay. Do you know a Jose Dutan?

A Same answer.

Q Do you know a Santiago Dutan?

A I wish the federal government would let me talk about

my patients but there are also ethical concerns also that forbid me from talking about my patients in public.

Q You have testified in cases in involving your patients in the past, correct?

MR. SCHWITZER: Objection.

THE COURT: Sustained.

Q Are you familiar with a Alexander Janda, J-A-N-D-A?

A Was that a testimony in trial.

Q Yes?

A Then we are allowed to talk about him because that was public, yes.

Q And by the way, let me ask you this.

How many surgeries a year do you perform?

A Depending upon the year, my associates and I will do between 250 to 300.

Q I didn't ask you how many associates and you do. I asked how many you're a involved in?

A I am involved in 250 or 300 because I work with two other spine partners.

Q On how many of those surgeries do you bill?

A We bill on -- we bill on all of the surgeries that are billable.

Q I'm asking you how many surgeries in a year you participated actively?

A Between 250, to 300 on average.

Q What is the average amount you charge for the surgery that you participate in?

MR. SCHWITZER: Objection.

A Depends on the surgery.

MR. SCHWITZER: We will go back to the same problem we had with Dr. Thomas.

THE COURT: Well, I hope not.

MR. BRODY: He asked Mr. Bonomo what the average cost of a treatment was?

THE COURT: You know.

MR. BRODY: I'm fully aware of the time, Judge.

THE COURT: No problem.

Q What's the average amount, doctor?

A It depends on the surgery.

Q Do you know how many you charge to treat Mr. Tapia for his surgery?

A Once again, it depends on what codes we put into for that particular case. So we would have to look at the operative report and the coding and then the billing thereafter. So every surgery that you do is based on what are called universal billing code. Every procedure you do have a billing code. And those billing codes are billed.

Q Doctor, I'd like you to answer the following question with a yes or no. If you can't just tell me you can't.

Do you know how much you charged for the surgery that

you charged with Mr. Tapia.

A I thought I just answered the question.

Q No. You answered about the thing about code. I'm asking you whether or not you know what the dollar amount that was charged?

A I can't give you a dollar amount because it is based on coding.

Q But somebody in your office sent out a bill with all of these codes on it so that you could get paid, correct?

A When we do a surgery then we can bill on and we send out a bill, yes.

Q And on that bill, after you put all of the codes down and everything else, at the bottom there is an amount that you want somebody to pay, correct?

A That is the purpose of a bill.

Q With regards to Mr. Tapia, at the bottom of that bill, do you know what the number was, yes or no?

A I don't know what the number is off the top of my head.

Q Of course we are here for trial, right?

MR. SCHWITZER: Objection.

THE COURT: Sustained.

Q Doctor, when you treat a patient and perform surgery on them, you also see them in the hospital, correct?

A Yes.

Q Is there a billing code for that?

A No.

Q When you see the patient in your office post-operatively, is there a billing code for that?

A No. Not for the first 60 to the 90 days.

Q What about when you saw Mr. Tapia after the 60 or 90 day period, was there a billing code for that?

A Then there is an off visit code, correct.

Q Do you get paid for those office visits?

A I think so.

Q You don't actually do the billing. You out source it to another company?

A Yes.

Q Did you out source the billing for the narrative report to Mr. Schwitzer's firm as well?

MR. SCHWITZER: Objection. I mean, judge.

THE COURT: I don't know what this is all about.

MR. BRODY: I am just returning the favor.

THE COURT: Did you out source the billing? Go ahead. You can answer.

A The billing in my office is generally out sourced. So we have an office manager that handles all of the billing and charges so I can focus on being a doctor and treating patients and doing surgery.

Q And coming to court and testifying?

MR. SCHWITZER: Objection.

THE COURT: Sustained.

A I would rather not be in court.

Q Doctor, are you familiar with this book, Surgical Techniques for the spine?

A Yes.

Q This is a book that you're the editor of? Would that be a fair way to put it?

A I am an editor of that book, yes.

Q Is this an authoritative source on surgical techniques for the spine?

A No.

Q Would it be fair to say that in your 16 years of testifying you have never testified that any book is an authoritative source of anything, correct?

MR. SCHWITZER: Objection.

THE COURT: I don't know. Have you?

THE WITNESS: Have I testified?

THE COURT: He said. Did you ever recognize the book as an authoritative tool.

A No. I think that books are guides and they are not alive and they are not patients. So in that sense, they are not authoritative, no.

Q Thank you. Doctor, I am going to need your help here. This is a reproduction of the spine, correct?

A That is a model of the spine, yes.

Q And what is this bottom disc right here?
A You are pointing to a vertebral body.
Q I'm sorry. What vertebral body is that?
A That's the last vertebral body in the lumbar spine. It's the fifth vertebral body.
Q So this is the L5, correct?
A Yes.
Q And in order to know where we are going in the spine, we have watched doctors count up from here. Because this is an easy way to identify, correct?
A In most cases it is, yes.
Q So we got L5, L4, L3, L2, L1, T12, correct?
A Yes.
Q Now, L1 is the place where the plaintiff had his burst fracture, correct?
A That is where he was broken in half, yes.
Q Now, T12 is the place above it?
A Yes.
Q Do T12 and L1, do they perform similar purposes at this transition from the thoracic to the lumbar spine?
A When you say similar purposes, I'm not sure exactly what you are asking.
Q Well, in other words, because of their proximity to each other, do they take about the same amount of general wear and tear and force that the body would give us during our normal

daily activities?

A They form what is called a vertebral unit. T12 and L1, which is connected by a disc. They are at the transitional zone between the thoracic and the lumbar spine. So they share responsibilities at that particular juncture.

Q And doctor, you have treated -- just yes or no. I don't want to get for the moment the names of anybody. But you have treated other patients who have had burst fractures either at L1 or T12, correct?

A I treated fractures in the past, yes.

Q Well, I'm specifically asking about burst fractures. You have treated patients, not even if you have treated the fracture, but you have treated patients after they have had a burst fracture in the past, correct?

A Now, I have treated patients with burst fractures in the past, Yes.

Q And you have treated patients who have had burst fractures at T12 and L1 prior to your treating them, correct?

A I haven't -- I could not treat somebody prior to my treating them.

Q I'll rephrase the question. You have treated patients who, prior to your treating them, had sustained burst fractures at T12 or L1, correct?

A I'm sure I have seen patients who had burst fracture at T12 and L1, Yes.

Q Have any of those patients ever left the hospital without having fusion surgery?

A When you say burst fracture, you have to define the type of burst fracture you are talking about. And you have to talk about the fracture and its stability or instability. So we can't talk about the fracture of a burst fracture in general terms. We need to talk about it in more specific terms and relate it to a specific patient. Because generalities or just that, general.

Q You define a burst fracture as being a three-part fracture, correct?

A It's a three-column fracture.

Q Have you treated other patients who sustained a three-column fracture, I will go further. With retropulsion of parts of their fragments into the spinal canal who left the hospital without having fusion surgery, yes or no?

A Retropulsion of bone into the canal with neurological problems and impending neurological deficits are surgical indications. So we would have to look at those specific cases for me to tell you and categorize those fractures for you to give you a better answer regarding that. Because I can't give you a general answer about other patients and other treatments because I don't have every patient memorize.

Q Well, let's talk about Alexander Janda for a moment that?

A Can we bring up the records, please.

Q I will bring up your transcript. I am not allows to bring his records, but I am allowed his transcripts?

THE COURT: Do you have a question.

MR. BRODY: He asked to see this?

THE COURT: Ask a question. He didn't have to see it.

Q Did Mr. Janda sustain a burst fracture at T12? We will go one step further. Broken into eight pieces with retropulsion into the spinal canal but not undergo fusion in the hospital.

A I have to look at his record.

Q So you don't remember that even though you testified in that case, correct?

A I am sure the transcript is what the transcript is. But if you want to categorize the fracture and the number of fragments and what the treatment was, we would have to look at the films and then review them and look at that case. So I can give you the specific reasons for what it was, how many fracture fragments there were and what we did why we did.

Q You would not trust your testimony in that case?

MR. SCHWITZER: Objection.

THE COURT: Sustained.

A Testimony is not treatment.

THE COURT: I sustained the objection.

THE WITNESS: I'm sorry.

Q Doctor, did you testify in that case despite the fact that Mr. Janda did not have a fusion in the hospital that it would take ten to fifteen years before the segment below would be affected by the instability of the fracture above.

A Can I see the record.

Q Sure.

MR. SCHWITZER: He asked for a record. Not a transcript.

THE COURT: Well, I don't know. You want just the transcript of your testimony.

THE WITNESS: That is just the transcript. I have to see the records so I can tell you why we said ten to fifteen years in that specific case.

THE COURT: Okay.

Q Doctor, from the transcript of that trial February 9, 2009 specifically page 38 line two. Did you give the following testimony quote.

"QUESTION: As time goes on and he, as I said, he is 40 years old now. But as time goes on and he ages at least within the next ten to fifteen years, there will be stress at the junction between the thoracic and lumbar spine and to a reasonable likelihood that area will continue to go off of neutral alignment and become progressively more bent. And then as that happens, it will become progressively more painful. And then that process

starts to happen. That's when the surgery will be needed.

Q Was that your testimony?

A Was that what was transcribed.

Q Yes.

A So then that would be what the testimony was.

Q In that particular case, do you claim that the stress on Mr. Tapia's lower spine at segments, multiple segments away from the trauma took less than a year to degenerate to the point that they required surgery?

A Mr. Tapia's lower lumbar spine from L3 to S1 precociously and rapidly degenerated over the course of time. That is correct, Yes.

Q That is your claim, correct?

A Yes.

Q Doctor, do you have that May 28, 2007 MRI booted yet?

A I do, yes.

Q Can you bring it down to the ladies and gentlemen of the jury, please.

A Witness complies.

Q Let's try to get close. You go to the middle and I'll try to stay away to see what I'd like you to show them.

Doctor, I want to focus your attention, if you would, to L5-S1 on that film. Okay. L5 and S1 is very dark.

A Actually L5-S1 has a signal in it.

Q It also have a signal in the canal next to it?

A It has disc material behind it.
Q Now, what is that disc material?
A That is a disc.
Q Or is it disc material or is it disc osteophyte complex?
A It is disc.
Q When did that disc get into the canal?
A We don't know when all of the disc material got into the canal. We see disc in the canal because the MRI is picture in time. At this point in time that is disc in the canal.
Q Doctor, if we would have taken a film of Mr. Tapia on May 26th five minutes before his accident specifically at L5-S1 it will look essentially the same as it does now?
A The preexisting degenerative conditions that he had, which made him more susceptible to the trauma to begin with, would be there right before the accident as well as they are now, yes.
Q Now, you can measure on an MRI to a certain degree the height between the two squares that form L5 and the space below it where the L5-S1 disc sits, right?
A You can measure the space. You actually want to measure the space between L5 and S1. That's the disc space.
Q Okay. Did you do that in this case?
A I mean, the space is right there. It's there for us to look at.

Q But you didn't have, at any time, have two computers or films with L5 on the May 2007 MRI on your left and the same disc space on the right with the September 18, 2008 MRI, did you?

A I looked at the films in comparison to each other, yes.

Q When?

A When I looked at them -- for the narrative, I looked at the films.

Q So when you wrote your report to get authorization to do the surgery, you did not know --

MR. SCHWITZER: Objection to the form.

THE COURT: Ask the question.

Q When you wrote your report to get authorization to do the surgery --

MR. SCHWITZER: What report is he referring to get authorization.

MR. BRODY: I will get a date. Doctor, we can go back to the written records. You can have a seat.

THE COURT: Okay. Go ahead.

Q Do you have your records in front of you?

A Yes.

Q We will break it down into two parts.

On October 6, 2008, you reviewed the Doshi Diagnostic MRI, right?

A Yes.

Q On that date, you didn't compare the MRI to Maimonides

MRI of May of 2007, did you.

A That is not necessary for treatment.

Q In fact, you have testified in cases where you have never seen the hospital records or treatment record from prior to you seeing the patient, correct?

A When you are treating a patient, you don't always see all of the records.

Q But when you are treating a patient, it wasn't important for you to determine what conditions existed at what point and time in the past. Only what was existing when you began to treat it, correct?

A When you are treating a patient, you are treating a patient's problem. So you are doing whatever you need to do to be pertinent and necessary to help them with the problem that they have at hand.

Q So, when you wrote that there was significant nerve compression shown on that October -- I'm sorry. On that September 19, 2008 Doshi Diagnose film, you don't know if that same nerve compression appeared on that film, do you?

A It doesn't matter.

Q So your answer would be you don't know?

A My answer is, it doesn't have any baring on treatment. And the word significant is based on his clinical symptoms at the time that I am treating him.

Q Let me ask you a hypothetical question, doctor.

Suppose on may 262007 Mr. Tapia had before his accident the exact same condition that you saw on that September 18, 2008 film. Your recommendation to do surgery would have been the same, correct?

A Absolutely not. Mr. Tapia was going up and down a 20 or 25 foot ladders asymptomatically. We would never recommend surgery on a patient who is asymptomatic.

Q Excellent. But if he had the same conditions and he was symptomatic, you would have recommended surgery, correct?

A If a patient is --.

Q Yes or no?

A No. Because first you want to treat the patient conservatively. Depending upon whether they have a progressive neurological deficit.

Q Well doctor, the space between where L5-S1 disc sat, that is narrower than it would normally be, correct. Yes or no?

A Which MRI?

Q May 28, 2007?

A May 28 of 2007, he actually has a reasonable L5-S1 space for a patient of his age and occupation. I would not call that a collapse disc space. You don't see bone on bone touching, you don't see any implate changes. It is not significantly collapsing on this case.

Q You are saying it is significantly collapsed on the September 19, 2008 MRI?

A No. I am saying he had significant nerve root compression.

Q Doctor, on May 28, 2007 the reading radiologist wrote: Impingement on the right and probably on the left at L5-S1, correct.

A That's the radiologist reading. Impingement based on his measurement of what are called the lateral recesses in the neural foraminal.

Q And it is your testimony that you see on this September 18, 2008 a greater amount of impingement; is that correct?

A My testimony is that it is significant at that time because he is clinically got a syndrome of low back radiculopathy.

Q But doctor, my point is that the spaces that are depicted on the MRI are not significantly different, are they?

A My point is we haven't measured those spaces.

Q Why not?

A Why?

Q Well, let me ask you a question, doctor. As we get older, if we have a disc that's desiccated, the bone on top of it comes down, correct?

A It can, yes.

Q It started to in Mr. Tapia, did it?

A Mr. Tapia has --

Q Yes or no, had it started?

MR. SCHWITZER: Objection.

THE COURT: Relax. Take it easy.

Q I ask yes or no?

THE COURT: You don't have to get so excited about it.

Q Had it started prior to his accident, yes or no?

A Mr. Tapia had normal constitutive low back changes..

Q So someone who is 47 should have the same MRI, correct?

MR. SCHWITZER: Object to the form.

A They are not going to have the same report.

MR. BRODY: I will withdraw the question.

Q You testified last week that Mr. Tapia had mcNab spurs; is that correct?

A Yes.

Q McNab was a gentlemen that wrote an article about spurring. And that is where the name comes from?

A Yes.

Q McNab spurs are an unusual type of osteophyte, correct fight?

A No. There are usual type of osteophyte for the spine in patients who have degenerative changes.

Q Caused by abnormal spine movements, correct? That is what McNab wrote. Would you like me to give you the article?

MR. SCHWITZER: Judge.

A I don't need the article, thank you.

Q Caused by abnormal spine movements?
A Yes.
Q And they take a long time to develop?
A They can take a while to develop, yes.
Q And McNab, the whole point of his article was that these types of spurs are evidence of significant instability at the segment were the spurs develop, correct?
A That's not the significance of his article.
Q Did he write that --
MR. SCHWITZER: Objection.
THE COURT: All right.
MR. SCHWITZER: He is quoting an article not in evidence.
MR. BRODY: I will offer the McNab article in evidence, if that is --
MR. SCHWITZER: Mr. Brody knows he is not allowed to do that either.
THE COURT: No articles.
Q Did McNab write that?
THE COURT: Counsel, what are you asking him? Just ask him.
Q You identified these spurs as McNab spurs, correct?
A That's the name that we would give them, yes. To characterize them from other types of what we call spondyloarthropathy or problems with the spine. So when you are

looking at a spine and you see a McNab traction spur, you are not thinking about arthrosis spondylitis or Rheumatoid arthritis or other issues that can cause spinal problems.

Q And when McNab identified these spurs, he identified them as correlated to significant instability at the place where they are located. That's what he correlated them to, correct?

A That is not -- that's why articles are not authoritative. Because over the course of time, that is not the significant finding in the McNab article.

Q They never changed to name of somebody else who have different findings --

MR. SCHWITZER: Objection judge.

THE COURT: Sustained.

Q Doctor, do you see any evidence of a traumatic annular tear at L5 - S1.

A No.

Q Do you see any evidence of water accumulating as a result of trauma to the disc at L5-S1 on that?

A On that --

Q On that MRI?

A The MRI from.

Q May 28, 2007?

A Yes. He has a bright signal in his disc. So that bright signal on his disc is indicative of some swelling within the disc itself.

Q Can you show us what picture you are referring to?

A Sure. So, if you look at this MRI, which is on the right-hand side of the screen, you can see the fracture site as the wedge vertebral body. So we count down to the fifth lumbar vertebra, which is the last square before we get to the sacrum. The disc in between, if you look at the middle of the disc, it's gray. It is not black. It's gray because there is water inside of that disc. And there is an area that is a degenerative area because it does have a McNab traction spur on it. Now, why is the degenerative disc with McNab traction spurs? Why does it have a signal in it? Why does it have a bright signal on a T2 image. It has a bright signal on a T2 image because it was damaged at the time of the trauma. So the preexisting degenerative changes that he had here was only added upon by the trauma of having fallen about 20 feet whereby he sustained a significant injury to the L1 vertebral body, which basically broke him in half.

Q Doctor, if I look at that to the right of your bright line or your marking, it's a dark spot between that part of the disc and where the spinal column is, correct?

A I'm sorry, I don't see exactly where you are looking. If you can point it out, I can bring up the arrow and you can use arrow and the pad.

Q I can show you right there. It is dark in this area, correct?

A There is a dark cortex, if we would call it, a dark outer covering. But if you look at the signal inside the L5-S1, if you look at the gray signal, the gray signal leaves the confines of the vertebral bodies. It leaves the confines of the vertebral body into the spinal canal in the area where that dark signal is. So there is fluid. And by definition, it has to the fluid in there because this is a T2 weighted image and the cerebral spinal fluid is white. And that's water. So you know anything that is bright is water containing. So that is water in the disc leaking out into the spinal canal at L5 - S1.

Q Okay. Doctor, go up to L2/3 for a moment.

MR. SCHWITZER: Can we identify the actual frame or image that we are dealing with.

A This is the T2 image Maimonides Hospital May 28, 2007. There are multiple images so you know it is not an artifact. You can have a bright signal change in one. This is not artifact. These are multiple images. But I am at image two out of six right now.

Q If you go up to L2/3, that is a much more normal disc; is it not?

A Yes. That's a brighter signal throughout the disc, correct.

Q In the center of it, you see a little bit of the gray surrounded by a much brighter signal, correct?

A Yes.

Q And it's width is much larger than the width at L5-S1, correct?

A It has to be because of its position of the spine. So that's correct. That is the anatomical variation of the L2/3 vertebral space versus the L5-S1 vertebral space.

Q And what you see at the L5-S1 is a residual of that center gray moisture. Whereas at the L2/3, you see a relatively fully hydrated disc?

A L2, three is none degenerative disc.

BY MR. BRODY:

Q Thank you.

Now, doctor the symptoms that you referred to that made it significant for Mr. Tapia to have the surgery -- you know what, let's go back a second.

Mr. Tapia had facet arthrosis prior to the time of his accident, correct?

A Yes.

Q And he had spinal stenosis at L5-S1 prior to the time of his accident?

A He had narrowing of some of the vertebral spaces down there, yes.

Q If a doctor were to perform surgery on spinal stenosis, what is the recommended procedure?

MR. SCHWITZER: Objection.

A That is a heck of a general question.

Q So you can't tell me?

MR. SCHWITZER: Objection.

Q In your first examination of Mr. Tapia, you did a test. You called to the jury a spinal Phalen's maneuver or spinal Phalen's test?

A Yes.

Q That test is for stenosis, correct?

A That test nerves to see whether or not extra pressure on the nerves, for whatever reason that extra pressure may exist, cause the nerves to be symptomatic.

Q And a positive spinal Phalen's maneuver suggest spinal stenosis, correct.

A It suggest nerve root compression during an extension maneuver of the lumbar spine.

Q Doctor, counsel has shown this jury on numerous occasions an X-ray report or an exam report of Dr. Kaisman where he refers to the L1 fracture as nearly total collapse. Have you seen that report?

A We have actually seen the X-rays as well.

Q Now, you did an X-ray examination of him on his first visit of the June 14, 2008, correct.

A Yes.

Q What did you write your findings were on that X-ray?

A Give me the date, please.

Q Your first exam, I believe, is June 9, 2008?

A Correct. So what I had wrote that the X-ray showed pedicle screw rod implant with fixation of L1, compression fracture with some mild kyphosis.

Q Thank you. And you did an X-ray the next time he came in on July 14, 2008; is that correct?

A Yes.

Q And on that X-ray, did you note that the rods, screw and implants were intact?

A Yes.

Q Doctor, once you had done X-rays on June 9th of 2008 and again on July 14, 2008, were Dr. Kaisman's X-rays necessary for you to review in the future?

A Yes. In fact, I use them when I ask did the operation.

Q Were they more informative than your X-rays?

A Yes. They showed us some progressive collapse at that L1 vertebral body.

Q And your X-rays did not show it?

A They didn't show significant collapse. Because those X-rays were taken in close proximity to each other. Kaisman x-rays were taken a little bit time afterwards.

Q No, weren't Kaisman's x-rays taken before?

A Can we check the date.

Q Yes, let's do that. Let me read to you. May 15, 2008. X-rays of the lumbar spine including oblique show there is almost total collapse of the L1 vertebrae which has worsened over time.

Patient clearly needs re-due spinal fusion. The patient is being referred to Dr. Merola for evaluation along with the copy of the X-ray films?

A Yes. They had been done before hand. And that's one of the reason he referred him to me.

Q So they weren't done after. And that's not the reason why your X-ray didn't show anything, correct?

A My X-rays were taken in close proximity.

MR. SCHWITZER: Objection to the form. Didn't show anything.

THE COURT: Sustained.

Q Doctor, where are those X-rays?

A Which X-rays?

Q The ones you took in June of 2008 and July of 2008?

A Those are with University Orthopedics.

Q Is there any reason why they are not here?

MR. SCHWITZER: We are going to approach because you and I discussed this before.

THE COURT: You want to ask me if it's okay.

MR. SCHWITZER: You Mr. Brody, please step up.

(At which time, there was an off-the-record discussion held)

Q Now, Dr. Merola, you reviewed Dr. Kaisman's records, correct?

A Yes.

Q So, you were aware that before Mr. Tapia's MRI Dr. Kaisman found at each exam that the plaintiff had normal sensation in the L5-S1 distribution, correct?

A Can I see the records, please.

Q Certainly. You don't remember them?

MR. SCHWITZER: Objection.

THE COURT: All right. Sustained.

Q Let's walk through them a little.

A Yes.

Q Just so I understand. 10/25 of 2007, is there an exam?

A The first exam is June 21st of 2007. And he has decreased sensation of the entire right lower extremity.

Q I asked you a specific question on a specific date. Did you hear the question?

A June 21, 2007.

Q Is that what I asked you?

THE COURT: All right. Ask it again,.

Q Doctor, you have testified many times?

A Yes -- well, many, I don't know if I would characterize it as many. I would like to go back to three to four a year.

Q Have you testified before?

A Yes.

THE COURT: Counsel, why waste time. Just ask the question.

Q Was there an exam on October 25, 2007?

A There is an exam from October 25, 2007.
Q We are now five months post-surgery, correct?
A Yes.
Q Did Dr. Kaisman find the plaintiff to have normal sensation of the lower extremities?
A Relatively to his first examination, yes.
Q Did he any where in that exam reference pain or spasm at L4/5 or L5-S1?
A He tells me that he has pain and spasm from T10 to L4. That's drawing out a map of the entire back from the thoracic area all the way down to the low back area. So, yes, he has pain and spasm in his lower back.
Q But he didn't include L5-S1 and he would know what that is, correct?
A You don't have it. You are not saying L5-S1 is painful. You are saying just the level at which the muscle spasm is palpated.
Q He didn't palpate any at L5-S1?
MR. SCHWITZER: Objection to what Dr. Kaisman did. Let him bring Dr. Kaisman in and ask him.
MR. BRODY: It's in evidence.
THE COURT: Ask another question.
Q It doesn't say he found spasm at L5-S1, yes or no?
A It says pain and spasm form T10 to L4.
Q Let me ask you this. When did Dr. Kaisman first find

any radiculopathy to the left lower extremity?

A The right lower extremity.

Q No, the left?

A February 9th of 2009 straight leg raising was positive bilaterally of 40 to 45 degrees. That's left lower extremity radiculopathy in addition to the right lower extremity radiculopathy.

Q He doesn't say that. It just says straight leg raising positive bilaterally, correct?

MR. SCHWITZER: Objection.

THE COURT: Does he.

Q You added in about radiculopathy. It doesn't say radiculopathy in there, does it?

A That's a straight leg raise.

Q Doctor, does it say bilateral radiculopathy in that report? Is that word there?

A A straight leg raise is a test for radiculopathy.

Q An EMG nerve conduction velocity is a test for radiculopathy; is it not, yes or no?

A No, I can't answer that as a yes or no.

Q Good. Then don't answer it?

A Okay.

Q Doctor, on February 9, 2009, it says straight leg raising is positive bilaterally?

A Yes.

Q I will move on. That is the first finding of it February 9th of 2009?

A As far as I can see, yes.

Q So that is a year and a half after the surgery that Mr. Tapia underwent; is that correct?

A Mr. Tapia had surgery on -- what was the date.

Q May 28, 2007.

A That was the original surgery for the fracture.

Q Correct. So a year and a half later is the first time that his pain management doctor identified any type of bilateral lower extremity anything; is that correct?

A Progressive lumbosacral radiculopathy over the course of time, yes. Exactly.

Q Exactly. But you diagnosed it six months earlier. Eight months earlier, correct?

A What date are we looking at in my note.

Q June 9, 2008 from the very first moment you saw Mr. Tapia, you started writing that he had bilateral lower extremity issues?

A He had pain radiating in the lower extremities. He had bilateral lower extremity radiating pain, yes.

Q Did you, at any time, ever discuss with counsel Mr. Tapia's testimony in this case?

A No.

Q I want you to assume for a moment that when asked the

question where did you have pain, he only testified about his right leg. Can you explain why that is?

A His right leg is the leg that had the neurological deficits. So that is the majority of his problem. He's dragging his right leg.

Q When a person has lower leg weakness and they use a cane, shouldn't they put the cane in their opposite cane?

A That is for a hip arthritis.

Q Only hip arthritis?

A Yes. You want to unload the hip joint. The way you do that you take the pressure off the Hip ABductor complex on the contralateral side during the stance phase of the gate. It is not the same for neurological injury whereby you are using the cane on the side where the deficit is because you are using it as crutch because you can't get your dorsi flexors to clear the foot off the ground.

Q And is that what you told Mr. Tapia?

A Excuse me?

Q Did you ever tell Mr. Tapia that?

A Did I tell him what?

Q To use the cane in his right hand.

A He was using his cane as he had to in order to maintain his gate and ambulation based on the fact that he had a neurological deficit to the right leg. I didn't have to tell him that. It was automatic.

Q And doctor, you sent Mr. Tapia to Dr. Hausknecht, correct?

A I believe so, yes.

Q Why?

A Dr. Hausknecht is a neurologist. We have got a gentlemen who has chronic pain and a burst fracture with other neurological issues that had come up over the course of time. Progressive deficit to the right lower extremity. Sometimes we send patients to neurologist to get their input on medications and that kind of stuff and medication we can get to them.

Q And you know that Dr. Hausknecht performs EMG and nerve conduction testing, right?

A Yes.

Q And from your point of view, an EMG and nerve conduction study testing gives you information about the nerves, correct?

A EMG does provide you with some information about nerves, yes.

Q Now, doctor was one of the reasons that you sent Mr. Tapia to Dr. Hausknecht is that you felt that he had blunted reflexes?

A Mr. Tapia did have blunted reflexes,yes.

Q And would that be one of the things that a neurologist would look for as to why this gentlemen had blunted reflexes?

A Neurologist look at a lot of different things, yes.

Q Did you send over to Dr. Hausknecht anything saying listen, this is what I am finding with regards to Mr. Tapia. Could you take a look at him?

A I don't recall.

Q Did you call him on the phone?

A I don't remember.

Q Well, when Dr. Hausknecht first examined the plaintiff, he found that he had normal reflexes; isn't that correct?

A Can we see Dr. Hausknecht's record.

(handing)

A He documented some normal deep tendon reflexes?

MR. DEMERS: I'm sorry.

THE COURT: He found what.

A He documented normal reflexes, yes.

Q And he did perform that EMG and NCV testing?

A He did an EMG in October.

Q By the way that first exam, he found intact motor strength in the lower extremities?

A Incorrect.

Q What did he find?

A I found four minus weakness of the right hip flexor with four plus weakness of the left hip flexor and four plus weakness of the right ankle dorsi flexor with five minus weakness of the left ankle extensor.

Q Can I see that, please.

(handing).

Q Can you explain why he wrote -- I'm sorry I take that back.

He then found that the remaining motor strength in the lower extremity was 5/5, correct?

A Yes.

Q And he arrange for this gentlemen to undergo the test of the EMG and NCV in October, correct?

A Yes.

Q Did he make any positive findings at L4?

A Yes.

Q He made positive findings at L4?

A Yes.

Q What are those findings?

A He has four plus weakness of the right ankle dorsi flexor, that is the fourth nerve root going in the right leg.

Q And that is an EMG?

A No, I don't think -- did you ask me about the EMG.

Q That's what I asked you about?

A You didn't say EMG.

THE COURT: What is the question now.

Q Let's try again?

A Okay.

Q Did he send him for and EMG and NCV in October?

A I believe Hausknecht did the EMG and NCV.

Q Do you have the report there?
A I do.
Q Is it normal at L4?
A The EMG shows no muscle nerve abnormality at L4.
Q Or L5?
A Correct.
Q Or S1?
A Correct.
Q Okay. And when we talk about muscle or nerve abnormality, we are actually talking about two things, aren't we doctor?
A I'm not sure I exactly understand that question.
Q Let me try to rephrase it. We are talking about first no evidence of the nerve signal being interrupted or interfered with in the nerve velocity conduction study, correct?
A It depends on what part of the nerve you are talking about. The EMG is specifically looking at the motor nerve. And it looks at how the motor nerve interacts with the muscle unit. So it is not the entire nerve. In fact, an EMG does not test sensory portion of the nerve. Which is a completely entirely different portion of the nerve. It only test motor portion of the nerve.
Q Let me ask you a question just on that subject. If Mr. Tapia has little bit of diminish pinprick sensation but no radiculopathy, no pain, no discomfort and full use of his lower

right extremity, would you still operate on him any way?

MR. SCHWITZER: Objection.

THE COURT: Go ahead.

A If he had a decrease in -- if the only finding was decrease in sensation without anything else.

Q Correct?

A That would not be a significant indication for surgery, no.

Q Now, just so we are clear, doctor. There is a test on here that says sensory nerve, is that not sensory nerve test?

A Can I see it.

Q Sure.

(handing).

A These are the peripheral, the motor nerve and sensory nerve section of the EMG describes the distal portion of the nerve unit in an anatomical sense. But the EMG, by definition, does not test sensory nerve itself.

Q Doctor, let's go back one more second. There is an EMG and NCV, correct?

A Yes.

Q I think there is a third component to the test. I'm sorry. There is an NCV and EMG, correct?

A Yes.

Q Let's see. The only positive finding on the EMG was one plus at the ilias soas?

A Yes.
Q That goes to the hip?
A Yes, ilias soas
Q Doctor to the extent that the EMG would have provided you with information about damage to Mr. Tapia's nervous system particularly with regards to the L4/5 and L5-S1 nerve roots, it was negative, correct?
A You know what, that's a pretty complicated question. So can you break it up.
Q Well, let me break it up a different way?
That narrative report that you wrote to Mr. Schwitzer, you didn't mention that you referred the patient to Dr. Hausknecht, did you.
MR. SCHWITZER: Objection.
THE COURT: I guess you didn't.
THE WITNESS: I guess I didn't, your honor.
Q You didn't mention that the patient had a negative EMG, did you?
A It's a positive EMG for L1 radiculopathy.
Q Okay. You didn't even mention that in your report, did you?
A I think I reviewed Dr. Hausknecht's records as part of the record review for the narrative.
Q Doctor, telling Mr. Schwitzer in a narrative that you reviewed records isn't helpful unless you tell him what is

important about the record, is it?

MR. SCHWITZER: Objection.

THE COURT: Sustained as to form.

Q Doctor, in your narrative report that you wrote to Mr. Schwitzer's firm, you didn't mention that the EMG did not show any damage to the nerve roots, did you?

A I don't think I was asked to comment on the EMG. I think I was asked to review the record, my treatment of Mr. Tapia. And then answer some questions regarding prognosis and treatment. So that's what I did.

Q You didn't mention that he had any degenerative changes in his spine as early as the day that he went to Coney Island Hospital in your narrative reports, did you?

A I would not be mentioning normal issues in narrative, no.

Q So, to you, the X-ray finding of severe degenerative disc decease is a normal finding in a gentlemen of Mr. Tapia's age, correct?

A I think we have been over this about ten thousand times. We are saying that Mr. Tapia had normal preexisting degenerative lumbar spine changes that just made it worse when he sustained the fracture that he did.

Q By the way, you didn't put in your report that the fracture made any preexisting conditions worse, did you?

MR. SCHWITZER: He said it made it more

susceptible to injury, Judge?

MR. BRODY: In his report.

MR. SCHWITZER: You are changing his words.

THE COURT: All right. All right. Calm down.

MR. BRODY: I didn't change his words at all.

Q You didn't write anything about an affect on his natural aging process in your report, did you?

A Once again, I base the report on everything that is on the report. It's there. We can read it. I'm happy to read it for you.

Q You didn't write anything about adjacent or sub-adjacent segment deterioration or dysfunction in your report, did you? Yes or no?

A He had surgery for that reason. So that is pretty obvious. I am not really a master of the obvious.

Q Well, doctor, you wrote that you recommended that he had surgery for a herniated disc in your report?

A Radiculopathy. Can I read the report and I can tell you exactly what I wrote.

MR. BRODY: Can we have the redacted record.

(handing).

Q Doctor, if you take a look at page three of your report. And by the way doctor, to save some time, these paragraphs in the first, let's say, beginning at page two. I'm sorry beginning at the bottom of page one where it says physical

examination. You see that on page one. Starting with physical examination. You basically cut and paste what you thought was important in all of those office records that you had and started the report with that, correct.

A No, I summarized my treatment of the patient.

Q Okay. So paragraphs that are verbatim from your records were you just dictating and reading as you went along?

A A narrative is a summary of my treatment records of the patient. So that is what you do when you write a narrative.

Q So let's go to page three. And you said that you wanted to perform a decompressive lumbar laminectomy, correct?

A What portion you are looking at.

Q I'm reading five paragraphs down.

A Okay. I see that.

Q It doesn't say anything about adjacent segment deterioration or sub-adjacent deterioration, does it? Yes or no.

A No. It says decompressive lumbar laminectomy and micro neuro foraminotomies with possible lumbosacral spinal fusion.

Q Now, that is a summary of what you wrote in your office record on that day, correct?

A It also says that I went over --

Q Yes or no, I asked you a question?

MR. SCHWITZER: Show him the date you are referring to.

THE COURT: Relax.

MR. SCHWITZER: He doesn't have it memorized.

Q Is that a summary of what he wrote in his records which happen to be write in front of him on January 26, 2009.

A So that is when the surgery was requested, January 26th of 2009, correct.

Q And again, yes or no, doctor. Is what you wrote in your narrative a summary of what you put this your office records that day?

A Yes.

Q Do the words sub adjacent or adjacent segment deterioration or dysfunction appear in your notes on that day?

A No.

Q Do they appear in your narrative?

A No.

Q In fact, doctor, if we go all the way to the date of your narrative, November 23, 2012, those words never appear, do they, yes or no?

A It is not a yes or no answer.

Q It's not a yes or no?

MR. SCHWITZER: Objection. He said he could not answer yes or no.

MR. BRODY: Fine. It the now in evidence.

MR. SCHWITZER: I put it in last week, Mr. Brody.

THE COURT: Stop talking to each other. Come on.

Q Doctor, you testified that Mr. Tapia is going to need

surgery within the next five years at a cost of $175,000; is that correct.

A Yes.

Q How many of that $175,000 is the charge by Dr. Merola to do the surgery?

A So what portion of the 175 would be the surgical. The primary surgeon free for that particular procedure.

Q That's my question.

A I would estimate the primary surgical fee out of that 175 cost is probably about 25.

Q Okay. Let's work backwards for one second, if you can, with me. In order to get to a number $175,000, what did you do?

A To get to that number.

Q Yes?

A You need to look at all of the cost involve in that particular surgery.

Q Can you show me your notes where you did that calculation? Yes or no? Do you have any notes.

A No.

Q Did you actually do a calculation of that?

A Yes.

Q In your head?

A Yes.

Q And when did you do that calculation?

A When I wrote the narrative.

Q How many days is Mr. Tapia going to be in the hospital for that surgery?

A That particular kind of surgery will put him in the hospital, including the intensive care unit. He will probably be in the hospital about seven to ten days.

Q Who did you contact to find out what cost per day would be?

A I deal with many hospitals.

Q I didn't ask you that. You did a specific calculation of $175,000. What hospital did you use to come up with that number?

A Hospital cost are pretty generalized across the city.

Q And the cost per day is?

A Depends on whether you are in the ICU or regular floor.

Q Doctor, you came up with a ball park number and that is what you testified to the jury, correct?

A Yes.

Q You didn't actually look up specific amounts for anything, did you?

A I am not an economist. I'm a surgeon. So I am giving you the estimated surgical cost for that procedure.

Q The surgical cost would have been your bill?

A No, the surgical cost is the surgery, including the hospital stay.

Q Now, you also said it would include the therapy

afterwards and the follow-up treatment, correct?

A Yes.

Q What therapy place did you contact to get amounts for that?

A In hospital care.

MR. SCHWITZER: Objection to the form. He can ask him.

THE COURT: Just say objection. What is the question.

MR. BRODY: I believe my question was what therapy facility did he contact to get the cost.

THE COURT: Did you.

A The $175,000 is the hospital cost that doesn't include internal physical therapy. I believe that's another issue.

MR. BRODY: One second, please.

Q Doctor, when you testified the last time you said it would include rehab, implant and anesthesia. Everything related to this surgery, correct.

A When you say testified the last time, what are you talking about.

Q Last Monday?

A What was the question.

Q What would the cost be? Or what will that be the cost of that type surgery, hospitalization implants, surgeon anesthesia, rehab, hospital stay, everything. Rehab in the

hospital, you are referring to?

A Correct.

Q How long was Mr. Tapia in the hospital when you operated on the last time?

A Can we look at the record.

Q You don't know?

A I would have to look at the record to give you the exact dates and time that he was in the hospital.

(handing).

A So he was admitted on the 12th and he was discharged on the 15th.

Q So he was in three to four days?

A Correct.

Q And this is very important. I think Mr. Schwitzer would agree for the moment that you answer this yes or no?

MR. SCHWITZER: Objection.

THE COURT: You don't have to editorialize. Why don't you ask a question.

Q Did you look at how much it cost for him to be at the hospital when he was in the hospital at St. Vincents, yes or no, did you?

A No.

Q At any time before you gave the estimate of how much his future care and treatment was going to cost related to the surgery, did you look at any of the cost, yes or no, that the

plaintiff had already incurred, yes or no. Did you look at the cost he already incurred?

A Once again.

MR. BRODY: Nothing further, your honor. I will withdraw the question.

THE COURT: Counsel, do you have any questions.

MR. DEMERS: Yes.

CROSS-EXAMINATION

BY MR. DEMERS:

Q Good morning, doctor?

A Good morning.

Q Doctor, I believe you have Exhibit Number 45, which is the St. Vincent's Catholic Medical Center Chart?

A It just went back down.

Q Now, that is the hospital record that was generated and created when you did your surgery on Mr. Tapia in January 12, 2010; is that correct?

A Yes.

Q Now, I'd like you to turn to page 32. Do you have at that doctor?

A Yes.

Q Now, that is an authorization that was signed by Mr. Tapia on January 12, 2010, the date of the surgery authorizing you to go ahead with the surgery that you had discussed with him; is that correct?

A No. It's a pre-procedure verification form page 32.
Q Yes?
A It's a pre-procedure --
Q That's a two-page form, correct?
A No. It's page 31 and 32 are the form and it's pre-procedural verification check list.
Q I'm sorry. May I see that, doctor?
A Sure.
(handing)
Q I may have the wrong page numbers. I apologize. My copy does not have the page numbers. Page 33 and 34. Is a two-page form; is that right?
A Yes.
Q That form is a form -- it's a permission that was signed by Mr. Tapia for you to operate on him for that procedure that you did?
A Yes.
Q And he signed that on the same day that you did the surgery, correct?
A Yes.
Q And on the bottom of page two, the procedure is describe; is that right?
A Yes.
Q In other words -- and that is in your handwriting; is it not?

A The blank spaces are filled in my handwriting, yes.
Q But this is a generic form for any kind of surgical procedure, correct?
A Yes.
Q So it doesn't assume anything in terms of what the specific nature of that surgery is, correct?
A Yes.
Q And you as the surgeon fill in the blank spaces that information?
A Yes.
Q And that information is in your handwriting, correct?
A Yes.
Q So it says procedure I hereby certify that I have explain the nature of. And you fill in the nature of the procedure, right?
A Yes.
Q And what is that?
A PCF/Lam. That's posterior spinal fusion laminectomy.
Q And it goes on procedure that possible benefits of the procedure are. And then you fill that line in. What does that say?
A It says decrease not eliminate pain.
Q And then it goes on to say that the risk include certain things. And what are those risks?
A It says they may include certain things but are not

limited to anesthesia, blood loss, infection dura leak neurological problems and medical problems.

Q An those are pretty standard kind of surgical risk in many types of procedures; is that right?

A Yes.

Q Now, going back up to -- going further down. Okay. And there are alternatives to the proposed procedure include but not limited to what?

A Include but not limited to chiropractic, physical therapy, pain medication and others.

Q So what you are telling Mr. Tapia in this procedure explanation was that instead of having surgery he could have chiropractic, physical therapy, pain medication and other alternatives; is that right?

A Yes. There are always alternatives to any kind of surgery because we can't force patients to have surgery,.

Q But it doesn't mention any other kind of surger; is that right?

A No.

Q And it doesn't mention specifically what kind of physical therapy you might consider as being an alternative?

A No, it says physical therapy.

Q Now, I just want to go back up to the second line where it says that the benefits of the procedure are. The possible benefits are the procedure are. And what did you write there?

A Decrease not eliminate pain.
Q But the word decrease doesn't appear there, correct?
A Yes.
Q It does not. It is indicated as a down arrow?
A Yes.
Q And that is your short hand or typical medical short land for reduce or decreased not eliminate pain?
A Yes.
Q It doesn't say anything in there that line about the benefits as being to prevent further nerve root damage. It doesn't say that, does it.
A There is no room to put everything down.
Q So the fact that there was no room, is that the reason you didn't put that?
A That's one of the reasons, yes.
Q Okay. And it didn't say anything about doing his procedure to postpone major thoraco- pelvic fusion, does it.
A I could have written a book about this, but I put down one or two things so that --
Q You put down the most important things, is that right?
A I put down the most pressing concern for the patient.
Q And that was Mr. Tapia's most pressing concern; is that right
A Pain, yes.
MR. DEMERS: Thank you, doctor. I have nothing

further.

REDIRECT EXAMINATION

BY MR. SCHWITZER:

Q Doctor, if you recall, when were you last in court? What day of the week?

A For this particular case.

Q Yes.

A I think it was last Monday.

Q Okay. And where were you on Tuesday?

A Operating room.

Q Where were you on Wednesday?

A Operating room.

Q Where were you on Thursday.

A Operating room.

Q Friday?

A Office hours and hospital.

Q How many patients do you see a year?

A I probably see about 100 patients a week and I work about 45 weeks a year. My wife says I work too much, but I think 45. So, 45 times a hundred per year.

Q Forty-five hundred.

A Yes.

Q And you said you did 250 surgeries a year?

A 250 to 300, Yes.

Q So something in the neighborhood of five to ten percent

of the people you see who actually recommend surgery?

A Correct.

Q Now, it was talk the other day that you did the surgery and you sat there just to get money. Is that why you did the surgery to get money?

MR. BRODY: Objection.

THE COURT: Sustained as to form.

Q Okay. Doctor, in addition to what you do, do you do as of spinal reconstruction surgeon, any philanthropy as far as surgeon?

A Yes.

Q What do you?

MR. DEMERS: Objection.

MR. BRODY: Objection.

THE COURT: Go ahead.

A So, for many, many years was part of what is known as Stanley Lamb Institute here in Brooklyn through SUNY Downstate for cripple children with neuromuscular disorders. So I served as their spine surgeon consultant. When that was dissolved, a lot of those patients went to different institutions and I still serve as a consultant for neuromuscular disorders in children here in the borough of Brooklyn. I also operate on children with spinal deformity like scoliosis and kyphosis at SUNY Down State medical center. I was also past chairmen of what's known as the global outreach program for the scoliosis research society

whereby we provide surgical and medical care for the children in third world countries that don't otherwise have surgery or medical care. I personally operated on children in the Dominican Republic as well as Honduras. I do that specifically as part of my philanthropic work for children.

Q Do you get paid for those surgeries?

A No.

Q The children you say you operate on SUNY Down state, do you get paid for those?

A No.

Q Now doctor, you indicated that when we were talking about desiccation and degeneration of a spine from the normal aging process of wear and tear. Everybody has it, correct?

A Yes.

Q And I believe what you were trying to explain is symptomatic versus asymptomatic?

MR. DEMERS: Objection form.

THE COURT: Go ahead.

A Yes.

Q And can you explain to the jury, if you can, that it isn't whether you have desiccation.

MR. BRODY: Objection.

THE COURT: Don't lead the witness.

Q Explain to the jury what you were trying to say as to what was important to you in regard to age related degenerative

process.

A The important thing about age-related degenerative processes are that any of us once we hit the age of 30 sometimes even younger but at least the age of 30 start to normally have degenerative changes in our discs. In all of the tissue of our body that are made out of collagen. And those degenerative changes are part of the normal aging process. That doesn't necessarily mean that they are symptomatic. And by symptomatic, I mean causing a problem that the patient manifest to a doctor that then require care and treatment.

In fact, if the normal degenerative processes were always symptomatic, it would not be enough doctors to treat them.

Q Now, doctor, is there any evidence in any record that Mr. Tapia was symptomatic in regard to any degenerative process prior to this accident?

MR. DEMERS: Objection to form. Any record?

THE COURT: Any record.

MR. DEMERS: I don't know that means.

MR. SCHWITZER: I will withdraw the question.

Q I will just trying to move along. How many pages is the narrative report?

A I don't know. I would have to count the number of pages for you. I don't have it in front of me.

Q I think we are going to have a stipulation by counsel it is 11 pages, correct?

A Yes.

Q And so there is a category on page ten. Review of records.

A Yes.

Q And that just listing the record takes up about three quarters of the page?

A Correct.

Q So, you don't list everything. You have the record. You are not listing in a narrative report everything you saw?

A Correct.

Q What was important to you, the treatment of this person or preparing a narrative report to come to court?

A Treatment.

Q Doctor, you are aware that -- well let me ask you this. Do you come to court for anybody other than patient that you are treating?

A No, just my patients.

Q In other words, if someone wants to send you someone just to examine them to come to court, that is not something you will do?

A No, I won't.

Q Now, doctor, you are aware from having done this over a period of time while preparing a narrative report that there are certain questions that has to be answered?

A Yes, there are questions that come with them, yes.

Q So you are not going to put in your office records the cost of future surgery, are you?

A It is not a treatment of a patient.

Q You are not going to put in your records how often they are going to need an MRI in the future, are you?

A No.

Q Or how often they are going to need physical therapy in the future?

A No.

Q Now doctor, there has been questions asked to you as to whether you contacted any facilities to determine cost. Are you familiar with the cost of various things?

A Yes.

Q Such as the hardware, the implants?

A Yes.

Q And is there any testimony here that you just pulled out of the sky as far as the cost of things?

MR. BRODY: Objection.

THE COURT: All right. Sustained.

MR. SCHWITZER: I will move on.

Q Okay. Now, doctor, you have Dr. Kaisman's records any longer?

A No, I don't.

Q Doctor, his worse lower extremity by far is his right side?

A Yes.

Q And that is why the majority of his findings are on the right?

A Yes.

Q Now, in the 6/21 of '07 initial evaluation that you tried to discuss with Mr. Brody as far as what Dr. Kaisman found on his very first visit. Can you tell us what you wanted to explain to the jury?

A Sure. So on Dr. Kaisman's very first visit in addition to severely restricted lumbar range of motion, was a loss of sensation on the right side, on the right leg. Down the right leg.

Q And on 6/26 of '08. Can you turn to that page. Because that is my only copy. I apologize, if I could. Okay. Could you tell us starting with palpation what did Dr. Kaisman find?

A So Dr. Kaisman, through touching the lower back, that is palpating of the lumbar spine found that there was pain and spasm bilaterally. And on the left side at the T10 through the L4 levels. And on the right side at the T10 through the S1 levels.

Q Okay. Now spasm, the jury knows all about spasm. And Mr. Brody says well on a certain occasion, only found spasm from T11 through L4. Does that mean you don't have pain at L5-S1 if there is not spasm?

A No.

Q And you have already explain to the jury the degree of pain before you get into spasm, so I will move on.

A Yes.

Q Now, you tried to explain there was a period of time where after Maimonides he had no radicular symptoms at all, right?

A Yes.

Q None at all.

A Correct.

Q And therefore he had no radiating pain down his left leg and no radiating pain down his right leg?

A Yes.

Q So therefore, doctor, would it be fair to say that whatever degenerative changes that he had before this accident, if he was fine with no radiating pain, could not be contributing to any problem at that period?

MR. DEMERS: Objection. Leading nature of the question.

THE COURT: Try not to lead the witness, counsel. I will let you answer.

A Yes.

Q Can you explain to us?

A Sure. He developed progressive radiculopathy to the lower extremities right side versus left. Over the course of

time since the time of the fracture, we had nothing that predated that to show that he had radiating symptoms into his legs or feet or a problem with the nerve roots going into his legs or feet.

Q So then just explain to us why is it your opinion as to why this radicular or radiculopathy whenever it started is related to the original accident of 5/26 of '07?

MR. BRODY: Objection.

THE COURT: Go ahead.

A So, the original accident causes a severe burst fracture of the L1 vertebral body whereby his spine is basically broken in half. It is fixed operatively and decompress to prevent that area of the spine from causing paralysis. That area of the spine is out of normal alignment. It is kyphotic. In addition to the fact that there is a long segment fusion causes pressure and break down at the lower portion of the lumbar spine that he is compensating for the fracture site and fusion area. And that pressure over the course of time produces radiculopathy.

Q Now doctor, when you went to do the surgery of January 12th of 2010 which had been authorized by the doctor on behalf of the employer, you did not do the extension of the instrumentation, correct?

A Correct.

Q Now, at the time you saw him, you did indicate that he will be required -- I'm sorry?

MR. DEMERS: Your honor, this is improper

redirect. This was not covered on cross. It is covered on direct already.

MR. SCHWITZER: It was absolutely covered.

MR. BRODY: It wasn't covered by me.

THE COURT: We are going through the same stuff over and over. Counsel, you talk to me. You talk it me.

MR. SCHWITZER: Judge, assuming they are stipulating he needs the revision surgery.

MR. DEMERS: Judge, if he needs to speak, we need a side bar. Objection.

THE COURT: Ask the question.

MR. DEMERS: I have an objection, your honor.

THE COURT: Overruled.

Q Can you explain to us if you knew back at the time you did the surgery at St. Vincents for the progressive radiculopathy that was compressing the nerves and you knew at that time he was going to need a revision surgery, could you please explain to the jury why you did this surgery then and held off on doing the revision surgery?

MR. BRODY: Objection. None of this was covered.

THE COURT: That was not on -- it was not on the cross-examination.

MR. SCHWITZER: Thank you, your honor. Can we move on.

THE COURT: They asked him why he did the surgery.

MR. SCHWITZER: He went into it the other day whether he will require it.

Q Doctor, when Mr. Brody questioned you the other day, remember him talking to you and I'm paraphrasing. I don't have the transcript?

MR. BRODY: Objection, he absolutely has a transcript.

MR. SCHWITZER: You know what I have.

THE COURT: I have one, too.

MR. BRODY: Correct.

MR. SCHWITZER: I don't have it in my hand.

MR. BRODY: That's the question.

MR. SCHWITZER: We are here for Mr. Tapia, Mr. Brody.

THE COURT: Counsel.

Q Dr. Merola, in your narrative report. The other day Mr. Brody said to you that you use the word possible and you didn't have anything with you. And you sort have agreed that that is what it said. Your narrative report, I want to hand it up to you.

(handing)

Q And take your time. And I want to ask you whether you in that entire report which I think is about 11 pages long. You ever said that the lumbar -- I want to use the right words. The thoraco-pelvic fusion will possibly be required in the future?

MR. BRODY: Objection, your honor. The question referred to a different report.

Q Did you ever just say it was possible that he would need that surgery? Did you quantify it or did you say he need the surgery?

A He need the surgery.

MR. SCHWITZER: I have nothing further.

RECROSS EXAMINATION

BY MR. BRODY:

Q Doctor keep your report that for one second. The only place you mention a future surgery is the last sentence of the report. I am not looking at it but go to the last sentence. I think that is where you mention it, right?

A Yes, it says thoracolumbar revision surgery.

Q You didn't even say what surgery you would do. Just eh thoracolumbar surgery?

A It says thoracolumbar revision.

Q You didn't mention any of the stuff going from T4 to the pelvis, none that have stuff is in there.

A It is in there. Thoracolumbar.

Q Someone reading that would know that you meant you would go all the way from T4 all the way to the pelvis?

MR. SCHWITZER: Objection.

THE COURT: What's your question.

Q Somebody reading that would know that you meant --

THE COURT: Nobody would know. I would not know. Go ahead. Ask another question.

Q The lawyer you were sending that to that you wrote the report for, they would know what surgery you meant?

MR. SCHWITZER: Please, don't insult me.

THE COURT: Sustained.

MR. SCHWITZER: I don't no much.

Q And doctor, the word possible, you have your records in front of you, right?

A Yes.

Q And we agreed that your records are really the thing that is important because that's what goes with the patient for his care and treatment, correct?

A What part of the record.

Q In general, your records are the treatment records are there for the patient not for the lawyer, correct?

A These are the treatment records.

Q On the December visit of 2012, that's where you talked about the surgery being possible, correct?

A December 15th of --.

Q December 2012, you only saw him once in December so there is one report there?

A It actually talks about the possibility of recurrent radicular symptoms. That's with respect to the L5-S1 and L4/5 segment.

Q May I see that for a second since that is your record.

(handing)

Q In fact, doctor, other than with regards to the possibility of recurrent neurogenic radicular symptoms, you don't even talk about any other surgery, do you?

A No, because it was in my operative report.

Q By the way, it was in your operative report in a section called informed consent, correct? Yes or no?

A Yes, that is where I spoke about it with the patient, correct.

Q Now doctor, you said you see 4500 patients a year? New patients?

A Combination of new and follow up.

Q You include that 4500 if you saw Mr. Tapia ten times, correct?

A No. Well, as a follow-up, yes, correct.

Q So you don't actually talk to 4500 different people in a year as your patient, do you?

A No.

Q How many do you talk to?

A That is a tough number to come up with. It depends on any given year. Surgeon have a lot of flow through their office. We don't have a tendency to follow patients for an extended period of time. In short periods of time, we follow people throughout the course of their lives. As time goes on, we see

them a little less frequent. So it is hard to say how many are new versus follow-ups.

Q So,?

A Patient contact visits per week.

Q My point is when Mr. Schwitzer said to you that you only recommend operations on five to ten percent of the people you see, that wasn't an accurate calculation?

A It is accurate. In general, the surgical rate is about five to ten percent.

Q Your surgical rate?

A Yes.

Q Doctor, the surgery was May 28, 2007. Dr. Kaisman saw the Plaintiff on June 21, 2007. Would you expect any pain finding that Dr. Kaisman found on that day to be accurate given its close proximity to the surgery with regards to whether or not something was causing a new radicular pain?

A Well, that is a complicated question. Can you break that down.

Q Sure. Shortly after surgery people are swollen, correct?

A Yes.

Q And they have surgical pains, correct?

A Yes.

Q And it takes time for the back after surgery, especially a surgery involving a fusion to heal, correct?

A Yes.

Q So you would not just diagnose a person with a new radicular pain based upon an examination you saw twenty days after the surgery unless there was something really glaring there, correct?

A I don't understand that part of the question.

Q People can have pain from their back from surgery that will go away when the inflammation subside from the surgery?

A The surgery was on the upper portion. I think Dr. Kaisman is describing more than one area that's painful.

Q So, if the upper back is inflamed, that would not affect whether or not the lower back would experience pain?

A Can you point out specifically what you are talking about.

Q That was your comment. I am just trying to follow up on it?

A I don't understand that follow up.

Q Okay. When you were asked the differences between the May 28, 2007 film and the 9/18 of '08 film in your testimony last Monday --

MR. SCHWITZER: Objection beyond.

THE COURT: Come on.

MR. BRODY: I will, Judge.

MR. SCHWITZER: I didn't cover this at all on redirect.

THE COURT: You want to talk to each other again.

MR. BRODY: I just want to get to three words that he used in his question.

MR. SCHWITZER: What day did I use these words.

MR. BRODY: Today. Five minutes ago.

THE COURT: Ask a question.

Q When you were asked the differences between the two films, you said there were two minor differences. Do you remember that?

A That was so long ago.

Q Last week?

MR. SCHWITZER: That is my objection, Judge. I didn't cover this?

MR. BRODY: I will rephrase the question to be done.

Q Doctor, if there were significant breakdown at the lower levels resulting from the initial surgery, would you have expected to see evidence of that on a 9/18 of '08 MRI yes or no?

A It is not a yes or no.

MR. BRODY: Okay. I have nothing further.

RECROSS EXAMINATION

BY MR. DEMERS:

Q Doctor, I just want to refer you very briefly to Exhibit number 13, which is a film that was done about a month after the initial surgery by Dr. Betchen done on June 21st of

2007. And it just showed us generally what the result of that surgery, correct. Would you agree?

A Yes.

Q And you have seen these films?

A Yes.

Q And by the time, you saw Mr. Tapia, of course, this surgery had been done sometime before?

A Yes.

Q More than a year before?

A Yes.

Q You did your own x-rays to see what was going on there, correct?

A Yes.

Q And you saw the damage to L1, the L1 vertebra.

A Yes.

Q By the time you saw that, that bone had healed, correct?

A I don't know if I documented that it healed.

Q Okay. Whether you documented it or not, were you satisfied that at some point after this surgery -- first of all, the hardware, I believe you said several times, that it was intact, correct?

A Yes.

Q It never once loosened. It did what it was suppose to do to hold this bone together by anchoring screws into the upper

and lower vertebrae?

A The rods and screws have not fractured or failed.

Q The rods and screws did not fracture or fail and it held this bone in place?

A It was spanning the fracture site, yes.

Q And it maintained the integrity of that bone, L1?

A I didn't comment on that, no.

Q I am not asking if you commented on it. As you sit here now, are you satisfied that when Dr. Betchen repaired that that bone, L1, eventually healed and solidified?

A I haven't seen any evidence that says it healed.

Q So, as you sit here now are you saying that there is any pseudo-arthrosis or false joint that exist at the L1 level?

A We are not talking pseudo-arthrosis. We are talking about sagittal malalignment.

Q I'm asking you about L1. Doctor, if the L1 bone had a problem and it never fused or it never healed, would you do something about as a spinal reconstruction surgeon, yes or no?

A Yes, he needs a revision.

Q And you haven't done anything with that, correct?

A We are waiting to give him as much time as possible.

Q You haven't done anything to do with L1 itself. I'm talking about the integrity of the bone. You haven't done anything, have you?

A Not yet.

Q An it is not indicated, is it?

A It is.

Q Is it indicated because the bone has not healed or solidified?

A It is indicated based on sagittal malalignment.

Q Is it indicated for another reason? Is it indicated because the bone hasn't solidified?

A I am not using that as part of a diagnosis.

MR. DEMERS: Thank you doctor.

MR. SCHWITZER: Just a little bit, Judge.

RE-REDIRECT EXAMINATION

BY MR. SCHWITZER:

A When Mr. Brody read to you from your record of July 14th of 2008 on your X-ray review. This is what was read. X-ray taken today in the office demonstrates rods, screw and implant to the tact and implacing the fracture site. Remember being ask that by Dr. Brody.

A Yes.

Q Did the sentence end at that point or did that sentence continue?

A Continued.

Q Now, read the whole sentence? Starting from the beginning of that sentence?

A X-ray taken today in the office demonstrates rods screw and implants to be intact and in place spanning the fracture site

with breakdown below the level of the instrumentation.

Q What does that mean, breakdown below the level of the instrumentation?

A Pressure at L3/L4, L4/L5, L5/S1 with collapse of those levels that will eventually require surgery.

Q And there is another term for that adjacent segment degeneration?

A Yes.

Q Sub-adjacent degeneration?

A Correct.

Q Different words.

Now doctor, the reason that you put in the St. Vincent record that he will require revision surgery, does that have to do with the hardware or some other reason?

A Some other reason.

Q What is the reason that he will require the surgery?

A Post-traumatic kyphosis with sagittal malalignment causing sub-adjacent L3/4,4/5, 5-1 breakdown.

Q If you had done that surgery, what levels would be fused already?

A Anywhere between T2 to T4 above the level of thoracic kyphosis to the pelvis.

Q All the way down?

A Yes.

Q So why didn't you do that already?

A I would have to basically crack him in half, cut his body in half, rearrange his vertebrae, put rods and screws up in the upper portion of the thoracic spine. Carry them all the way down into the pelvis and revise everything. In a relatively young man, that has significant what we call morbidity associated with it.

MR. SCHWITZER: Thank you.

THE COURT: I am not going to keep this up.

RE-RECROSS-EXAMINATION

BY MR. BRODY:

Q Doctor, the reason you haven't done the surgery is because the revision surgery that Dr. Betchen did is stable; isn't that right?

A Incorrect.

Q It is incorrect?

A Yes.

Q And it is your testimony that right now it would be good medical practice to do that surgery on Mr. Tapia?

A I didn't say I am doing it now. I am in court right now.

Q This month. Would it be good medical practice to do that surgery?

A We are buying Mr. Tapia as much time possible.

Q You are buying him time?

A Yes.

Q According to Dr. Thomas, the next time he needs an MRI is five years from now. What time are you buying him?

A For a pain management physician, that is pretty reasonable for an MRI.

MR. BRODY: Nothing further.

THE COURT: Thank you. The last witness is this afternoon.

MR. DEMERS: Yes.

MR. BRODY: Judge, can we address this off the record. I think Plaintiff needs to rest at some point.

THE COURT: Can I dismiss the jury?

MR. BRODY: Yes.

THE COURT: All right. Folks, you are going to have a little bit more of an extended time now. It will be one more witness. The doctor, the radiologist that testified last week, will be questioned by the plaintiff this afternoon. So in any event, have a pleasant lunch. Don't discuss the case. I will see you back here at two o'clock this afternoon.

COURT OFFICER: All rise.

(Whereupon, the jury is exiting the courtroom)

(At which time, there was an off-the-record discussion held)

(Whereupon, there was a luncheon recess held in the proceedings, at which time Teresa McGrath relieves

Nadonna Ferguson, as the official court reporter)