UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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YARIMA MOYA,

Plaintiff,

- against - Index No. 18-cv-5337

CAREY HALL and ALPHA MISSION, INC.,

Defendants.

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DEPOSITION of ANGEL NACAGNO, M.D., an Expert Witness, held via web conference on March 22, 2021, commencing at 2:00 p.m., before KAREN VIGGIANO, a Shorthand Reporter and Notary Public within and for the State of New York.

Job No: 739949

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

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FILE# 48536.2

A N G E L N A C A G N O, having been first duly sworn by a Notary Public within and for the State of New York, was examined and testified under oath as follows:

EXAMINATION BY
MR. WHALEN:

Q State your name for the record.

A Angel Nacagno.

Q State your address for the record.

A 761 Merrick Avenue, Westbury, New York 11590.

Q Good afternoon, Dr. Nacagno.

A Good afternoon, sir.

Q I am Jim Whalen. I'm with the law firm of Lewis Brisbois, and I represent the defendants in this case which is Carey Hall and his company Alpha Mission, Inc.

I'm going to ask you some questions regarding the treatment of your patient, Yarima Moya.

If you don't understand the question, please let me know. I'll attempt to rephrase it. Otherwise I'll assume you understood the question; fair enough?

A Perfect sir, yes.

Q Yarima Moya is a patient that came under your care sometime in 2019; is that correct?

A Correct. I'm sorry. I'm just trying to correct against my medical records. Give me one second.

Q While you're looking for that, Doctor, we do all understand the difficulties today with staying on the Zoom and off the Zoom, okay.

A Correct. I got it. Looks like I'm in again. I have it again, okay.

Q So I think the question was: I'm going to be asking you questions regarding your patient Tarima Moya, correct?

A Correct.

Q First of all, Doctor, I have in front of me testimonial history which was provided by counsel for Ms. Moya, and it reflects that you've testified as an expert witness three times. Has that changed since the since I received this?

A No, absolutely not. It's about that, yes.

Q Just so we're clear, it's not a

trick question. I have you testifying in 2018, the beginning of 2019 twice, and nothing since then, either deposition testimony or in-court; is that correct?

A Yes.

Q Fair enough.

I think you were trying to pull your records up in front of you. Were you able to do that?

A I have it in front of me. I already have them. I cannot see you, but I can listen to you if that's okay.

Q That's probably good for you, okay?

A Yes.

Q I have the first time you saw Ms. Moya was on May 14, 2019; is that correct?

A Correct.

Q Do you have that record in front of you?

A Correct.

Q On that date you took a history, a social history from her first; is that correct?

A Correct.

Q Now, do you take this preliminary

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information yourself or does somebody in your office?

A No, normally I do it myself.

Q You took a social history from her; is that correct?

A Yes, normally we take social history.

Q You also took her vitals. That she was 5 foot 7 inches tall and 216 pounds, correct?

A I don't do the vitals. I have a nurse or a physical assistance that do that part.

Q But those are appropriately set forth in your records, though, correct?

A Yes, they are present there, correct.

Q Now, what is the significance to a spine surgeon of Ms. Moya weighing 216 pounds, if any?

A Well, it's an overweight lady that is important for us in some way. This depends like every patient how tall is the patient, how is the weight. That is important, yes.

Q Is it a fair statement to say that

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a spine surgeon finds that there's more people who were overweight have spinal problems than people who are slender; would that be fair to say?

A Not necessarily. You can have a really, really slim. I have a variety of patients with -- slim patients that have injuries of the lumbar or cervical spine and they need surgery. Either way, it's not really.

Q But obesity would be a factor in spinal issues; would that be fair to say?

A Yes, in patient who have current pain that don't have any traumatic event or anything like that. Obesity could carry problems over time, but not necessarily going to tell us that the patient have more problems with lower back or neck related to only obesity, okay.

Q Fair enough.

You took a history from her regarding the accident and how it happened; is that correct?

A Correct.

Q And you found out that she was in

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a car or motor vehicle, correct?

A Correct.

Q You recited in your report that she had an accident with a trailer; is that correct?

A Yes, a tractor trailer, correct.

Q So a truck, correct?

A Correct, a trailer truck.

Q That was the significance to you because of the size of the vehicle, correct?

A Correct. Always significant, yes.

Q Besides understanding that she was in a collision with a tractor trailer, you didn't know anything else about the accident; would that be fair to say?

A At that moment, what I have written there, no. That's what was reported there, yes.

Q So you didn't know the extent of the damage to either her vehicle or the tractor trailer, correct?

A It's not written in the chart. I didn't know at that time.

Q You didn't know the forces that were involved in the accident; fair to say?

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A No, I did not.

Q You didn't know what part of her vehicle came in contact with the trailer, or what part of the trailer came in contact with her vehicle?

A Not at that time.

Q You didn't know if this was a major accident or a minor accident, correct?

A I don't know what you mean by major or minor accident.

Q Fair enough.

You didn't know if this accident had significant damage to the vehicles or very little damage to the vehicles, correct?

A No, I didn't know.

Q You recited in your records -- by the way, do you take down all this information yourself, or do you have somebody else there in your office, or your staff taking down this?

A Normally I take it myself and I'm dictating when the patient is telling me what is going on.

Q You took down information that she was taken from the scene by an ambulance, correct?

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A Correct.
Q You also had information that she was a seat belted driver, correct?
A Restrained driver, correct.
Q And that's of significance to you as a spine surgeon because the seat belt will restrain the occupant, fair to say?
A Not necessarily. Sometimes seat belt helps. Sometimes play against us. Mostly with cervical injuries.
Q But not with the lumbar spine; is that fair to say?
A No, could happen either way. It's not really related unless it's a major accident where the patient flew away from the car and break the front window, that is going to be significant.
Q You knew that the airbags did not deploy, or did you know that?
A I don't have it written here. I didn't know.
Q You knew that she was taken by the ambulance to an emergency room where they treated her and released her correct?
A Correct, it's written there.

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Q These are all things recorded in your initial consultation with her, correct?
A Correct.
Q And each and every one of these things has a relative degree of importance to you in assessing her situation, correct?
A Correct.
Q She told you that she did not have a prior history of neck or lower back pain, correct?
A Correct, it's what is written in my chart.
Q And that's of significance to you because she's telling you it came out of this accident, correct?
A Correct.
Q And that would affect your opinions regarding causation as you move forward through this process of treatment for her, correct?
A Not necessarily. It's going to change some things in my thinking but not necessarily it's going to change my opinion of treatment.
Q I probably misphrased that, okay.

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It's not going to affect your treatment, we both can agree on that, correct?
A Correct.
Q You're going to treat her as appropriate as a spine surgeon for her complaints, correct?
A Correct.
Q But when you're opining about how she was injured, the history that she gives you is important; is that fair to say?
A I'm sorry, I couldn't hear you.
Q When you're opining as to what was the cause of her injuries, the history that she's giving you is important, correct?
A Some degree, yes. Not totally.
Q When you're opining on what caused her injury, causation, the history she gives you is all you really have to base it on, correct?
A Not necessarily because the injuries that she has now even if she has previous history, could be related to the accident. It doesn't work in that way, but it's relative. But, yes, it's important in some way to know if she has previous history or

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not.
Q And in her giving you the history, you rely on her truthfulness; is that fair to say?
A Correct.
Q You don't launch an investigation to see what she's telling you is the truth, correct?
A Correct.
Q At the time that you saw her, it was a year and a half after the accident, approximately, correct?
A Correct.
Q There had been some MRIs taken before she saw you, correct?
A Correct. Now I know that, yes.
Q What do you know about MRIs that were taken?
A The MRI she came with. Every patient comes with MRI to the office, okay. If not, I don't see the patient. I don't base my diagnosis in reports basically. This patient brought the CD with her as I put there. She had an MRI of the cervical and local spine performed on Third Avenue Images. I reviewed

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the images myself and wrote there what I saw basically.

Q Okay, I misunderstood you. When you said, "I know that now," you knew that at the time you were examining her that first time too that she had a prior MRI, correct?

A Yes, this MRI. This is the only MRI that I knew she had, the one that she brought to me.

Q I believe that MRI, its in your report was dated February 1, 2019, correct?

A That is the cervical lumbar, correct, that is the MRI that I saw. That's what she brought.

Q Would it be fair to say that those are the only MRIs you've ever seen with regard to her cervical and lumbar spine?

A The question is if I -- they the only images that I saw? Yes, these are the only.

Q Well, you just kind of made it a trick question, so I'm going to rephrase it because I don't want it to be one.

These are the only MRI images you've seen regarding her cervical and lumbar

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spine, correct?

A Correct.

Q Because you have seen other images such as X-rays of her lumbar spine, correct?

A After the surgery, yes, I have X-rays. Normally I request the X-rays. At that point, I only saw this that she bring with her.

Q Understood. I just didn't want you to think I was just referring to only the MRIs. I know you've seen other things.

A I understand.

Q You conducted -- we already went over this. This was one and a half years after the accident, correct?

A Correct.

Q Approximately. And this was your only visit with her before recommending fusion surgery; is that correct?

A Let me see. I want to see this.

Q Sure.

A I want to see what I put. In this visit, I already said she was -- basically all history and treatments, my physical exam, complaints of the patient, she was a candidate

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for a posterior spinal fusion.

Q Was it your understanding she already had some kind of procedure to her lumbar spine before seeing you?

A Let me see. I'm reading the report at that time, okay. Everything that is written in the report is what I knew at that time. I knew -- give me one second. At that time, I knew what is in my history of present illness. That the patient has extensive conservative treatment. She had epidural injections. If you call it procedure. Three in the lower back and three in the neck.

Q Epidural injections are not spine surgeries like a surgeon like yourself performs. You wouldn't call that spine surgery, correct?

A Correct.

Q You requested authorization for a lumbar fusion surgery, correct?

A Correct.

Q Are you performing surgery now as much as did you before the pandemic?

A It's a special question. Yes, we're performing some surgeries now because

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during pandemic we're backed up with surgeries. We had to stop doing surgeries for months. And all these surgeries that were indicated, that means we have a number of surgeries. That is the reason why we're performing more surgeries at this time.

Q That's why I asked you the question that way. Obviously, we're all aware of that. So this visit is obviously pre-pandemic, correct?

A Correct.

Q You're recommending, this surgery pre-pandemic, correct?

A Correct.

Q At that time, okay, with things not having returned to normal completely yet, or getting there, how many surgeries spinal surgeries were you performing on a weekly or monthly basis generally?

A Pretty same over time. I cannot say exactly how many surgeries, but between 20 and 30 surgeries a month probably.

Q And those 20 to 30 surgeries would involve the cervical thoracic or lumbar spine; fair to say?

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A Yes, spine surgeries in general.
Q Those spinal surgeries are surgeries that only a spine surgeon can perform and they are such as discectomies, correct?
A Correct.
Q And fusion surgeries, correct?
A Correct.
Q And laminectomies, correct?
A Correct.
Q You don't do percutaneous diskectomies though, correct?
A No, only minimally invasive but not percutaneous.
Q Percutaneous diskectomies are done by pain management doctors, correct?
A Yes, most of the time that's correct.
Q Who else does them besides pain management doctors?
A I think mostly pain management. I understand that some physical therapy authorize to do that, but it's like really strange. It's going to be performed mostly by pain management. I'm not so sure some surgeons will do it, but pain management is the standard of

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care now.
Q Right, and these percutaneous -- are you okay with that definition "percutaneous discectomy"?
A It's okay, yes.
Q These percutaneous diskectomies are outpatient procedures, correct?
A I do believe so. I'm not really familiar with that, but, yes, they are outpatient procedures.
Q But they are specifically not spine surgery that a trained spine surgeon does, correct?
A It's not performed by the spine surgeons but they are spine procedures, correct.
Q Certainly.
On this first visit you also ordered for Ms. Moya a CAT scan and X-rays of the lumbar spine, correct?
A Correct.
Q We already discussed you sought authorization for her surgery, correct?
A Correct.
Q Why did you order the CAT scan and

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the X-rays?
A X-rays mostly to evaluate if this something unstable, instability of the level of the spine that could change the orders or could change the indications. And CT scan mostly for pre-surgical planning.
Q And you got those X-rays prior to conducting the spine surgery, correct?
A I do believe so. Yes, I should have them the day before. At least the day before the surgery, yes.
Q In the first report right after you order where it reflects you ordered these diagnostic films, you say in the discussion section, "Based on this clinical evaluation, the current problem is causally related to this accident." Did I read that correctly?
A Correct.
Q When you say, "the current problem," you're of course referring to her cervical and lumbar spine; is that fair to say?
A Correct. Yes.
Q Without knowing anything about the accident, except the vehicles involved, you say it's causally related to the accident. So

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you're relying on the truthfulness once again of Ms. Moya, correct?
A Correct.
Q Your relying on the truthfulness of her saying that she had no prior history regarding neck and back problems, correct?
A Correct.
Q You saw her again, I think for the second time. And when I say that to you, Doctor, I do have your records, but you never know, maybe I'm missing a page. So that's why I want to verify. The next time you saw her is on September 3rd of 2019, correct?
A Correct.
Q So the first time you saw her, we're about a year and a half and now you're seeing her we're another three, four months down the road, correct?
A Correct.
Q At this time you planned the surgery; is that correct?
A Preoperative planning or preoperative discussion, yes.
Q Your plan now is to do a lumbar fusion surgery with a laminectomy, correct?

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A Correct.
Q And this is based on her continued complaints that she still is reciting to you, correct?
A Correct.
Q And it's also based on your review of the MRI from February of 2019, correct?
A Correct.
Q You've also had an opportunity at this time. You reviewed the actual images of the MRI. I think you had that opportunity also before, correct?
A Correct.
Q Now you have the X-rays of the -- you don't have the X-rays. You asked her to bring them with her; is that fair to say?
A It depends because sometime the X-rays are done in the pre-op period in the hospital that where surgery is going to be done. But normally I have access to the X-rays before the surgery. I should have access before the surgery.
Q You reflect in your treatment plan she had taken the lumbar X-ray and that she's to bring it with her the following day when the

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operation is scheduled for, correct?
A Normally my surgical coordinator takes care of that. But basically she have X-rays done -- let me see -- on August 29, 2019. I have X-rays there.
Q What was the date?
A August 29th I have X-rays from her, okay.
Q Okay.
A The other X-rays I have lower back X-rays. I'm checking my documents, I'm sorry, just to be fair with the time, okay. She had -- she performed X-rays with flexion and extension at my facility. That is why I have access to them. She performed those on October 25th -- this is after the surgery. Let me be sure of the -- these are after the surgery. I don't want to get confused. This is regular standard of care, okay.
Q Your records do reflect you had X-rays before the surgery. We can't pin our finger on them right away.
A But I have to have them. Yes, I cannot find them. But I have to have them or I don't do surgery.

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Q We have no dispute fair enough. You scheduled her surgery at St. Frances Hospital on September 4, 2019, correct?
A Correct.
Q Doctor, how long have you been involved with the New York Spine Institute?
A Five, six years since I finish my fellowships.
Q Is there a boss at the New York Spine Institute?
A Yes, Dr. Alexander Demoura, D-E-M-O-U-R-A.
Q The New York Spine Institute has several facilities, correct?
A We have one main facility that is in Westbury, the one that I gave there. We go to different offices to see patients, correct. We have a new one that didn't exist at that time in Queens now.
Q Besides the one in Westbury, you have the one in Queens, you have one in New York City, correct?
A It's offices we rent for seeing patients there.

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Q One in the Bronx also, correct?
A Correct.
Q One in Brooklyn?
A Not anymore Brooklyn due to the pandemic.
Q Deer Park?
A Deer Park is not anymore. We just opened a new one in Commack, our facility.
Q Newburgh, New York?
A I go there personally, correct. We rent there.
Q White Plains?
A I go there too.
Q And New Jersey?
A No, we don't have any facility in New Jersey.
Q Is that because you closed that facility?
A No, we were going to a hospital there. I not going anymore there. It's not that we close it. We're seeing patients in New Jersey hospital, but we are not going for -- a couple of years I didn't go there.
Q The facility you have in Westbury, can you do operations there?

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A No.
Q At any of these facilities can you do operations?
A No.
Q Not even diskectomies at any of these facilities, is that fair to say?
A No, they are not surgery centers. I don't work in surgery centers. I think pain management perform the percutaneous there. I do believe so now in the Westbury one. I'm not sure they doing it there or they go to the hospital.
Q So all of your surgeries that are performed by doctors in the New York Spine Institute are done in hospitals; is that fair to say?
A Correct.
Q Should I give you a second to pull up the operative report?
A I have it in front of me, yes.
Q You told me you do operations 20 to 30 times a month, correct?
A Correct.
Q This is one of those operations that you perform on those occasions, correct?

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A Correct.
Q This is an operation that you're fully familiar with obviously, correct?
A Correct.
Q This is an operation that is performed by spine surgeons thousands of times a year in the United States every year, correct?
A Correct, spine surgeons and neurosurgeons both perform fusions.
Q This is a surgery that has become very frequent in the community, correct?
A Correct.
Q This is a surgery that you've had yourself great success with, correct?
A Correct. It works pretty good.
Q And the purpose of the surgery is to take away the pain in the patient; would that be fair to say?
A Not necessarily. Main purposes of this surgery are when it could be done for pain, if you have a big injury of the disk. But also is to decompress the nerves and basically improve the function and avoid more deterioration of the nerve. That is the main

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reason of why these patient have surgery.
Q Sure.
And also would it be fair to say to create stability in the spine?
A Well, only if spine is unstable. Not every case is going to be unstable.
Q How long -- I'm sure you don't remember this specific surgery exactly, but in general a one-level fusion surgery like this, once you start the operation, not once you knock the person out, how long is the surgery take?
A Surgery for one level fusion is about two hours, two hours and a half. Laminectomy, I would say two hours and a half, maybe three hours.
Q Fair enough.
You state in your operative report that the patient recited a history again in the operative report that the patient was involved as a restrained driver operating an SUV involved in a collision with a trailer, correct?
A Yeah, I put same history I have in my chart.

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Q Why do you put that history in the chart for the operative report?
A Because these are indications when I perform surgery.
Q That's an important indication that she was a restrained driver in a collision with a tractor trailer, correct?
A No, this is part of the history. It's not make difference. Remember, I'm a spine surgeon. I don't do legal part. I'm more stressed doing this with you guys than real spine surgery. I put all the facts there that are -- they are involved in car accident, only fall or push or have pain forever. It's a different situation if you have scoliosis in the chart. We put everything related there.
Q And also important for you and that's why you put there her denial of a history of neck and back pain, correct?
A Yes, standard of care I repeat what the patient -- my history of present illness.
Q On page 3 of the report, I'll refer you to a better section in a second.
A Okay.

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Q At the top of page 3, you site that "There was a large amount of residual scar tissue an ligamental flavum adherent to the underlying dura." So you do a comprehensive external neurolysis. What does that mean? What is the residual scar tissue in ligamentum flavum?

A Every time patient have an injury not necessarily a previous surgery. But in this case I know now she had, you know, the percutaneous discectomies. But every time the patient have an injury with this bulging disc herniation, some compromise of the bone and the reaction is common as in any part of the body. The body's trying to protect itself and is going to form scar tissue around. We see all the time, okay. The flavum is a ligament. Normally body's really smart. It's trying to compensate everything or everything that could be an injury. It's trying to stabilize the spine. It's trying to grow parts of the spine, create some scar tissue or fibrosis just to try to minimize the injury. That is why we found this almost in every of our surgeries that are more than months old, okay.

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Q You used the adjective there was a large amount. So this was something that was going on for a while and was of some significance fair to say?

A Yes, consistent with time of accident couple years or one year is enough for giving you all these reactions. We're not going see this if I do surgery in patient that have an accident one month ago.

Q This could be consistent with somebody having problem for three, four, five years; isn't that fair to say?

A It could be. But it doesn't need to be so long. It could be shorter than that.

Q But we both agree that this is a process that occurs in the body over time?

A Over months, yes.

Q But it could be years, correct?

A Of course it could be.

Q Because you didn't do a fact check on the history that was given to you by Ms. Moya. You relied on her truthfulness, correct?

A Correct, I repeat before I don't do that because I don't care about the legal

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part, the situation we have now. I'm a spine surgeon. I localize the patient. I related it to an accident. I make sure the symptoms relayed by the patients are consistent with my physical exam with the result of the status performed on the patient and that is what I decide surgery.

Q Fair enough.

Doctor, you also recited down a little farther you had to remove several posterior osteophytes at L5-S1, correct?

A Yes.

Q Osteophytes are bony growth; is that fair to say?

A Correct.

Q It's the body once again compensating for the injury, correct?

A It's all related, correct.

Q These osteophytes form over time; fair to say?

A Correct. Months to years.

Q And it's difficult just seeing the osteophyte in and of itself to tell how long it's been ongoing; fair to say?

A Yes.

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Q Except for the fact that it doesn't suddenly appear; fair to say?

A Correct.

Q There were no complications with this surgery, correct?

A Not that they record. No complications, correct.

Q It was a successful surgery, correct?

A Correct.

Q You addressed the nerve entrapment in her lumbar spine, correct?

A Correct.

Q You freed up the nerves to the best of your ability, correct?

A Correct.

Q And the fusion part of this, you took some bony material, bone from the pelvis I believe of this patient, correct?

A From where? I'm sorry?

Q Pelvis.

A No, from the pelvis I get bone marrow. The bone that we used for the fusion is cadaver bone. That bone has no cells or anything that could transfer disease to the

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patient. That is why we use blood from the pelvis that we do it through the same surgery that we use the pelvic bone. That is basically bone marrow that have stem cells.

Q And the purpose besides relieving the nerve entrapment was to fuse L5-S1, those two vertebras, correct?

A Yes.

Q Once the bone marrow or the bone paste hardens, those two vertebra will be fused, correct?

A Correct.

Q If there was instability in that area, that certainly would create stability correct?

A Correct.

Q You've been involved with the New York Spine Institute for a number of years. Do you know what the rate of compensation for this surgery was to that entity?

A I have no idea.

Q Do you know the rate of compensation for the hospital for this operation?

A Absolutely not.

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Q How about the anesthesiologist, any idea what his or her compensation would be?

A No, I do not know. I think it varies too. It depends what insurance the patient have. Everything you're telling me depends on the insurance. In this case its Workers Comp, no-fault or Medicare or whatever. But I don't know really the amounts.

Q That would be true if a person's just paying their own way without insurance was in there, you don't know the amount of the cost of the surgery; fair to say?

A No, I have no idea how much it cost one or the other. I have no idea.

Q How about this. Do you know since you ordered another X-ray before this surgery, what the cost of the X-ray was?

A I don't really remember right now, but it's a cost for X-rays, MRIs, and everything, yes.

Q When you did this surgery, you certainly had to rely, before you opened the person up, before the operation started you relied on the MRI; is that fair to say?

A Yes.

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Q You used the MRI that the plaintiff, Ms. Moya had taken on February 1, 2019, correct?

A Correct. Yes, I used it. I used the MRI. We try to use the MRIs within one year. If it's more than one year or longer than that, we request a new MRI normally.

Q So that was my next question. You didn't see the need to order a further MRI before the surgery, correct?

A No, because the surgery -- let me see just to be sure. The surgery was performed in September and the MRI is from -- what is the last MRI? From January?

Q The MRI is February 1, 2019.

A Correct. It's like six, seven months after. It's still valuable. We use it.

Q The patient, Ms. Moya, was discharged after this surgical procedure to her home, correct?

A I do believe so. I don't recall right now. Most of the patients are going home. Some patient are going to subacute rehab. I don't recall if she went home or went to subacute rehab. Most of these patients I

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will say 95 percent are going home.

Q So this is a procedure after it's completed, the patient can return that same day sometimes to home?

A Not this procedure. I don't know lumbar fusion that retained the same day home. We're trying that with minimal invasive techniques now. But neck, yes, they go home same day. Lower back, they stay in the hospital about two, three days.

Q But you don't know if she did stay in the hospital or not two, three days, correct?

A Well, she stayed. They have to stay in the hospital two, three days because I'm not going to risk -- I never remember sending patient home the same day after this kind of surgery.

Q That would be a lumbar fusion surgery?

A We're talking about the lumbar fusion, correct.

Q Day one, surgery. Day two is the next day they can go home sometimes. Day three, others?

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A Yeah, they need cleared by physical therapy. They need to do couple of exercises, go upstairs. We have to remove the drains that we put there. I don't send patient with drain to home. But basically two, three days patient are going home. That is the norm.

Q She followed up with you postoperatively on September 20th, correct?

A Correct. I saw her on September 20th.

Q You took X-rays. Did you take X-rays that day or was it the next appointment?

A No, normally the next appointment. Unless something is going on. The standard of care is seeing the patient two weeks, six weeks, six months and one year in general. The first two weeks appointment is mostly for wound care or checking the wound and see how the patient is doing.

Q Now speaking of the wound, in this case you created an incision into Ms. Moya in her back to get access to the L5-S1 space, correct?

A Correct.

Q And that incision is made by you,

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and it's approximately a couple inches; is that fair to say?

A It depends how big is the patient in the back. In her case it could be a little bigger besides L5-L1 fusion. I did a laminectomy or partial laminectomy in L4, 5 that means you have to go to two spaces. It's a little bit bigger, but yes, it could be three inch, five inches. It depends. Every patient is different.

Q Fair to say you don't have a specific recollection on this patient whether it's three inches or five inches?

A No, I do not recall.

Q Fair enough.

You saw her a second time for follow-up on October 25, 2019, correct?

A Correct.

Q Things were pretty much the same; is that fair to say?

A Correct. Yes.

Q Recovery was moving along, correct?

A Recovery was moving along. We get X-rays at that time.

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Q The X-rays are to ensure that the instrumentation you put in there's no movement; fair to stay?

A Correct.

Q And that the bone material is hardening, correct?

A Well, you are not going to see with X-rays, but the idea is probably that there's no movement at the level of the surgery.

Q You saw her again on November 5, 2019, correct?

A Let me see. Yes, I saw her again November 5th.

Q I believe she gave you a history at this time that said that she states that she has a lot of low back pain, she's ambulating with a cane. The patient states numbness and tingling has improved. Is that what she told you on that date?

A Yes, basically what we're seeing with the patient, correct.

Q Because the reason I ask you that way, Doctor, a lot of these things are auto populated on each report; isn't that fair to

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say?

A Correct. Sometime auto populated, but we change it if something changes, okay.

Q Right. For example, looking at that same report, you got the same history you've been carrying throughout the report because it's the same history, correct?

A Correct. It could populate there and basically normal post-op in these patients they're going to complain about lower back pain, but we care mostly about the leg pain.

Q Right, because the leg pain reflects the surgical repair you did that took the pressure off the nerves, correct?

A Correct.

Q Next visit January 16, 2020?

A Correct.

Q She states at this point in time she has a lot of back pain, low back pain. She's still using a cane, and she states numbness and tingling in lower extremities is resolved, correct?

A Correct.

Q The operation in your mind at this point in time was successful, correct?

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A It's early to say, but it's what we expect. It's moving in the right direction.
Q You don't see her for many different reasons probably until March of 2021, again, correct?
A Let me see.
Q March 8th, correct?
A Correct.
Q So approximately 14 months, just under 14 months since you last saw her, correct?
A Correct.
Q Normal in a fusion surgery after the surgery there is a follow-up, correct?
A Correct.
Q Would it be fair to say in the general population of your patients, you see them a few times in -- maybe two, three times in the first six months, and it's pretty much they go on with life after that unless there's complaints; fair to say?
A Correct.
Q That was pretty much the course of conduct with this patient seeing her once in September, October, November, and January.

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Four visits following up with her, correct?
A Correct.
Q By the time of that fourth visit in January of 2020, as a matter of fact, even the month before that the radicular symptoms had resolved, correct?
A At that time they were resolved, yes.
Q That's what you found in the vast majority of your patients that you treat with similar situations like these operations, correct?
A Not necessarily. You have a lot of patient that have increasing leg pain for months because when you decompress, the leg pain is getting worse because the nerves is trying to recover and we have to medicate that. It happens all the time.
Q But that didn't happen here correct?
A I don't have any record from there, yes.
Q This one was a success, correct?
A It was a expected result.
Q Because you're a good spine

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surgeon with good outcome; fair to say?
A No, I will not say that. I'm really precautious when I talk about surgery because we have a lot of surprises over time. We saw that is suspected result at the moment of the surgery at that time post-op.
Q When you see her on March 8th of 2021, she reported improvement after the surgery with complete resolution of radicular symptoms to the lower extremities, correct?
A That is what patient reported.
Q But still complaining of lower back pain and muscle spasms, correct?
A Correct.
Q But no radicular symptoms, correct?
A That is what the patient said, correct.
Q Well, were you relying on her truthfulness there, but she's a patient. If she had pain, don't you think she would tell you?
A Absolutely. It's pretty common that they complain about pain, yes.
Q I assume you auto populate that

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history again from your beginning reports, correct?
A No, this is completely different situation. The report is totally different to the other one. It's not auto populated. It says that with complete resolution and radicular symptoms, still complaining of lower back pain and muscle spasm. She's been treated by Dr. Ventrudo that was not written before. She underwent facet joint injection. She was proactive with the treatment. She referred having serious problem walking more than one block without stopping secondary to lower back pain. That is new to this encounter.
Q That's why you weren't listening. Doctor, I asked if you auto populate the history again.
A The history of present illness?
Q History, this is a 39-year-old female?
A No, but this is seen different. I will explain. The history of present illness is start now. When we put history there, that part is going to stay the same, okay, after history, my written history.

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Q That's what I was asking you if it stayed the same?
A It's confusing because the history of present illness is the history, but it's not auto populate. It's the first part. This is what we change every time. The other history is going to remain the same. It is the history that the patient told, okay. That initial history that is going to remain the same always. We do that on purpose.
Q My question was, Doctor, the history is auto populated here, correct?
A Yes, it's remains the same. We want to keep it the same. I cannot change that.
Q Several X-rays were taken along the way during the course of your treatment after the operation; fair to say?
A Correct.
Q The purpose of those X-rays was to make sure that the hardware was in place, which it was, correct?
A Correct. Standard of care.
Q You don't have any future appointments with Ms. Moya, correct?

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A Let me see if it's something written here. No, I don't have any appointment at this time.
Q And that's an expected result in many, if not all of your fusion surgeries, correct?
A It's a worrisome situation because she had lower back pain. She need pain management. It's not what we see normally. It's not what I want to see in these patients. Normally the patient have some lower back pain. But this lower back pain is kind of out of control. That is why she's seeing pain management. Normally at this point patient don't see pain management.
Q Fair enough.
You also issued a narrative report, I can't tell you the date of the report. It looks like it could be January 14, 2020. Do you have that report?
A Yes, I have it. January 14, 2020, correct.
Q I apologize for not knowing that. It says an appointment date there, but that was the date this report was prepared, correct?

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A Correct.
Q This is a report prepared two days before you saw Ms. Moya on January 16th of 2020, correct?
A Correct.
Q I'll let you look at your records. It was the 16th you saw her?
A Correct, it was the 16th.
Q You prepared this report for purposes of litigation, correct?
A Correct.
Q You were asked by Ms. Moya's attorneys to prepare this report, correct?
A Yes, narrative is requested.
Q In this you say that Ms. Moya was -- you reflect her history treated at the ER and discharged to home same day, correct?
A I have to read that.
Correct.
Q You also put in here the patient denies prior history of motor vehicle or a work-related accident, correct?
A Correct.
Q So no prior accidents for her. Patient denies prior history of neck or lower

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back pain, correct?
A Correct, that's what it's said.
Q You put that in this narrative report because that's important, correct?
A Correct.
Q And you relied on her truthfulness as you have throughout the course of your treatment of her, correct?
A Correct.
Q Would it be fair to say that if there was a history of prior neck or lower back pain, that would be of significance to you, correct?
A It could be. It depends on the situation. Not always.
Q Well, you're being asked here to opine on causation where the pain came from, correct?
A You're talking about related to the narrative. Not the regular normal history of the patient, correct?
Q Correct.
A Yes, it's going to be important for me to know.
Q Then you go through the history

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that you have of your treatment with the patient, Ms. Moya, correct?

A Correct.

Q I'm going to go right to the end of your report. Give me a second. I'm sorry, I don't have a page. I think it may be 7 out of 9 where you have treatment plan. Do you see that?

A I see that. Treatment plan, yes.

Q You say patient will continue physical therapy and pain management. These weren't prescriptions you were issuing. She was treating with a pain management doctor, correct?

A Not necessarily. I send her to pain management, but maybe she was better. I don't remember. I should check other charts. But, yes, she will continue pain management and physical therapy.

Q You say, "She will return to see me in two months," correct?

A For six months post-op. That's standard of care.

Q That's not what happened though on January 14th of 2020, is it? Or was that just

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auto populated there?

A Say that again.

Q Well, she didn't see you again until March 2021, correct?

A Correct. It's not auto populated. I want to see her six months post-op.

Q Let me ask you this question. Did you do virtual appearances during the pandemic with patients?

A When I get off the hospital, I did some virtual. But I was sick myself and I was away for couple of months. Yeah, we did some virtual.

Q Was there a point in time during the pandemic that you -- I'm sorry to hear you got sick -- that you started seeing patients again?

A Correct.

Q In the summer, or the fall, or some other time?

A I don't recall right now the date.

Q That's fair.

You say under discussion, you say based on this clinical evaluation the current problem is causally related to the accident, do

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you see that?

A Yes. We're talking about the narrative at this time, right?

Q Yes.

A Yes.

Q What's the clinical evaluation you did that related this to the accident? Was it what Ms. Moya told you?

A Correct. Clinical evaluation is when patient tell me. As I said before, I didn't have previous history of previous accidents. That is why you can read the first time. When I have that, I will relay that what the patient tell me. That she was not involved in previous accident, okay.

Q You didn't either because Ms. Moya told you she didn't have any prior neck or back problems, you didn't have any history of not only accidents, but of complaints of pain in the past to her neck and back, correct?

A I didn't have any at that time.

Q So, therefore, without that history, you could do the next thing and certify based on the truthfulness of her answers that this accident caused these

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injuries, correct?

A Correct.

Q You say then that the patient is temporarily disabled, correct?

A Temporary totally disabled, correct.

Q But she's not treating with you anymore, correct?

A Well, she's treating with me. I didn't abandon the patient. She had consult with my office on January 5, 2020 over the phone. No telemedicine. Where the patient was seen by one of the PAs. Probably at that time I was not in the office.

MR. HERBERT: I don't have that record, James, from June of 2020.

A 6/5/20. It's a phone visit, okay. She called the office basically to talk to one of the PAs -- I will tell you, it's straight forward -- requesting medication because she was in pain and she was directed to see -- by the PA to see Dr. Ventrudo at this time.

MR. WHALEN: Jason, I know you would have exchanged it if you had it.

MR. HERBERT: Thank you, James.

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Q You then go on in your discussion to say that regarding the injuries of the cervical spine future spine surgery is anticipated.
A Correct.
Q You've been doing spine surgery for how long now, Doctor?
A Counting my fellowships and everything for seven, eight years spine specifically.
Q What you're talking about is future spine surgery is possible above or below the levels where the fusion took place, correct?
A Correct.
Q But in this case, what we fused L5-S1 didn't we, Doctor?
A Correct.
Q So there is no below space; fair to say?
A Correct.
Q So there's only L4-5 disk space, correct?
A Correct.
Q Only one level, but it's exposed

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to what I think you guys call "adjacent disc disease"; is that fair to say?
A Correct.
Q And the likelihood of adjacent disc disease over a 10- or 12-year period is percentage wise very small, correct?
A It's 2.5 percent per year. That means this patient have ten years, 25 percent chance, 50 percent chance in 20 years to have surgery at the next level. When we talk about a clean or healthy level, but that change when we're talking about level that have problems or previous discectomy. Or I did a laminectomy, probably the numbers are going to change over time, but it's going to be less than that.
Q So if it's 2.5 percent per year over ten years that would be 22.5 percent, correct?
MR. HERBERT: No.
A No, it's going to be 25 percent. I'm a spine surgeon.
Q Not a mathematician.
A I'm not going to get into discussion. But for me 2.5.
Q You're right 25 percent.

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A We shouldn't be having this discussion, yes.
Q So 25 percent chance over ten years and that's based on studies that were done a number of years ago, correct?
A Correct, but basically we're talking in healthy discs when you have one level surgery and the disc above, below is healthy. In her case, probably going to be less than that because level with some problem but we cannot predict future.
Q Wouldn't you agree when that study was done, that the spine surgical procedures had become even less evasive than when that study was done?
A This is the problem that we're having. If you want to talk about that? One of the big problem that we have I'm involved in this too and with you, we're trying different techniques to make that to go lower than we want to, okay, lower than that to 2.5 percent or less. We use hooks, we try to make it someplace we try to use some bands, try to make transition from fusion level to the other level better, okay. Minimally invasive surgery too.

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But it's something that we don't have an answer yet. We cannot make it less. There are some studies that it can make it a little bit less than that. But the general standard of care is keep continuing to be the same. Even with less invasive surgery we're having this same amount of chances to get ASD. But that is the problem. We're trying, working in a lot of research and we're having a lot of problem trying to take that number down.
Q You're also having a lot of success, fair, to say it cuts both ways?
A Yes, I have patients that were ten years without any problems, and I had patients that one year or two years after surgery they need the other segment to be done.
Q Just to be fair, if over ten years it's 25 percent may have a problem, okay, that means over ten years 75 percent won't?
A Ten years is going to be -- no. Ten year is going to be 50 percent. Let me see. Ten years is going to be we say 25 percent.
Q So 75 percent of the people or population won't have a problem?

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A Correct. That is general. Remember, this is not mathematical, okay. This is surgery, spine surgery. When I have patient like this, I'm talking in general. Not only for this patient. This is big deal with spine surgery, how many level you fuse. Some people going to say don't fuse anyone. Some people going say you're crazy, you have to fuse both because you have more chance that the level above in this case is sick level, already sick level because we know she got disc herniation on previous procedure it will be less than 2.5 percent. But no one has power to predict future in this case. I expect that the chance to have another surgery are going to be more than 25 percent in ten years, but that is my opinion.

Q You told us already in your testimony today you don't know how much your surgery cost for her, correct?

A You asked me for the hospital rates, for the anesthesia rates?

Q Yes.

A Yes, I don't know.

Q The surgeon rates?

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A The surgeons rates it depends. As I told you, it depends. I don't know if it was Workers' Comp. Workers' Comp pay for one level. It depends. They pay about $10,000. No-fault pay about the same. If you're going to Medicare, it's going to be I think -- I don't do Medicare anymore, but I think it's going to be 2,500 or something like that.

Q Did you during the course of your treatment for Ms. Moya, you never prescribed any physical therapy for her, correct?

A Yes, we prescribe physical therapy after six weeks I sent the patient back to physical therapy.

Q You send them for a period of 6 weeks to 12; fair to say?

A I have standard of care in my chart. I have prewritten thing I send three time a week for six weeks at the beginning and see how she does with that.

Q What physical therapy facility did you send her to?

A I have no idea. I don't send to specific facility. The patient pick the facility. Mostly the one that is near her home

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or facility that was doing physical therapy in the past. I don't direct patient to a specific place.

Q Would it be fair to say you don't know the cost that the physical therapy place is charging?

A No, I have no idea.

Q Would you agree that if physical therapy works, okay, it's only going to be for a certain amount of time, correct?

A Correct.

Q That would be 6 to 12 weeks; is that what you said?

A Require about six weeks patient come back say, listen, physical therapy is really working, I feel better, I will give her six more weeks. It depends on how the patient feels regarding physical therapy or what will need. A patient that have significant atrophy of muscles will need more physical therapy or at some point I will say don't do anymore physical therapy, go to the gym. It's not going to the gym and start doing quadricepts and teach her exercise. Mostly we start 6 to 12 weeks. That is fair to say, yes.

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Q Would it be fair to say if physical therapy isn't working, you're not going to continue to send the person to physical therapy?

A I no refer the patient for physical therapy. But if the patient discuss with the physical therapy place and she want to continue, I will not be against that.

Q With regard to Ms. Moya, you've taken X-rays of her during the course of your treatment we already discussed that, correct?

A Correct.

Q It's not necessary to take those X-rays every year. Every two years, every three years is fine; is that correct?

A Correct. Normally the standard of care that I do is six weeks X-rays, three months X-rays, six months X-rays and one year X-rays. After one year everything looks okay, the patient is okay, I decide maximum medical improvement, the patient -- I release the patient. We tell the patient she can come to see me any time that she has a problem or wants to see me, but I will not prescribe more X-rays after that.

Q So it's fair to say after the one-year mark that unless there's a problem or a complaint by the patient, no more X-rays, correct?

A Correct. Unless like in this case she didn't come to one year. When I saw her in January 2021, I wanted to see the one-year X-rays. I cannot do the one-year X-ray, but I sent her to do a new X-rays.

Q That's fair enough.

That X-ray showed everything still good, right?

A Correct. I don't think you have it. I just reviewed this today because she did it after my last visit and everything was in place, correct.

Q You haven't prescribed anymore MRI studies of her lumbar spine, correct?

A Correct. Yes.

Q That's because it's not medically necessary, correct?

A Correct. My only point is going to be here not an MRI because it's pretty difficult to see in the X-rays even after one year if the bone consolidate. It's really

difficult to see sometimes an X-ray. What we're looking basically is signs -- indirect signs of nonunion. This means the bone didn't grow. That it's going to be loosening up the hardware and other stuff. But sometimes when patient after one year has significant pain -- I didn't do in her case -- but it could happen. Sometime I request a CAT scan. CAT scan is showing me with more detail the bone and it's going to tell me more specifically if the fusion was done.

Q But we're not experiencing those problems in Ms. Moya's case, correct?

A She's still having lot of lower back pain when I see her again to discuss the X-rays because I just saw the X-ray. I didn't see any strains. I could be one of the things that I could request, yes.

Q And right now you have no scheduled appointments with Ms. Moya, correct?

A I don't have any scheduled appointments.

MR. WHALEN: That's all I have, doctor, okay.

(Time noted: 3:23 p.m.)

A C K N O W L E D G E M E N T

STATE OF NEW YORK)
: ss
COUNTY OF)

I, ANGEL NACAGNO, M.D., hereby certify that I have read the transcript of my testimony taken under oath in my deposition of March 22, 2021; that the transcript is a true, complete and correct record of my testimony; and that the answers on the record as given by me are true and correct.

_____
ANGEL NACAGNO, M.D.

Signed and subscribed to
before me, this ____ day
of _____, 2021.

_____
Notary Public, State of New York

C E R T I F I C A T E

STATE OF NEW YORK)
) ss:
COUNTY OF BRONX)

I, KAREN VIGGIANO, a Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That ANGEL NACAGNO, M.D., the witness whose examination is hereinbefore set forth, was duly sworn by me and that this transcript of such examination is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 1st day of April, 2021.

Karen Viggiano
KAREN VIGGIANO

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