1 SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CIVIL TERM-PART JURY 27
2 --x
MARIO MONTERO,
3 Plaintiff,

4 -against-

5 INDEX
7479/2010
6
MYRTLE AVENUE BUILDERS LLC and
7 MYRTLE OWNER LLC
Defendants
8 --x

9 360 Adams Street
Brooklyn, New York 11201
10 April 21, 2014

11
B E F O R E: Honorable ARTHUR SCHACK
12 Justice of the Supreme Court

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A P P E A R A N C E S:
14
SILBERSTEIN AWAD & MIKLOS
15 Attorney for Plaintiff
600 Old Country Road
16 Garden City, NY
BY: DANIEL MIKLOS, Sr.
17 And DANIEL MIKLOS, Jr.

18 FABIANI COHEN & HALL
Attorney for defendant
19 570 Lexington Avenue
New York, NY 10022
20 BY: JOHN V. FABIANI, Jr.

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24

25 ADMELINDA J. RUBIO, RPR

1 about the idea that surgery is unnecessary in 133
2 cases, if I have to sit there and try each case, it
3 is not right.
4 THE COURT: You will not have to try each
5 case.
6 MR. MIKLOS, SR: That's what it sounds
7 like.
8 THE COURT: You are not. Anything else?
9 MR. MIKLOS, SR: That's more than enough
10 for one day.
11 THE COURT: Bring the jury in.
12 THE COURT OFFICER: All rise.
13 Jury entering.
14 THE COURT: Please be seated. Good
15 morning, members of the jury.
16 Ready to call your witness?
17 MR. MIKLOS SR: Yes.
18 THE COURT: Please do.
19 MR. MIKLOS SR: We are calling Dr. Merola.
20 THE COURT: Dr. Andrew Merola is being
21 called to the stand A-N-D-R-E-W M-E-R-O-L-A.
22 THE CLERK: Please raise your right hand.
23 A N D R E W M E R O L A called as a witness having
24 been duly sworn was examined and testified as
25 follows:

1 THE CLERK: You may be seated. Please
2 state your name and in a clear voice spell it.
3 THE WITNESS: Andrew. A-N-D-R-E-W
4 M-E-R-O-L-A.
5 THE COURT: Your business address, doctor.
6 THE WITNESS: 567 First Street, Brooklyn,
7 New York.
8 THE COURT: Zip?
9 THE WITNESS: 11215.
10 THE COURT: Thank you. Keep your voice
11 up. Your witness.
12 DIRECT EXAMINATION
13 MR. MIKLOS, SR:
14 Q. Could you tell the jury what kind of doctor
15 you are?
16 A. Orthopedic reconstructive spinal surgery.
17 Q. From that answer, I take it, you are licensed
18 to practice medicine and surgery in the State of New
19 York?
20 A. Yes.
21 Q. When were you licensed?
22 A. I was licensed in 1992.
23 Q. You have been engaged in one form or another
24 in the field of orthopedics since then?
25 A. Yes.

1 THE COURT: For the benefit of the jury,
2 you did your undergraduate work, medical school,
3 intern, let us know that.
4 THE WITNESS: I went to New York
5 University for College, undergraduate. After that,
6 I went to Howard Medical School. I did my
7 residence, formal training in orthopedic surgery at
8 State University of New York. In here, in Brooklyn
9 Downstate Medical Center. I did spinal
10 reconstructive fellowship at University of Colorado
11 in Denver.
12 Q. In addition to your education, could you tell
13 us a little bit about the hospitals you have been
14 affiliated with, appointments you had?
15 A. So, I am here at Downstate medical center in
16 Brooklyn, New York, Associate Professor of Orthopedic
17 Surgery. I am also affiliated with the New York
18 Hospital as well as Mount Sinai hospital.
19 Q. Could you tell us, have you held any teaching
20 positions in the field of orthopedics?
21 A. Yes. I do teach residents and interns and
22 allied professionals as well.
23 THE COURT: Are you board certified in
24 orthopedics?
25 THE WITNESS: Yes.

1 Q. That's by the National Board of Examiners?
2 A. It is by the American Board of Orthopedic
3 Surgery,which is also part of the, there is national
4 crediting board for all medical subspecialties?
5 Q. That's an organization that gives oral and
6 written test to become board certified?
7 A. Yes.
8 Q. You passed those exams?
9 A. Yes.
10 Q. Have you ever had to be recertified?
11 A. Yes. I recertify every ten years. First exam
12 that I took was in 1998. I recertified in 2008. I will
13 be recertifying again in 2014 in 2018.
14 Q. Have we covered all of your professional
15 accomplishments in the field of orthopedics?
16 A. Yes, pretty much.
17 Q. I don't think we mentioned it but if you could
18 give us a, just a working definition of what orthopedics
19 is?
20 A. Orthopedic surgery is that portion of medicine
21 that deals specifically with the, your muscular skeletal
22 system, that's everything that is required for you to be
23 up and moving around your arms and your legs and your
24 neck and your back, bones, joints, discs and the nerves
25 running throughout those portions of your body.

1 Q. Now, I just want to get an idea, if you can
2 tell us, in your practice of orthopedics, can you tell
3 us, approximately, how many surgical operations do you
4 do in a year?
5 A. So, in a year, I would say I average about 200
6 or so operations per year.
7 Q. Approximately, how many patients do you see a
8 week and we can do the math. On average week, how many
9 new patients do you see?
10 A. On a weekly basis, I see about 100 patients
11 per week or so, 25 percent of those patients are new.
12 75 percent of those patients are followup patients.
13 That is patients that come back in for followup visits.
14 Q. If you could give us some idea in orthopedics,
15 dealing with bones and back, things of that nature, how
16 do patients typically find you as a physician?
17 THE COURT: Before you get to that
18 question, do you want to move him in as an expert,
19 do you move to deem him as an expert in orthopedics?
20 MR. MIKLOS SR: Yes.
21 MR. FABIANI: No objection.
22 THE COURT: Dr. Merola is deemed an expert
23 in orthopedics.
24 Now let's go back to that question.
25 Q. If you give us some idea being an orthopedic

1 surgeon, how is it you get patients into your practice?
2 A. Patients come in and make appointments to see
3 me through other patients that have recommended me that
4 I treated over 18 years I have been in practice. Other
5 doctors would also make referrals, then I guess patients
6 could also look me up as well to see whether or not they
7 could come in to seek surgical consultation regarding
8 their neck or back.
9 Q. I wanted to get the name correct. University
10 Orthopedics, did I say it right?
11 A. Yes.
12 Q. What is University Orthopedics?
13 A. University Orthopedics is an orthopedic group
14 that was started by one of my co-residence, one of the
15 residents that I train with over at Downstate Medical
16 Center, it is a group of orthopedic surgeons and some
17 physical therapists, and some pain management doctors,
18 who specialize in treating muscloskeletal or bone and
19 joint issues and problems.
20 Q. I am looking at a piece of paper, it says
21 University Orthopedics of New York PLC, is that the full
22 legal name?
23 A. Yes, I believe that's the full technical
24 designation.
25 Q. I am going to ask you this: I know that you

1 treated Mr. Montero, is that right?

2 A. Yes.

3 Q. You treated him at University Orthopedics,

4 initially?

5 A. Yes, I initially saw him through that office.

6 Q. Could you tell us at the time, according to

7 the records, I think, it was January 26 of '09 that you

8 first saw Mr. Montero, at least that's the first note

9 that you have, so at or around that time, okay, in '09,

10 could you tell us what the nature of your relationship

11 was with University Orthopedics of New York?

12 A. So, I functioned as their spinal surgical

13 consultant, that if they had patients that required a

14 visit with a specialist, dealing with the neck and back,

15 I was a specialist who saw their patients for any issues

16 that related to their neck or their backs.

17 Q. Were you an employee of the medical group?

18 A. No, I was known consulting surgeon, I was an

19 independent practitioner that came to that practice in

20 order to see those consults that they had regarding

21 spinal surgery.

22 Q. Since the time that you initially became

23 associated with University Orthopedics, have you left

24 that group as a consultant?

25 A. Yes.

1 When I was under that University Orthopedics
2 auspice, we had an active practice in St. Vincent's
3 Hospital in New York City. We shared office space
4 across the street from the hospital. When that hospital
5 no longer existed, that was the time at which I left
6 University Orthopedics and I opened up my own practice,
7 private office in Manhattan and limited myself to seeing
8 patients only in Manhattan and Brooklyn. When I was
9 with University Orthopedics, I saw patients in
10 Manhattan, Brooklyn, Queens where main office for
11 University Orthopedics were.
12 Q. I guess we have --
13 MR. MIKLOS, SR: I think that's number 11
14 in that the Court officer gave you. Those are the
15 records we subpoenaed in from University
16 Orthopedics, okay.
17 Is that what you have in front of you?
18 A. Yes, I have that as well as my own office
19 notes from my office as well.
20 Q. Well, here is what I would like to do, just as
21 housekeeping kind of thing, I know you saw Mr. Montero
22 at the University Orthopedic and did you also see him in
23 new offices?
24 A. Yes, at my other office as well.
25 Q. So if we could, just take a look at it, at the

1 University Orthopedic records and just call out the
2 dates that Mr. Montero was seen at the group?
3 A. January 26 of 2009, February 2 of 2009,
4 February 16th of 2009, July 27, 2009, December 7, 2009,
5 February 1, 2010, May 18th, 2010, June 14th, 2010,
6 October 4, 2010, November 15, 2010, November 24, 2010,
7 December 8th, 2010, January 12, 2011, February 9, 2011,
8 March 8th, 2011, August 10, 2011, April 11, 2012.
9 Q. Are you finished?
10 A. Yes, those are the office visits.
11 Q. Now, in addition to yourself seeing Mr.
12 Montero, did other orthopedic doctors see Mr. Montero in
13 the office?
14 A. Yes.
15 Q. Who would that be?
16 A. Dr. Charles DeMarco and a Dr. Steven
17 Touliopoulos.
18 Q. Generally what were they seeing him for?
19 A. I believe they were seeing him primarily for
20 the knee.
21 Q. Going back to January 26 '09, that's the very
22 first visit, could you tell us what it is Mr. Montero is
23 seen by you for?
24 A. He came in to see me for his primary symptom,
25 which was low back pain with pain radiating, that is

1 traveling down into the lower extremities.
2 Q. What did you understand to have been his
3 medical treatment up until the time that he got you in
4 terms of what they were trying for, since his accident.
5 MR. FABIANI: I am going to object to the
6 form of the question.
7 THE COURT: Rephrase it, please.
8 Q. Mr. Montero was injured in an accident on
9 August 27, 2008 and as you told us, you saw him on
10 January 26, 2009, so in that interval, had Mr. Montero
11 received medical care?
12 MR. FABIANI: Objection to form.
13 THE COURT: Rephrase it.
14 Q. Did you ask Mr. Montero if had received
15 medical care in that period of time?
16 A. Yes.
17 Q. What did you learn?
18 A. That he had been treating with the offices of
19 Dr. Jenko (ph) and had undergone what is known as
20 conservative care, that is non-surgical treatment.
21 Q. Was the non-surgical treatment the
22 conservative care that he had been receiving before you
23 showed up on the scene, was that successful in
24 ameliorating his complaints?
25 A. No, he continued to have lower back symptoms

1 with pain going down the legs.
2 Q. Did you perform an examination on Mr. Montero?
3 A. Yes, I did.
4 Q. Tell us about the exam that you performed?
5 A. So, I did an examination of his spine to
6 localize his complaints and symptoms, to correlate with
7 his physical findings.
8 Q. Just give us an idea of the type of
9 examination that you performed on the very first visit?
10 A. So, the type of exam that was done was an
11 examination in order to basically look at and test his
12 back, to see whether or not there was any correlation
13 between his complaints and symptoms and physical
14 findings to lead me to a diagnosis to suggest treatment
15 for.
16 Q. And did you find any such correlation between
17 your exam and the patient's complaints at the time?
18 A. Yes, I did.
19 Q. What was that correlation?
20 A. So, I looked at his -- the way his lower back
21 moved, looked at what is known as the normal lumbar
22 lordosis. In your lower back, there should be slight
23 curvature to your lower back, that curvature was lost or
24 flattened out in the lower portion of Mr. Montero's
25 back.

1 There were what are known as provocative tests
2 that I could put the lower back into a position to
3 reproduce symptoms.
4 One test, called spinal phalen test where by
5 when the lower back is extended or tipped backward, it
6 reduces palpability spasm in the back with symptoms
7 going down the leg. That was positive. There was a
8 straight leg raise, which is a test where by you stretch
9 out the sciatic nerve.
10 The sciatic nerve is the large, long nerve
11 that travels out of your back and down your leg and by
12 straightening out the leg, extending your knee fully and
13 bring your ankle back, when you pull on that nerve, you
14 put tension on that nerve, if that nerve is irritated in
15 any way, you will respond by trying to pull your leg
16 away from the irritation, the irritated factor. You
17 manifest what is known as straight leg raise.
18 Then, in testing sensation to the legs, there
19 were some sensory abnormalities in the nerve that run
20 down into the legs.
21 Q. Now, subsequent to this visit, did you
22 recommend surgery for Mr. Montero as one of the options?
23 A. After that visit, he had an MRI film that was
24 done, which was not available during the first visit I
25 saw him at, asked him to bring that film in so I could

1 look at it, correlate the film with the physical
2 findings and subsequently I did recommend surgery, yes.
3 Q. Now before we get into that, I would like to
4 do a little bit to give the members of the jury some
5 idea of what we are talking about and some of the
6 rationale relating to the surgery that you ultimately
7 performed. If you could bear with me one second.
8 Doctor, you have seen these posters --
9 THE COURT: Do you have any objection to
10 the use of posters as demonstrative aid.
11 MR. FABIANI: I have not seen them yet.
12 THE COURT: Show it to Mr. Fabiani. I
13 want to make sure we can move this along.
14 MR. FABIANI: I think I need a voir-dire
15 outside of the hearing of the jury.
16 THE COURT: I take it you want to use
17 those --
18 MR. MIKLOS, SR: To help explain the
19 anatomy.
20 THE COURT: I will ask the officer to take
21 the jury back to the jury room.
22 THE COURT OFFICER: All rise.
23 Jury exiting.
24 THE COURT: Let the record reflect the
25 jury and alternates have left the room. Proceed

1 with your voir-dire.

2 VOIR-DIRE BY MR. FABIANI:

3 Q. I want to have a discussion with the court
4 first outside the presence of the witness?

5 THE COURT: Doctor, leave the room. Thank
6 you.

7 (Witness exits courtroom.)

8 MR. FABIANI: I have no objection to the
9 use of medical illustrations but in comparing to the
10 naked eye, comparing the actual film of the axial
11 MRI at L-4/L-5 with the illustration, the naked eye
12 can see that the two MRI do not resemble each other,
13 that the protusion in the disc, bulge L-4/L-5 in the
14 medical illustration is in color, much more
15 pronounced than the protusion is in the axial MRI.

16 If the doctor is going to say that this is
17 a fair and accurate representation of what it looked
18 like, I don't know how he can because the naked eye
19 tells you it is much more exaggerated. I have an
20 objection to it on that basis. I have not looked at
21 the other one yet.

22 THE COURT: Let me hear from Mr. Miklos.

23 MR. MIKLOS, SR: These Are not being
24 offered in evidence as being an accurate depiction
25 of what is on the MRI, these are being offered for

1 demonstrative purposes, to show the anatomy and to
2 show portions of the MRI which would reflect where
3 the injuries are.
4 So if you look over here, this arrow
5 clearly is not on the MRI. That goes without
6 saying, this red is clearly not on the MRI because
7 MRI's are not in color.
8 The objection to an artist drawing in and
9 highlighting in an area is not an objection. It is
10 just an illustration with an arrow pointing to the
11 area we need to focus in on. It has nothing to do
12 with this to be an exact equal. It is like taking a
13 broken bone and drawing a red arrow and spurting
14 some blood to show soft tissue damage. I don't see
15 what any problem is with that. We are not claiming
16 that this piece here that is shown with the red
17 arrow, that's what I assume you are referring to is
18 what in fact it is, but this certainly, can call the
19 jury's attention to the area of the body that was
20 affected and the type of injury that is involved.
21 It is not saying this is the injury. It is the type
22 of injury that you would expect. Now, this picture
23 is an actual picture taken from the MRI and so is
24 this picture at the bottom left.
25 If it was, you know red, being shown, I

1 would agree with him. It is not. The red area is
2 just on the diagram to show where it is affected.
3 MR. FABIANI: I think that essentially
4 affects a concession by plaintiff's counsel that the
5 prejudicial value of the reds and the exaggerated
6 picture shown in the demonstrative aids outweighs
7 the probative value if they are not intended to be
8 an accurate reflection of what is going on, of what
9 was going on, what was shown in Mr. Montero's back
10 on October 14th, 2008, they are in color and
11 exaggerated then what purpose do they serve? They
12 are no longer demonstrative aid, they are served to
13 inflame the passion of the jury.
14 THE COURT: I don't think they are there
15 to inflame the passion of the jury. I am going to
16 allow it in with one caveat, I am going to let him
17 use it but I think in the questioning of, by the
18 plaintiff's counsel of Dr. Merola, I think you have
19 to bring out the arrow and the red there is to
20 emphasize the area where there is a problem.
21 MR. MIKLOS SR: That was always my intent.
22 THE COURT: To show it is not red and no
23 arrow then I will allow it.
24 MR. FABIANI: As long as there is an
25 knowledgement in front of the jury -- I still make

1 my objection, that the jury be told the medical
2 illustrations are not a fair and medical
3 representation of what is shown in either of the
4 MRI's.
5 THE COURT: Correct. It is there to
6 emphasize, to make it easier for them to follow the
7 MRI and doctor's explanation but I want it to be
8 clear it is not totally clear because there is no
9 arrow in real life in his body and it is not red.
10 Any objection to the other --
11 MR. FABIANI: I have to look at them.
12 THE COURT: Just those two.
13 MR. FABIANI: There are three.
14 THE COURT: Take a look, see if you have
15 an objection.
16 Where did he perform the surgery?
17 MR. MIKLOS SR: St. Vincent's.
18 THE COURT: Which is out of business now?
19 MR. MIKLOS SR: That's correct.
20 MR. FABIANI: I have same exact objection
21 to this. I imagine the ruling is going to be
22 identical.
23 THE COURT: We will bring out there are no
24 arrows in his spine.
25 MR. FABIANI: These are used for

1 illustrative purposes, they are not intended to
2 represent that which is in his back.
3 THE COURT: That's part 2. What about
4 part 3?
5 MR. FABIANI: Part 3 has a lot of red in
6 it.
7 Am I safe in assuming that the purpose of
8 this is just a demonstrative aid for the Court --
9 for Dr. Merola to assist the jury in understanding
10 the nature of the procedure that was performed?
11 MR. MIKLOS SR: That is not the exact
12 procedure that was performed. It is some artist's
13 representation of this type of surgery that was
14 performed.
15 MR. FABIANI: As long as that is made
16 clear to the jury, then I have the same objection
17 but as long as the same instruction is given and the
18 same caveats are given to the jury then I am okay
19 with it.
20 THE COURT: Fine. That's similar number
21 3, or whatever you want to call that 3/30/10
22 decompression surgery. It does look like meat.
23 Okay. As long as the jury gets an explanation as,
24 that it is illustrative purposes so they understand
25 it. That's fine.

1 Let's move on. Let's bring the jury back
2 and the doctor.
3 THE COURT OFFICER: All rise. Jury
4 entering.
5 THE COURT: Please be seated. Let's ask
6 the doctor to come back in here and we can proceed.
7 Let's continue.
8 Q. Before the little break, what I wanted to do
9 with you, doctor, is to use demonstrative evidence so we
10 can kind of explain what went on in this case and what
11 the MRI findings were, etc., and talk about that, okay?
12 A. Yes.
13 Q. If you want, your Honor, with your permission,
14 can he leave the stand?
15 THE COURT: Yes. You may step down.
16 Q. Before we start, let's talk about this piece
17 of demonstrative evidence, okay.
18 There are some drawings --
19 MR. FABIANI: Can we have it marked first
20 so we know what we are talking about.
21 MR. MIKLOS SR: Okay.
22 We need a marking on this. We will mark it
23 afterwards. For purposes of record, this is spine MRI
24 finding part 1. There will be part 2 and there is
25 another one labeled something else.

1 Q. So we are clear about this, there are areas on
2 here that are clearly artist's drawings and the artist's
3 drawings are based on the portions of MRI films. To be
4 certain about this, when we look right here, there is a
5 little arrow and we see some red area here, the labels,
6 that's not present in this case, it is an artist's
7 representation of what we have here. These images,
8 right here are taken off MRI's that are already in
9 evidence. Okay. These two exhibits are designed to
10 tell us what doctor?
11 A. This is, it is an interpretation of the
12 anatomy of the lower back, based on MRI films, where by
13 the illustrations are adjacent to the films and in the
14 lower left hand corner of the illustration, there is an
15 MRI film, which is called a para sagittal MRI. That
16 means a sideview of an MRI of the lower back.
17 We are looking at the vertebral bodies
18 numbered with white lettering, they are labeled from
19 L-1. That means lumbar 1 or lower back vertebral body
20 number one through lumbar five or lower back vertebral
21 body number 5 down into what is known S-1 or sacrum.
22 Sacrum is a portion of the pelvis.
23 In between each of the bones is a disc and the
24 disc itself is made up of two basic pieces and on the
25 right hand side of this drawing, if we are looking at

1 what is illustrated here, we are actually looking at a
2 little bit different view. We are looking at top down
3 view, where we are seeing the discs cut in half, from
4 the top down, just to illustrate the two portions of
5 discs that exist.
6 There is a disc nucleus or inner jelly like
7 core and an outer more fibrous or tougher covering,
8 called the annulous, the annulous is responsible for
9 keeping in jelly like center in place. You can kind of
10 think of it like jelly donut, there is jelly in the
11 donut and pastry outside and the pastry keeps the gel in
12 the inside. If the jelly comes out of the donut, it
13 goes into an area where the nerves are.
14 The nerves are behind the area where the disc
15 is, area of your spine called the spinal canal. Those
16 are the nerves that go down into your legs and feet.
17 That is directly adjacent to the area where the disc is.
18 What we are looking at here is illustration of
19 the disc, an anatomy of the disc, its relationship to
20 the nerves of your lower back.
21 Q. Now, Mr. Montero had the lumbar spine MRI,
22 October 14th, 2008 and you reviewed that film, you have
23 that film, do you have the report or your report for
24 your findings or do you remember?
25 A. I remember the findings from the MRI because I

1 did look at the film. I wrote a note based on what I
2 saw on those films.
3 Q. Could you explain for the jury, using your
4 diagram, exactly what was found and what significant
5 aspects of it were?
6 A. When you look at those MRI films, what we are
7 looking at here, we are looking at a portion of the MRI,
8 up to top down view of MRI, axial, right-hand corner
9 here and sideview or the or sagittal view of MRI.
10 When we look at the sideview, it is a nice way
11 of getting overall appearance of what the lower back
12 looks like. It gives an opportunity to compare it, the
13 discs to the other discs that are in the lower back.
14 The first thing we notice is that all of the
15 bones are lined up on top of each other in a very
16 symmetrical orderly fashion. In between each of the
17 bones, we see a disc, the bones appear to be squares,
18 the discs look like these -- they are very elliptical
19 sitting in between the squares of the bones. We can see
20 the majority of the discs here, in fact all the way down
21 to L-4 and including L-4/L-5, some extent L-5/S-1 each
22 of these discs appear to be relatively bright. That
23 bright white signal that you see in the discs on an MRI
24 it generally means there is water inside the disc which
25 you normally see in normal healthy discs. Many of these

1 discs look nice and normal and healthy.
2 Between L-5 and S-1, this disc is a little bit
3 more gray than the other disc. It does not have the
4 white signal that the other discs on top have. It
5 appears to have lost some water.
6 When comparing the back portion of the disc,
7 and by back, I mean, if you are looking at this picture,
8 it is the right side of the picture, if you look at the
9 contour of the picture and compare it to the other
10 discs, it appears to be protruding or projecting into
11 the area of the spinal canal which is the area where the
12 nerve roots are.
13 When disc material projects beyond the borders
14 of the vertebral bodies and the borders of vertebral
15 bodies are where you can see the back of the square, so
16 if you line up the backs of the squares, anything
17 projecting beyond the back line of the squares
18 represents a protusion of disc or sticking out of disc.
19 When that sticking out of disc is asymmetrical
20 that is, it sticks out in more than one region than
21 another then it is known as herniation.
22 You can compare to hernia that may occur in
23 another part of your body. We have, if we have a bulge
24 around our waist, the bulge goes symmetric around your
25 entire wrist. But if you have hernia, it sticks out one

1 side more than the other. In similar fashion, that's
2 what happens to the discs as well.
3 Here, we can see that there is a protrusion or
4 herniation between L-5 and S-1 and you also see that
5 there is a protrusion between L-4 and L-5.
6 This illustration does show us what we would
7 otherwise term as herniation or a protrusion of disc
8 material beyond the borders of the vertebral bodies.
9 Q. Now when you were looking at the original
10 films, you told us that you also looked at the report
11 from the radiologist.
12 Did you agree with what the radiologist said
13 in his report relative to the MRI study?
14 A. As far as the radiologist report goes, I
15 generally keep a copy of the radiology report in my
16 chart so I know where the film was taken and so I can
17 document the fact that there was an MRI film, taken at
18 certain point in time. I had that part of the chart.
19 I always read my own films, mostly because,
20 completely, entirely because, I have an opportunity to
21 examine the patient, treat the patient, correlate what I
22 see on the film with what is happening to the patient.
23 I also have operative experience where I
24 correlate operating on people with what MRI look like on
25 the inside as well. I read films for all my patients.

1 Q. I have another illustration, but before I get
2 to it, do you have that MRI report that is there?
3 A. Yes, I believe it is part of the chart.
4 Q. I may have not heard you, so I apologize, but
5 the question that I have: Did you agree entirely with
6 the radiologist report?
7 A. I have to look. I mostly agree with what the
8 radiologist wrote down.
9 Q. What does mostly mean?
10 A. The radiologist has written, he described what
11 is, his description is a left foraminal bulge at L-4 and
12 L-5 creating impingement on neural canal. I agree with
13 impingement. I describe it more as herniation because a
14 bulge is symmetric where herniation is asymmetric, by
15 definition, if have you one area of disc sticking out,
16 more than another because it is not completely
17 symmetric, it would be herniation by my definition.
18 Q. When we were looking at this part of the
19 illustration, just to be clear about this, this part is
20 described to show what portion of the anatomy?
21 A. So what we are looking at, from illustration
22 prospective, we are looking at the L-4/L-5 segment
23 that's being illustrated for us in the middle portion of
24 the upper right-hand corner of the illustration,
25 compared with a normal segment in the lower right hand

1 corner of the illustration.
2 Q. On the para-sagittal view, which area are we
3 looking at on that view?
4 A. So on this view, we are looking predominantly
5 at the left para-sagittal region of the sideview. On
6 the sideviews, what that basically means is when you
7 have an MRI, the MRI scanner takes multiple pictures.
8 Those pictures can be analogous as if you put
9 the body through baloney slicer and looked at different
10 slices of your anatomy from left to right. On this
11 side, this particular view is one of the views
12 off-centered more towards the left side.
13 Q. Right over here, this would correspond, the
14 drawing part would correspond to the MRI spot over here?
15 A. Yes, the drawing illustrated L-4/L-5 would
16 correspond MRI of the L-4/L-5 segment.
17 Q. Is that the area, the L-4/L-5 that you said
18 that there was some impingement upon the spinal cord?
19 MR. FABIANI: Objection.
20 THE COURT: What's the objection?
21 MR. FABIANI: That's not what he said.
22 THE COURT: Let him talk. Can you clarify
23 your finding.
24 THE WITNESS: Yes.
25 A. It is not impingement on the cord, it ends up

1 further up on the spine. This is an area of nerve
2 roots, area of L-4, L-5. It is an area where L-5 nerve
3 root is descending or traveling below this segment in
4 the L-4 nerve root is exiting at this segment.
5 Q. Now, I would like to show you again another
6 artist's representation.
7 Would you mind holding this.
8 Now again, this is an artist's rendering from
9 actual films, of course, we when we look at actual
10 films, they don't have these arrows and they don't show
11 this redness that's over here. This is kind of like,
12 without the numbers, this is what the MRI films look
13 like, so if you could tell us now what basically is the
14 difference between the first board and this board?
15 A. So, here again, we are looking at side-view of
16 the lower back. This time, instead of the left side of
17 the lower back, we are looking more centered, the right
18 side of the back, with an illustration adjacent to it.
19 We are also looking at the illustration in the upper
20 right-hand corner of the diagram. We are centering in
21 more so on L-5/S-1 segment area below L-4/L-5.
22 Q. Show us where that is?
23 A. On the sideview, it is between the 5th
24 vertebral body and the sacrum at the bottom of your
25 lumbar spine and that corresponds to the area that we

1 are looking at that is behind L-5 and S-1, once again,
2 this material asymmetrically protruding beyond the
3 borders of vertebral bodies at L-5, S-1.
4 If you look at that from the top bottom, you
5 would be looking at an area on the, what is known as the
6 axial MRI work, where we see the nerve root going
7 through its nerve opening, also called neuro foramen is
8 being impinged upon or pinched.
9 Q. Now, this diagram or drawing, I should say of
10 the L-4/L-5, is this the area that the radiologist
11 reported in his report as being herniated?
12 MR. FABIANI: Objection to the form of the
13 question.
14 THE COURT: I will ask you to rephrase it.
15 Q. How does this illustration compare to the
16 radiologist' report?
17 A. So this illustration specifically with respect
18 to the L-5/S-1 segment correlates with the radiology
19 reading right side herniation at L-5/S-1.
20 Q. Let's talk a little bit, let's put this down,
21 so we can turn back.
22 MR. MIKLOS SR: Please return to your
23 seat.
24 Q. This is the sum of the information that you
25 had before you made a recommendation to Mr. Montero

1 about having surgery, is that right?
2 A. Yes.
3 Q. So, the MRI films that you read and your
4 clinical experience with Mr. Montero, meaning the number
5 of exams that you had, the number of visits that you had
6 and what he described to you his problems were, you
7 ultimately came to a recommendation as to a course of
8 action, is that correct?
9 A. Yes.
10 Q. Could you tell us about the recommendation?
11 A. So, the recommendation was the patient who was
12 having five months worth of symptoms, that had not
13 gotten any better with conservative treatment, with MRI
14 findings demonstrating discs that were impinged upon or
15 touching the nerve going into the distribution of those
16 nerves that were symmetric, the recommendation was to
17 take pressure off of those nerves to prevent those
18 nerves from continuing to get worse as well as try to
19 reduce some of the nerve related radiating pain into the
20 legs.
21 Q. So, at -- you already told us but I just want
22 to make sure I got it right.
23 At the time that you were talking to
24 Mr. Montero, did you tell him what you thought his
25 diagnosis was?

1 A. Yes.
2 Q. What did you tell him?
3 A. So the diagnosis was technically known as
4 radiculopathy, which means a problem with the nerve
5 roots, specifically, in the lower back, so lumbosacral
6 radiculopathy.
7 Q. Now, when orthopedics surgeons in general, you
8 specifically are talking to patients about this kind of
9 diagnosis, typically, is there a discussion that takes
10 place regarding the risks of surgery and the benefits of
11 surgery versus conservative therapy?
12 A. After we came up with the diagnosis and made a
13 recommendation regarding surgery, we sit down and have a
14 discussion with the patient to present to them their
15 options and alternatives.
16 Q. Could you tell the jury, please, what you said
17 to Mr. Montero about his options and risks related to
18 the surgery?
19 A. Options and alternatives for this include
20 continued non-surgical care and an option to decompress
21 or get the pressure off of the nerves, that would be a
22 surgical procedure.
23 Because it is a surgical procedure, it does
24 involve certain risks and certain benefits. The major
25 benefit of the surgery is to prevent the nerves from

1 continuing to get worse as time goes on and the risks of
2 the surgery involve the risks of having a general
3 anesthetic, which is required for the operation itself.
4 The risks associated with the potential for an
5 infection, which comes with opening the skin in order to
6 be able to expose the area that you are operating on.
7 The nerves themselves require mobilization,
8 that is you need to move them out of the way, then you
9 are going to have some manipulation of the discs as well
10 so there is a potential for further irritating nerves
11 that are already irritated, that's a possibility.
12 The covering of the nerve roots, that's called
13 the dura or covering of the nerves can sometimes leak
14 when you have a surgical procedure on the nerves.
15 The procedure also comes with certain
16 potential medical complications from the operation and
17 from general anesthetics, such as the possibility of a
18 blood clot or a pneumonia post-operatively in addition
19 to the risks for infection that we had spoken about.
20 Those are some of the major type of risks associated
21 with decompression surgery.
22 Q. Did Mr. Montero indicate what he wanted to
23 have done concerning the surgery?
24 A. So, he indicated that his, he had opted for a
25 surgical decompression.

1 Q. You performed that at St. Vincent hospital, if
2 I remember?
3 A. I did.
4 Q. Do you remember the date?
5 A. That was in March of 2010.
6 Q. The operative report is inside the office
7 record that you have?
8 A. Yes.
9 Q. You have the St. Vincent's Hospital record in
10 evidence, if you need to refer to that but I would like
11 to, if we could just run through with you, with this
12 illustration, just to get an idea of what type of
13 surgery was actually performed on Mr. Montero, again,
14 like before, this illustration is designed to show, just
15 generally speaking, what was done in similar type
16 procedure. It is not intended to be actual procedure
17 performed on Mr. Montero, because there were no cameras.
18 This is to help the jury get some idea of what we are
19 talking about in terms of the surgery, okay.
20 With the Court's permission, could he come up
21 again?
22 THE COURT: Sure. Go ahead.
23 Q. If you can give us some idea. I know is a
24 drawing, why don't we start with -- I guess the letters
25 A, B, C, and in that order, tell us what is going on and

1 relate it to Mr. Montero?
2 A. Every surgical procedure, generally begins
3 with what is known as approach. You have to be able to
4 get to the portion of the anatomy you are operating
5 upon.
6 Panel A is approach, surgical approach which
7 involves the initial surgical incision, which is made
8 over the area of interest and in this case, between L-4
9 to S-1 in the lower portion of the lumbar spine.
10 Part B is the retraction of the muscles that
11 cover the bones of the lower part of the back, so that
12 you can identify the actual bones themselves and the
13 spaces in between those bones, which are then, you are
14 then going to take advantage of those spaces, in order
15 to get down to the area where the nerves are so we can
16 make sure that we have gotten pressure off the nerves.
17 Q. If you don't mind, in panel B, there seems to
18 be silver things, what are these silver things?
19 A. The muscles in your lower back, cover the
20 bones of your lower back, they meet in the middle of
21 your back, while you are doing the operation, so your
22 hands are free to work on bones and nerves, the silver
23 instruments are known as retractors, they are placed
24 into the lower portion of the back in order to hold the
25 muscles away from the area that you are operating upon

1 so you can have your hands free to actually do the
2 operation itself.
3 Q. Let's go to panel C, what are you looking at
4 here?
5 A. Number C is what is known as laminectomy
6 itself. The laminectomy involves a removal of the
7 portion of the lower back vertebra known as the lamina.
8 The lamina covers the spinal canal and any time you see
9 the word "ectomy" it means removal of, this is an
10 illustration, utilizing a device that is known as
11 rongeur, which is a device specifically designed to cut
12 bone away without damaging the nerves that are
13 underneath it, to make openings in the spinal canal such
14 that you can now relieve pressure on the nerves by doing
15 the laminectomy that gives you access to the actual
16 canal itself in the area where the nerves are located.
17 The illustration adjacent to panel C, is this
18 top down view again, so we are looking from the top
19 down, where we see the device removing bone, opening the
20 spinal canal in the area where the nerves are located.
21 In the lower portion of the illustration or
22 panel D , there is illustration of removal of the right
23 sided herniation at L-5/S-1, with a device known as a
24 pitutiary, which is a grasping device, you can hold on
25 to the disc with, after you identified that material can

1 be removed and sent for pathology.
2 Q. Before you return to your seat, I have two
3 more questions.
4 This incision that we have talked about in
5 panel A, that's made with a scalpel and the skin is
6 actually split, is that correct?
7 A. Yes.
8 Q. In Mr. Montero's case, does he have a scar
9 from the surgery?
10 A. Yes.
11 Q. The other question that I have is if we look
12 at B, area B, that's when you open it up, that's what
13 the operating surgeon would see, is that correct?
14 A. Yes.
15 Q. Then, if we go to see, these circles that you
16 pointed out before, correspond to what is in B, over
17 here, correct?
18 A. Yes.
19 Q. So, it looks like material was removed, is
20 that correct?
21 A. Yes.
22 Q. Now, that material is bone?
23 A. Yes.
24 Q. That bone, does it ever grow back?
25 A. No, not usually.

1 Q. And this procedure that was done, the
2 laminectomy and the medial fasciotomy, do these
3 operations you did, were designed to address what
4 problems in Mr. Montero?
5 A. So, the purpose of the decompression, that is
6 the laminectomy and the fasciotomy, it is to address,
7 pressure on nerves, to take the compressive effect of
8 hernia away from the nerves and to protect those nerves
9 so they don't continue to deteriorate or become damaged.
10 Q. If you would, would you return to your seat.
11 One of the things I want to talk to you about
12 is Mr. Montero's complaints and problems that you
13 mentioned before.
14 I want to relate it again to the surgery that
15 we just saw and the other two illustrations, if you
16 will.
17 Mr. Montero, as I understood it, was
18 complaining of back pain and complaining of pains that
19 were going down his legs, is that correct?
20 A. Yes.
21 Q. Now, as to the back pain, in of itself, as a
22 separate and distinct from the leg pain that you
23 described for us, was this surgery designed to relieve
24 the back pain in of itself?
25 A. No.

1 Q. Could you tell us a little bit about that.
2 Exactly what was and is Mr. Montero's back pain problem?
3 A. So in this case, the back pain, that is the
4 pain in the lower back is related to a number of
5 different issues. One of those issues, is the disc
6 themselves, that are not functioning properly.
7 The disc itself is an important part of the
8 way the bones in the lower back moves in relationship to
9 each other. A normal disc has the ability to make sure
10 that the bones that are adjacent to each other in your
11 lower back move in such a way as not to put excessive
12 pressure on the facet joints, which are the joints
13 between the bones on the back side of your back. It is
14 also able to resist the normal wear and tear, loading
15 vibration and other motions that your body exerts upon
16 your lower back in terms of force.
17 When a disc does not function normally, it
18 increases the wear and tear and the loads that are
19 transmitted across what are known as the facet joints.
20 The facet joints themselves can start to
21 become symptomatic or painful. Facet joint is a joint
22 not unlike any other joint in your body that is covered
23 with cartilage, so if there is extra load or extra wear
24 and tear on it, that joint can become inflamed and
25 painful. That's one mechanism of pain production in the

1 lower back. The other is that the discs themselves have
2 certain nerves that go inside of them. When those
3 nerves become inflamed and irritated, they will also
4 produce pain and symptoms.
5 The muscles in your back try to accommodate
6 for these abnormal conditions that are happening in your
7 lower back, they also become sore and painful. Back
8 pain particularly in this condition can have multiple
9 different ideologies or reasons for existing. Most of
10 it stems from abnormal amount of motion and loading to
11 the lower back in the area of L-4/L-5 and L-5/S-1.
12 Q. I am going to change the topic a little bit,
13 if you would.
14 What I want to know is we heard from Mr.
15 Montero and from some of the records that on August 27th
16 of '08, he was involved in a hoist or elevator, whatever
17 you call it, incident where the elevator dropped at the
18 worksite.
19 My first question is, do you have an opinion
20 with a reasonable degree of medical certainty as to
21 whether or not this back surgery that we have been
22 talking about is causally related to this hoist incident
23 on August 27 of '08?
24 A. Yes.
25 Q. What is that opinion, sir?

1 A. That the surgery was causally related to that
2 accident that occurred on August 27, 2008.
3 Q. We heard from you and it is also reflected in
4 all these medical records that we have that Mr. Montero,
5 before he had the surgery, was involved in a number of
6 different kinds of conservative therapy. We heard
7 acupuncture, we heard physical therapy, chiropractic, I
8 think heat treatments and do you have an opinion with a
9 reasonable degree of medical certainty as to whether or
10 not this conservative treatment was causally related to
11 the August 27th incident with the hoist?
12 A. Yes, I do.
13 Q. What is your opinion, sir?
14 A. That those treatments were related to that
15 hoist incident.
16 Q. Now, I am going to change the topic again and
17 one of the things I want to talk to you about is some
18 records that I sent you to review. I want to relate
19 that to this case, we heard during the trial from Mario
20 and some of the documents that on or about October 20 of
21 '07, Mr. Montero was involved in an automobile accident.
22 Make that assumption for me. And you reviewed those
23 treatment records, have you not?
24 A. Yes.
25 Q. Now we know from looking at the records in

1 this case that Mr. Montero never told you about that
2 automobile accident, correct?
3 A. Yes.
4 Q. Okay. My first question about that is when it
5 comes to prior accidents and patients who come to you as
6 a physician or another accident, is a prior accident
7 something you may be interested in?
8 A. Yes, sometimes.
9 Q. In this case, after having reviewed the
10 records, do you have an opinion with a reasonable degree
11 of medical certainty as to whether or not Mr. Montero's
12 operation or course of treatment would have been any
13 different if he had reported that accident to you?
14 A. It would not have been any different, no.
15 Q. Why do you say that?
16 A. After that particular accident, he underwent
17 conservative treatment, non-surgical treatment, he was
18 actually able to return to work as an iron worker, where
19 by he was doing heavy labor and heavy construction
20 without any significant issues.
21 Q. What I want to talk to you about. Again I am
22 changing the topic, would you take a look at records you
23 have in front of you.
24 Now incidentally, are your last visits that
25 were at your office from Andrew Merola PC, in November

1 4, 2013, are they part of the university records?
2 A. No.
3 Q. Let me see if we have those in evidence.
4 From the material you brought, could you
5 separate out your two visits or three visits that you
6 saw him privately, if you don't mind?
7 A. Sure.
8 MR. FABIANI: Can I see what the doctor is
9 looking at.
10 THE COURT: Sure. Why don't we break for
11 lunch now. We will come back at 2:15. Enjoy lunch.
12 Follow the instruction of the officer. Please do
13 not discuss this case amongst yourself.
14 THE COURT OFFICER: All rise.
15 (Jury exits courtroom.)
16 THE COURT: Let the record reflect the
17 jury and alternates have left the room.
18 Anybody need anything on the record?
19 MR. MIKLOS SR: No.
20 MR. FABIANI: No.
21 THE COURT: We stand in recess until 2:15.
22 (Luncheon recess taken.)
23 A F T E R N O O N S E S S I O N
24 THE COURT OFFICER: All rise. Jury
25 entering.

1 THE COURT: Everybody, please be seated.
2 Good afternoon, members of the jury. Please make
3 yourself comfortable. We are going to continue with
4 Dr. Merola.
5 DIRECT EXAMINATION BY MR. MIKLOS SR:
6 Q. Before the break, I was asking you to separate
7 out the three pages.
8 MR. MIKLOS SR: If we could have those
9 three pages marked as 22.
10 I will offer this into evidence.
11 THE COURT: Have you seen the documents?
12 MR. FABIANI: Yes.
13 THE COURT: Any objection?
14 MR. FABIANI: No objection.
15 THE COURT: Let's put them in evidence.
16 Q. Now turning to what we have marked as 22 in
17 evidence, the last visit was dated what day, sir?
18 A. Last visit?
19 Q. Yes.
20 A. November 4, 2013.
21 Q. That I have from your office?
22 A. August 12, 2013, those are my last visits with
23 him.
24 Q. What I wanted to talk to you about was the
25 idea -- before I do that. You said 2013?

1 A. 2013, yes.
2 Q. Did you have any other visits that were just
3 by you and not by University Orthopedics?
4 A. Let's see.
5 I have one from August 15 as well, yes.
6 Q. Could you pull those out also. There should
7 be one from August 15th and I think there is one from
8 January 31, 2011, see if I am right about that.
9 A. Yes.
10 MR. MIKLOS, SR: January 31, '11 and
11 August 15th '11.
12 MR. FABIANI: I have no objection.
13 Q. We have the four visits. Under your name, not
14 the university?
15 A. Yes.
16 Q. That's all part of 22 in evidence.
17 I know you read all the records and so forth,
18 but Mr. Montero's complaints throughout the course of
19 your treatment with respect to his back, has that been
20 fairly consistent in your opinion?
21 A. Yes.
22 Q. Your examination before Mr. Montero, that has
23 been consistent?
24 A. Yes.
25 Q. Now, given the fact that his accident happened

1 in '08, you last saw him, I guess, in November of '13,
2 year '13, do you have an opinion with reasonable degree
3 of medical certainty as to whether or not his condition
4 is a permanent one?
5 A. Yes.
6 Q. What is your opinion, sir?
7 A. That his condition is permanent.
8 Q. Now, that would include the pain in his back
9 and the radiculopathy we were talking about?
10 A. Yes.
11 Q. In the future, have you considered the idea of
12 what his future looks like?
13 A. In terms of prognosis?
14 Q. Yes.
15 A. Yes.
16 Q. Could you tell us about that, sir?
17 A. So, the prognosis right now, Mr. Montero is
18 stable, which means he is neurologically pretty much on
19 a plateau, his condition has remained plateaued after
20 surgery.
21 As time goes on, with the normal aging
22 process, we need to continue observing the lower back
23 disc; and as time goes on, those discs with the aging
24 process are quite likely to collapse, and there is
25 potential for a revision laminectomy in the future.

1 Q. Is that your opinion, with a reasonable degree
2 of medical certainty, sir?
3 A. Yes.
4 Q. If you could, I would like to talk to you
5 about the day of the accident, August 27, '08 and the
6 fact that Mr. Montero was involved in this elevator
7 incident and he initially had told somebody that he was
8 not hurt and within an hour or so later, had told
9 somebody that he in fact was hurt.
10 Is that consistent, in your opinion, with the
11 natural progression of this disease?
12 MR. FABIANI: Objection to the form of the
13 question.
14 Q. In cases where someone has a back injury,
15 could you tell the jury what the natural progression of
16 the disease is, if there is one?
17 MR. FABIANI: Objection.
18 THE COURT: I will sustain it. Instead of
19 general, the progression for him, Mr. Montero.
20 Q. Okay. We will make it for Mr. Montero.
21 Could you tell us in your opinion, with a
22 reasonable medical certainty, what would be the natural
23 progression of Mr. Montero's disease?
24 A. The natural progression of his disease,
25 basically, what we saw in the clinical setting, which

1 was over the course of time that he began to develop
2 more symptoms in his lower back, with nerve root
3 symptoms or radiculopathy.
4 Q. Would his initial complaints be the same as
5 his subsequent complaints?
6 A. No.
7 Q. Why is that?
8 A. Because, what we call a progressive clinical
9 deterioration, basically, means as time goes on, despite
10 conservative treatment, you have a worsening in your
11 condition as the discs are unable to heal themselves, so
12 that when you have an initial symptom, you see where you
13 are when you start, then you see where you are when you
14 are done with your conservative treatment or over the
15 course of time, progressive means things get worse as
16 time goes on.
17 Q. Given what you told us and what is reflected
18 in your records and university orthopedic records, do
19 you have an opinion with a reasonable degree of medical
20 certainty about Mr. Montero's prognosis for construction
21 work in the future?
22 A. I do, yes.
23 Q. What is that?
24 A. So, his prognosis, that's his ability to
25 return to work and duty, construction person or labor,

1 is unable do that with these types of injuries.
2 Q. We have or we will have, I should say, a
3 certain medical bills in connection with your office and
4 with University Orthopedics.
5 Do you have an opinion with reasonable medical
6 certainty as to whether or not those bills and costs
7 incurred are approximately related to or caused by the
8 elevator incident or hoist incident?
9 A. Yes, I do.
10 Q. What's that sir?
11 A. That they are related to that incident.
12 Q. Thank you sir. I don't have anything else.
13 MR. FABIANI: I need a few minutes.
14 THE COURT: We will ask the officer to
15 escort the jury back into the jury room. We will
16 come back in a few minutes.
17 THE COURT OFFICER: All rise.
18 THE COURT: Let the record reflect the
19 jury and alternates have left the room.
20 (Break taken.)
21 THE COURT: Please be seated.
22 We will begin.
23 CROSS EXAMINATION
24 BY MR. FABIANI:
25 Q. You and I have never met, correct?

1 A. Correct.
2 Q. You are familiar with my firm, correct?
3 A. I have heard the name, yes.
4 Q. You actually have been a witness in cases
5 where my partners have been the lawyers for the
6 defendants, correct?
7 A. That's possible, yes.
8 Q. You have also received numerous requests from
9 my office for copies of records pertaining to some of
10 your patients, correct?
11 A. I would say if that's the case, then my office
12 has received requests, yes.
13 Q. The patients of yours, for whom we have
14 requested copies of records have been patients of yours
15 who have been plaintiffs in personal injury actions,
16 correct?
17 A. I think so, yes.
18 Q. Do you know how many different patients my
19 firm has requested records from you for over the past
20 ten years?
21 A. No, I do not.
22 Q. Would it surprise you to know that my office
23 has requested records from your office on 133 of your
24 patients who have been involved in personal injury suits
25 over past ten years?

1 A. Over ten years?
2 Q. Yes.
3 A. It is possible particularly since I have been
4 doing this for 18 years.
5 Q. In ten years, my firm alone has had lawsuits
6 involving 133 patients of yours, are you okay with that
7 number?
8 A. I have not verified the number but I will take
9 it on your word.
10 Q. During that same period of time, let's just
11 focus on the past ten years, how many of your patients
12 have been plaintiffs in personal injury lawsuits?
13 A. I don't know.
14 Q. Is it more than 500?
15 A. I don't know.
16 Q. Is it more than a thousand?
17 A. I don't know.
18 Q. Is it more than 2 thousand?
19 A. I don't know.
20 Q. There has to be a number that sounds so absurd
21 that you would say no it is not that number, have we hit
22 that number?
23 A. I don't want to guess because we don't have
24 numbers and I don't track patients who are involved in
25 litigation. Orthopedics deal with patients who have

1 trauma, it ends in litigation and often it overlaps.
2 Q. You have testified you are on panel that has
3 treated construction workers?
4 A. Yes.
5 Q. In all of the cases that my firm is
6 representing defendants where you have been one of the
7 treating physicians they have involved injured
8 construction workers, correct?
9 A. I am not 100 percent sure but if your firm has
10 represented them and we overlap, we take your word for
11 it.
12 Q. Now, the -- does the name Joseph Rotero mean
13 anything to you?
14 A. Joseph Rotero is a law firm that deals in
15 workman's related injury.
16 Q. Injured construction workers?
17 A. All sorts of work-related injuries.
18 Q. Have you received referrals from Mr. Rotero
19 for patients over the past ten, 12 years?
20 A. I know we have dealt with that law firm in
21 terms of treating patients that have had injuries, yes.
22 Q. Do you know how many -- what percentage of
23 your patients are referrals from Mr. Rotero's law firm?
24 A. No, I do not.
25 Q. The referrals from Mr. Rotero, do they come

1 directly to you or University Orthopedics?
2 A. When you say the referrals, I am not sure
3 exactly what you mean. If it was University
4 Orthopedics, patients would go to University Orthopedics
5 then be referred to me for spine care from that
6 particular practice.
7 Q. Well, until you separated your relationship
8 from University Orthopedics -- I will rephrase the
9 question.
10 How long were you affiliated with University
11 Orthopedics?
12 A. I think University Orthopedics came into
13 existence -- I started practice in '96.
14 Dr. Touliopoulas who started the University Orthopedics
15 was junior resident, he was a year below. He did a
16 fellowship, then he went into private practice then
17 started university. I would say university came into
18 existence '98 or '99, I want to say.
19 Q. When did you separate from University
20 Orthopedics?
21 A. So, when St. Vincent's closed, which I think
22 was -- I think it was the spring of 2010, if I am not
23 mistaken.
24 Q. It was just -- this surgery was performed at
25 St. Vincent's on March 30, 2010, presumably the hospital

1 was opened when you performed the surgery there?
2 A. Yes.
3 Q. So, it closed after March 30, 2010?
4 A. Correct, yes.
5 Q. Is that when you separated from University
6 Orthopedics?
7 A. Yes.
8 Q. That's when you opened your office in
9 Brooklyn?
10 A. I always had an office in Brooklyn because I
11 had teaching responsibilities in Downstate. I always
12 had an office in Brooklyn.
13 In Manhattan, I was in the building across
14 from St. Vincent's in Astoria, the university had their
15 office in Astoria, as well.
16 Q. You saw patients at the University Orthopedics
17 office in Astoria?
18 A. Yes.
19 Q. Now, let me ask you, cases that you have been
20 involved in and performed surgery on, is it fair that
21 the course of aftercare differs from patient to patient?
22 A. Yes, it can.
23 Q. And there are some patients who require
24 constant monitoring after the surgery has been performed
25 and other patients who you see and operate on then you

1 never see them again?
2 A. Yes. There is a spectrum of aftercare, yes.
3 Q. And that is the case regardless of whether the
4 surgery is a micro foraminotomy or full blown spinal
5 fusion?
6 A. The full blown spinal fusion have a tendency
7 to require a longer course of aftercare, in general.
8 Q. The foraminotomy, is it a less serious
9 surgery that requires less aftercare?
10 A. The magnitude of surgery is not as large, so
11 aftercare would be less than it would be for fusion.
12 Q. You performed micro foraminotomies on patients
13 you do the surgery and never see them again, correct?
14 A. I think there are probably some patients I
15 have not seen again, yes.
16 Q. Perhaps I misspoke.
17 Obviously, you see them for a short period of
18 time for aftercare?
19 A. Yes.
20 Q. But after that aftercare, emergent aftercare
21 is over, they go on with their lives and you never see
22 them again, is that correct?
23 A. Yes.
24 Q. And, that was the case for Mr. Montero, wasn't
25 it?

1 A. Let's see. Well I operated on him in 2010, I
2 saw him up until November of 2013.
3 Q. Well, you saw him in 2010, you saw him a
4 couple of times in 2011, then you did not see him again
5 for over two years, correct?
6 A. Yes. I think we went from '11 then from '11
7 to either 12 or 13.
8 Q. April of 2013 of '11 to April of 13?
9 A. Yes.
10 Q. From April of 2011, I don't -- unfortunately I
11 do not have a copy of that report. May I see a copy of
12 that?
13 A. Yes. Let me get it.
14 Q. You said it is part of exhibit 22.
15 THE COURT: Do you want to put that in as
16 the next exhibit.
17 Q. There are four separate visits.
18 THE COURT: Can we agree to add that to
19 exhibit 22.
20 MR. MIKLOS, SR: Yes.
21 A. This is August of 2013 and November of 2013.
22 THE COURT: We will add that to the
23 exhibit, okay.
24 Q. That is the exhibit, we need to add August
25 2011 and one other date, in 2011, date February --

1 THE COURT OFFICER: January 31.

2 THE COURT: We will add that to the

3 exhibit.

4 We will add those.

5 Q. On January 31, 2011, what was your recommended

6 course of care for Mr. Montero?

7 A. So let's see, I advised followup with treating

8 orthopedic surgeons at orthopedic and physical medicine

9 at University Orthopedics as well.

10 Q. Dr. Gladis?

11 A. Yes.

12 Q. He never saw Dr. Gladis, did he?

13 A. No, I don't think that he did.

14 Q. You also said, you told him to come back when?

15 A. I indicated about six-weeks or so.

16 Q. So that was January of 2011. The next time he

17 came back to you was in August of 2011?

18 A. August of 2013.

19 Q. So he came back to you not six-weeks later but

20 seven months later?

21 A. Yes.

22 Q. If you check the August -- you have University

23 Orthopedics records there?

24 A. Yes.

25 Q. Could you check the August 10th, 2011 report

1 from University Orthopedics.

2 Do you have that?

3 A. Yes. August 10th, 2011.

4 Q. Five days before he saw you, he also saw Dr.

5 DeMarco?

6 A. Yes.

7 Q. Did Dr. DeMarco recommend repeat x-rays and

8 MRI's of both knees?

9 A. Yes, that's part of his assessment plan.

10 Q. Do you know if plaintiff ever underwent x-rays

11 or MRI's of either knee?

12 A. I don't no.

13 Q. You were not treating him for his knees,

14 correct?

15 A. Correct.

16 Q. But you did have occasion to discuss with him

17 the impact that his knee conditions is having on his

18 gait, correct?

19 A. Yes.

20 Q. It is a fact, is it not, that you told Mr.

21 Montero after the, after you performed your spine

22 surgery that the spine surgery was a success and that

23 the problems that he was having were related to his

24 knees, not to his back?

25 A. That the spine surgery made him neurologically

1 stable but he should continue to treat for his knees.
2 Q. That's what you told him when you saw him
3 sometime in 2011, correct?
4 A. Yes.
5 Q. You would agree with me, would you not, that
6 that Mr. Montero never told you about the August 20th
7 automobile accident, correct?
8 A. Yes.
9 Q. And, you would also agree with me that
10 performing medical assessment of causation, it is
11 important to know everything related as far as the
12 patient's past history is concerned, correct?
13 A. For pertinent things, yes.
14 Q. In other words, if you are going to try to
15 pinpoint the cause of a particular condition, if you
16 can, you need to know the history of that condition and
17 that particular aspect of the patient's anatomy,
18 correct?
19 A. Yes.
20 Q. So you would agree with me that in determining
21 whether the condition that you observed in January of
22 2009, when you first saw Mr. Montero was a condition
23 that commenced in August of 2008 or perhaps back in
24 October of 2007 or even some time before then, it would
25 have been important for you to know everything about the

1 condition of Mr. Montero's back, as far as back he could
2 remember, is that correct?
3 A. That's why I reviewed those records as well,
4 yes.
5 Q. But you did not review them until well after
6 you performed your surgery, correct?
7 A. But I was asked about causation here today.
8 Q. I understand but you also -- those records are
9 not in your file, correct?
10 A. Right.
11 Q. When were you first shown those records?
12 A. From the previous accident?
13 Q. Yes.
14 A. I want to say probably, maybe a month or so
15 ago.
16 Q. A month or so ago?
17 A. Three, four weeks ago.
18 Q. Back in -- you agree with me that an MRI does
19 not give you a date of when the condition shown in the
20 MRI began to exist, correct?
21 A. Yes.
22 Q. You also agree with me that the growth around
23 the -- what's spondylosis?
24 A. Spondylosis is descriptive term that relates
25 to the way the vertebra or the bones in your back

1 appear, if you take an x-ray or CT scan or MRI ,
2 spondylosis in general refers to the gender process that
3 happens over course of time.
4 Q. Did you observe any spondylosis in the
5 plaintiff's lumbar spine?
6 A. No significant spondylosis changes.
7 Q. You testified that Mr. Montero, that he had
8 been involved in an accident on August 27, 2008,
9 correct?
10 A. Yes.
11 Q. What did he tell you about the mechanism of
12 the accident?
13 A. That he was in an elevator, as he described it
14 to me, that was undergoing a rapid descent then at that
15 point in time, he sustained an injury to his backs and
16 knees.
17 Q. He did not tell you the mechanism of the
18 injury he sustained, did he?
19 A. In terms of exactly what happened to his body
20 on the inside of the elevator?
21 Q. Correct?
22 A. I recall we had spoken, something he was in
23 the elevator and I believe because the rapid descent of
24 the elevator, there was a fall or something that
25 happened to him inside where he sustained in the lower

1 back and knees.

2 Q. You would have written down if he had told you

3 how his body moved that allegedly caused this injury?

4 A. I don't always write down the specific -- the

5 details of the body mechanics that happen but I do take

6 a history of whether or not it was a work-related injury

7 then I know what the basic mechanism of that injury was.

8 In this case, a rapid deceleration.

9 Q. Let's go back to your initial report from

10 January of 2009. You have that in front of you?

11 A. Yes.

12 Q. All I see there, correct me if I am wrong is,

13 you have written down, he was injured on August 27, 2008

14 in elevator accident when construction elevator he was

15 riding in abruptly fell causing acute injuries to the

16 neck, back and bilateral knees?

17 A. Yes.

18 Q. That's what he told you?

19 A. Yes.

20 Q. That's what you wrote down?

21 A. Yes.

22 Q. You don't remember anything else about that

23 specific interview conducted more than four years ago in

24 the intervening time of which you have seen thousands of

25 patients?

1 A. Well, not specifically more than that, but I
2 do recall that there was something in addition to just
3 the rapid deceleration that occurred, because just rapid
4 deceleration in of itself would not cause any bodily
5 injuries.
6 Q. Exactly.
7 You say in the, in your next past medical
8 history, you see intake sheet.
9 Do you have the intake sheet there?
10 A. No, I do not have the intake sheet.
11 Q. Where is the intake sheet?
12 A. Intake sheet is a handwritten sheet the front
13 desk at orthopedic university would hand to the patient,
14 the patient fills that out when they come into the
15 office.
16 Q. That's not in the file from University
17 Orthopedics there?
18 A. No, I have the transcribed notes but I don't
19 have a copy of the in-take sheet.
20 Q. I don't have a copy of this.
21 We will mark this one for identification.
22 Show it to him, replace it with a photocopy.
23 THE COURT: What do you want to do with
24 that?
25 MR. FABIANI: I would like to have it

1 marked as the next exhibit. For some reason, I
2 thought it was in the University Orthopedics.
3 THE COURT: Any objection?
4 MR. MIKLOS SR: Let's get an
5 identification of it then I have no objection.
6 THE COURT: Let's mark it for ID.
7 THE COURT OFFICER: Defendant's O for ID.
8 Q. Do you recognize that document?
9 A. Yes.
10 Q. Is that the intake sheet from University
11 Orthopedics referable to the plaintiff?
12 A. Yes, it is.
13 Q. Was that a record that was kept --
14 MR. MIKLOS, SR: We will stipulate.
15 THE COURT: Do you want it in?
16 MR. MIKLOS SR: We put it in evidence
17 because he says it is. That's good enough for me.
18 THE COURT: We will put exhibit O into
19 evidence.
20 Q. Could you tell us what the, what Mr. Montero
21 listed as his chief complaints?
22 A. Sure. Chief complaint, lower back, middle
23 back, left and right knees.
24 Q. What did he identify as the onset of the
25 symptoms?

1 A. He wrote down next day.
2 Q. That's the day after the accident, correct?
3 A. According to this, yes.
4 Q. And he identifies what the location of the
5 problem, correct?
6 A. Yes.
7 Q. What does he identify the location of the
8 problem?
9 A. He identifies it as back and knee.
10 Q. Which of the medical records of the prior
11 medical treatment did you see?
12 A. I saw the -- he had conservative treatments,
13 the physical therapy and conservative treatment he had.
14 I saw some reports on some MRI, I saw MRI and EMG.
15 Q. Did you see the records of Dr. Mostovoy?
16 A. I don't recall the name off the top of my
17 head.
18 Was that part of the conservative treatment
19 group he saw for the accident?
20 Q. Was he under the treatment of a physiatrist
21 and chiropractor, Dr. Roberts?
22 A. I believe so.
23 Q. And the chiropractor was Dr. Mastovoy?
24 A. Yes.
25 Q. Which is the Healing Arts, is that G?

1 A. G.

2 Q. Let's look at that. Dr. Mastovoy.

3 A. Yes, is it.

4 Q. Dr. Mastovoy wrote down what level of pain Mr.

5 Montero complained of after the October 2007 accident in

6 his lower back?

7 A. I have the first page.

8 Q. Yes?

9 A. Yes.

10 Q. What does he say that the pain that he felt

11 after the October 2007 accident was in his lower back?

12 A. He has down acute moderate bilateral lumbar

13 pain, pain scale 9 out of 10.

14 Q. Then, you subsequently learned that he

15 underwent three months of physical therapy and other

16 treatments, correct?

17 A. Yes.

18 Q. Could you, the doctor who was treating Mr.

19 Montero from the date of this accident, through his

20 being referred to you as Dr. Khanan?

21 A. Yes.

22 Q. Plaintiff's Exhibit 1 I think is Dr. Khanan's

23 record.

24 MR. FABIANI: May I approach?

25 THE COURT: Go ahead.

1 Q. 9 not 1.
2 September 5th, 2008.
3 After the accident that is the subject of this
4 lawsuit, did Mr. Montero report pain in his lower back?
5 A. Yes.
6 Q. Did he report the level of pain as being 7 out
7 of 10?
8 A. Yes.
9 Q. You would agree with me that 7 out of 10, on a
10 pain scale is less than nine out of ten on pain scale?
11 A. 7 is less than 9, yes.
12 Q. Then during the course of your treatment with
13 Dr. Khanan, bear with me for one second.
14 The next day -- the next treatment is November
15 4th, 2008, correct? I think you have to work your way
16 forward.
17 A. Yes, November 4, 2008.
18 Q. There, the plaintiff reported pain level of 6
19 out of 10, correct?
20 A. Yes.
21 Q. 6 out of 10 is better than 7 out of ten?
22 A. Yes.
23 Q. And much better than 9 out of ten?
24 A. Yes.
25 Q. Then let's move forward to December of 2008.

1 A. Yes.
2 Q. And, lower back pain is reported as being five
3 out of ten?
4 A. Yes.
5 Q. That's correct. There is continued
6 improvement, is there not?
7 A. Yes. Pain.
8 Q. Lower back pain has continued improvement.
9 Let's go to January of 2009. Do you have that
10 January 30, 2009?
11 A. Yes.
12 Q. Which is a couple of days after he saw you?
13 A. Yes.
14 Q. What did he tell Dr. Khanan that his lower
15 back pain was the day -- four days after he had seen you
16 for the first time?
17 A. He had this listed as a four.
18 Q. Four out of ten, that's even better than it
19 was before?
20 A. For the lower back, yes.
21 Q. Continuing improvement for the lower back,
22 yes?
23 A. Yes.
24 Q. Now, he was not referred to you by Dr. Khanan,
25 was he?

1 A. No, he came in from the university group.
2 Q. He was referred to you by Mr. Rotero?
3 A. He sent him to the university and the
4 university sent me to.
5 Q. Mr. Rotero sent him to university then that's
6 how he got to you?
7 A. Yes.
8 Q. Can you look at Dr. Khanan's September 5, 2008
9 report?
10 A. Yes.
11 Q. Where there is a discussion of radiating pain
12 from the lower back down to the lower extremities?
13 A. I don't see him indicating a radiating pain,
14 radiating symptoms except for the positive straight leg
15 raise.
16 Q. And you will also, you agree with me that Dr.
17 Khanan reports that Mr. Montero told him that he had no
18 similar symptoms in the past as reported with the
19 accident, correct?
20 A. Yes.
21 Q. We know that to be untrue, correct?
22 A. Yes.
23 Q. So would you agree with me that at least with
24 respect to this particular aspect of the case, Mr.
25 Montero was not being truthful with his providers?

1 A. Or he did not indicate it as being a
2 significant problem to his service providers.
3 Q. It says no similar symptoms in the past,
4 correct?
5 A. Yes.
6 Q. You would agree with me that he underwent
7 three months of physical therapy, less than a year prior
8 for lower back problems, correct?
9 A. And neck, as well, yes.
10 Q. Let's look at the November 4th -- one more
11 question -- Mr. Montero told you he had not worked since
12 the date of the accident in August of 2007, correct?
13 A. Sorry. Since?
14 Q. Mr. Montero told you in January when he came
15 to see you that he had not worked since the August 2007
16 accident?
17 A. August 2008. That he was not able to get back
18 to work, correct, yes.
19 Q. Let's look at the November 4, 2008 report?
20 A. Yes.
21 Q. There is no mention of any radicular symptoms
22 in that 2008 report, is there?
23 A. Correct.
24 Q. What does it say with regard to work status?
25 A. Work status, it says part-time.

1 Q. It says, Mr. Montero told Dr. Khanan that he
2 was working part-time?
3 A. According to this.
4 Q. That's inconsistent what he told you in
5 January of 2009?
6 A. Although he told me he was not doing his iron
7 work at the time.
8 Q. He told you he was not doing any work?
9 A. I have him down as no work.
10 Q. Let's go to the January -- the December 2008
11 -- December 12, 2008 report of Dr. Khanan?
12 A. Yes.
13 Q. Any mention in there of radicular symptoms?
14 A. Straight leg raise.
15 Q. Other than the straight leg raising, any
16 mention of radicular symptoms?
17 A. Other than the straight leg raise, no.
18 Q. So we are clear, the way Dr. Khanan reports it
19 Dr. Khanan wrote the straight leg raising revealed lower
20 back pain bilaterally at 60 degrees, that's correct?
21 A. Yes.
22 Q. Not radiating pain down the legs, is that
23 correct?
24 A. No, he did not indicate radiation of pain, no.
25 Q. Now let's go to January 30, 2009, which was

1 four days after Mr. Montero saw you, correct?
2 A. Yes.
3 Q. And, that's when he is reporting to Dr. Khanan
4 that his lower back pain has gone from 4 to 10?
5 A. With the lower back, yes.
6 Q. Is there any mention in that January 30, 2009
7 report other than the straight leg raising test of there
8 being any radicular symptomatology?
9 A. No, not this report.
10 Q. Let's continue on to March 24, 2009.
11 Dr. Khanan, any mention of radicular pain
12 radiating down into the legs?
13 A. Other than the straight leg raising, no
14 radiating symptoms, no.
15 Q. Continue on to May 1, 2009.
16 A. May 1, I have March 2009 and April 2010.
17 Q. May I approach?
18 We did just March 24th?
19 A. Yes.
20 Q. You have what next?
21 A. Then I have April 9, 2010.
22 Q. It is here but it is out of order. Hold on a
23 second.
24 We are looking at May 1, 2009?
25 A. Yes.

1 Q. Any mention on any radicular symptomatology?
2 A. No, just the straight leg raise again.
3 Q. In June of 2009, June 23, same question?
4 A. Pretty much the same exam.
5 Q. In terms of the pain level, the lower back
6 pain is now five out of ten, correct?
7 A. In June of 2009, yes.
8 Q. The knee pain seems to have disappeared,
9 correct?
10 A. Well, he has -- he is still limping. Knee --
11 no tenderness on the medial condyle.
12 Q. If you look at the May 1, 2009 report, it
13 indicates lower back pain 6. Right knee, 3. And then
14 in the June 23, 2009 report, it says lower back pain 5
15 and right knee pain. There is no mention of right knee
16 pain, correct?
17 A. Correct he does not list the right knee.
18 Q. If we go forward -- do you have July 24, 2009
19 there?
20 A. Yes.
21 Q. And lower back pain is now 6 to 7 and nothing
22 with the right knee, with the knee, correct?
23 A. Yes.
24 Q. We will stop at this point.
25 You testified on direct examination, I think

1 that Mr. Montero continued to see University Orthopedics
2 throughout 2011 and then again from -- then again in
3 2013, he saw you on two separate occasions.
4 Take a look at University Orthopedics records.
5 When was the last time that you saw
6 Mr. Montero at University Orthopedics?
7 A. November of 2010 at University Orthopedics.
8 Q. November 15, of 2010?
9 A. November, yes.
10 Q. That's six and-a-half months post-surgery?
11 A. Yes.
12 Q. All of the treatment you received at
13 University Orthopedics thereafter was treatment received
14 by either Dr. DeMarco or Dr. Touliopoulos, correct?
15 A. Yes.
16 Q. Would you agree with me at one point Dr.
17 DeMarco or Dr. Touliopoulos recommended surgery for the
18 left knee?
19 A. Yes.
20 Q. At one point, they recommended surgery for the
21 right knee?
22 A. Yes.
23 Q. They end up doing surgery on neither knee,
24 correct?
25 A. Correct.

1 Q. This all occurred in 2011, correct?
2 A. Yes.
3 Q. That was after the plaintiff was completely
4 asymptomatic with respect to his knee as reported by Dr.
5 Khanan in 2009, correct?
6 A. That was after 2009 from the notes that we
7 reviewed from Dr. Khanan where by he did not list the
8 knee issues, correct.
9 Q. The level that you performed the surgery on,
10 you performed a surgery at L-4/L-5, tell us what that
11 surgery was?
12 A. It was the micro neuroforaminotomy with
13 partial medial fastectomy then the laminectomy with
14 medial fastectomy and partial discectomy at L-5/S-1.
15 Q. How much of disc did you remove at L-5/S-1?
16 A. The portion of material that was protruding.
17 Q. Was that the portion of the nucleus pulposus
18 or annulous fibrosis?
19 A. It is a combination of both of those pieces.
20 Q. The part that you removed, you sent it to
21 pathology, is that correct?
22 A. Yes.
23 Q. Why did you send it to pathology?
24 A. In general, when we take something out of the
25 body, we send it to pathology. Usually, just to make

1 sure that we are not removing something that we think we
2 are not removing. That's the major reason.
3 Q. What was the -- how did the path report come
4 back on this one?
5 A. I don't know. I did not see the path report.
6 Q. Can you check the St. Vincent's Hospital
7 record?
8 THE COURT OFFICER: Plaintiff's 7 in
9 evidence.
10 A. I don't see the entire lab section. There is
11 usually a section that has blood value. That comes in
12 from pathology. All I see is the pre-op. I think there
13 is the portion of the path section in the chart that may
14 be missing.
15 Q. That's the subpoenaed record, I will tell you
16 the one we received pursuant to authorization did not
17 have path report, does that lead us to believe that
18 there was no path report generated?
19 A. You know, St. Vincent's was not on a -- I want
20 to check, there was a specimen. The operating room, the
21 nursing log from operating room checks out the specimen
22 so we know it was sent to pathology.
23 St. Vincent's was not on -- the path reports I
24 believe were not generated on paper then, they were
25 carbon copies, they were either faxed out carbon copies

1 or sent the carbon copy to the chart because it was not
2 computerized at the time. It is possible the path
3 report never made it to the chart.
4 Q. As you sit here today, you have no
5 recollection of ever having reviewed the path report, as
6 you sit here?
7 A. No.
8 Q. Can we go back to January 26 intake report --
9 not the intake report, the initial report on January 26?
10 A. Yes.
11 Q. On January 26 of 2009, that was the first time
12 you ever saw the plaintiff and you told him to come back
13 with the MRI's he had previously done, correct?
14 A. Yes.
15 Q. You told him to come back in four weeks,
16 correct?
17 A. Yes, I think I wrote down four weeks, correct.
18 Q. Instead, he comes back about six days later?
19 A. February 2, yes.
20 Q. Six or seven days later. He has the MRI
21 reports with him, correct?
22 A. Yes.
23 Q. Did he have the films themselves or just the
24 reports?
25 A. The films.

1 Q. You reviewed the films, right?
2 A. Yes.
3 Q. You spoke to him?
4 A. Yes.
5 Q. Now you had not conducted any course of
6 treatment of conservative care?
7 A. No, he came in after that, correct.
8 Q. But you, typically, before you recommend
9 surgery, you do recommend a course of conservative
10 treatment to try to ameliorate the symptoms?
11 A. It depends when you see the patients in their
12 treatment spectrum.
13 Q. Here, you saw the patient about five
14 and-a-half, six months after the accident, correct?
15 A. Yes.
16 Q. And, as far as you know, he told you that he
17 has been undergoing a course of physical therapy and
18 some conservative care, correct?
19 A. Yes.
20 Q. For five and-a-half months more or less?
21 A. Yes.
22 Q. You never saw those records of Dr. Khanan or
23 any of the people who were monitoring or who were
24 supervising that conservative course of treatment, did
25 you?

1 A. No.

2 Q. Yet, on February 2nd, less than a week after
3 you saw him, approximately, one week after you saw him
4 for the first time, you recommended that he undergo
5 surgery, correct?

6 A. After five months of symptoms with
7 neurological findings, yes.

8 MR. FABIANI: I have no other questions.

9 THE COURT: Is there any redirect?

10 MR. MIKLOS, SR: I don't think so.

11 THE COURT: Doctor, you are excused.

12 I ask the attorneys to approach.

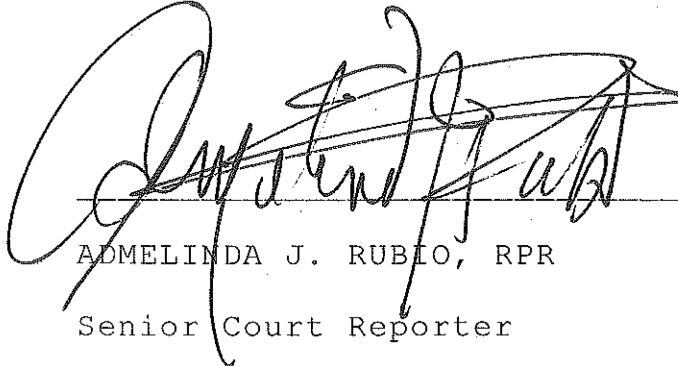
13 (Discussion held at bench.)

14 THE COURT: One of the jurors, I know has
15 a doctor's appointment on Wednesday morning, so we
16 work the schedule to allow members of the jury to
17 visit the doctor and get in on time so we will be
18 here Wednesday afternoon. We will not be here
19 tomorrow because I have other matters to attend to.
20 I think I might have told you earlier. We will be
21 here Wednesday but Wednesday afternoon to allow the
22 member of the jury to take care of whatever he has
23 to take care of.

24 We will be here 2:15 on Wednesday.

25 I will not be here Thursday, Friday. I

1 will see you Wednesday, 2:15.
2 Than thank you.
3 (Jury exits courtroom.)
4 THE COURT: Let the record reflect that
5 jury and alternates have now left the room.
6 Does anybody have anything they need to
7 put on the record?
8 MR. MIKLOS SR: No.
9 MR. FABIANI: No.
10 THE COURT: We stand in recess until
11 Wednesday, the 23 at 2:15.
12 (Proceedings concluded.)
13
14 * * * * *
15 The foregoing is hereby certified to be a
16 true and accurate transcript of the proceedings as
17 transcribed from the stenographic notes.
18
19
20



21 ADMELINDA J. RUBIO, RPR
22 Senior Court Reporter
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