

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS: CIVIL TERM : PART LABOR LAW ONE

EDGAR and ESTELA CIFUENTES,	:	
Plaintiff (s)	:	
- against -	:	INDEX #
240 W. 35TH STREET NYC LLC, BOK SHIN, LLC	:	500776/2016
Defendant (s)	:	

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 360 Adams Street  
 Brooklyn, New York, 11201  
 MAY 16, 2025

B E F O R E : HONORABLE DEVIN P. COHEN,  
 Justice (and a jury)

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

FOR THE PLAINTIFF:

WILLIAM SCHWITZER & ASSOCIATES, P.C.  
 820 Second Avenue  
 New York, New York 10017  
 BY: WILLIAM SCHWITZER, ESQ.  
 BETH DIAMOND, ESQ.

FOR THE DEFENDANT:

LEWIS BRISBOIS BISGAARD & SMITH, LLP  
 77 WATER STREET, 21ST FLOOR  
 New York, New York  
 BY: DARRELL J. WHITELEY, ESQ.  
 By: JENNIFER W. YUEN, ESQ.

Nadonna Ferguson, RPR  
 Senior Court Reporter

1                   **THE CLERK:** Case on trial continues.

2                   **THE COURT:** We are waiting for the arrival of some  
3 jurors. Outside the presence of the jury, I understand  
4 that we have a witness. I thank defense counsel for  
5 facilitating that. Let's go ahead and call that witness.  
6 Counsel, Natalia's last name?

7                   **MS. YUEN:** I believe --

8                   **MR. WHITELEY:** We haven't spoken to her.

9                   **THE COURT:** Got it. I appreciate that.

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

12                   **THE COURT:** Natalia Perlazamunoz.

13                   (Whereupon, the witness takes the witness stand)

14                   **THE COURT:** Also known as Natalia Cerpeda.

15                   **THE CLERK:** Raise your right hand, please.

16 **N A T A L I A P E R L A Z A M U N O Z, after having first been**  
17 **duly sworn by the Court Clerk, was examined and testified as**  
18 **follows:**

19                   **THE WITNESS:** Yes, I do.

20                   **THE CLERK:** In a loud, clear voice, please state  
21 your name and address for the record and spell your names,  
22 please.

23                   **THE WITNESS:** Natalia, N-A-T-A-L-I-A, Cristiana,  
24 C-R-I-S-T-I-A-N-A.

25                   **THE CLERK:** T-I-A-N-A?

1                   **THE WITNESS:** Correct?

2                   **THE CLERK:** P-E-R-L-A-Z-A-M-U-N-O-Z.

3                   **THE COURT:** So, thank you.

4                   **THE WITNESS:** You are welcome.

5                   **THE COURT:** You are going to swear the witness.

6                   **THE CLERK:** I did swear her.

7                   **THE COURT:** You can be seated.

8                   **THE CLERK:** I just need her address.

9                   **THE COURT:** Your address.

10                  **THE WITNESS:** 314 Bedford Avenue, Apartment C3,  
11 Brooklyn, New York 11249.

12                  **THE COURT:** Thank you.

13                  Ma'am, you introduced yourself today as Natalia  
14 Cristiana Perlazamunoz.

15                  **THE WITNESS:** Correct.

16                  **THE COURT:** I assume it's a tilde over the N?

17                  **THE WITNESS:** Yes.

18                  **THE COURT:** You pronounce it as Christina, but it  
19 sounded like it was pronounced as Cristiana.

20                  **THE WITNESS:** Christina.

21                  **THE COURT:** How do you spell it again?

22                  **THE WITNESS:** C-R-I-S-T-I-N-A.

23                  **THE COURT:** The reporter will read it back, but I  
24 believe you spelled it I-A-N-A.

25                  (The testimony as requested was read by the

1 reporter.)

2 **THE COURT:** When you spelled it, you included the  
3 letter A.

4 **THE WITNESS:** I wasn't aware.

5 **THE COURT:** Are you also known by the name --  
6 withdrawn.

7 Are you also known with the name reversed with your  
8 first name is reversed, it's Cristina Natalia rather than  
9 Natalia Cristina?

10 **THE WITNESS:** No.

11 **THE COURT:** Do you also sometimes spell your first  
12 name N-A-T-H-A-L-I-A.

13 **THE WITNESS:** No.

14 **THE COURT:** Do you also occasionally use the name  
15 Natalia Perlaza?

16 **THE WITNESS:** Yes.

17 **THE COURT:** Is that a married name or some other.

18 **THE WITNESS:** That is just -- no, not a married  
19 name.

20 **THE COURT:** How do you come to use Perlaza?

21 **THE WITNESS:** Perlaza. So, that would be my first  
22 name, N-A-T-A-L-I-A.

23 **THE COURT:** I'm sorry. What I meant was, do you  
24 sometimes use the name Natalia Cerpeda?

25 **THE WITNESS:** No.

1                   **THE COURT:** Or Cespeda?

2                   **THE WITNESS:** No.

3                   **THE COURT:** So, I want to show you what's been  
4 previously marked Court Exhibit IV for identification. It  
5 includes one full size sheet of paper and one small hard,  
6 which appears to be a business card. Would you look at  
7 them and tell me if you recognize those two things, please.

8                                   (handling)

9                   **THE WITNESS:** Yes, I do.

10                  **THE COURT:** Okay. The smaller one, the smaller  
11 document, what do you recognize that to be.

12                  **THE WITNESS:** That is my business card.

13                  **THE COURT:** The larger document, what do you  
14 recognize that to be?

15                  **THE WITNESS:** This is an authorization, a  
16 permission slip to view and copy records.

17                  **THE COURT:** Do you see your name any where on that  
18 document?

19                  **THE WITNESS:** No.

20                  **THE COURT:** Are you familiar with someone named  
21 Natalia Cerpeda or Cerpeda?

22                  **THE WITNESS:** No.

23                  **THE COURT:** Are you familiar with someone named  
24 Frantz Gaillard?

25                  **THE WITNESS:** Yes.

1                   **THE COURT:** Who is Frantz Gaillard?

2                   **THE WITNESS:** My co-worker.

3                   **THE COURT:** I see. So, if there a is permission  
4 slip that was anomaly submitted as I thought I understood  
5 it to be in your name, that include the name of Frantz  
6 Gaillard and Natalia spelled, N-A-T-H-A-L-I-A, last name  
7 appears to the Court to be, C-E-R-P-E-D-A. You're saying  
8 that is not you.

9                   **THE WITNESS:** That is not my name.

10                  **THE COURT:** And the fact that your business card  
11 was stapled to the top of that permission slip apparently  
12 at the time that it was submitted for signature is  
13 coincidental, you're saying?

14                  **THE WITNESS:** Not necessarily.

15                  **THE COURT:** Okay. Can you help me understand  
16 better?

17                  **THE WITNESS:** Yes. So, in order to view records,  
18 we are required to fill out a permission slip.

19                  **THE COURT:** With your own name.

20                  **THE WITNESS:** Exactly.

21                  **THE COURT:** Yes.

22                  **THE WITNESS:** My co-worker filled out the  
23 permission slip for both of us as you can see. When I went  
24 to pick up the form, the permission slip, to go copy  
25 records, you go through a pile where you look for the

1 authorized permission slip. So, there are three baskets.

2 **THE COURT:** Yes.

3 **THE WITNESS:** One basket is -- after you fill out  
4 this permission slip, you get it authorized from the  
5 subpoenaed record room. Then you bring it to the basket to  
6 be signed. Then from that basket, the Court Clerk picks it  
7 up, they authorize it, and then they drop it either in the  
8 basket where it is not authorized to be signed or the  
9 basket where it's authorized to be signed.

10 **THE COURT:** Okay.

11 **THE WITNESS:** This permission slip, when I went  
12 back to look for it, I looked through a pile of permission  
13 slips. So, what I did is, when I looked in -- if you can  
14 see in this permission slip --

15 **THE COURT:** You can have it back. I'm sorry.

16 (handing)

17 **THE WITNESS:** On the left-hand side it has my  
18 co-workers name.

19 **THE COURT:** Is that his handwriting?

20 **THE WITNESS:** Yes, that is his handwriting and  
21 that is his name. So, I automatically just went by that  
22 name and picked up the permission slip.

23 **THE COURT:** I see.

24 **THE WITNESS:** Took it out to the subpoenaed record  
25 room and hand it in with my ID.

1           **THE COURT:** And you didn't notice that the other  
2 name wasn't your name?

3           **THE WITNESS:** No, I went by the name.

4           **THE COURT:** Got it. I think I asked you this, but  
5 I will ask you again.

6           Are you familiar with or do you have a co-worker named  
7 Natalia Cerpeda?

8           **THE WITNESS:** No.

9           **THE COURT:** I think I also asked you this, but  
10 just to be clear. Have you ever been referred to, in your  
11 presence any way, as Natalia Cerpeda particularly in front  
12 of Mr. Gaillard?

13          **THE WITNESS:** No.

14          **THE COURT:** I see. So, when you submitted this  
15 form with the name Frantz Gaillard but also Natalia Cerpeda  
16 and your business card that says Natalia Perlaza, were you  
17 able to retrieve the records with using that?

18          **THE WITNESS:** And my ID.

19          **THE COURT:** Do you have a copy of your ID with  
20 you?

21          **THE WITNESS:** Yes.

22          **THE COURT:** May I have a look.

23          **THE WITNESS:** Yes. It's actually in my other bag.

24          **THE COURT:** Do you have it present?

25          **THE WITNESS:** Yes.



1                   **THE COURT:** So, we will look at it in a minute.  
2                   Do you recall if you ever had a conversation with Christine  
3                   Salvador, the lady who swore you in this morning, do you  
4                   remember having a conversation with her with regards to  
5                   accessing the records on this case?

6                   **THE WITNESS:** Yes.

7                   **THE COURT:** Do you remember what the sum and  
8                   substance of that conversation was?

9                   **THE WITNESS:** Yes. I came to view the records  
10                  that were here in the part. She asked me for my ID. And I  
11                  began to copy -- well, it was a different order. So, I  
12                  came in with just explaining that I was here to copy the  
13                  records. That I had gone to the subpoenaed record room  
14                  upstairs and that they had e-mailed her the permission slip  
15                  for me to view the records. I asked if it was okay and she  
16                  said yes. And then casually -- I casually said my middle  
17                  name is Cristina. She said just like hers almost similar.  
18                  And she said let me see your ID. And then when she saw my  
19                  ID then.

20                  **THE COURT:** She said that --

21                  **THE WITNESS:** She compared it to the permission  
22                  slip and that's when we both found out that the name on the  
23                  permission slip was not the same as my ID or my business  
24                  card.

25                  **THE COURT:** Got it. And at that point, did she

1 deny you access? Did she say you could not take the copies  
2 out to copy them?

3 **THE WITNESS:** Yes.

4 **THE COURT:** Okay. Thank you.

5 **THE WITNESS:** May I add?

6 **THE COURT:** Yes, please.

7 **THE WITNESS:** The lady from the subpoenaed record  
8 room actually entered the courtroom at that time.

9 **THE COURT:** Yes.

10 **THE WITNESS:** And she recognized me as having  
11 copied the records before.

12 **THE COURT:** Yes.

13 **THE WITNESS:** And then Christine explained to her  
14 the name in the ID is not matching the name in the  
15 permission slip. That is when the subpoenaed record lady  
16 also found out that the name was not the same.

17 **THE COURT:** Was not matching. Got it. Thank you.  
18 I am going to show you two other documents in just a  
19 second.

20 **THE WITNESS:** Yes.

21 (handing)

22 **THE COURT:** Thanks. I am going to show you now  
23 what was marked Court Exhibit V. If you would take a look  
24 at that and tell me if you recognize it?

25 (handing)

1           **THE WITNESS:** Yes.

2           **THE COURT:** What do you recognize it to be?

3           **THE WITNESS:** This is a form that you filled out  
4 when you -- when you are handed the records and copy them.

5           **THE COURT:** Is that form in your handwriting?

6           **THE WITNESS:** Yes.

7           **THE COURT:** Does it include your signature?

8           **THE WITNESS:** Yes.

9           **THE COURT:** Does it indicate at the top the index  
10 number and date?

11          **THE WITNESS:** Yes.

12          **THE COURT:** What is the index number?

13          **THE WITNESS:** 500776/16.

14          **THE COURT:** And the date.

15          **THE WITNESS:** 3/21/25.

16          **THE COURT:** Thank you. And the number of records  
17 that it indicates were taken out?

18          **THE WITNESS:** Twenty-three.

19          **THE COURT:** And the number of records that it says  
20 that were returned?

21          **THE WITNESS:** Two.

22          **THE COURT:** Thanks. Do you have a recollection --  
23 as you sit here, does this document refresh your  
24 recollection as to the time on March 21th of 2025 when you  
25 went and signed out records related to this case, the

1 Cifuentes case?

2 **THE WITNESS:** Yes, 3/21/25 is the date when I --

3 **THE COURT:** One of the dates you looked at the  
4 records.

5 **THE WITNESS:** Yes, one of the dates.

6 **THE COURT:** Does the record accurately reflect  
7 that you took out 23 records?

8 **THE WITNESS:** I don't recall.

9 **THE COURT:** Do you know whether the record  
10 accurate reflects that you returned two records.

11 **THE WITNESS:** So, yes, it says two records, but  
12 also the parameter in which I know I have returned all of  
13 the records, if I don't get my ID back, it means that I  
14 have not -- equivalent of not returning all of the records  
15 given to me. So, I believe that was a mistake.

16 **THE COURT:** I only asked whether you recall  
17 whether or not you returned all of the records you took.

18 **THE WITNESS:** Yes, I returned all of the records  
19 that I took.

20 **THE COURT:** So, you are saying if the Court's  
21 record indicates that you took out 23 and returned 2, that  
22 would be in error.

23 **THE WITNESS:** I don't believe so.

24 **THE COURT:** Okay. And on -- withdrawn.

25 Court Exhibit Number VI, do you recognize that

1 document?

2 **THE WITNESS:** Yes.

3 **THE COURT:** What do you recognize that document to  
4 be?

5 **THE WITNESS:** The same document. The document you  
6 fill out when you are going to copy records.

7 **THE COURT:** Same document or same type of  
8 document?

9 **THE WITNESS:** Same type of document.

10 **THE COURT:** Does it reflect the same index number,  
11 but different date.

12 **THE WITNESS:** 500776/16.

13 **THE COURT:** Different date from March 21st?

14 **THE WITNESS:** Yes.

15 **THE COURT:** What's the date on that?

16 **THE WITNESS:** That is 3/12/25.

17 **THE COURT:** Great. How many records does it say  
18 that you signed out on that day?

19 **THE WITNESS:** Twenty-eight.

20 **THE COURT:** How many records does it say you  
21 returned?

22 **THE WITNESS:** Blank.

23 **THE COURT:** It doesn't indicate anything, right?

24 **THE WITNESS:** Yes.

25 **THE COURT:** Did you have a custom and practice or

1 do you have a custom and practice with respect to taking  
2 out records, copying them and returning them to make sure  
3 that you return -- besides the guardrails for safety backup  
4 of whether or not you get your ID back, do you have a  
5 custom and practice for assuring yourself that you returned  
6 all the records you take out?

7 **THE WITNESS:** Yes.

8 **THE COURT:** What is that?

9 **THE WITNESS:** The area of the room where you are  
10 able to copy the records has an empty desk. So, if you  
11 retrieve all of your items, if you return all of the  
12 records, the desk will be completely empty.

13 **THE COURT:** And in the case of CDs, for example,  
14 if you were to sign out CDs, how would you copy those when  
15 you are sent copies of disks?

16 **THE WITNESS:** So, you would put them in a CD  
17 reader and then you put them back into the sleeve and you  
18 attach them to the record.

19 **THE COURT:** So, I want you to assume for the sake  
20 of this question that the court records indicate that on  
21 March 12th a set of 12 CDs came in, I believe, from Lennox  
22 Hill Radiology.

23 **MR. SCHWITZER:** Yes.

24 **THE COURT:** Lennox Hill?

25 **MR. WHITELEY:** Yes.

1           **THE COURT:** Lennox Hill Radiology. And that some  
2           number of days thereafter when the records came up to the  
3           courtroom, only one CD was present. So, I ask because  
4           there is an indication that you signed out 28 records but  
5           it doesn't say whether there were CDs or paper records or  
6           something else on March 12th doesn't indicate how many came  
7           back. But that seems to be true for some of the other  
8           sign-out sheets that has nothing to do with you. But that  
9           on March 21st, you signed out 23 records. And the Court's  
10          record indicate that you only gave back two. So, I guess,  
11          I would ask whether that -- withdrawn. Whether you think  
12          it's possible that you accidentally didn't return all of  
13          the records on the 21<sup>st</sup> that you signed out.

14          **THE WITNESS:** No, it is not possible. The other  
15          thing is the clerk also checks to make sure that the  
16          subpoena that has the CD actually comes with a sleeve and  
17          that it is filled in. So, they check everything to make  
18          sure that it's completed.

19          **THE COURT:** Should check, I agree. So, in this  
20          case they say you signed out 23 and signed back in 2.

21          **THE WITNESS:** Yes, I returned all of the records.  
22          I did not keep any of the records that I was copying. Also  
23          on the 12<sup>th</sup>, I was not -- he already copy records. Like  
24          the other day, I was really checking in for something  
25          specific different than the other dates.

1                   **THE COURT:** What were you checking for?

2                   **THE WITNESS:** I was looking for an affirmation  
3 which is a different document where -- yes, a different  
4 document. It is not really a subpoena.

5                   **THE COURT:** And on the 21st?

6                   **THE WITNESS:** On the 21<sup>st</sup>, I was here to copy  
7 all of the records.

8                   **THE COURT:** Got it. Do you ever take out the  
9 records for more than one case at a time?

10                  **THE WITNESS:** No.

11                  **THE COURT:** Okay. Does anybody else have any  
12 questions that they want The Court to ask?

13                  **MR. SCHWITZER:** No, Your Honor.

14                  **MR. WHITELEY:** No, Your Honor.

15                  **THE COURT:** Okay. Thank you for coming in.

16                  **THE WITNESS:** Thank you.

17                  **THE COURT:** If you would before you leave just  
18 grab your ID and show it to The Clerk.

19                  **THE WITNESS:** Okay. You're welcome.

20                         (Whereupon, the witness steps down from the witness  
21 stand)

22                                 (handling)

23                  **THE COURT:** For the record, the witness' New York  
24 State Driver's License is not a real ID license, but it  
25 does appear to be a bona fide license. It indicates the



1 witness's name as Perlazamunoz Natalia Cristina. I assume  
2 that is last name first or last names first, sorry.

3 So, Natalia Cristina Perlazamunoz, which is consistent  
4 with the name as pronounced by the witness on the record.

5 Thank you.

6 (handing)

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

9 **MS. YUEN:** Your Honor, we have the second  
10 investigator here today.

11 **THE COURT:** Great. Let's have him come in and  
12 testify.

13 Sir, if you would, go ahead and take the stand.

14 **THE CLERK:** Raise your right hand, please.

15 **F R A N T Z G A I L L A R D, after having first been duly sworn**  
16 **by the Court Clerk, was examined and testified as follows:**

17 **THE WITNESS:** I do.

18 **THE CLERK:** In a loud, clear voice, please state  
19 your name and address for the record, spelling your names,  
20 please.

21 **THE WITNESS:** My name is Frantz Gaillard. First  
22 name is spelled, F-R-A-N-T-Z. Last name, Gaillard,  
23 G-A-I-L-L-A-R-D.

24 **THE CLERK:** Your address?

25 **THE WITNESS:** My mailing address is 55 Maple

1 Avenue, Rockville Center, New York 11570

2 **THE CLERK:** Thank you.

3 **THE COURT:** Mr. Gaillard, good morning. Thanks  
4 for coming in.

5 **THE WITNESS:** Good morning.

6 **THE COURT:** Are you currently employed?

7 **THE WITNESS:** Yes.

8 **THE COURT:** By whom?

9 **THE WITNESS:** By Daniel J. Hannon & Associates.

10 **THE COURT:** Is that an investigative firm, is that  
11 a law firm or something else?

12 **THE WITNESS:** Investigation firm.

13 **THE COURT:** Investigation firm. Are you employed  
14 there -- withdrawn.

15 Can you describe your duties there?

16 **THE WITNESS:** I'm a process server and sometimes I  
17 copy records.

18 **THE COURT:** I am going to show you a document that  
19 was previously marked as Court Exhibit IV. I just ask you  
20 to take a look at it and let me know whether you recognize  
21 the document?

22 **THE WITNESS:** Yes.

23 **THE COURT:** What do you recognize that document to  
24 be?

25 **THE WITNESS:** I am sorry?

1           **THE COURT:** What do you recognize that document to  
2 be?

3           **THE WITNESS:** That's the permission slip that I  
4 submitted on, if I remember, February 28<sup>th</sup>.

5           **THE COURT:** Okay. Is that permission slip written  
6 out in your handwriting?

7           **THE WITNESS:** Yes.

8           **THE COURT:** And who -- withdrawn.

9           Are there names that appear in the middle of that  
10 permission slip?

11           **THE WITNESS:** Yes, it's my co-worker Miss Natalia.

12           **THE COURT:** Is that Natalia who was just present?

13           **THE WITNESS:** Yes.

14           **THE COURT:** A few minutes ago.

15           **THE WITNESS:** Yes.

16           **THE COURT:** Can you read the name that you wrote  
17 down for Natalia?

18           **THE WITNESS:** Actually, I spelled -- it was a  
19 mistake.

20           **THE COURT:** I just asked what you wrote down on  
21 the form.

22           **THE WITNESS:** Okay. I put Natalia Cerpeda.

23           **THE COURT:** Do you know anyone named Natalia  
24 Cerpeda?

25           **THE WITNESS:** No.

1           **THE COURT:** So, do you know why you wrote Natalia  
2           Cerpada as the second person who had authorization to  
3           access the records?

4           **THE WITNESS:** Like I said, it was a mistake.

5           **THE COURT:** How did you figure out that you had  
6           made a mistake?

7           **THE WITNESS:** Miss Natalia told me.

8           **THE COURT:** When did she tell you that, do you  
9           know?

10          **THE WITNESS:** I was in the courtroom here and she  
11          told me.

12          **THE COURT:** Today she spoke to you?

13          **THE WITNESS:** No.

14          **THE COURT:** When was it?

15          **THE WITNESS:** It was April 9<sup>th</sup>.

16          **THE COURT:** On April 9<sup>th</sup> she told you that you  
17          had the name wrong?

18          **THE WITNESS:** In the courtroom here.

19          **THE COURT:** To copy records?

20          **THE WITNESS:** Correct.

21          **THE COURT:** Got it. Thanks. Do you know where  
22          you got that name Natalia Cerpada from what gave you that  
23          that was Natalia's name?

24          **THE WITNESS:** Actually, when I check my phone, I  
25          thought that was the name. So, I made the mistake.

1                   **THE COURT:** I think I asked but maybe I didn't.  
2 Do you know anyone else named Natalia Cerpeda?

3                   **THE WITNESS:** No.

4                   **THE COURT:** I see. Do you know whether Natalia,  
5 who was here this morning, has ever gone by Natalia Cerpeda  
6 or introduced herself to you or anyone in your presence as  
7 Natalia Cerpeda?

8                   **THE WITNESS:** No.

9                   **THE COURT:** No, you don't know or.

10                  **THE WITNESS:** No, I don't know. Off the record.

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

13                  **THE COURT:** Sir, were you ever present with  
14 Ms. Perlazamunoz when she took records out from the  
15 subpoenaed records room in this case?

16                  **THE WITNESS:** No.

17                  **THE COURT:** Did you ever retrieve records in this  
18 case from the subpoenaed record room?

19                  **THE WITNESS:** No.

20                  **THE COURT:** Was there a reason that you were the  
21 one who submitted your name on the permission slip rather  
22 than Natalia's name or someone else's name?

23                  **THE WITNESS:** I believe her name was a backup. If  
24 I was too busy, then, sometimes we have somebody else to  
25 copy records.

1           **THE COURT:** So, is it your contention that you  
2           were too busy and that's why you never accessed records in  
3           this case just by putting your name.

4           **THE WITNESS:** I mean, I thought that was her name.

5           **THE COURT:** No, no, I understand that. So, you  
6           listed your name first and her name as a backup. What I am  
7           asking is when you listed your name, did you anticipate  
8           that it was going to be you who would retrieve the  
9           subpoenaed records for inspection and copying?

10          **THE WITNESS:** Correct.

11          **THE COURT:** So, what I am saying is in response to  
12          your saying that you put her name as a backup in case you  
13          were too busy, did it turn out that you were too busy to  
14          retrieve the records in this case and that is why Natalia  
15          went to do it?

16          **THE WITNESS:** I believe, yes.

17          **THE COURT:** Okay. When you came on April 9<sup>th</sup>,  
18          were you able to access any records?

19          **THE WITNESS:** Yes.

20          **THE COURT:** What records did you access on that  
21          day?

22          **THE WITNESS:** I have no information on that day.

23          **THE COURT:** Did you remove any records to be  
24          copied on April 9<sup>th</sup>?

25          **THE WITNESS:** No.

1                   **THE COURT:** You just came to inspect?

2                   **THE WITNESS:** Yes, I came in the courtroom and I  
3 worked with Miss Christine.

4                   **THE COURT:** With Ms. Salvador, but you didn't  
5 remove any records from the room on that day?

6                   **THE WITNESS:** Removed any records?

7                   **THE COURT:** Did you take any records out of the  
8 room that day?

9                   **THE WITNESS:** No, no.

10                  **THE COURT:** Did you just inspect or inventory  
11 records that were already in the room or something else?

12                  **THE WITNESS:** I worked with Miss Christine. She  
13 gave me one record at a time.

14                  **THE COURT:** Okay. She give it to you. Did you  
15 take it somewhere to be copied or just looked at it?

16                  **THE WITNESS:** No.

17                  **THE COURT:** No to what?

18                  **THE WITNESS:** Everything was done in the  
19 courtroom.

20                  **THE COURT:** Sir, I am sorry. The question was,  
21 did you just look at the records here, did you copy them  
22 here, did you take them somewhere else to the copied or  
23 something else?

24                  **THE WITNESS:** I copied them here in the courtroom.

25                  **THE COURT:** With some sort of a portable copier?

1           **THE WITNESS:** Yes, I had a scanner.

2           **THE COURT:** I see. So, you are saying that you  
3 scanned one record at a time here and give them back?

4           **THE WITNESS:** Yes, give it back to her.

5           **THE COURT:** Does it include scanning or copying  
6 any CDs or DVD?

7           **THE WITNESS:** I did not copy any CD that day.

8           **THE COURT:** You did not you are saying?

9           **THE WITNESS:** No.

10          **THE COURT:** As you finished with each record, what  
11 did you do with it? Each record you were finished with,  
12 what did you do with the record?

13          **THE WITNESS:** Actually, I was working with Miss  
14 Natalia. We send them to our supervisor.

15          **THE COURT:** You sent them to your supervisor how?

16          **THE WITNESS:** By e-mail.

17          **THE COURT:** I see. Who is your supervisor?

18          **THE WITNESS:** Mr. Brian Gormerly (ph).

19          **THE COURT:** Brian?

20          **THE WITNESS:** Mr. Brian.

21          **THE COURT:** Gormerly?

22          **THE WITNESS:** Yes.

23          **THE COURT:** You were able to do that e-mailing  
24 straight from the courtroom?

25          **THE WITNESS:** No, we went outside. It was like



1 4:40. I believe it was about to be closed.

2 **THE COURT:** Got it. So, you are saying -- let me  
3 see if I understand what you described. So, you came in,  
4 you retrieved records from Ms. Salvador, my part clerk.  
5 You scanned them with a portable scanner here in the  
6 courtroom. And then when you were done, you went outside  
7 and e-mailed them to Mr. Gormerly?

8 **THE WITNESS:** What do you mean by retrieve?

9 **THE COURT:** Retrieve means that you took them, but  
10 that you didn't take -- I am so sorry. You took them from  
11 somewhere whether they were here in a bin or in a cart.  
12 You took them out of the cart, you said, working with Ms.  
13 Salvador. You took one record at a time. I am just  
14 describing back what I think you have described to me. You  
15 scanned with a portable scanner. You saved it in some way.  
16 Then you left the courtroom and e-mailed it to your  
17 supervisor, is that correct?

18 **THE WITNESS:** Correct.

19 **THE COURT:** Okay. Did you keep any of the records  
20 that you had gotten from Ms. Salvador, the hard copies?

21 **THE WITNESS:** No, I don't really keep records. I  
22 don't have enough space. I erase them after I send them to  
23 my supervisor.

24 **THE COURT:** My question was, sir, did you keep any  
25 of the paper copies? Meaning, did you return to

1 Ms. Salvador every document that you had taken from  
2 Ms. Salvador or did you keep some of records for whatever  
3 reason?

4 **THE WITNESS:** Like I said, she gave me one record  
5 at a time. After I finished one, she took and she give me  
6 another one. After I finish--

7 **THE COURT:** I understand. I'm just trying to  
8 confirm that. At the end of the day, is it safe to say  
9 that you had not -- that you didn't still have any of the  
10 paper records that Ms. Salvador gave you one at a time?

11 **THE WITNESS:** No.

12 **THE COURT:** Is that correct?

13 **THE WITNESS:** I didn't have anything with me, no,  
14 sir.

15 **THE COURT:** I see. Do you know whether you ever  
16 saw the CDs in this case from Lennox Hill Radiology? The  
17 ones that came in either in the courtroom or subpoenaed  
18 records?

19 **THE WITNESS:** I am sorry?

20 **THE COURT:** Did you ever see the CDs from Lennox  
21 Hill Radiology that's related to this case whether you saw  
22 them in the courtroom or in subpoenaed records or somewhere  
23 else?

24 **THE WITNESS:** I saw a lot copies. I don't  
25 remember which one.

1           **THE COURT:** You saw what?

2           **THE WITNESS:** I saw CDs, but I don't remember  
3 which ones.

4           **THE COURT:** I see. Did you see in the courtroom  
5 or did you see them in the subpoenaed records or somewhere  
6 else?

7           **THE WITNESS:** I saw them here in the courtroom.

8           **THE COURT:** Here in the courtroom. And do you  
9 remember whether you saw one or more than one?

10          **THE WITNESS:** Yes.

11          **THE COURT:** Was it one or more than one?

12          **THE WITNESS:** It was more than one.

13          **THE COURT:** More.

14          **THE WITNESS:** Yes.

15          **THE COURT:** Do you remember how many?

16          **THE WITNESS:** I am not sure, like three.

17          **THE COURT:** You think you saw three CDs?

18          **THE WITNESS:** Yes.

19          **THE COURT:** Can we have -- was this previously  
20 marked.

21                               (handling).

22          **THE COURT:** Sir, I am showing you now what's been  
23 marked as Court Exhibit VII and VII-A. If you would take a  
24 look at those and let me know whether you have seen them  
25 before. Whether you recognize them.

1 (handing)

2 **THE WITNESS:** I don't remember if I saw this one.

3 **THE COURT:** You don't remember if you saw that  
4 one.

5 **THE WITNESS:** Yes.

6 **THE COURT:** Can you see -- did you look also at  
7 the yellow envelope?

8 **THE WITNESS:** Yes. I don't remember.

9 **THE COURT:** Do you remember whether the --  
10 withdrawn.

11 You said you saw three CDs. Do you know whether they  
12 were in one record or more than one record?

13 **THE WITNESS:** I took pictures of the --

14 **THE COURT:** You can't pictures of anything in the  
15 courthouse.

16 **THE WITNESS:** No, before when I was here.

17 **THE COURT:** You took pictures of what you looked  
18 at?

19 **THE WITNESS:** Yes, sure.

20 **THE COURT:** No, you can't take pictures of things  
21 in the courtroom. But you can show me what you took  
22 pictures of, sure.

23 (handing)

24 **THE COURT:** I am looking at a photograph, a series  
25 of photographs on the witness' phone. It indicates a

1 picture of a CD, several it looks like.

2 The first is Lennox Hill Radiology, New York Radiology  
3 Partners, West Side radiology Associations. It says  
4 Cifuentes, Edgar. Gives date of birth medical record  
5 number. Indicates US abdomen. Complete abdomen. MR knee.  
6 WO. Knee R. US Unilateral leg. Venous Doppler. Leg R.  
7 XR knee one or two views knee R. Which I take to mean it  
8 include dates on each one. I take that to mean ultrasound  
9 abdomen, complete abdomen, magnetic resonance knee with WO,  
10 I assume, without contrast right knee. Ultrasound  
11 unilateral leg venous Doppler Leg R mean right leg. XR  
12 knee which mean X-ray knee. One or two views knee R, I  
13 take it to mean right knee. That's not for evidence, but  
14 just for purposes of what I believe the document shows to  
15 identify later. And that is appears to be sitting on a  
16 brown wood grain table.

17 Then I see another CD. Lennox Hill Radiology. It  
18 does include the names of the other entities. It says  
19 Cifuentes Edgar. Gives the name of birth. Medical record  
20 number. It says at the bottom of this CD only XR knee  
21 three views. Knee R. XR shoulder. Minimum two views  
22 shoulder R.

23 Now, there is a third photograph that appears to be a  
24 third CD Kolb Radiology Cifuentes Edgar. Date of birth.  
25 The bottom indicates CT spine lumbar without contrast and

1 the date. CT spine cervical without contrast and a date.  
2 MRI hip without contrast Right R and a date. That's also  
3 in a sleeve, a clear sleeve. It appears to be on the same  
4 wooden table.

5 And now, I am looking at a fourth photograph. This  
6 one is Kolb radiology, Cifuentes, Edgar. Date of birth.  
7 The bottom it says CT spine lumbar without contrast. CT  
8 spine cervical without contrast. MRI hip without contrast  
9 R. Each of which is followed by a date. That appears to  
10 be sitting on top of a subpoena. Those are the four  
11 photographs that the witness appears to have taken on or  
12 received. I am not clear on May 2nd of this year.

13 I would ask the witness to preserve those photographs  
14 and to share them with defense counsel so they can be  
15 shared with Plaintiff's counsel in case we need them.

16 All right. Do you have any other photographs or CD  
17 that you observed or copied?

18 **THE WITNESS:** No.

19 **THE COURT:** Did you take pictures of any of the  
20 records here in the courtroom or else here in the  
21 courthouse using your phone?

22 **THE WITNESS:** I scanned the paper records.

23 **THE COURT:** Page by page using your phone?

24 **THE WITNESS:** No, on a scanner.

25 **THE COURT:** I asked if you took any other pictures

1 of records or scans of records on your cell phone?

2 **THE WITNESS:** No.

3 **THE COURT:** Okay. And you said on that date that  
4 you described the April 9<sup>th</sup> that you did not make copies  
5 of any CDs or DVDs on that date? Only 4/9. Sir, if you  
6 need to refer to something other than your memory and you  
7 need to refresh your recollection, you need to let me know  
8 what that is and see it first. You can't just look at  
9 notes on your phone before you answer questions.

10 **THE WITNESS:** I don't remember, sir.

11 **THE COURT:** Do you remember whether you ever  
12 accessed any of the radiological records in this case, CDs  
13 or paper or any films if there were films on or before  
14 March 28<sup>th</sup> of this year?

15 **THE WITNESS:** No, sir.

16 **THE COURT:** No, you don't remember or no, you did  
17 not.

18 **THE WITNESS:** I don't remember.

19 **THE COURT:** Does anyone have any other questions  
20 for this witness?

21 **MR. WHITELEY:** No, Your Honor.

22 **MR. SCHWITZER:** No, Your Honor.

23 **THE COURT:** Thank you. Sir, you are excused with  
24 the understanding that you are required to share those  
25 photographs right away with defense counsel by e-mail, the

1 photos and the 4 CDs with defense counsel by e-mail. And  
2 then defense counsel can share them out to Plaintiff's  
3 counsel. I just don't want it to be e-mailed to us. We  
4 can't open photos and media that comes from outside  
5 sources. Thanks, very much.

6 (Whereupon, the witness was excused)

7 **THE COURT:** I think we just have to wait for the  
8 last juror.

9 (Whereupon, there was a brief break in the  
10 proceedings)

11 **THE COURT:** It is my understanding that counsel  
12 have stipulated with respect to the spinal films that are  
13 expected to be used by Dr. Merola today. I also  
14 understand that out of an abundance of caution,  
15 notwithstanding the stipulation, Plaintiff's counsel has  
16 asked the record witness from Lennox Hill to appear. That  
17 witness has appeared with a sealed envelope that  
18 Plaintiff's counsel, probably smartly, did not ask or allow  
19 the witness to open the sealed envelope in his presence  
20 outside of the courtroom. And then we will all get  
21 educated as to the contents of that envelope when the  
22 witness is put on the stand.

23 Now, what do you want to say?

24 **MR. WHITELEY:** The stipulation that we have agreed  
25 with Plaintiff's counsel is that we are not objecting to



1 the Lennox Hill Radiology films of the lumbar and the  
2 cervical spine.

3 **THE COURT:** I think I just said that.

4 **MR. WHITELEY:** You said just films. And there are  
5 other films from Park Place and others.

6 **THE COURT:** Of the lumbar. I apologize. And  
7 cervical spine.

8 **MR. WHITELEY:** Yes.

9 **THE COURT:** Okay.

10 **MR. WHITELEY:** So, we have not stipulated to  
11 those. Also, it is my understanding in speaking with Bill  
12 that we are stipulating that all of the cervical records  
13 and all of the lumbar films from Lennox Hill are in  
14 evidence which include pre and post cervical and  
15 intraoperative of the lumbar and cervical.

16 **THE COURT:** I am going to clarify. I think that  
17 should be the case, but let me ask. Are you stipulating to  
18 all pre, post and intra-operative films to be in evidence?.

19 **MR. SCHWITZER:** Yes, Your Honor.

20 **THE COURT:** And that's okay with counsel?

21 **MR. WHITELEY:** And lastly --

22 **THE COURT:** That's okay with counsel.

23 **MR. WHITELEY:** I didn't hear the last part.

24 **THE COURT:** He said, yes, he is agreeing that all  
25 of the films pre, post and intra-operative from Lennox Hill

1           should be in evidence.

2                   **MR. WHITELEY:** Of the cervical and the lumbar.

3                   **THE COURT:** Of the cervical and lumbar spine. I  
4 will clarify because I think I alluded to off the record my  
5 concerns about the handling of the Lennox Hill films and  
6 subpoenaed records and thereafter and the discrepancy  
7 between the witnesses' testimony with regard to the  
8 handling of the CDs and other records and The Court's  
9 record, not mine, but the County clerk record in the  
10 subpoenaed records room of what was taken out, volume of  
11 things versus volume of things returned. That discrepancy  
12 still gives me concern. It is my expectation that I am  
13 going to err on the side of inclusivity because I can't  
14 have a situation which records go missing particularly if  
15 they seem to go missing after they were accessed and then  
16 that forms the basis of not getting them in evidence at  
17 trial. We will certainly take them up one at a time. We  
18 have all evidentiary objections.

19                   Anything else you want to talk about with regards to  
20 that?

21                   **MR. WHITELEY:** With Bill's consent, we would like  
22 to see whatever he is intending to display and just confirm  
23 what those are. The things --

24                   **THE COURT:** I believe that Bill already said that,  
25 but even if he didn't say it, I will require it. So,

1           that's fine.

2                   **MR. SCHWITZER:** Just going back.

3                   **THE COURT:** Off the record.

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

6                   **MR. WHITELEY:** Judge, we are going to object --

7                   **THE COURT:** I haven't heard any testimony, but I  
8                   will take under advisement. Any where you have an  
9                   objection, I will take under advisement. All the  
10                  objections as they come up with based on testimony  
11                  foundation. If there is no testimony foundation, then it  
12                  won't matter in any way.

13                  **MR. WHITELEY:** We may need to voir dire the  
14                  witness on the exhibits themselves, Judge, before they are  
15                  prepared.

16                  **THE COURT:** Is your objection to language on the  
17                  exhibits or to the sort of graphic components of the  
18                  exhibits or something else?

19                  **MR. WHITELEY:** Both language and the nature of the  
20                  graphic display which is not representing what is on the  
21                  films and not representing what existed with Mr. Cifuentes.

22                  **THE COURT:** Well, I would have to let the witness  
23                  testify to that. I will go ahead and we will just start  
24                  with some testimony. If we get to a place where we are  
25                  hung up on a specific exhibit and it can't be resolved -- I

1           assume, somebody has small size copies of those same  
2           graphics that they can show the witness without the jury  
3           seeing them, correct?

4                   **MR. SCHWITZER:**   Yes.

5                   **THE COURT:**   So, we can show them to the witness as  
6           documents for ID and then we can figure out whether there  
7           is a foundation or not.  If there are and you still have an  
8           objection, I will take it under advisement at that time.

9                   **MR. WHITELEY:**  No objection to the films  
10          themselves.

11                   **THE COURT:**  I appreciate it.  Thank you.  Do we  
12          have all of the jurors now so we get started?

13                   **COURT OFFICER:**  Yes.

14                   **THE COURT:**  Let's go.

15                   **COURT OFFICER:**  Ready for the jury, Judge.

16                   **THE COURT:**  Yes.

17                   **MR. WHITELEY:**  What is the purpose of the Lennox  
18          Hill witness if we are consenting?

19                   **THE COURT:**  Because you have consented to a  
20          limited number of films and counsel has indicated that he  
21          just wants to have all of the films certified by a record  
22          witness.  That way, hopefully, I assume and I can't speak  
23          to why he is bringing in the witness.

24                   **MR. WHITELEY:**  So, you are trying to get this  
25          witness to talk about the films other than cervical or

1 lumbar.

2 **MR. SCHWITZER:** Sorry?

3 **MR. WHITELEY:** You are asking this witness about  
4 other films than cervical or lumbar films?

5 **MR. SCHWITZER:** I am asking this witness whether  
6 she brought with her and I don't know, a complete set of  
7 all of the films done on Edgar Cifuentes at Lennox Hill  
8 Radiology. I am not asking body parts.

9 **THE COURT:** Essentially, I assume, to replicate  
10 what should have come through the subpoena which is  
11 missing.

12 **MS. YUEN:** May I ask counsel a question. Does the  
13 flash drive where Sylvia was kind enough to provide, does  
14 that include every single study that's on this Lennox Hill  
15 CD?

16 **MR. SCHWITZER:** How can I compare them.

17 **THE COURT:** Here is the thing. The original  
18 objection was that the records Plaintiff wanted to offer  
19 were not certified. Now, non-hospital records don't  
20 technically have to be certified, but that was the  
21 objection. Counsel then, when we spoke earlier this week,  
22 said if you can work it all out to stipulate to everything,  
23 great. If you can't, then either you will need a record's  
24 custodian and we will figure how long it will take to get  
25 them back through subpoena records. I said that in front

1 of everybody. It was indicated to me that you have to let  
2 Plaintiff's counsel know at some point during the week  
3 whether you can stipulate to records and which ones. Then  
4 I heard that you had stipulated but only to certain  
5 records. I was, therefore, not surprised that Plaintiff's  
6 counsel turned up today with a records' witness since I  
7 assume we weren't going to get a subpoena fast enough. I  
8 think it was your office who sent out a subpoena. So, I  
9 assumed, but I don't know, that this is just an attempt to  
10 accomplish what the subpoena would have otherwise  
11 accomplished. Since counsel has not yet looked inside the  
12 envelope, I gather no one has except for the records  
13 witness , we don't know what is in it. We will have to  
14 figure that out. Can we get the jury, please?

15 **COURT OFFICER:** Yes, sir.

16 All rise. Jury entering.

17 (Whereupon, the jury is entering the courtroom)

18 **THE COURT:** Thanks. You can all be seated as you  
19 come in.

20 Is Plaintiff ready to call your next witness, please?

21 **MR. SCHWITZER:** Yes. Thank you, Your Honor.

22 Good morning, everyone.

23 **THE JURY:** Good morning. (in unison)

24 **MR. SCHWITZER:** Nelly Marte.

25 **THE COURT:** Ms. Marte will take the stand, please.

1 (Whereupon, the witness takes the witness stand)

2 **THE CLERK:** Raise your right hand, please.

3 **N E L L Y M A R T E**, after having first been duly sworn by the  
4 **Court Clerk, was examined and testified as follows:**

5 **THE WITNESS:** Yes.

6 **THE CLERK:** In a loud clear voice, please state  
7 your name and address for the record?

8 **THE WITNESS:** Sure. That would be Nelly Marte,  
9 M-A-R-T-E, N-E-L-L-Y.

10 **THE CLERK:** Your address?

11 **THE WITNESS:** My home address.

12 **THE COURT:** Your work address?

13 **THE WITNESS:** 1184 Broadway, Hewlett, New York  
14 11557.

15 **THE CLERK:** Thank you. You may be seated.

16 **THE COURT:** You can sit.

17 **THE WITNESS:** Thank you.

18 **THE COURT:** Your witness, sir.

19 **MR. SCHWITZER:** Thank you, Your Honor.

20 DIRECT EXAMINATION.

21 BY MR. SCHWITZER::

22 Q Good morning, Ms. Marte.

23 A Good morning.

24 Q Have we ever met before?

25 A Before?

1 Q I am sorry?

2 A No.

3 Q Other than this morning?

4 A Yes, yes.

5 Q When I introduced myself?

6 A Yes.

7 Q Were you contacted by someone in my office to come down  
8 to court?

9 A Yes.

10 Q Were you asked -- before we get there, who are you  
11 employed by?

12 A Lennox Hill Radiology.

13 Q How long have you been employed by Lennox Hill  
14 Radiology?

15 A Ten years.

16 Q What is your position at Lennox Hill Radiology?

17 A The manage the medical and legal department for them.

18 Q What does that mean you manage the medical and legal  
19 department?

20 A Well, we process when patient or attorneys request  
21 patient records.

22 Q Okay. What is the business of Lennox Hill Radiology?

23 A They do radiology exam and out-patient procedures.

24 Q What type of radiological exams?

25 A They do all parts of the body like x-rays, MRI and



1      sono. All radiologist exams.

2            Q      How many imaging centers are there for Lennox Hill  
3 Radiology?

4            A      About 375 United States -- within the United States.

5            Q      Is there any radiology center bigger than yours in the  
6 United States?

7            A      No.

8            Q      And about how many radiologist, if you can approximate,  
9 read films on behalf of Lennox Hill?

10          A      About five hundred.

11          Q      And is part of your job include record keeping?

12          A      Yes.

13          Q      And are films of patients kept in the regular course of  
14 the business.

15          A      Yes.

16          Q      Were you contacted specifically by my office to bring  
17 with you the records of the patient that was seen at Lennox Hill  
18 Radiology Edgar Cifuentes?

19          A      Yes.

20          Q      Did you bring films with you?

21          A      I bought CDs, yes.

22          Q      CDs.

23          A      Yes.

24          Q      And have I had the opportunity to see those CDs?

25          A      I have them.

1 Q Have I looked at them? I know this is not something  
2 you regularly come to court?

3 A No.

4 Q Just relax.

5 A Sorry.

6 Q It's okay.

7 A Bear with me.

8 Q Have you and I reviewed the films?

9 A Together, no.

10 Q And you came here with the sealed envelope, correct?

11 A Yes.

12 Q Did I ask you to open the envelope?

13 A No.

14 Q Now, in order for you to come to court with the films  
15 of a particular patient, is there identifying information  
16 contained on those CDs that would let you know that you have the  
17 right patient?

18 A Yes, they are outside. The CD has the patient's name  
19 and the reports.

20 Q Okay.

21 A For each procedure.

22 Q Now, the sealed envelope that contains these CDs, who  
23 put the CDs into that sealed envelope?

24 A Me.

25 Q Okay. Are those CDs a fair and accurate depiction of

1 the films kept in the regular course of business in regards to  
2 Edgar Cifuentes?

3 A Yes.

4 **MR. SCHWITZER:** Your Honor, I'd ask that those CDs  
5 be admitted into evidence.

6 **THE COURT:** We don't know how many CDs are in the  
7 envelope.

8 Q With the Court's permission, could you open the  
9 envelope?

10 **MR. SCHWITZER:** Sorry, Judge.

11 **THE COURT:** Sure.

12 A Sure. (Witness complies)

13 Q Can you tell us do you know how many CDs there are?

14 A About 37.

15 Q I am sorry?

16 A About 37 images.

17 Q Thirty-seven images?

18 A Yes.

19 Q On how many CDs?

20 A Sorry, twelve.

21 **THE COURT:** Twelve CDs.

22 Q And with each of those CDs, is there an accompanying  
23 report?

24 A Yes.

25 Q And that accompanying report, is that the report of the

1 employee of Lennox Hill Radiology, the radiologist that read that  
2 scan?

3 A Yes.

4 Q And are those records kept in the regular course of the  
5 business of Lennox Hill radiology?

6 A Yes.

7 Q And are those certified records?

8 A Yes.

9 MR. SCHWITZER: I move them into evidence, Judge.

10 MR. WHITELEY: Just a few questions, if I could.

11 THE COURT: Sure.

12 MR. WHITELEY: The report that you have for those  
13 films, Ms. Marte -- strike that.

14 In your experience at Lennox Hill typically you  
15 mentioned there were 500 different radiologist, correct?

16 THE WITNESS: About.

17 THE COURT: Typically could any one of those  
18 radiologist provide a report based upon a film that they  
19 reviewed?

20 THE WITNESS: Correct.

21 MR. WHITELEY: And in a typical situation, would  
22 you expect if you have 12 different reports, there  
23 conceivably could be as many as 12 different radiologist  
24 for those reporters?

25 THE WITNESS: Correct.

1           **MR. WHITELEY:** In this case, isn't every one of  
2 those reports by a Doctor Milbauer.

3           **THE WITNESS:** Can I?

4           **THE COURT:** You may.

5           **MR. WHITELEY:** Please take your time.

6           **THE COURT:** That's okay. I will ask if you try to  
7 move to the front of the microphone close to your face.

8           **THE WITNESS:** Sure. I will have to search each  
9 one of them.

10          **MR. WHITELEY:** We are concerned about the lumbar  
11 and the cervical. If you just want to skip through to go  
12 to those.

13          **THE WITNESS:** Okay.

14          **MR. WHITELEY:** Maybe read each of the name of the  
15 radiologist to the jury.

16          **MR. SCHWITZER:** Are you stipulating that the  
17 reports go in?

18          **MR. WHITELEY:** I assume I will, yes, but I just  
19 want to get this --

20          **MR. SCHWITZER:** Well, before we start reading  
21 anything, I want to know.

22          **MR. WHITELEY:** Just the name at the bottom of the  
23 report. I don't need to read anything.

24          **MR. SCHWITZER:** Well, then, I am objecting. I  
25 will stipulate to the whole thing in.

1           **MR. WHITELEY:** You will stipulate as to Milbauer  
2 to every --

3           **MR. SCHWITZER:** No, I will stipulate to the report  
4 of the reading radiologist.

5           **THE COURT:** Your objection is to reading from a  
6 document not in evidence unless the document is stipulated  
7 into evidence?

8           **MR. SCHWITZER:** Correct.

9           **THE COURT:** Got it. I think that's probably true.  
10 The question is whether it's identifying. I guess my  
11 question for counsel is does it impact your mind the  
12 admissibility or any objection to the admissibility of the  
13 document? If it does, then we should figure out. If it  
14 does not impact it's admissibility, then this seem to be a  
15 question that is better applied to the subsequent witness  
16 that may turn up on this topic.

17           **MR. WHITELEY:** I think I can save The Court time.  
18 I am just going to ask to summarize not to read everything.  
19 All I want to know is Dr. Milbauer, was he the radiologist  
20 on the vast majority of those records.

21           **MR. SCHWITZER:** Your Honor, once again, I am  
22 stipulating the whole report in. Otherwise, he is going to  
23 ask questions about things not in evidence.

24           **MR. WHITELEY:** Judge, I probably have no objection  
25 at all. I just haven't seen them because they were just

1 opened here.

2 **MR. SCHWITZER:** That is --

3 **THE COURT:** Hold on. Stop. Remember how we don't  
4 do speaking objection.

5 **MR. SCHWITZER:** I am sorry.

6 **THE COURT:** I will ask that, first of all, that  
7 these documents be all marked for identification which I  
8 don't believe they have yet. Mark the reports, perhaps,  
9 collectively as one exhibit and the CDs, perhaps,  
10 collectively as an Exhibit A. Meaning, if it's and I don't  
11 remember where we are

12 **THE CLERK:** Twelve.

13 **THE COURT:** So, why don't we call the disk  
14 Plaintiff's 12 and the reports 12A. Is that okay to  
15 everybody?

16 **MR. SCHWITZER:** Yes, Your Honor.

17 **THE COURT:** And if we need to subdivide them as  
18 12-1 or 2, that is fine. If we need to further designate  
19 the reports as 12A-1 through whatever it is, that's fine.

20 (handing)

21 **THE COURT:** The CDs are in there?

22 **THE WITNESS:** Yes.

23 **THE COURT:** Ma'am, did you make a search for all  
24 of the films associated with Edgar Cifuentes with this  
25 patient?

1                   **THE WITNESS:** I am sorry.

2                   **THE COURT:** Did you make a search of Lennox Hill  
3 records from all of the imaging studies related to  
4 Mr. Cifuentes.

5                   **THE WITNESS:** Yes, I searched for them.

6                   **THE COURT:** And are all of those images and the  
7 records of those images contained in the records you  
8 produced to us today?

9                   **THE WITNESS:** Yes.

10                  **THE COURT:** So, would it be fair to say it's a  
11 complete copy and accurate copy of the records of Lennox  
12 Hill radiology with respect to Mr. Cifuentes?

13                  **THE WITNESS:** Yes.

14                  **THE COURT:** Thank you. I apologize. If you  
15 already asked those questions, it's the same questions.

16                  **MR. SCHWITZER:** I did not, Your Honor, so thank  
17 you very much.

18                  **THE COURT:** Don't thank me. You will do it for me  
19 but you are welcome.

20                               (handling)

21                  **THE COURT:** So, I am holding one document. It  
22 appears to be a certification document, a copy of a  
23 subpoena and some more records related to the subpoena  
24 itself including an authorization. What appears to be on  
25 the back some billing records. So, I am not referring to



1 that. I was referring to -- why don't you show them all to  
2 counsel. I didn't mean for this to be marked for an  
3 exhibit. Just billing records. Just show them to counsel  
4 and get it straight.

5 (handing).

6 **THE COURT:** Why don't you all look at them  
7 together.

8 **MR. SCHWITZER:** I can see, Your Honor --

9 **THE COURT:** Hold on. Do me a favor. Just look at  
10 them together.

11 For the jury's education about this, the witness came  
12 with a sealed envelope. So nobody knows for sure what is  
13 in the envelope until the witness takes it out and show it  
14 to us. That is why they now have to look at it together.  
15 Step up. Off the record.

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

18 **THE COURT:** All right. So, is it possible,  
19 ma'am, counsel tells me just we can move this along, it's  
20 possible that you produced 13 CDS today and not 12?

21 **THE WITNESS:** Maybe, I'm sorry. I counted fast.

22 **THE COURT:** Can we show them to the witness. I  
23 just want to make sure. We can show it to the witness.  
24 Let her do the counting and confirm it's 13 CDs in her  
25 possession. So, later if we have twelve, one would wonder

1 what happened and later we have 13 and nobody will wonder  
2 where the extra one came from.

3 (handing)

4 **THE WITNESS:** Yes, thirteen.

5 **THE COURT:** Terrific. Is it still your  
6 understanding that which you produced is a complete and  
7 accurate copy of the records of the images of  
8 Mr. Cifuentes?

9 **THE WITNESS:** Yes.

10 **THE COURT:** And that it includes the reports  
11 associated with each of those images from Lennox Hill  
12 Radiology?

13 **THE WITNESS:** Yes.

14 **THE COURT:** Great. With those understanding and  
15 with the opportunity counsels now had to review both the  
16 face of the disks and count them and the face of the  
17 reports in a cursory way, at this point, are there still  
18 objections to admitting the documents as a certified record  
19 of Lennox Hill Radiology?

20 **MR. WHITELEY:** No objection.

21 **THE COURT:** Without objection, the entire record  
22 is taken into evidence.

23 (Whereupon, Plaintiff's Exhibit 12, was marked for  
24 identification and moved into evidence)

25 **THE COURT:** Maybe we need to order them and

1 sub-number them differently from the way I originally  
2 suggested based on the fact that they are stapled and  
3 assembled. I think I saw some sort of either billing or  
4 invoice record.

5 **THE WITNESS:** Just a billing.

6 **THE COURT:** Can we give that also a sub-number of  
7 12 and decide whether or not to what extent admissible  
8 after the fact when we see whether it needs to be used.

9 **MR. SCHWITZER:** Yes, Your Honor.

10 **THE COURT:** Great. Thank you. Thank you, so  
11 much, ma'am.

12 **THE WITNESS:** Thank you.

13 **MR. SCHWITZER:** Mr. Marte, thank you so much for  
14 coming down.

15 **THE WITNESS:** No problem.

16 **THE COURT:** For the record, we will track it  
17 later. I believe that my part clerk put stickers on based  
18 on my earlier instructions that turned out to have been  
19 erroneous about how they are stapled together. I will just  
20 ask that you indulge her relabeling things under 12 and sub  
21 12s as necessary. They are all still part of Exhibit 12.

22 **MR. WHITELEY:** Agreed.

23 **THE COURT:** Thank you. That's all in evidence.  
24 That's fine.

25 Do you have another witness?

1                   **MR. SCHWITZER:** Yes, Your Honor.

2                   **THE COURT:** Would you like to call your next  
3 witness.

4                   **MR. SCHWITZER:** Yes. Dr. Andrew Merola.

5                   (Whereupon, the witness takes the witness stand)  
6 M-E-R-O-L-A.

7                   **THE CLERK:** Doctor, raise your right hand,  
8 please.

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

12                   **THE WITNESS:** Yes, I do.

13                   **THE CLERK:** In a loud clear voice, please state  
14 your name and address for the record.

15                   **THE WITNESS:** Andrew Merola, M-E-R-O-L-A, 567  
16 First Street, Brooklyn, New York 11215.

17                   **THE CLERK:** Thank you. You may be seated.

18                   **MR. SCHWITZER:** May I inquire, Your Honor.

19                   **THE COURT:** Please do.

20 DIRECT EXAMINATION.

21 BY MR. SCHWITZER::

22                   **Q** Good morning, Dr. Merola?

23                   **A** Good morning.

24                   **Q** Dr. Merola, first I'd like to ask you about your  
25 educational background?

1 A Yes.

2 Q Can you start with us, take us, maybe, from college  
3 forward?

4 A Sure. I went to New York University undergraduate.  
5 After I left NYU, I went to Howard University College of Medicine  
6 for medical school. I did four years there. And then I came to  
7 State University of New York here in Brooklyn where I did one  
8 year internship in general surgery and then a four year residency  
9 in orthopedics surgery. After that, I went to the University of  
10 Colorado where I did an additional year in spinal surgery.

11 Q Would that be a fellowship?

12 A Yes.

13 Q Can you explain to the jury what a fellowship is?

14 A A fellowship is when you are doing specific training in  
15 one very limited area of surgery. So, you are not really doing  
16 anything else except focusing on one specific portion of surgery.

17 Q What were you focusing on?

18 A Neck and back surgery and spinal surgery.

19 Q Have you held any type of academic positions?

20 A Yes.

21 Q Can you tell us what?

22 A Sure. So, in the course of doing spinal surgery and  
23 doing work for city and state, I teach residents in medical  
24 school at SUNY Downstate. I also teach residents and medical  
25 students at New York Presbyterian as well.

1 Q What does that mean that you teach them?

2 A So, you know, during the course of surgery and in my  
3 clinical practice, we have residents and medical students that  
4 follow us so that they can learn about orthopedic surgery and  
5 spinal surgery.

6 Q How long have you been teaching?

7 A Since I came into -- well, I started my residency in  
8 1990. I started my private practice in 1996. So, every since I  
9 graduated medical school.

10 Q Okay. Have you held any positions with any hospitals?

11 A Yes, State University Hospital here in Brooklyn and New  
12 York Presbyterian as well.

13 Q Okay. What does that mean?

14 A That means that I have an opportunity to admit patients  
15 to those hospitals and treat them.

16 Q Have you in the past also had privileges at other  
17 hospitals?

18 A Yes.

19 Q Where would that be?

20 A Here in Brooklyn at the Long Island College Hospital,  
21 Brookdale Hospital kings, County hospital. And in Manhattan at  
22 St. Vincents Hospital.

23 Q And is there a reason that you no longer at those  
24 hospitals and you are affiliated with the two hospitals you just  
25 mentioned?

1           A     Yes, a number of reasons. Not the least of which is  
2 Long Island College Hospital was closed not too many years ago.  
3 St. Vincent's also undergone shut down closures as well.

4           Q     Do you have any licenses or board certifications?

5           A     Yes, I'm board certified in orthopedic surgery and I'm  
6 licensed to practice here in New York State.

7           Q     What does it mean that you are board certified?

8           A     Board certification is an educational essentially a  
9 degree that you obtained after you have completed your training,  
10 you take a written examination that test your knowledge in the  
11 field of orthopedic surgery. And then after you have been in  
12 practice for several years, you collect all of your cases and  
13 then you're examined on those cases that you have done surgeries  
14 on. So, you are asked questions about those cases. When you  
15 pass both parts of that examination, you then become more  
16 certified and then that is a process that repeats itself every  
17 ten years with examinations in case filings within that ten-year  
18 recertification process.

19          Q     Approximately when was your last recertification?

20          A     Actually, I just recertified two years ago.

21          Q     Do you hold any professional memberships?

22          A     Sure. I am a member of what is known as Scoliosis  
23 Research Society. As well as a member of the American Academy of  
24 Orthopedic Surgeons.

25          Q     What is the Scoliosis Research Society?

1           A     It is a branch of orthopedic and neurosurgical care  
2 that involves the care and treatment of the patients with spinal  
3 deformities, particularly scoliosis. That usually involves both  
4 adolescents, young children and adult with spinal deformities.

5           Q     Have you received any honors or awards during your  
6 career?

7           A     Sure, yes.

8           Q     Can you tell us what?

9           A     Yes. When I graduated medical school, I had the  
10 Charles Epps award for orthopedics upon graduating medical  
11 school. And I wrote a paper for the Scoliosis Research Society  
12 where I received the Hibbs award as a paper. I also have an  
13 award from the Brooklyn Orthopedic Society for research as well.

14          Q     Doctor, have you published?

15          A     Yes.

16          Q     Tell us how many articles or topics?

17          A     So, the topics range from some general orthopedic  
18 topics through spinal surgery involving neck and back. Also  
19 published on biomechanics. Most of the articles deal with the  
20 clinical treatment of neck and back disorders and disease. They  
21 also deal with biomechanics of certain spinal implants.

22          Q     Have you also been involved in the publication of any  
23 medical textbooks?

24          A     Yes.

25          Q     Can you tell us?



1           A     Sure. I have been fortunate enough to be able to edit  
2 some text books on surgical practices for spinal surgery as well  
3 as some text books on biomechanics also for orthopedics and  
4 spinal surgery.

5           Q     Those text books, are those text books for non-medical  
6 people such as me and the jury or is that specifically for  
7 surgeons?

8           A     It is specifically for physicians and surgeons.

9           Q     Now, you mentioned scoliosis. Are you still involved  
10 with any society or any extramural responsibility that you have  
11 in that area?

12          A     Yes, I deal with the scoliosis research society  
13 regarding children with pediatric deformities. We basically look  
14 at how to treat kids here and abroad.

15          Q     Okay. The kids abroad, can you explain to us your  
16 involvement?

17          A     Sure. So, as part of the Scoliosis Research Society,  
18 there are several medical missions that we have been running to  
19 the Americas regarding kids who have spinal deformities that  
20 don't have access to spinal deformities surgical care. We work  
21 with local surgeons and physicians in order to get care delivered  
22 to those kids and sometimes that involve surgery.

23          Q     What countries?

24          A     Started in Honduras. We also done Columbia and we have  
25 expanded into other parts of the world including Europe and

1 Africa.

2 Q Have you, yourself, perform some of those surgeries?

3 A Yes.

4 Q Those surgeries that you have performed, were you paid  
5 for those or was that something you did voluntarily?

6 A It's all part of the voluntary work with the Scoliosis  
7 Research Society and deformities societies for the children.

8 Q And you are still affiliated with that?

9 A Yes.

10 Q Now, doctor, are you familiar with the term  
11 medical/legal consultation?

12 A Sure.

13 Q Doctor, that is something where someone is hired on  
14 behalf of someone or company or a law firm defending claims of  
15 personal injury to do consulting work?

16 A Yes.

17 Q Okay. Did you, yourself, do that type of work?

18 A No, not typically.

19 Q Doctor, you've come to court in the past, correct?

20 A Yes.

21 Q And you started coming to court how many years ago?

22 A Started soon after I began my private practice in '96.  
23 So, it's been going on about, I guess, 25 years or so, now.

24 Q Okay. The people that you come to court to testify on  
25 behalf, are those always your patients?

1           A     Yes, typically they are my patients.

2           Q     Doctor, at some point in the past, have you testified  
3 on behalf of me or my law firm?

4           A     Yes.

5           Q     Do you know approximately how long ago that would have  
6 been?

7           A     No.

8           Q     Doctor, at some point, you came to treat Edgar  
9 Cifuentes, correct?

10          A     Yes.

11          Q     Doctor, when I reached out to you in regards to Edgar  
12 Cifuentes to make yourself available to come to court, you  
13 indicated that you were under subpoena, right?

14          A     Yes.

15          Q     Doctor, whether you are under subpoena or not, you have  
16 indicated that you come to court on behalf of your patients  
17 without a subpoena in the past, correct?

18          A     Yes.

19          Q     Now, doctor, let's -- did you bring your records with  
20 you?

21          A     I brought my treatment notes with me, yes.

22          Q     Can you explain to the jury what you mean by your  
23 treatment notes?

24          A     When I see a patient in the office, you either write or  
25 dictate what happened at that encounter with the patient. So

1 it's something that you can use in order to kind of give yourself  
2 all of the encounters that you have had with that patient  
3 throughout the course of time and treatment with your treatment.

4 Q Okay. With The Court's permission, doctor, I'd like  
5 you to look at your treatment records?

6 MR. WHITELEY: Could we just voir dire on this.

7 THE COURT: In front of the jury or outside.

8 MR. WHITELEY: Either, Judge.

9 THE COURT: In front of the jury is fine.

10 MR. WHITELEY: Okay. Counsel, is that the same as  
11 the subpoenaed records that were subpoenaed in court or is  
12 that something different?

13 THE COURT: You said counsel or doctor.

14 MR. WHITELEY: I am sorry, doctor.

15 THE WITNESS: They are, I believe, the subpoenaed  
16 records likely contain my entire chart and these are just  
17 my treatment records.

18 MR. WHITELEY: Okay. We would just ask, Judge,  
19 that assuming that it's going to be marked, that the entire  
20 subpoenaed records of Dr. Merola be marked as an exhibit.  
21 Let's use those since they are in the subpoenaed records  
22 room.

23 MR. SCHWITZER: There is going to be a lot --  
24 there is a lot of -- can we approach, Judge?

25 THE COURT: You can. Outside the presence of the

1 jury?

2 **MR. SCHWITZER:** Yes.

3 **THE COURT:** Sir, you remain under oath. I will  
4 be right back.

5 **THE WITNESS:** Yes.

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

8 **THE COURT:** Just to try to speed this along, we  
9 will take five. Doctor, if you could make your chart  
10 available to counsel to compare with the subpoenaed  
11 records. I guess there is nothing in your chart that is  
12 not also in the subpoenaed records. And then they can  
13 compare the two. We will move on from there. You remain  
14 under oath, sir.

15 Ladies and gentlemen, all the same rules apply. Don't  
16 discuss the case. Don't do any research. Don't have any  
17 outside contact. Thank you.

18 **COURT OFFICER:** All rise. Jury exiting.

19 (Whereupon, the jury is exiting the courtroom).

20 (Whereupon, the witness steps down from the  
21 witness stand)

22 **THE COURT:** I will be back in five.

23 (Whereupon, there was a five-minute break in the  
24 proceedings)

25 (Whereupon, the witness retakes the witness stand)

1           **MR. WHITELEY:** Judge, we have agreed that we are  
2 going to have marked for ID the doctor's file and marked  
3 for ID the doctor's file and subpoenaed records.

4           **THE COURT:** Great.

5           **MR. WHITELEY:** I have no objection to admitting  
6 them in evidence.

7           **THE COURT:** Good. Let's do that.

8           **MR. WHITELEY:** We are both agreeing that they  
9 would go into evidence. The redactions being if there are  
10 things --.

11          **THE COURT:** One hundred percent. Thank you. We  
12 are ready for the jurors.

13          **MR. SCHWITZER:** Your Honor, can I just have his  
14 file from the subpoenaed record room just so we can look at  
15 it for a second.

16          **THE COURT:** Sure.

17          **THE CLERK:** Are we marking that now?

18          **MR. SCHWITZER:** I will mark them both Plaintiff  
19 subject to redactions.

20          **THE COURT:** In evidence subject to redactions.  
21 Both of them for ID subject to redactions.

22          **MR. WHITELEY:** In evidence subject to redactions.

23          **THE COURT:** That's fine. In evidence subject to  
24 redactions. That's fine.

25               (Whereupon, Plaintiff's 13 and 14, were marked and

1 moved into evidence)

2 **THE CLERK:** The subpoena records would be number  
3 13.

4 **MR. SCHWITZER:** Your Honor, just so The Court sees  
5 like the caption. There is a lot here.

6 **THE COURT:** Obviously, that's going to be redacted

7 **THE CLERK:** So, that would be Number 14.

8 **MR. WHITELEY:** The doctor's record is 14.

9 **THE CLERK:** In evidence.

10 **MR. SCHWITZER:** What he brought with him is going  
11 to be 14?

12 **MR. WHITELEY:** Yes.

13 **THE COURT:** Okay.

14 **MR. SCHWITZER:** Yes.

15 **THE COURT:** Good. Can we have the jurors?

16 **COURT OFFICER:** All rise. Jury entering.

17 (Whereupon, the jury is entering the courtroom).

18 **THE COURT:** Thanks. You can all be seated.

19 Doctor, I know I said this before, but you are still under  
20 oath.

21 It sounds like a stipulation to put on the record

22 **MR. SCHWITZER:** Yes, Your Honor.

23 **THE COURT:** Go ahead.

24 **MR. SCHWITZER:** Plaintiff is going to offer into  
25 evidence the chart that Dr. Merola brought with him today

1 subject to redactions.

2 **THE COURT:** That's Exhibit 14, is that right,  
3 Christine.

4 **THE CLERK:** Doctor's chart.

5 **MR. SCHWITZER:** Plaintiff's 14. The Plaintiff is  
6 going to offer into evidence subject to redactions Number  
7 13, which is the subpoenaed records that were sent from  
8 Dr. Merola's Office to the court some time before the start  
9 of this trial.

10 **MR. WHITELEY:** So stipulated, Your Honor.

11 **THE COURT:** Thank you. I appreciate you helping  
12 us save that time.

13 **MR. WHITELEY:** Yes.

14 **THE COURT:** Yes. With those stipulations, those  
15 documents are in evidence.

16 Doctor, you can read from them subject to redactions  
17 that you may have talked about earlier.

18 Q Now, Doctor, there were things sent to the court prior  
19 to the start of this trial. Are you familiar with that?

20 A Yes.

21 Q Okay. Did anyone in your office help to put together  
22 some of those things?

23 A Sure, yes.

24 Q You have other employees there?

25 A Yes.



1 Q Doctor, what you brought with you today yourself, those  
2 were treatment records in regard to Mr. Cifuentes?

3 A Yes.

4 Q What we have marked that was sent to subpoenaed  
5 records, those were things in addition to treatment records?

6 A Yes.

7 Q Okay.

8 THE COURT: But including treatment records,  
9 right.

10 Q But including treatment records?

11 A Yes.

12 Q So, for the purposes of this jury today, we are going  
13 to refer to treatment records?

14 A Yes.

15 Q So, let's go to your first date of treatment.

16 A Yes.

17 Q When would that have been?

18 A March 11, 2016.

19 Q Okay. Do you note something? You have the patient's  
20 name, the date and then you have something written underneath  
21 that. I think in cap?

22 A Yes.

23 Q What is that.

24 A It says initial evaluation.

25 Q Okay. Now, do you recall who, if anyone, referred

1 Mr. Cifuentes to you?

2 A University Orthopedics.

3 Q Okay. Do you know what doctors are composed of  
4 University Orthopedics?

5 A Dr. DeMarco and Dr. Touliopoulos.

6 Q How do you know them?

7 A We trained together.

8 Q Now, in your practice as a spinal surgeon, do you  
9 receive referrals from other doctors?

10 A Yes.

11 Q Can you estimate how many different doctors you receive  
12 referrals from?

13 A Quite a bit. A lot.

14 Q Over 50.

15 A More likely than not.

16 Q Okay. Doctor, do you also refer your patients out to  
17 other doctors as well depending on what the situation is?

18 A Yes.

19 Q Doctor, the doctors that you choose to refer your  
20 patient to, how is it you come to pick those particular doctors?

21 A You know the doctors. You are familiar with them. You  
22 trust them. Sometimes patients maybe seeing that particular  
23 doctor or that doctor maybe in their neighbors. So, there is a  
24 lot of factors that are involved.

25 Q Okay. Now your treatment records are now in evidence,

1     okay?

2             A     Yes.

3             Q     So, I am going to have you just take us through in  
4     general. When you first see a patient for the very first time,  
5     forget the record just for a moment.

6             A     Yes.

7             Q     First time. You know that you've never seen the person  
8     before. Obviously, they are coming in with physical complaints.  
9     What is your protocol as to what you are looking to do and  
10    accomplish on that initial visit?

11            A     You are essentially starting with a conversation to  
12    find out why the patient is seeing you and what their general  
13    nature or problem is that you can help them with.

14            Q     Okay. So, please, you can read right from the record  
15    and then I will stop you and ask questions.

16            A     Sure. So, it says initial evaluation. It says Edgar  
17    is accompanied to the office today by some friends and family  
18    members. Utilizing private transportation. Gentlemen was  
19    referred to me for evaluation and management of severe pain in  
20    his neck and back with radiating symptoms into the upper  
21    extremity arms and hands.

22            Q     Stop. I will be doing that and I apologize. I am  
23    going to be doing that a lot. Okay. I want to make sure we all  
24    understand these terms. You said radiating symptoms to the upper  
25    extremities. What does that mean?

1           A     Radiating means essentially traveling. So, symptoms  
2 that this patient is complaining about that includes the symptoms  
3 of pain coming from the neck and going down the arms and hands.

4           Q     Okay. Please continue.

5           A     And radiating symptoms into the lower extremity legs  
6 and feet.

7           Q     Okay?

8           A     Status post fall from height which occurred in  
9 December 19<sup>th</sup> of 2015.

10          Q     Now, do you do something called take a history?

11          A     Yes.

12          Q     Can you explain to the jury what you mean by take a  
13 history?

14          A     It's the conversation that you are having with the  
15 patient to determine why they are there to see you and what it is  
16 that you can help them with.

17          Q     And is the history important?

18          A     It's extremely helpful in terms of trying to figure out  
19 what to do with a patient.

20          Q     Please continue.

21          A     He was working in his usual state of health and  
22 sustained a fall whereby he sustained multiple injuries. He came  
23 under the auspices of University Orthopedics and was referred to  
24 me because of his neck and back symptoms. His neck and back  
25 symptoms were recalcitrant in conservative care and management.

1 Q What does that mean?

2 A It means that it didn't get better with non-surgical  
3 care.

4 Q Please continue.

5 A His neck pain was rated as an eight out of ten on a  
6 zero to ten scale. His lower back pain was also eight out of ten  
7 on a zero to ten scale. Neck symptoms could become as bad as a  
8 ten out of ten depending upon his activities with an increase in  
9 activity increasing his pain and his symptoms.

10 Q Does this scale have an importance to you as a treating  
11 doctor?

12 A It helps to kind of understand the severity of pain.

13 Q Please continue. Do you have another category after  
14 that?

15 A Yes.

16 Q What was that?

17 A Constitutional complaints and symptoms.

18 Q When does that mean before we note what they were?

19 A Your constitution is kind of your overall health status  
20 and how you perceive and feel your body is behaving.

21 Q Okay. What did you note?

22 A I indicated that he had some headaches. Difficulty  
23 with his ability to focus and concentrate. Difficulty with his  
24 ability to sleep at night. And difficulty with sexual function.

25 Q By the way, without your chart, would you recognize

1 Edgar Cifuentes?

2 A Sure.

3 Q Why?

4 A I have been seeing him ever since 2016. So, that is  
5 quite a bit of time. And I did operate on him. So, I typically  
6 remember the folks that I had the opportunity to operate on.

7 Q And do you recognize who is sitting next to him?

8 A Yes.

9 Q Who is that?

10 A That is his wife.

11 Q Okay. As you sit here, do you recall whether she  
12 accompanies him on many of his visits to you?

13 A Yes.

14 Q Yes, she does?

15 A Yes, she does.

16 Q Did you note a work history?

17 A Yes.

18 Q What did you note?

19 A I noted that he was at work full-time at the time of  
20 the accident without any other reports of injuries or illnesses.

21 Q Did you note what medication he was on when he first  
22 came to you?

23 A Yes.

24 Q What was what?

25 A He was on Oxycodone, Naprosyn and Simvastatin.

1 Q Do you know what Oxycodone is for?

2 A It is an opioid pain medication.

3 Q And Naprosyn?

4 A It's a non-steroidal anti-inflammatory medication.

5 Q And if you know, Simvastatin?

6 A Simvastatin is a medication that lowers your overall  
7 blood cholesterol.

8 Q Now, you noted a past surgical history?

9 A Yes.

10 Q What did you note?

11 A That he had had right shoulder surgery, right knee  
12 surgery and also had history of carpal tunnel on his right hand.

13 Q Now, when you take a surgical history, are you asking  
14 the patient -- strike that.

15 He came in and told you he had an accident on  
16 12/19/15, correct?

17 A Yes.

18 Q When you meet that person who comes and tells you they  
19 had an accident on a particular date, do you also ask them about  
20 all surgeries whether related or unrelated to the accident?

21 A Yes.

22 Q Okay. Do you know whether the right carpal tunnel  
23 surgery was related or unrelated?

24 A Unrelated.

25 Q After you took a history, spoke to him at some point,

1 did you perform a physical examination?

2 A Yes.

3 Q Can you tell us what that examination -- I apologize.  
4 I am going to be interrupting you. There are words that are  
5 common to you, not common to me and probably not common to many  
6 of the jurors. Okay. Please tell us what the exam revealed?

7 A Sure. It demonstrated what I indicated was severely  
8 antalgic and kyphotic gait pattern.

9 Q Tell us what that means in English?

10 A Antalgic is a term that refers to when a patient is  
11 walking, a limp. Antalgic is a fancy word for limp. Kyphotic  
12 gait pattern is a gait pattern is the way a patient is walking  
13 whereby there is some element of the patient being pitched  
14 forward rather than completely entirely up right.

15 Q Was there any significance to you that just by  
16 observing him that he had a kyphotic gate?

17 A Most typically patients who have a kyphotic gait  
18 pattern have some spinal issue that is causing them to have what  
19 we call a loss of sagittal balance. Which basically means  
20 inability to complete entirely straight up and down.

21 Q Please continue?

22 A He was using a right knee brace. Was in a right  
23 shoulder sling. Had a cane and did require some assistance  
24 getting on and off of the examination table.

25 Q Now, why do you note whether someone needs assistance



1 getting on or off the examining table?

2 A In a general sense, it can give you some idea of what  
3 their muscular skeletal function is like and whether they have  
4 mild, moderate or severe dysfunction.

5 Q You indicated that he demonstrated a reversal of  
6 lordosis upon ascent. What does that mean?

7 A So, ascent is rising from a seated position. Typically  
8 when you get up from a seated position, if you do not have any  
9 pain or stiffness in your neck or back, you get up in a very  
10 fluid, easy manner. A reversal of lordosis typically means when  
11 you observe the patient getting up, they have to kind of bend  
12 forward a bit and their ability to arise from that seated  
13 position is not fluid.

14 Q Please continue?

15 A I indicated that his cranial nerves were intact and  
16 nonfocal. Also that his jaw jerk was negative. And that he did  
17 not have any spasticity or clonus in his arms or hands. Nor did  
18 he have any spasticity or clonus in his legs or feet. He did  
19 have a painful arc of motion if his right shoulder as well as his  
20 left shoulder. The hips showed some difficulty with range of  
21 motion as did the right knee and the right foot and ankle.

22 Q What did that indicate?

23 A That was consistent with the right knee injury and the  
24 right shoulder injury.

25 Q Okay.

1           A     I noted that he didn't have any evidence of vascular  
2 disease or what we call deep vein thrombosis, another term for  
3 blood clots. And that his abdomen was soft and non-tender. And  
4 that his chest expanded essentially normally.

5           Q     Okay.

6           A     He had palpable spasm in his cervical spine.

7           Q     What does that mean?

8           A     Palpable spasm is an area where your muscles are  
9 abnormally tensing up or contracting in order to prevent your  
10 spine from being placed into a position with would otherwise  
11 cause discomfort.

12          Q     And is that something that you can fake?

13          A     A spasm, no.

14          Q     What else -- did you also palpate him for spasm in the  
15 lower back?

16          A     Yes.

17          Q     What did you note?

18          A     I noted that he did have spasm in his lower back as  
19 well.

20          Q     When you palpate for spasm in the neck, can you explain  
21 or show us where you touch?

22          A     Yes. So part of your examination is not only  
23 observation of the patient which are also palpating or feeling  
24 your body parts. In this case, you take your hand and you are  
25 putting it up on the back and sides of the neck in order to get

1 an idea of where those muscles are and what they feel like.

2 Q When you palpate for spasm in the back, where do you  
3 put your hands?

4 A Same thing. You are trying to palpate and feel where  
5 the lower back muscles are and where they attach into your pelvis  
6 and into your lower buttocks and hip area.

7 Q Where are the different places you are putting your  
8 hands if you can show us?

9 A Yes. So, essentially the neck. Any where from below  
10 where your head is down to your upper shoulders and neck area.  
11 In your upper back, it would be on the back side of your chest.  
12 And in your lower back, it's on both sides of your lower back and  
13 then down into your pelvic and hip area.

14 Q Would that include your buttocks?

15 A Sure.

16 Q Your butt?

17 A Yes.

18 Q You touch both sides?

19 A Yes.

20 Q Okay. Then what did you do? What did you perform?  
21 What test?

22 A So, next test I did is called a compression distraction  
23 maneuver and a Spurling's test.

24 Q Explain what those are.

25 A Starting up at the top. So, in this case, the head and

1 neck. Compression distraction is where you are pushing down on  
2 the top of the neck and you are seeing whether or not the neck  
3 goes into spasm and/or reproduces pain or symptoms in the arms  
4 and hands.

5 Q Why are you doing that?

6 A You are trying to see whether or not the nerves that  
7 are in the neck that goes into the arms and hands are irritated.

8 Q Okay.

9 A And the distraction part of that test that you are  
10 pulling up on the head and neck is to take pressure off all of  
11 those nerves and to see if that relieves the symptoms.

12 Q Please continue?

13 A The Spurling's test is another test where you are  
14 pushing down on the head and neck, but you are also turning and  
15 bending at the same time. It's a little bit more specific for  
16 you to be able to pick up to see whether or not there are any  
17 nerves that are being irritated.

18 Q Then what did you do?

19 A I looked for what we call a Hoffmann sign which is  
20 where you're flicking the fingers to see whether or not there is  
21 an abnormal contraction of the finger and wrist muscles.

22 Q Okay. I want you to stop for a moment. When you do  
23 that, does the patient really know what you are trying to figure  
24 out when you are doing that Hoffmann test?

25 A No.

1 Q Okay. So, explain to the jury again what you're doing  
2 and what you are expecting to find out?

3 A So, you are trying to test to see whether or not there  
4 is a normal or abnormal response of the nerves that are going  
5 into your arms and your hands.

6 Q What did that reveal?

7 A It shows that the Hoffmann test was positive. Which  
8 meant that there was some irritation of the nerves going into the  
9 arms and hands.

10 Q Please continue.

11 A I then looked at the lower back and in this case  
12 extended, that is put the back into a position of lordosis up to  
13 10 degrees whereby it produce spasm and cause symptoms down to  
14 the legs and feet.

15 Q What does that indicate to you?

16 A That's also an indication of nerve irritation. And  
17 it's very similar to the testing that was done in the neck when  
18 you are trying to figure out if there is any nerve irritation.

19 Q Please continue.

20 A There was a decrease in his ability to feel pinprick  
21 and tactile sensation.

22 Q How do you perform that test?

23 A A pinprick is done with like a little metallic thing  
24 that looks kind of like a paper clip that is blunt at the end.  
25 It is not a pin, but it is similar to a pin. So, you see whether

1 or not the patient can feel something as you are touching them  
2 with this little metallic object.

3 Q What did that reveal?

4 A There was a decrease in sensation in the L4, L5 and S1  
5 nerve roots.

6 Q What did that indicate to you?

7 A That's an indication of nerve root dysfunction in the  
8 legs.

9 Q Okay. Please continue.

10 A Let's see. I tried to do a femoral stretch test, but I  
11 couldn't really perform that because it was a little bit painful  
12 for the patient, so I abandon that particular test.

13 Q What is the purpose -- first of all, what is that test  
14 and what is the purpose of that test assuming you could have.

15 A So, there are two big nerves that travel into your  
16 legs. The top most nerve is the femoral nerve. It comes into  
17 your thigh and it goes down below the knee a little bit. So, a  
18 stretch test, you're basically taking that leg and you are  
19 extending the hip. You are pulling on that nerve to see whether  
20 or not it reproduces any symptoms. It was hard to do mostly  
21 because, as I said, he did have painful motion in the knee and in  
22 the hips. So, that was a test that really could not be done.  
23 The other test I did was the straight leg raise which is where  
24 you are testing the other big nerve that goes down into your leg  
25 which is the sciatic nerve. Which is a nerve that travels down

1 the back side of your legs. Once again, you are pulling on that  
2 nerve to see whether or not it reproduces any pain.

3 Q What did you note?

4 A Let's see. That nerve test was positive on the right  
5 side. So that meant there was irritation on the sciatic nerve  
6 particularly the one going down the right side.

7 Q Okay. Please continue.

8 A Sure. Also appreciate something called a Trendelenburg  
9 gait and a Trendelenburg stance. That's associated with hip  
10 pain, hip problems and nerve root dysfunction in the muscle that  
11 go down to the hip joint that maintains the hip joint in a normal  
12 position.

13 Q After you took the history and did your exam, did you  
14 form some sort of diagnosis and/or treatment plan?

15 A Yes.

16 Q What was that?

17 A So, the diagnosis and the treatment plan involved the  
18 positive physical findings and history which indicated there was  
19 some difficulty with the nerves in the arms and hands. And some  
20 difficulty with the nerves in the legs and feet. Also known as a  
21 radiculopathy. The plan was for diagnostic imaging scans.

22 Q When you ordered diagnostic imaging scans, is that to  
23 confirm what you already are thinking or for another reason?

24 A For basically two reasons. One is to confirm the  
25 diagnosis and your history and your physical are telling you is

1 there. The other thing is to make sure that there is nothing  
2 really grossly abnormal like an infection or tumor or something  
3 like that.

4 Q What did you diagnosed before reading any films?

5 A Cervical and a lumbar radiculopathy.

6 Q What does that mean?

7 A Problem with the nerve roots in the arms and hands and  
8 problems with the nerve roots in the legs and feet.

9 Q Okay. Did you give -- did you note or level the  
10 disability at that time?

11 A Yes, I indicated that he was not able to return to  
12 work.

13 Q What percentage disability?

14 A That he was totally disable from his work and duties.

15 Q The next date you saw him was what?

16 A April 8<sup>th</sup> of 2016.

17 Q Okay. On that time, I am going to read a bit since  
18 it's in evidence. He came in. He had his right knee immobilizer  
19 on. He had his right arm sling, correct?

20 A Yes.

21 Q He was also utilizing crutches?

22 A Yes.

23 Q Can you tell us what his complaints were on that date?

24 A Severe pain in both his neck and his lower back.

25 Q Did you perform a physical exam on him on that day?



1 A Yes.

2 Q Did he still require assistance on and off the  
3 examining table?

4 A Yes.

5 Q And was there still reversal of the lordosis?

6 A Yes.

7 Q On that particular day that he came in, did he have  
8 spasm to the neck and back?

9 A Yes.

10 Q So you saw him in March 11<sup>th</sup>. So, this next visit is  
11 April 8<sup>th</sup>, which is about a month later?

12 A Yes.

13 Q Was it significant to you that he still had spasm in  
14 his neck and back?

15 A Yes.

16 Q What did that indicate to you?

17 A That he had a persistent neck and back problem.

18 Q All right. Now, on that day, do you see where you note  
19 the spasms to the neck and back?

20 A Yes.

21 Q Could you read starting the line after that?

22 A Sure. Spinal range of motion tested both actively and  
23 passively. Noted to be at the extremes motion and confirmed by  
24 spasm was only 30 percent of normal.

25 Q What was the significance to you that it was only

1 30 percent the range of motion of normal?

2 A Significant problems with both his neck and back.

3 Q Okay. Now, please continue to read from compression  
4 distraction?

5 A Compression distraction, Spurling's maneuver with  
6 respect to the neck reproduce pains into the upper extremity arms  
7 and hands going down into what I reported as the C6 and C7 nerve  
8 roots.

9 Q Okay. Now, with The Court's permission, can I hand up  
10 the spinal model?

11 MR. WHITELEY: A what?

12 MR. SCHWITZER: A spine model.

13 THE COURT: For demonstrative.

14 MR. WHITELEY: No problem.

15 THE COURT: Without objection, can we mark that  
16 for ID for demonstrative, please.

17 (handing)

18 THE COURT: Ladies and gentleman, you are going to  
19 see a synthetic model of the spine. Doctor, is it fair to  
20 say that this is not an extract replica of Mr. Cifuentes'  
21 spine.

22 THE WITNESS: Correct.

23 THE COURT: Is it just a representative anatomical  
24 model of an adult spine general.

25 THE WITNESS: Yes.

1                   **THE COURT:** Okay. So, it is permitted, ladies and  
2 gentlemen, for demonstrative purposes. So it's used to  
3 describe something or illustrate something. It is not  
4 meant to exactly mimic Mr. Cifuentes' spine.

5                   **MR. SCHWITZER:** With The Court's permission, can I  
6 allow the witness to step down with the spine?

7                   **THE COURT:** Sure. If that would help him to  
8 describe the spine, sure.

9                   Q     Dr. Merola.

10                  A     Yes.

11                  Q     When you are ready, can you step down?

12                  A     Sure.

13                         (Whereupon, the witness steps down from the witness  
14 stand)

15                  Q     Can you kind of center yourself in front of the jury so  
16 everybody has a view.

17                         First of all, can you explain to the jury using the  
18 model, the anatomy of the spine, please?

19                  A     Yes. Pretty much this is a plastic model of an adult  
20 spine. What it represents is everything from the bottom of your  
21 head, which is up on top, down into your pelvis and hips. You  
22 will notice that it's got a bunch of bones that are essentially  
23 stacked up on top of each other. So, it's basically a column.  
24 It's there to support your head over your pelvis. It has like  
25 three basic parts. It has bones, which are the white plastic

1 things that look like squares if you are looking at them from the  
2 side-view. And then in between the bones, it has these what look  
3 like here are clear plastic regions. Those are called discs.  
4 So, those things are all stacked up on top of each other. And  
5 then behind all of these bones and discs are those little yellow  
6 things. These are nerve roots. Those are the nerves that exits  
7 the spine and travel into your arms and hands and your legs and  
8 feet.

9 Q What is the purpose anatomically of those discs between  
10 each level?

11 A So, discs do a couple of different things. The first  
12 thing they do is their, you know, they are essentially gluing the  
13 bones together to make sure that the bones are not sliding around  
14 or moving abnormality. The other thing that they do, they  
15 absorb, for example, shock as you might anticipate as you are up  
16 and walking around. They absorb stress in between the bones when  
17 you are, you know, bending and moving and lifting and twisting  
18 doing things like that. So, the discs can be thought of as a  
19 structure that helps to hold the bones together in a normal way  
20 and is also responsible for making sure that the bones, for lack  
21 of a better term, behave appropriately as you are up and doing  
22 your normal activities.

23 Q Now, you noted you started throwing letters and  
24 numbers. You said C6, C7. Can you explain to the jury, you  
25 know, the C part the number part?

1           A     Sure. So, the spine is broken up into three parts.  
2     The top of it where your neck is, is called the cervical spine.  
3     There are seven bones there. So, C means cervical from your  
4     neck. They are numbered one through seven. So, if we say C7, we  
5     know it's the seventh cervical bone.

6                     In the middle portion of your back, that's also known  
7     as thoracic spine. So, there are 12 thoracic bones. So, if you  
8     know it's T5, you know it's the fifth thoracic bone. The nice  
9     thing is these are all lined up on top of each other. The  
10    numbers go along with the levels. The lower part of the back,  
11    they are all called lumbar. There are five major bones in the  
12    lower back numbered one through five. So L1 to L5.

13                    And then the last bone technically is part of your  
14    spine. It is part of your pelvis. It is called the sacrum. It  
15    likes look a triangle ear on this model. It sits inside your  
16    pelvis. Anything within an S designation refers to the sacrum.  
17    Typically, we really talk about mostly what's known as the first  
18    sacral bone or S1.

19           Q     Now, you noted C6, C7. Are there and I don't know if  
20    the word is different purpose. But each level of the cervical  
21    spine, you said there were nerve roots that come out?

22           A     Yes.

23           Q     Are there certain patterns that if you injure certain  
24    levels of the cervical spine, you would expect symptoms in  
25    particular locations?

1           A     Yes. So, each nerve as you will notice comes out of a  
2 particular area in the spine. The nerve comes out in between two  
3 bones. So, the area or the opening that it comes out in between  
4 gives the nerve it's designation. So, for example, the nerve  
5 that comes out between C5 and C6, is the sixth nerve root. The  
6 nerve that comes out from six and seven is the seventh nerve  
7 root. C4/5, C5. And therefore and so on based on whatever level  
8 those nerves happen to be exiting.

9           Q     I want you to assume, and I am paraphrasing, that Edgar  
10 already testified in front of this jury, okay. That he indicated  
11 that before he had any cervical spinal surgery he still has some  
12 residual issues, but that he was having numbness and tingling  
13 down his arm and was having difficulty buttoning or tieing shoes,  
14 holding his keys. Can you explain to the jury why that was  
15 medically or if it's related to your findings?

16                   **MR. WHITELEY:** I am going to object, Judge.

17           Unless he is going to read from what the testimony was, I  
18 don't think a narrative explanation of -- The Jury will  
19 remember what they remember. It's not --

20                   **THE COURT:** Remember how we are not doing speaking  
21 objections. Your objection is sustained with respect to  
22 foundation.

23                   **MR. SCHWITZER:** Okay.

24           Q     Doctor, is numbness and tingling an indication of  
25 cervical radiculopathy?

1           A     Yes, it can be.

2           Q     Okay. Is an inability to button your clothes or drop  
3 things an indication that you are trying to hold them an  
4 indication of cervical radiculopathy?

5                   **MR. WHITELEY:** I am going to object again.

6                   **THE COURT:** Sustained.

7                   **MR. WHITELEY:** Leading.

8                   **THE COURT:** Sustained.

9           Q     Doctor, you can take the stand if you don't mind. I  
10 think you can keep the model with you just in case we need it for  
11 other things?

12                   (Whereupon, the witness resumes the witness stand)

13          Q     Doctor, by the time he came back to you on April 8<sup>th</sup>.

14          A     Yes.

15          Q     Had Mr. Cifuentes listened to you and went and obtained  
16 MRIs of his neck and back?

17          A     Yes.

18          Q     Okay. Did you review those films with him?

19          A     Yes.

20          Q     Before we get there, you also noted and in your  
21 physical exam and I apologize if you mispronounce it.  
22 Lhermitte's sign is positive. What is that?

23          A     Lhermitte's sign is positive.

24          Q     All right. Can you tell us what that is and what it  
25 means?

1           A     That's a sign, in other words, that's something the  
2 patient body tells you based on you extending their neck and this  
3 causes reproduction of an electrical sensation going down to the  
4 arms and an hands.

5           Q     What does that mean?

6           A     It's an indication of nerve root irritation.

7           Q     Now, did you also perform a straight leg raised test on  
8 that day?

9           A     Yes.

10          Q     On what side?

11          A     This show straight leg raising test on the left side at  
12 35 degrees.

13          Q     Okay. Now, you indicated he has difficulty heel-toe  
14 raising bilaterally. First of all, what is heel-toe?

15          A     So, when you are standing on -- when you are toe  
16 raising, you're standing on your toes. So, you are pushing down  
17 on the ground to stand up. When you're heel raising, you are  
18 lifting your ankle and your feet so that you are standing on your  
19 heels. That involves the muscle of your lower legs that are part  
20 of those femoral nerves and sciatic nerve, the nerves that travel  
21 down to your legs and feet.

22          Q     Okay. Now, at some point we met before you came to  
23 court, correct?

24          A     Yes.

25          Q     I told you I would be asking questions about Edgar's



1 treatment?

2 A Yes.

3 Q Did I also ask you to review the films that you had  
4 taken of him?

5 A Yes.

6 Q Okay. Prior to taking the stand today, did you look  
7 specifically at neck and back MRIs that were taken some time  
8 before April 8<sup>th</sup> of 2016?

9 A Yes.

10 Q Do you recall where those were performed?

11 A I have to look up the --

12 Q If I said Lennox Hill Radiology, would that refresh  
13 your recollection or not really?

14 A Sure.

15 Q Okay.

16 MR. SCHWITZER: So, what I am going to ask, Your  
17 Honor is I have Oscar here to assist me. What I'd like to  
18 do is set up the screen so that we can project the films  
19 onto the screen?

20 THE COURT: Counsel.

21 MR. WHITELEY: Which film.

22 THE COURT: Lennox Hill Radiology.

23 MS. YUEN: Do you intend to put it here?

24 MR. SCHWITZER: I don't know. You can come on  
25 this side. The most important is the jury to see it.

1                   **MR. WHITELEY:** Yes.

2                   **THE COURT:** Can we set that screen up, please.

3                   **MR. WHITELEY:** As long as it's a film they showed  
4 us. No objection at all.

5                   **THE COURT:** Sure. It's films from Lennox Hill  
6 Radiology that are now in evidence, right?

7                   **MR. SCHWITZER:** Yes, Your Honor.

8                   **THE COURT:** Counsel, if you need to move to see,  
9 that's fine.

10                  **MR. WHITELEY:** Thank you, Your Honor.

11                  **MR. SCHWITZER:** With the Court's permission, I  
12 will ask the doctor be allowed to come down.

13                  **THE COURT:** Certainly.

14                  **MR. SCHWITZER:** And scroll through which film he  
15 wants to show because there are multiple and I certainly  
16 would not have no idea what I am looking at?

17                  **THE COURT:** Certainly.

18                  **Q** Dr. Merola, you can scroll through and show whatever  
19 you want to show the jury please and we will put it up.

20                  **THE COURT:** Doctor, I will remind you that half of  
21 the jury is behind your back.

22                  **Q** Dr. Merola, can you tell us what slice that is or if  
23 you can identify it for the record?

24                  **A** This is --

25                  **THE COURT:** I think these two jurors can't see the

1 film. Because of the angle of the screen and placement of  
2 the witness. Dr. Merola, are you able to stand further  
3 back. If you stand closer to us and still off to the side,  
4 you should be able to see.

5 Q Okay, doctor.

6 A So, this is a side-view image of the cervical spine.

7 At the top of the image is the base of the brain.

8 MR. SCHWITZER: I am sorry. Doctor, I don't know,  
9 could this help you?

10 (handing)

11 A Sure. So, at the top of the image is the base of the  
12 brain and the bottom of the skull. To the left, it appears as  
13 though they are gray squares. Those are the bones of the  
14 cervical spine that are lined up on top of each other. To the  
15 right of those bones is this gray line, this thick gray line  
16 that's surrounded by some white lines. That's the spinal cord  
17 exiting the bottom of the brain, traveling down into the rest of  
18 the spinal canal. And then if you look in between the bones,  
19 these are the discs. And looking at this particular image, if we  
20 look at the, number two here is on top. One is all the way on  
21 top. So it's two, three, four, five, six, and seven. We can see  
22 that there is protrusion here or disc sticking out from behind  
23 C6/C7. There is little bit of a disc sticking out between C5/C6.  
24 Somewhat of a bulge here at C4/C5. But mostly C5/C6 and C6/C7 on  
25 these images.

1 Q Can you, without the pointer, just walk up and kind of  
2 point to the jurors to show the herniation a little closer maybe  
3 with a pen or something?

4 A So, you can see that there is an area behind C5/C6 and  
5 behind C6/C7 less so up on top that are kind of, if you can  
6 imagine in your mind kind of like pinching those little areas in  
7 the spinal canal region.

8 Q What is that pressing on?

9 A So, this spinal canal region contains not only the  
10 actual spinal cord itself, but coming out from the spinal cord  
11 which you don't see on this particular image, are those nerves  
12 that then travel down into your arms and hands in the cervical  
13 spine area.

14 Q Did those films once you reviewed them of the neck  
15 confirm what you thought from your history and physical exam?

16 A Sure, yes.

17 Q Can you explain to the jury how and when?

18 A Yes, it tells you that there is nothing else in here  
19 that can be causing the symptoms that the patient have and that's  
20 the neck pain symptoms and radiating symptoms into the arms and  
21 hands. There is no fractures, dislocations, tumors, infections  
22 or any other things going on. But there are some abnormalities  
23 in the way the discs are protruding or sticking out and that is  
24 very consistent with the history and the physical findings.

25 Q Are there any other films of the neck you want to show

1 the jury?

2 A No.

3 Q But there are multiple slices?

4 A That's correct.

5 Q Okay. Now, did you also review with Edgar Cifuentes on  
6 that date films of the lumbar spine?

7 A Yes.

8 Q Are they on this disk or another disk? Can we go to  
9 the lumbar spine, please. All right, Doctor?

10 A So, this is a very similar image to the neck. The only  
11 difference here is that this is the lower back or the lumbar  
12 spine. The square or the bones are much larger as you might  
13 imagine in your lower back than they are in your neck.

14 Q Doctor, can you take the spinal model and show the jury  
15 where on the model as compared to the film you are talking about?

16 A So we are talking about the lower portion of the lumbar  
17 spine area as it goes down into the pelvis. The pelvis and the  
18 sacrum are in the bottom. The lumbar spine is up on top. The  
19 spinal canal that contains the nerve root is here to the right.  
20 And it's that area that appears to be bright on the MRI.

21 Q Now, on the model, there is something red.

22 A Yes.

23 Q So, what is that to demonstrate?

24 A That's a piece of disc material that it shows or  
25 demonstrates an area where the disc is sticking out more on one

1 direction than another.

2 Q Okay. Now, doctor, if I may, where you showed the  
3 disc, what level is that?

4 A So, if we look again here to see how things basically  
5 lineup and we are looking at the bones and we are looking at the  
6 discs in between the bones, we see that there is an abnormal  
7 protrusion of disc material right at the very bottom between L5  
8 and S1.

9 Q Now, doctor, what's that nine?

10 A This is image 9 of 17.

11 Q Doctor, looking at this board, can you tell us if that  
12 is the same --

13 A Yes, it is. It's image 9 of 17.

14 Q Okay. What I'd like to do, doctor, is take the board.  
15 I want to go through the board with you. Let's take that down.  
16 Is there any other films you want to show at this time?

17 A No.

18 Q Let's take that down. Wait.

19 MR. SCHWITZER: May I show something to counsel,  
20 Judge?

21 THE COURT: Yes.

22 MR. SCHWITZER: Your Honor, I am going to offer --  
23 are we up to Plaintiff's 14?

24 THE COURT: I think.

25 MR. SCHWITZER: Christine.

1                   **THE CLERK:** Yes.

2                   **THE COURT:** In the future and I'm pretty sure it  
3 will get in, that we mark it before we show it to the jury.

4                   **MR. SCHWITZER:** Okay.

5                   **THE COURT:** Thanks.

6                   **THE CLERK:** Plaintiff's 16.

7 (Whereupon, Plaintiff's 16, was moved into evidence)

8                   **MR. SCHWITZER:** Thank you.

9           Q       Now, doctor, if you come over here, please.

10          A       (Witness complies)

11          Q       So, we just indicated that Plaintiff's 16 that is now  
12 in evidence, which is a duplicate of the slice of the MRI film of  
13 March 29th of '16 of the lumbar spine. Now, the disc -- what  
14 level was it that you showed us was pressing?

15          A       Lower back area between L5 and S1.

16          Q       Now, the white -- if you go up, the lighter colored  
17 areas what I am referring to is here (indicating). Those look  
18 lighter than the disc below?

19          A       Yes.

20          Q       Can you explain to us medically if there is any  
21 significance to that?

22          A       So, on an MRI there are shades of gray here. You will  
23 see that there are shades of gray any where between what looks  
24 like dark black gray, very bright white and then everything kind  
25 of in between. Things that are very bright white contains water.

1 So, an MRI you're really looking at the water content of your  
2 tissues. So, the brightness in these discs is determined by the  
3 amount of water that is in those discs. The lower disc is  
4 lighter gray. So, it contains less water than the discs that are  
5 above it.

6 Q What is the significance of that?

7 A Several things. It does tell you that when you are  
8 losing water, the water loss typically occurs as you age or get  
9 older. So, there are some degenerative changes that happen to  
10 the disc. There is also a loss of water that occurs in  
11 conditions where disc material is protruding, herniating or  
12 making its way out of the main portion of the disc as well.

13 Q If it was just natural aging process, would you expect  
14 the discs obviously the age of the --

15 MR. WHITELEY: Objection.

16 THE COURT: Overruled.

17 Q Would --

18 MR. WHITELEY: Leading.

19 THE COURT: Overruled. You can answer that.

20 A So, typically degenerative changes over the course of  
21 time are more diffuse. That is you see them in multiple  
22 different areas.

23 Q Okay. Do you see that here?

24 A These discs are pretty well hydrated. This disc has  
25 some retained hydration within it. So, it's not completely and



1 entirely 100 percent totally degenerative.

2 Q Now, doctor, thank you. Take that down. Okay. Thank  
3 you, so much.

4 THE COURT: Mr. Schwitzer, you are two minutes to  
5 one.

6 MR. SCHWITZER: I can stop here.

7 THE COURT: If you have a two-minute segment.

8 MR. SCHWITZER: I can continue.

9 THE COURT: Why don't you do two minutes.

10 Q I am going back for the record to April 18<sup>th</sup> of '16.  
11 Did you come up with a treatment plan after the review of the  
12 films?

13 A Yes.

14 Q What was it?

15 A Activity modification and restrictions which kind of  
16 sounds like intuitive. You already think if it hurts don't do  
17 it, but it's kind of let your body be your guide. So, if you are  
18 doing something that causes pain avoid doing that because it's  
19 causing extra stress to the areas that are causing pain.  
20 Physical therapy. Remaining off duty. Therapy for the neck and  
21 back. Pain management evaluation. Because at this point and  
22 time in April of 2016, the accident happened quite some time ago.  
23 We are entering into a period where we are thinking about chronic  
24 pain. And in that sense, that type of pain should best be  
25 managed by a pain management doctor. And then a follow-up with

1 myself to continue to monitor the patient's clinical condition  
2 that is how they are doing clinically with follow-up examinations  
3 thereafter.

4 Q Thank you.

5 MR. SCHWITZER: Your Honor, I think it's a good  
6 place to stop because the next thing is the next day of  
7 treatment.

8 THE COURT: That's fine. We are going to recess  
9 until 2:15. Sir, you remain under oath.

10 Ladies and gentlemen, please don't discuss the  
11 testimony among yourself or the case among yourself or  
12 anyone else. Don't have any of the outside contacts. See  
13 you then. Thank you, so much.

14 COURT OFFICER: All rise. Jury exiting.

15 (Whereupon, the jury is exiting the courtroom)

16 MR. WHITELEY: What time did you want us back?

17 THE COURT: 2:15. Thank you.

18 (Whereupon, the witness steps down from the witness  
19 stand)

20 (Whereupon, there was a lunch and recess taken in the  
21 proceedings)

\* \* \* A F T E R N O O N S E S S I O N \* \* \*

**COURT OFFICER:** Are you ready, Judge?

**THE COURT:** Ready, yes.

**COURT OFFICER:** All rise. Jury entering.

(Whereupon, the jury is entering the courtroom)

**THE COURT:** You can all be seated. Thank you.

You can begin, sir. Sir, you are still under oath.

**THE WITNESS:** Yes.

DIRECT EXAMINATION

BY MR. SCHWITZER:: (cont'd)

Q Dr. Merola, do you have your chart with you?

A Yes.

Q So, I believe the next date of treatment that we have  
is June 13, 2016?

A Yes.

Q Okay. He returns to the office. He is still in the  
right knee immobilizer?

A Yes.

Q He's got the right extremity sling?

A Yes.

Q And he is on crutches?

A Yes.

Q And he says he came here with private transportation?

A Yes.

Q On that day, you note that he has neck pain with upper

1 extremity pain, pins, needles, numbness and tingling. What does  
2 that mean?

3 A Those are radiating symptoms of radiculopathy.

4 Q Okay. And that was the cervical radiculopathy that you  
5 discussed before lunch?

6 A Yes.

7 Q And then you indicate that he has low back pain with  
8 lower extremity pain, pins, needles, numbness and tingling. So,  
9 those are radiculopathy of the lumbar spine?

10 A Yes.

11 Q Okay. Then you have a category for MRIs?

12 A Yes.

13 Q Can you tell the jury what you noted in your record  
14 regarding MRIs?

15 A That I reviewed the films and I appreciated what I  
16 indicated was significant herniations which then they were  
17 correlated with the patient's conditions in both the neck and  
18 back regions.

19 Q Let me ask you something. If you didn't have the  
20 patient. If he didn't come to you and you didn't examine him,  
21 but you looked at the films, is it fair to say that you would  
22 need to take a history from him and talk to him before reaching a  
23 conclusion about the films?

24 **MR. WHITELEY:** Objection.

25 **THE COURT:** Sustained as to form at least.

1 Q All right. Doctor, I will rephrase it. Do you have an  
2 idea what I am asking you somewhat?

3 MR. WHITELEY: I'm objecting to that.

4 THE COURT: Yes.

5 Q Doctor, if you just looked at the films themselves  
6 whether it's his films or anyone else's films, would you make a  
7 determination just by looking at films on whether someone was a  
8 surgical candidate or would you want to see the person?

9 MR. WHITELEY: Objection.

10 THE COURT: Overruled.

11 A You have to see the person.

12 Q Explain to this Jury why the films by themselves are  
13 not enough?

14 A The films is not a person, so you don't know whether or  
15 not any abnormalities or any anatomical thing you see on a film  
16 actually correlate with what is happening to a person because you  
17 can see things on films that maybe causing completely and  
18 entirely no problems at all.

19 Q So, do you have a medical term that doctors use called  
20 symptomatic and asymptomatic?

21 A Yes.

22 Q And in regard to Edgar Cifuentes, did you correlate the  
23 films with his symptoms?

24 A Yes.

25 Q Did you find that he's symptomatic?

1 A Yes.

2 Q Can you explain what that means.

3 A It means that the findings that were appreciated on the  
4 films correlated with his symptoms or his complaints and his  
5 physical findings.

6 Q Okay. At some point during that visit, did you form an  
7 impression and a treatment plan?

8 A Yes.

9 Q Can you tell us what it was?

10 A That he had evidence of cervical radiculopathy and  
11 lumbar radiculopathy and that the treatment plan was for surgery  
12 to the lower back.

13 Q Okay. Did you discuss this with Edgar?

14 A Yes.

15 Q Don't tell me what you discussion involved?

16 A Options and alternatives regarding whether or not to or  
17 not to have the surgical procedure, what we call realistic goals  
18 and expectations of surgery.

19 Q Well, assume I am Edgar for a patient. Tell us the  
20 conversation -- do you have a custom and practice in regard to  
21 that the conversation?

22 A Sure.

23 Q Can you tell us what it is.

24 A So, sit down with the patient. First of all, make sure  
25 that they are continuing to remain symptomatic for the problem

1 that they seen you with and that you reviewed their complaints  
2 and their symptoms and their physical findings, their MRI  
3 findings. You then discuss the condition that they had so that  
4 they understand what it is that you are basically talking about.  
5 And then you present them with some options and alternatives  
6 which are primarily when you're talking about surgery, to  
7 continue non-surgical care which we talked about before.  
8 Modifying your activities, physical therapy, pain management and  
9 medications versus doing something surgical whereby it would be a  
10 procedure to change the internal status of the abnormalities that  
11 you are finding on the MRI that correlate with the patient's  
12 condition. So, that is an option there. And then that option  
13 has certain realistic goals. Which are surgery may not make all  
14 of your symptoms go away. Surgery does have with it certain  
15 potential complications because it's a procedure and that  
16 procedure requires a general anesthetic which could have  
17 potential problems associated with it. It involves making  
18 incision of the skin. Any time you make an incision, it could be  
19 either bleeding or infection that can occur. It involves working  
20 in an area that is already irritated and inflamed and painful.  
21 So, sometimes that area can also become irritated, painful and  
22 inflamed subsequent to the surgery. There are medical  
23 complications that can occur with the surgery. With your heart,  
24 your lungs or blood clots, things like that. And there is a  
25 healing process that is also involved with the surgery. So,

1 there are good things of surgery, potential benefits and there  
2 are potential risks. And then the patient needs to make a  
3 decision about whether they want to proceed based on their  
4 symptoms and their, you know, overall functionality.

5 Q Now, doctor, you started seeing patients in your  
6 private practice what year?

7 A 1996.

8 Q So, we are going around 30 years?

9 A Close to it, yes.

10 Q Okay. Is it fair to say that you and I don't know  
11 however you can categorize it, thousands of patients, tens of  
12 thousands?

13 A At least thousands, yes.

14 Q Okay. Can you quantify in any way, if you can. By the  
15 time a person gets to you, you're a spinal surgeon, correct?

16 A Yes.

17 Q Someone has felt that they need a consult --

18 MR. WHITELEY: Objection.

19 Q You have --

20 MR. WHITELEY: Objection.

21 THE COURT: He is re-asking the question. He was  
22 re-asking the question.

23 Q Doctor, you're referred patients from various  
24 specialties, correct?

25 A Yes.



1 Q If there is a way for you to quantify of the patients  
2 that you've seen over the course of your career, what percentage  
3 of those have you recommended surgery to?

4 THE COURT: Overall patients you mean? Total?

5 MR. SCHWITZER: Yes.

6 A Out of all of the patients that I have seen, you know,  
7 typically as you get older and referring doctors are more  
8 understanding of what a surgical issue is, you start to get more  
9 and more patients that require surgery. So, I would say  
10 typically probably in the neighborhood of about 30 percent or so.

11 Q Okay. So about 70 percent you don't recommend surgery  
12 to?

13 A Typically, it's conservative management up front.  
14 Hopefully most of those patients get better, yes.

15 Q Now, his next visit with you is on July 28<sup>th</sup>?

16 A Yes.

17 Q At that time, he reports severe pain nine out of ten  
18 and it can be bad as ten out of ten?

19 A Yes.

20 Q Okay. Pain shooting into the lower extremity legs and  
21 feet primarily?

22 A Yes.

23 Q Neck pain with upper extremity. Pins, needles,  
24 numbness and tingling is noted and appreciated?

25 A Yes.

1 Q You still note that he has a severely antalgic and  
2 kyphotic gait and requires assistance on and off the table?

3 A Yes.

4 Q Okay. And then you note this. That surgical -- you  
5 have the model. Cervical spine extension is 7 degrees. What  
6 does that mean?

7 A That means that bending the neck backwards to 7 degrees  
8 reproduce spasm and symptoms.

9 Q What would be considered normal?

10 A You should normally be able to extend your neck to be  
11 able to look at the sky. So, that is typically in the  
12 neighborhood of 60 degrees.

13 Q Okay. And you noted that flexion was 30. What is  
14 flexion with the neck?

15 A Flexion is forward bending of the neck to get your chin  
16 down on to your chest.

17 Q You noted 30. What would be normal?

18 A So, normal should be, you should be able to get your  
19 chin all the way down on to your chest so you are looking at  
20 55 degrees or so.

21 Q Okay. You noted right and lateral bending at 30. What  
22 is that?

23 A So, that is tilting your head to the side one side and  
24 the other side.

25 Q You noted -- what is normal?

1 A I am sorry, say that again.

2 Q If I am correct, you noted on your record 30 degrees?

3 A Yes.

4 Q What is normal?

5 A Normal lateral bending should be at least a minimum of  
6 45 degrees.

7 Q Okay. The next thing was left lateral bending  
8 30 degrees. What is that?

9 A That's the same thing as right lateral bending only to  
10 the other side.

11 Q Okay. Did you note that he still has spasms?

12 A Yes.

13 Q Did you do an exam specifically of the C6/C7 nerve root  
14 distribution?

15 A Yes.

16 Q What did you find?

17 A That there was some persistent decreases and sensation  
18 involving the C6 and C7 nerve roots.

19 Q I am sorry, say that word.

20 A Lhermitte's.

21 Q Lhermitte's sign is still positive?

22 A Yes.

23 Q You noted lumbar spine extension was at 10 degrees.  
24 What is the lumbar spine extension.

25 A That's bending the lower back backwards.

1 Q What is normal?

2 A Once again, you should be able to get your lower back  
3 into a position where you can get your body to look up towards  
4 the sky. So, that's in the neighborhood of about 60 degrees as  
5 well.

6 Q You noted forward flexion of the back 30 degrees?

7 A Yes.

8 Q What is flexion of the back?

9 A Bending forward.

10 Q What should be normal?

11 A At least functionally about 50 to 60 degrees.

12 Q And right lateral bending, you noted 30. What is that?

13 A That is bending from side to side.

14 Q What is normal?

15 A 40 to 45 degrees.

16 Q You also noted that he had loss of pinprick and tactile  
17 sensory findings at L5 and S1 dermatome distribution?

18 A Yes.

19 Q Is that the area where you showed the jury the disc  
20 that was pressing on the film from the MRI?

21 A Yes.

22 Q That was the L5 level -- L5/S1?

23 A Yes.

24 Q So, your clinical exam was correlated with what you  
25 were seeing on the films?

1 A Yes.

2 Q You also noted a positive straight leg raise. Can you  
3 explain to me why you do that test and how important that test  
4 is?

5 A So, that's a test where you are pulling on the nerve  
6 that is going down into your leg known as the sciatic nerve. If  
7 you are straightening the leg out and it is causing pain in the  
8 sciatic nerve, you know that something is irritating the sciatic  
9 nerve.

10 Q What did you note as far as numbered degrees?

11 A Let's see. That was positive at.

12 Q Two lines from the bottom. July 28th

13 A 35 degrees.

14 Q What is normal?

15 A You should be able to fully extend your leg to at least  
16 90 degrees.

17 Q You then had the MRIs with you to review, correct?

18 A Yes.

19 Q And you note herniations most severe at C5/C6, C6/C7,  
20 correct?

21 A Yes.

22 Q And the lumbar herniation most severe at L5/S1?

23 A Yes.

24 Q At this visit, do you then discuss a surgery again with  
25 Edgar?

1 A Yes.

2 Q What did you discuss as far as surgery?

3 A We call it a decompressive lumbar laminectomy and  
4 possible partial discectomy at L5/S1.

5 Q What was the reason for the recommendation?

6 A Persistent radiculopathy that is nerve root pain and  
7 findings in the sciatic nerve radiating into the lower extremity  
8 correlated with the MRI findings that showed disc herniation at  
9 L5/S1.

10 Q Did you tell him the primary reason that you were  
11 recommending that surgery?

12 A Yes.

13 Q And what would that have been.

14 A The primary reason to do the surgery is to prevent any  
15 progressive pain symptoms or neurological deterioration and to  
16 try to ameliorate some of the symptoms that are present.

17 Q Okay. When you say the term progressive neurological  
18 deterioration. Explain to us what you mean by that?

19 A So, the nerves that go down into your legs are  
20 responsible for sensation, reflexes and the way your muscle work.  
21 So, if there is progressive neurological deterioration, you would  
22 start to lose more sensation, reflexes and develop weakness. So,  
23 of the reason you want to do something surgical is to prevent  
24 those things from happening.

25 Q Now, if you don't do anything and the neurological

1 deterioration continues what happens to the patient?

2 A Well, in addition to being chronically painful, the  
3 nerves themselves can continue to deteriorate and become damaged  
4 to a point where they can no longer recover.

5 Q Can you explain what you mean by that to a point where  
6 they can no longer recover?

7 A Well, if you develop a condition, for example, where  
8 you have weakness in your leg that's preventing you from walking  
9 normally, the weakness itself maybe persistent.

10 Q Can you explain to The Jury what happens as a nerve  
11 continues to be damage as far as, you know, if I cut myself it  
12 will heal eventually, difference with a nerve damage?

13 MR. WHITELEY: Objection.

14 THE COURT: Can you read that back?

15 (The testimony as requested was read by the  
16 reporter.)

17 MR. WHITELEY: My objection --

18 THE COURT: Sustained.

19 Q Can you explain to The Jury nerve damage as opposed to  
20 some other condition that if you had a cut and explain the  
21 difference?

22 A Sure. So, you know, every part of your body has a  
23 different capacity to heal. If you had a broken bone that can  
24 heal, fracture can heal itself. Cut skin can heal with scar  
25 tissue. Your skin can mend itself. There are other, you know,

1 organs like your liver and other parts of your body that have a  
2 capacity to heal themselves. Nerve tissue has perhaps one of the  
3 lower capacities to heal or to regenerate so to speak. In terms  
4 of the capacity to regenerate, nerve tissue has a very, very,  
5 very low capacity to do that. So, once you start to develop  
6 nerve damage or nerve problems, it's very highly unlikely that  
7 those nerves can become ever at 100 percent of what they were  
8 before they were damaged nerve was manifest. So, you try to get  
9 things before they get to the point where they are irredeemable

10 Q Now, when Mr. Cifuentes came into your office on  
11 July 28, 2016. Did he indicate to you that he had had something  
12 happened at some other doctor's office?

13 A Yes.

14 Q What did he indicate?

15 A That there was a broken chair which he fell off of  
16 onto the left side of his body.

17 Q Now, do you know whether that was at some treating  
18 doctor or somewhere else?

19 MR. WHITELEY: Objection.

20 THE COURT: I think the witness has already been  
21 instructed just to answer either treating doctor or  
22 somewhere else.

23 MR. SCHWITZER: Yes.

24 A Somewhere else.

25 Q Okay. Now, you then go, I believe, he went to undergo



1 a surgery on 9/15/16 at Methodist Hospital, correct?

2 A Yes.

3 MR. SCHWITZER: Could I have this mark for ID,  
4 Judge.

5 THE COURT: For ID, yes.

6 MR. WHITELEY: Judge, we will renew our objection  
7 for this.

8 THE COURT: For ID. I will only be marked for ID.  
9 It is not in evidence. So, in that case, if your objection  
10 is to marking it for ID.

11 MR. WHITELEY: No objection for marking it for  
12 identification.

13 THE COURT: Thanks.

14 MR. SCHWITZER: For the record, Your Honor, what  
15 number is that.

16 THE CLERK: Seventeen.

17 THE COURT: Seventeen, I believe.

18 (Whereupon, Plaintiff's 17, was marked for  
19 identification)

20 Q Doctor Merola, I am going to ask you to look at that.  
21 Once you are done looking at it, let me know?

22 A Yes.

23 Q Doctor Merola, you performed the surgery on 9/15/16 at  
24 Methodist Hospital?

25 A Yes.

1 Q Is that illustration a fair and accurate representation  
2 of the surgery that you performed on 9/15/16?

3 A Yes.

4 Q Dr. Merola, would that assist you in explaining to the  
5 jury the surgery you performed on 9/15/16?

6 A Yes.

7 MR. SCHWITZER: I offer it, Your Honor.

8 THE COURT: Okay. This is the point at which your  
9 objection is renewed.

10 MR. WHITELEY: He will renew the objection.

11 THE COURT: Got it. I am going to take this for a  
12 second. Let's talk on the side.

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

15 THE COURT: The objection is sustained only on  
16 foundational grounds. Counsel can continue to try to get a  
17 description from the witness and see if the document can  
18 get in later.

19 MR. SCHWITZER: What I am going to do now, Your  
20 Honor, is put the operative report that is already a record  
21 in evidence that I've blown up. If we can just set up.

22 THE COURT: Great. It's a blowup of the document  
23 already in evidence.

24 MR. WHITELEY: No objection to it.

25 THE COURT: Great.

1                   **MR. WHITELEY:** They are already in. We consented  
2 to both of them.

3                   **MR. SCHWITZER:** With the Court's permission, I am  
4 going to ask the doctor to step down.

5                   **THE COURT:** Sure.

6                   **MR. SCHWITZER:** Dr. Merola, I will ask you to come  
7 down.

8                   (Whereupon, the witness steps down from the witness  
9 stand)

10                  **MR. SCHWITZER:** Your Honor, if you can just ask  
11 the jurors if they can see.

12                  **THE COURT:** Ladies and gentlemen, are you able to  
13 see the report?

14                  Counsel, if you need to see it, that's fine.

15                  **THE WITNESS:** We have a copy, Judge. Thank you.

16                  Q     So, doctor, can you note for the record what's the date  
17 of this operation?

18                  A     September 15, 2016.

19                  Q     Okay. It notes that you have an assistant during the  
20 procedure?

21                  A     Yes.

22                  Q     What is the reason for an assistant?

23                  A     It makes the procedure faster and safer.

24                  Q     Okay. What was your -- you have something there called  
25 preoperative diagnosis?

1 A Yes.

2 Q What did you indicate?

3 A Disc herniation at the L5/S1 segment producing severe  
4 lumbosacral radiculopathy.

5 Q Okay. Then you have a post-operative diagnosis?

6 A Yes.

7 Q Just explain in general why is there a preoperative --  
8 why is there a preoperative diagnosis and then you have a  
9 post-operative diagnosis?

10 A So, the preoperative diagnosis is what you are going  
11 into the operating room as your presumptive problem with the  
12 patient. Sometimes you do the surgery and you see other things  
13 that are there that may not have been present or apparent before  
14 you went there. Because once you are there, it is different than  
15 looking at things from the outside because you are looking at  
16 things from the inside. So, sometimes a post-operative diagnosis  
17 can be different than a preoperative diagnosis.

18 Q What did you note for the post-operative?

19 A It was the same. Disc herniation at L5/S1 segment  
20 producing severe lumbosacral radiculopathy.

21 Q Now. Doctor, tell us what the operation consisted of  
22 and if you can explain what those are?

23 A Sure. So, the operation consisted of a decompressive,  
24 that means taking pressure off of the lumbar spine area with a  
25 laminectomy technique with medial facetectomies.

1 Q Can you describe what you are doing?

2 A Sure. So in the lower back of the covering of the  
3 spinal canal is known as the lamina. So, if you are removing  
4 portions of the lamina, you are ectomiesing or removing portions  
5 of lamina. Therefore, it's laminectomy. A portion of the lamina  
6 being removed.

7 Q Would the spinal model help at all?

8 A Sure. So, if you are looking at the back of your  
9 spine. If you look at the area where the nerves are, there is a  
10 covering to the area where those nerves are. That covering is  
11 like a shingle on a roof. The name of the shingle happens to be  
12 lamina. So, if you are having to take pieces of the shingle away  
13 to get in, you are taking portions of the lamina away to get into  
14 the spinal canal where the nerves are.

15 Q Okay. Please continue.

16 A Medial facetectomies. And decompression of  
17 neurological elements and nerve root of the L5 and S1 segments.  
18 And roots with partial discectomy of L5/S1.

19 Q What did you note under indication?

20 A Indication is a description of the patient. I  
21 indicated that it was a man who had sustained a severe trauma  
22 with respect to the lower back that produced a herniation at  
23 L5/S1 with nerve root damage injury and severe lumbosacral  
24 radiculopathy. I then gave a brief description of the physical  
25 exam that was correlated with the MRI findings which we use in

1 the operating room while we were doing the surgery so that we can  
2 confirm the appropriate surgical site and level with X-ray that  
3 we take during the surgery.

4 Q Why are you doing that?

5 A So that we can make sure that we are at the proper  
6 level. Because when you are doing the surgery, you are making a  
7 small incision as you can to achieve the desired effect. You are  
8 not slicing the entire back open. If you are looking at portions  
9 of the lumbar spine, each piece kind of looks like the other  
10 part. So, the way to confirm the level of your procedure is to  
11 take an X-ray in the operating room typically with an instrument  
12 in the area where the decompression is so that you can compare it  
13 to the MRI to make sure that you are where you thought you were  
14 and that you done the job that you intended to do.

15 Q Please continue.

16 A So, let's see. It basically indicated that the L5/S1  
17 segment was the reason for the procedure because of the patient's  
18 radiculopathy.

19 Q So, then you obtained a informed consent, correct?

20 A Yes.

21 Q And then what did you find?

22 A A large essentially related herniation with an  
23 associated annular tear at the L5/S1 segment. And then the  
24 herniation itself was sent for pathological evaluation and  
25 examination.

1           Q     What does it mean that the herniation was sent for  
2 pathological evaluation?

3           A     That I have found a piece of this disc material that I  
4 move and I sent it to pathology.

5           Q     Now, doctor, it says with an associated annular tear.

6           A     Yes.

7           Q     What does that mean?

8           A     So, the disc contains an outer covering called the  
9 annulus which keeps the jelly like center of the disc in place.  
10 In this case, a piece of disc material was found up against the  
11 nerve. So for that jelly like piece of material to exit the disc  
12 and come up into contact with the nerve, it came through a breach  
13 in the annulus or tear in the annulus.

14          Q     Doctor, don't let the jury see this. I want you to  
15 look at this just for yourself. Comparing what's been marked as  
16 Plaintiff's 17 for ID compared to the surgery. Is it noted on  
17 these diagrams the description, you know, of what took place  
18 during the surgery?

19          A     Yes.

20          Q     Once again, is this a fair and accurate representation  
21 of the surgery that you performed?

22          A     Yes.

23          Q     Okay.

24                   **MR. SCHWITZER:** Your Honor, I'd like to use this  
25 for demonstrative purposes at the time.

1           **THE COURT:** Illustration you mean?

2           **MR. SCHWITZER:** Yes.

3           **MR. WHITELEY:** Objection continued, Judge.

4           **THE COURT:** I want to take a look at the document  
5 again for a second. If the witness will retake the stand.

6                               (handling)

7           **THE COURT:** Doctor, without saying what the  
8 language is, there is language in various spots on this  
9 document, right?

10          **THE WITNESS:** Yes.

11          **THE COURT:** And that language includes pointers  
12 and things like that, right?

13          **THE WITNESS:** Yes.

14          **THE COURT:** My question, I guess, is whether all  
15 of that language reflects things that are in your operative  
16 report or whether there is other language that does not  
17 reflect things that happen in your operative report or  
18 somewhere else in medical record? I don't mind if you need  
19 to compare it to the operative report.

20          **THE WITNESS:** I mean there are some descriptions  
21 in there that are not contained in the operative report.

22          **THE COURT:** You pointed to something that seems to  
23 be just an anatomical name. Are there descriptions of  
24 injuries or items, you know, or procedures that you did  
25 that are not contained in your operative report. Just not



1 that you labeled body parts, but are their descriptions or  
2 findings that would not be contained in either your  
3 operative report or your medical reports.

4 **THE WITNESS:** No.

5 **THE COURT:** No, they are not.

6 **THE WITNESS:** Correct.

7 **THE COURT:** And I don't know if you asked, so I  
8 apologize. The coloration of this exhibit, is that  
9 consistent with more, for better lack of a better example,  
10 more colorful or less colorful or something else than the  
11 anatomy as you viewed it during the procedure?

12 **THE WITNESS:** I mean, some parts are a little more  
13 colorful in general. It's pretty close.

14 **THE COURT:** I would ask that maybe we take a step  
15 outside and maybe have a conversation. Why don't we take  
16 five. Stay here. We will take five. The jurors can take  
17 a five-minute recess. Our court reporter can take a five  
18 minute recess. You will still under oath. Ladies and  
19 gentlemen, please don't discuss the case.

20 **COURT OFFICER:** All rise. Jury exiting.

21 (Whereupon, the jury is exiting the courtroom)

22 **COURT OFFICER:** Ready for the jury?

23 **THE COURT:** Yes.

24 **COURT OFFICER:** All rise. Jury entering.

25 (Whereupon, the jury is entering the courtroom)

1           **THE COURT:** You can all be seated thanks. I am  
2 not sure if it was on the record, but it may have been on  
3 the record. Plaintiff offered was 17 for identification.

4           **MR. SCHWITZER:** It is now 19.

5           **THE COURT:** For identification into evidence.  
6 There was some colloquy. At that point we took a break.  
7 You are reoffering, correct?

8           **MR. SCHWITZER:** Yes, Your Honor.

9           **THE COURT:** And you objected.

10          **MR. WHITELEY:** Yes, for the reasons mentioned,  
11 Judge.

12          **THE COURT:** The Court overruled the objections to  
13 the extent described, but I am going to give a couple of  
14 corrective notes. So, the document is in evidence. Once  
15 you put it up, I want to both say something and then ask a  
16 couple of questions.

17          **MR. SCHWITZER:** Should I put it up?.

18          **THE COURT:** You can put it up.

19                 Doctor, I am going to ask you something that was asked  
20 during colloquy with counsel. With respect to the  
21 coloration of the body parts in the exhibit, I believe you  
22 mentioned that there was one particular body part that is  
23 brighter or more colorful than you find it in real life  
24 anatomy.

25          **THE WITNESS:** Yes, sir.

1                   **THE COURT:** What was that body part?

2                   **THE WITNESS:** The internal structure of the nerve  
3 roots.

4                   **THE COURT:** And is it safe to say that on your  
5 demonstrative exhibit that you have next to you, that's  
6 demonstrative also, on your model, that the nerve roots are  
7 colored bright yellow?

8                   **THE WITNESS:** Yes.

9                   **THE COURT:** Would it be safe to say that your  
10 opinion in colloquy and in front of the jury is that they  
11 are not such bright yellow in real life.

12                  **THE WITNESS:** Correct.

13                  **THE COURT:** What color are they in real life in  
14 your view point.

15                  **THE WITNESS:** They are closer to a creamy white.

16                  **THE COURT:** Okay. Other than that, does the  
17 coloration sort of graphic nature of that exhibit fairly  
18 and accurately represent the anatomy as you understand it  
19 and in the places where you say you did part of the  
20 procedure, the anatomy as you experienced it during your  
21 surgery?

22                  **THE WITNESS:** Yes.

23                  **THE COURT:** Okay. And while I am sure this is  
24 common sense, I will ask you any way. Is it fair to say  
25 that the body parts in the real body are not labeled in the

1 way that the body parts are labeled in your exhibit?

2 **THE WITNESS:** Yes.

3 **THE COURT:** And that the descriptions of what you  
4 did which I understand from counsel and from you were drawn  
5 from your operative report and other medical records, that  
6 those are also not contained on the patient's physical  
7 anatomy?

8 **THE WITNESS:** Yes.

9 **THE COURT:** With those two exceptions, the  
10 document is accepted into evidence over defendant's  
11 objection. And your earlier exception is noted.

12 **MR. WHITELEY:** Thank you, Your Honor.

13 **THE COURT:** Sure. You can use the exhibit.  
14 Again, ladies and gentlemen, unlike the model, this does  
15 purport to reflect an illustration of the patient's, the  
16 Plaintiff as his patient's anatomy but it is not a  
17 photograph, it is a medical illustration. So, it's only  
18 worth the weight you give to it when you are reviewing  
19 evidence.

20 **Q** Doctor, with the Court's permission, could you step  
21 down again. Do you have the pointer.

22 (Whereupon, the witness steps down from the witness  
23 stand)

24 **Q** So, what I'd like you to do is explain to the jury what  
25 you are cutting through to get to this surgical site first and

1 then walk us through what you did using this illustration?

2       A     So, on the lower part of the back of the patient, you  
3 are going to make an incision directly in the mid portion of the  
4 lower portion of the back whereby you can open the skin over the  
5 area that you are interested in getting to. And then after you  
6 have opened the skin, you would retract or move aside the muscles  
7 that cover the lower portion of the bones of the lower back  
8 that's described in this illustration here in E. Once you are at  
9 the level that you need to be at and that is between the L5  
10 lamina, the shingle of L5 and the S1 lamina, the shingle of S1,  
11 when you are in between that region, you can then expose that is  
12 open the area where the nerves are by removing portions of the  
13 shingle of L5 and portions of the shingle at S1 such that you can  
14 expose the area where the actual nerve roots are that are being  
15 impinged upon by the disc. That is depicted in C and D in a  
16 three dimensional way with the top portion of the spine removed  
17 here so that you have a closer look at the area where the disc  
18 is. And then the area where the disc is where there is  
19 protrusion or another term herniation of disc material coming  
20 through a tear in the outer covering of the disc called the  
21 annulus, you can then remove that portion of disc material itself  
22 in order to further decompress or take pressure off of the  
23 nerves. And that is essentially a decompressive procedure that  
24 is a procedure to remove pressure on a nerve. It is being  
25 impinged upon in this case by a piece of disc material which is

1 causing pressure inside the spinal canal area.

2 Q Now, you said an annular tear. That you found an  
3 annular tear. Can you explain to the jury a torn annulus, is  
4 that something that you would expect from trauma or something  
5 else?

6 A So, a torn annulus can happen as a consequence of  
7 trauma.

8 Q Okay. As far as you as a spinal surgeon, when you see  
9 a torn annulus, is that more than likely with a reasonable degree  
10 of medical certainty from trauma or something else?

11 A So, the torn annulus needs to be put together with the  
12 entire picture of the patient and their entire clinical  
13 presentation in order to be able to make that determination.

14 Q And?

15 A In this case, as I had indicated on the operative  
16 report based on my treatment of the patient and his history and  
17 his findings over the course of time up until when I did take  
18 care of this patient, yes, my conclusion would be that that  
19 annular tear was traumatically induced resulting in a disc  
20 material impinging upon a nerve root.

21 Q Okay. Now, am I correct that is you are cutting  
22 through to get to the surgical site, you are actually damaging  
23 parts of the body as you cut through?

24 A Well, the surgical term would not be that we are  
25 damaging portions of the body. We are altering portions of the

1 anatomy in order to be able to achieve the goal of decompressing  
2 the nerves.

3 Q Okay. And once the surgery takes place, is there a  
4 period of time just because of what you cut through or what did  
5 you call it, the term you used?

6 A Exposed.

7 Q Exposed for there to be a healing process.

8 A That is correct. After the surgery, there is a healing  
9 process.

10 Q How long would that be?

11 A So, the healing process occurs in stages. Those stages  
12 include the first stage which is the alleviation of the soreness  
13 in the area of the muscles that had been moved away. And then  
14 the second stage of the healing process is the areas where the  
15 disc has been removed and the areas where you shaved away bone  
16 are now going to by nature of the fact that you have operated on  
17 them, they are now going to heal over. So your body will now  
18 cause there to become scar tissue in those areas. And that scar  
19 tissue will also happen in the area where you made the skin  
20 incision. So that scar tissue mends together or heals together  
21 the soft tissues in the area where you did the surgery. And  
22 that's typically for the next 8 to 12 weeks where those soft  
23 tissue begin to mend themselves together to the point where they  
24 had become strong enough to resist more normal activities.

25 Q Thank you. Are we done with describing the procedure?

1 A Yes.

2 Q Now, doctor, I don't know if I am using the term  
3 properly. Is there a more invasive surgery to the back that  
4 could have taken place called spinal fusion surgery?

5 A Yes.

6 Q Is there a reason that on September of '16 you chose to  
7 do this particular surgery versus a more invasive surgery?

8 A Yes.

9 Q Can you explain to the jury what and why?

10 A Well, any surgical procedure that you are going to  
11 perform as we have discussed previously, has a benefit and it  
12 also has a risk to it. The goal of doing a surgical procedure is  
13 to try to do the least amount of surgery for the most potential  
14 benefit. Circumstances dictating how much you have to do. You  
15 know, in the absence of an unstable spine, that is the spine that  
16 is slitting apart and moving apart. In the absence of having to  
17 remove significant amounts of bone which would otherwise also  
18 cause instability, if you can limit your procedure to just  
19 removing the portion of disc that is causing impingement, that's  
20 your goal because we want to do this in the least amount of way  
21 possible to minimize any potential complications.

22 Q So, turning back to your record. His first post-opt  
23 visit is September 23rd of '16. A little over a week after the  
24 surgery, correct?

25 A Yes.



1 Q And at that time you discussed with him starting  
2 physical therapy?

3 A Yes.

4 Q Then the next visit you have with him is  
5 November 2<sup>nd</sup> of '18. I don't know if it is a visit, but it  
6 looks like you were sending a letter to someone.

7 A November 2<sup>nd</sup> of --

8 Q November 2<sup>nd</sup> of '16. He requires home care?

9 A That is correct, yes.

10 Q So, that was a letter to some other entity?

11 A That's correct, yes.

12 Q He then -- and if I miss a date, please tell me, okay?

13 A Yes.

14 Q I believe the next date that you see him is  
15 February 27<sup>th</sup> of '17?

16 A Yes.

17 Q So, the surgery was in September. October, November,  
18 December, January. So, we are five months since the surgery,  
19 correct?

20 A Yes, correct.

21 Q He still using a crutch to ambulate. The crutch to  
22 ambulate, do you know why he needed a crutch to ambulate for what  
23 part of the body or parts?

24 A Well, he has a concomitant knee injury.

25 Q What do you mean a concomitant?

1           A     So, there is a right knee injury that he has also been  
2     dealing with.

3           Q     Okay. Please continue to read the note that you have  
4     there from his post-operatively

5           A     Yes. So, it says he is post-operatively doing  
6     rehabilitation of the right knee. Indicates that with respect to  
7     the lower back surgery, it has been helpful in terms of  
8     preventing further significant and severe shooting pain into the  
9     extremities. He does have axial symptoms which include neck,  
10    thoracic and low back symptoms. He has undergone some injections  
11    to the thoracic area.

12          Q     Okay. What did you mean by he has axial symptoms?

13          A     So, the term axial refers to the spine itself without  
14    significant radiation of symptoms. So, primarily axial symptoms  
15    meaning pain in the back that's aggravated with activities.

16          Q     And then you note that he still has severe antalgia and  
17    kyphosis during gait and ambulation with respect to the low back  
18    and lower extremity legs and feet?

19          A     Yes.

20          Q     From a sensory motor neurological perspective, the  
21    patient is stable?

22          A     Yes.

23          Q     With respect to the neck, Spurling's maneuver  
24    compression distraction maneuver and evidence of cervical  
25    radiculopathy with some evidence of myelopathy? What did you

1 mean when you said you discussed cervical radiculopathy earlier  
2 to this jury, but now you are saying there is some evidence of  
3 myelopathy. What is that?

4 A Myelopathy has to do with difficulties, for example,  
5 buttoning and unbuttoning your shirt. Using your hands and  
6 fingers. Combined with positive finding of a Hoffmann's sign  
7 which continues to remain appreciated. As well as what I picked  
8 up on that date what's known as inverted flexor response. Which  
9 is also another sign of some excessive spinal cord irritation.

10 Q What was your impression and plan at that time?

11 A Continued rehabilitative post-operative care to the  
12 right knee. Avoid bending, lifting and twisting. Observational  
13 care with respect to the neck, upper and low back regions. And  
14 for pain management, to continue injections as necessary.

15 Q As far as the knee and shoulder injury, am I correct,  
16 you weren't treating him for that? That was other physicians?

17 A That's correct.

18 Q His next visit -- so this is February 27<sup>th</sup>. His next  
19 visit with you is on April 1<sup>st</sup>?

20 A Yes.

21 Q He indicates when he comes in that with respect to the  
22 low back, he remains essentially stable, but the neck has  
23 unfortunately gotten worse. He has been having injections into  
24 the neck to no avail. Explain to us what is going on?

25 A He is having an increase in his neck symptoms.

1 Q Please go through your physical findings on that date?

2 A So, on that day, he had a positive compression  
3 distraction maneuver in the back. That is the test where you are  
4 pushing down and pulling up to see whether or not there was any  
5 persistent nerve root irritation coming from the neck. So that  
6 was positive. Spurling's maneuver, which is the test where you  
7 are pushing down and also bending and turning to reproduce  
8 systems was also positive. There was involvement of the C5/C6  
9 and C7 nerves, as well as positive Hoffmann's signs and inverted  
10 flexor responses which are all signs that there is a cervical  
11 radiculopathy going on. Also on this visit, I looked at his  
12 shoulder and his shoulder area on the right side and there was  
13 also some evidence of atrophy and weakness on the right side more  
14 than the left.

15 Q What do you mean atrophy?

16 A Atrophy means a shrinkage of the muscle.

17 Q What would that indicate to you medically that there  
18 was a shrinking of the muscle?

19 A So, in this case, it has to do with the injury that  
20 occurred to the right shoulder and also in conjunction with  
21 shoulder girdle weakness can also be coming from the neck as  
22 well.

23 Q Okay. What was your impression and plan?

24 A At that time, I wanted to update the MRI findings for  
25 the cervical spine to get a better look at the neck because his

1 condition with respect to the neck had gotten somewhat worse.

2 Q Okay. Did you order updated MRI?

3 A Yes.

4 Q And did Edgar Cifuentes undergo the MRIs?

5 A Yes.

6 Q Did you review the MRI?

7 A Yes.

8 Q What did those MRI reveal?

9 MR. WHITELEY: What date, just for clarity.

10 THE COURT: Yes.

11 MR. SCHWITZER: May 6, 2017.

12 MR. WHITELEY: What is the facility?

13 THE COURT: Is this Lennox Hill?

14 MR. WHITELEY: This is Park Place. I thought we  
15 agreed --

16 THE COURT: I think we had.

17 MR. SCHWITZER: I am not getting -- I'm getting  
18 that he reviewed the films.

19 THE COURT: They are not in evidence currently,  
20 right?

21 MR. SCHWITZER: Not yet.

22 THE COURT: I think you and counsel should talk  
23 for a second about what it is you agreed. I didn't hear  
24 the details of it. I just heard you thought you had an  
25 agreement about it. Why don't you take a second. We won't

1 let the jury leave. Speak in the hallway if you need to  
2 and try to get to an agreement.

3 MR. SCHWITZER: Okay.

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

6 MR. SCHWITZER: All right. I am going to stay  
7 away from it right now.

8 THE COURT: Great.

9 MR. SCHWITZER: And I will continue.

10 THE COURT: No problem.

11 MR. SCHWITZER: Just one moment, Your Honor.

12 THE COURT: Sure.

13 Q Now, just tell us, doctor, why did you order new films?

14 A His neck had subjectively gotten worse and his physical  
15 examination of his neck on that particular day when I had seen  
16 him also shown that his neck examination had gotten worse itself  
17 as well.

18 Q Okay. Whatever films you ordered, did you review those  
19 films?

20 A Yes.

21 Q The next day you saw him was when? Was that  
22 June 12<sup>th</sup>?

23 A Yes.

24 Q On that day, did you discuss with Mr. Cifuentes the  
25 findings of the new film you had ordered?

1 A Yes.

2 Q At that point on that date, was the pain in his neck  
3 and his symptoms regarding cervical radiculopathy staying the  
4 same, getting better or getting worse?

5 A It continued to remain rather significant.

6 Q And as far as the neck on that day, if you remember --  
7 I am sorry. What did you note as to your findings?

8 A So, he continued to have a positive compression  
9 distraction test. Positive Spurling's test. C5/C6 root sensory  
10 loss was predominant. Persistent Hoffmann signs and persistent  
11 inverted flexor responses. Also a little bit of hot/cold  
12 intolerance on his right side versus his left side.

13 Q What did that tell you?

14 A So, hot/cold intolerance is one of the -- it is what we  
15 call posterior column function of the spinal cord. So, it is a  
16 little bit of a spinal cord finding as well as a nerve root  
17 finding.

18 Q What's the significance that you are now seeing in  
19 addition to a nerve root from a herniation some indication of a  
20 problem with the spinal cord?

21 A Yes. The spinal cord is like your brain. It's a  
22 little bit more of a higher level concern because it's kind of  
23 concentrated nerve tissue. So, the spinal cord stuff is a little  
24 bit -- it makes you worry a little bit more of compression and  
25 irritation.

1 Q Why?

2 A Well, because the spinal cord controls so many  
3 different things. You don't want that particular nerve to get  
4 any worse.

5 Q Because?

6 A If it does, then you can have progressive, once again,  
7 neurological problems with the areas that are controlled by the  
8 spinal cord.

9 Q Well, what's the difference between problems with the  
10 area control from the spinal cord versus problems that you would  
11 have from an area a level of the cervical spine regarding a nerve  
12 root irritation?

13 A So, a nerve root is responsible for a specific area of  
14 sensation on your arm, a specific reflex on your arm and a  
15 specific muscle or two. Sometimes three muscles. A spinal cord  
16 does other things because your spinal cord is responsible for  
17 maintaining the way all of those muscles and nerves interact.  
18 So, you can think of a spine nerve like a wire coming out of a  
19 computer, but if you can think of the spinal cord like the  
20 motherboard in the computer. So, there is higher level function  
21 in the cord than there is in the nerve roots.

22 Q Now, did you come up with a treatment plan on that  
23 date?

24 A Yes. The treatment plan was to consider surgery to the  
25 neck to take pressure of the spinal cord and nerve roots.



1 Q Okay. What did you discuss?

2 A That surgical procedure.

3 Q That was on June 12<sup>th</sup> of '17, correct?

4 A Yes.

5 Q The next time you saw him was July 9<sup>th</sup> of '18?

6 A Correct.

7 Q Okay. So, that is about a year later?

8 A Yes.

9 Q Now, did Edgar Cifuentes on that date bring any type of  
10 diagnostic testing with him?

11 A Yes.

12 Q What did he bring?

13 A He had brought in an updated MRI and he had also  
14 brought in a nerve conduction test.

15 Q And is another name for the nerve conduction testing  
16 EMG?

17 A Yes.

18 Q Can you explain to the jury what an EMG is?

19 A An EMG is an electrical test to see what the function  
20 of a nerve or nerves is as they are innervating, that is as they  
21 are working with the muscles in your arms and hands.

22 **MR. WHITELEY:** Judge, I am going to object to  
23 neurological testimony from this doctor. We have a  
24 neurologist coming in.

25 **THE COURT:** I understand. This isn't that

1 extensive. This is just about a test he, himself, ordered,  
2 right?

3 **MR. WHITELEY:** It is also not a test that is in  
4 evidence.

5 **THE COURT:** Is the record not in evidence yet?

6 **MR. SCHWITZER:** The test is not itself in evidence  
7 yet. I am not getting into the findings of the test.

8 **THE COURT:** Only what it is and why he did it.

9 **MR. SCHWITZER:** Yes.

10 **THE COURT:** Overruled.

11 **MR. WHITELEY:** Dr. Hausknecht will be here --

12 **THE COURT:** That's it. Just overruled. If it's a  
13 test he ordered, he can talk about what it is and why he  
14 ordered.

15 **MR. WHITELEY:** He didn't order it. Hausknecht  
16 ordered it.

17 **THE COURT:** In any event, I will let him testify  
18 about it. He is not testifying as a neurologist. Without  
19 getting into too much detail about this, this doctor does  
20 surgeries that is orthopedic in nature but has neurological  
21 implications. I am going to allow him to testify about it.

22 **Q** Doctor Merola, is there a reason that sometimes prior  
23 to a spinal surgery taking place that you would also like, in  
24 addition to the MRI, an EMG performed?

25 **A** Sometimes.

1 Q What would the reasons be?

2 A Sometimes the EMGs can help you differentiate between  
3 different compounding diagnosis in patients. For example, you  
4 have this kind of a problem with some atrophy, in this case,  
5 shoulder area with a shoulder injury in addition to a neck  
6 problem. EMGs can sometimes be helpful to help you kind of  
7 distinguish one from the other and see what the combined affects  
8 of each are.

9 Q Okay. Now, doctor, did you then discuss once again the  
10 surgery to the neck with Mr. Cifuentes?

11 A Yes.

12 Q Tell me what you discussed?

13 A Discussed a surgical procedure involving the findings  
14 based on the updated diagnostics including that MRI test and his  
15 physical exam from July 9, 2018.

16 Q Okay. And using the spinal model, can you tell us  
17 where you indicated you needed the surgery?

18 A Yes. For the cervical spine which is up on top in this  
19 area of the neck based on the July 9, 2018 examination in the  
20 updated diagnostic films and studies, I had indicated to him that  
21 C4/C5 and at C5/C6.

22 Q Doctor, that surgery took place at New York  
23 Presbyterian Cornell on 11/28 of '18?

24 A Yes.

25 Q I don't know what number that is, but I believe that

1 record is in evidence. I think, is it --

2 **MR. SCHWITZER:** Your Honor, that's already in  
3 evidence. Counsel, you agree that this record is in  
4 evidence already?

5 **MR. WHITELEY:** I am not sure.

6 **MS. YUEN:** Presbyterian.

7 **THE COURT:** He said it was Cornell.

8 Mr. Schwitzer, I thought he said it was Cornell.

9 **MR. SCHWITZER:** It's considering the way they have  
10 that. It's 5A. So, Your Honor, I want to have these  
11 marked as different exhibits, the operative report if we  
12 could.

13 **THE COURT:** Fine. Are we using the same number  
14 but a different letter.

15 **MR. SCHWITZER:** I think just a whole new number.

16 **THE COURT:** That's fine. So, we are up to.

17 **MR. SCHWITZER:** So, we are up to -- if we can have  
18 them marked 20 A, B and C Your Honor.

19 **THE COURT:** That's fine. In evidence.

20 (Whereupon, Plaintiff's Exhibit 20A, B and C, were  
21 moved into evidence)

22 **THE COURT:** Just a reminder that we will finish  
23 today around 4:30. We are back on Monday at 9:30, I  
24 believe, right? We are back on Monday. And you have a  
25 witness.

1                   **MR. SCHWITZER:** Yes.

2                   **THE COURT:** We are back on Monday. And then in  
3 terms of next week, that is the only day next week that we  
4 will be up on this case which I think I mentioned to you.  
5 And then the Tuesday after Memorial Day we will be back.  
6 So, after Monday, you have the rest of that week off  
7 including Memorial Day and we will come back the day after

8           Q     Dr. Merola, I am going to ask you to step down, please.  
9 We are going to go through the procedure that you performed  
10 starting with Plaintiff's 20A in evidence.

11                   Doctor, once again, can you tell us what the date of  
12 that surgery was?

13           A     The date of this surgery is November 28th of 2018.

14           Q     Okay. Where was that performed?

15           A     New York Presbyterian Lower Manhattan Hospital.

16           Q     Okay. Doctor, once again, you had an assistant with  
17 you?

18           A     Yes.

19           Q     And you explained earlier the reason for that was?

20           A     It makes them faster and safer.

21           Q     Okay. When you say, "faster", you mean because of  
22 anesthesia?

23           A     Well, sure. You try to minimize the amount of time  
24 that it takes to do a surgery. And that also helps to minimize  
25 the potential complications.

1 Q Now, what was your preoperative diagnosis?

2 A Cervical disc herniation at C4/C5 and C6. With  
3 cervical radiculopathy and myelopathy.

4 Q And your post-operative diagnosis?

5 A Cervical disk herniation C4/C5 and C6 with cervical  
6 radiculopathy and myelopathy.

7 Q Okay. What I am going to want you to do, the  
8 surgery -- I think what I am going to have you do. You did the  
9 surgery. Take the boards as you're going through it and you  
10 switch them. And then just note when you switch it, what it is  
11 marked, okay.

12 A Okay. So, I'm talking about the surgery now?

13 Q Yes. Unless you want to go through the anatomy first  
14 or whatever you want to go into.

15 A Might as well talk about the surgery. Number --

16 Q 20B.

17 A So, 20B indicates the reason for the actual operation  
18 itself. Just like we did for the lower back, this is also a  
19 statement of the reason for why we are doing this at this point  
20 and time.

21 Q Go through that for the record, please?

22 A Sure. Indication. That's the rationale for surgery.  
23 Indications are C4/C5, and C6 vertebral segments. That is the  
24 segments of the neck at 4, 5 and 6 that are causing symptoms  
25 including numbness, tingling and weakness. Positive Spurling's

1 maneuver. Positive Hoffmann's sign. Positive inverted flexor  
2 response. All signs of a problem with the spinal cord and the  
3 nerve roots. With C5 sensory and C6 sensory loss as well as  
4 reflex loss and some motor weakness at the deltoid atrophy and  
5 shoulder weakness.

6 So, surgery is being done as it says here to prevent  
7 the condition from getting worse. In other words, this is a  
8 decompression and a stabilization procedure in order to  
9 essentially help the patient and prevent this problem from  
10 continuing to get any worse.

11 Q I will stop you for a second. When you tell a patient  
12 you are going to do this exactly what you just told the jury, do  
13 you tell them, hey, when I am done doing this you are going to be  
14 pain free?

15 A No.

16 Q Can you explain to the jury why?

17 A Sure. That's also part of what we talked about before  
18 which are the realistic goals of surgery. So, realistically, we  
19 want to do a safe operation that is going to make the patient  
20 better but might not make them perfect particularly if the  
21 problems has been going on for quite sometime. And particularly,  
22 if there are nerve roots findings that may not completely  
23 entirely recover. And that the major goal of the surgery here  
24 is, as I say, to try to make the condition as best we can and to  
25 stabilize the condition in order to prevent it from getting

1 worse.

2 Q Please continue?

3 A So, informed consent just reiterates exactly what I  
4 just said. Which is a discussion with the patient to outline  
5 what we are doing. Why we are doing it. What the options and  
6 alternatives are. And what the goal of surgery is and what the  
7 potential complications of the surgery is.

8 The area that says findings are what we saw during the  
9 surgery. Which was here, tears in the annulus. Once again,  
10 which are areas where the outer covering of the disc is  
11 disrupted. Which causes the inner portion of the disc to  
12 protrude or herniate.

13 Q I will stop you. Was it significant to you as far as  
14 relating it to trauma that on both the lumbar spine and the  
15 cervical spine that you found --

16 MR. WHITELEY: Objection.

17 THE COURT: Sustained as to form.

18 Q Was there any significance to you as far as relating  
19 this to the accident of 12/19/15 that you found a torn annulus in  
20 regard to the lumbar spine and a torn annulus in regard to the  
21 cervical spine?

22 MR. WHITELEY: Objection.

23 THE COURT: Overruled. Just because the witness  
24 already testified about the meaning of the torn annulus.

25 MR. SCHWITZER: Your Honor, I think he is waiting



1 to know whether to answer.

2 **THE COURT:** I said it was overruled

3 A So I can answer?

4 Q Yes.

5 A Okay. Putting it together correct in the picture of  
6 this patient and my treatment of him, it would be consistent with  
7 a traumatic injury having occurred in 2015.

8 Q Please continue.

9 A And then there is a description of the actual procedure  
10 itself where the patient is taken to the operating room and  
11 placed in a position where we are able to identify the cervical  
12 spine. We will go to board 20C. And in much the same way as the  
13 lower back is approached, there is an incision in this case --

14 Q I will stop you again. I apologize. You said the  
15 patient is put into a position.

16 A Yes.

17 Q What do you mean? What's done before you even start?

18 A So, we position the patient on the operating table  
19 whereby their neck is facing upwards so that we can approach the  
20 area that we are going to operate it on.

21 Q How do you do that?

22 A You have the patient while they are asleep and then you  
23 physically position the patient.

24 Q Well, do you restrict the head in any way?

25 A The head is maintained in a, we call it a donut. It's

1 kind of a fluffy pillow that has an opening in the center that  
2 cradles the outside portion of the head.

3 Q Please continue.

4 A So that positioning is done. And then there is an  
5 approach to the neck whereby an incision is made in the area of  
6 the front part of your neck which is the area where the discs are  
7 located. And then underneath that area --

8 Q Doctor, I want you to take us through with when you  
9 start that incision as you are cutting, what are you cutting  
10 through and what are you trying to avoid as you are cutting as  
11 you go?

12 A So, what we are doing is, we are going in between the  
13 area where your trachea and your esophagus is located and the big  
14 muscle on the left side of your neck is located and your necrotic  
15 jugular vein are located. So, there is an area in between those  
16 two sections of your neck that presents as a little hollow in  
17 your neck area.

18 So, there is an incision made into the skin of the  
19 neck. There is a very wispy muscle that's underneath the skin  
20 called the platysma. It's the muscle that, you know, men kind of  
21 use when they are shaving their necks. That muscle is split open  
22 and then you can use a retractor called the Cloward retractor to  
23 move the breathing tub, trachea, esophagus, food tube out of the  
24 way. Muscle on the side of your neck, called the  
25 sternocleidomastoid, necrotic jugular vein out of the way to

1 visualized the spine

2 Q As you are cutting or however you want to describe it,  
3 what are the risks and can you explain to this jury, this isn't  
4 like slicing, you know, how are you cutting through meaning how  
5 slowly are you going and what are you trying to avoid?

6 A Well, you are trying to only enter the area where the  
7 discs are without causing any issues to any of the other  
8 structures.

9 Q What kind of risks are there as to what you could cut  
10 incorrectly as you are trying to get to the surgical site?

11 THE COURT: If anything. Counsel, if anything.  
12 What you are can cut incorrectly, if anything.

13 MR. SCHWITZER: If anything. I am sorry, Judge.

14 A So, I am sorry. What's the question.

15 THE COURT: What are the risks as to what you can  
16 cut, if anything, incorrectly as you are getting to the  
17 procedure site.

18 A Yes. So, the problems with this approach if you are  
19 not doing the approach correctly is you can have the problem with  
20 your ability to swallow or eat. Your ability to breathe or speak  
21 or blood flow to your head and brain. Those are the major  
22 structures that are in this area where the cervical spine or the  
23 discs are.

24 Q Before Edgar agreed to do this, did you explain all of  
25 this to him?

1           A     Sure.

2           Q     Please continue.

3           A     So, the two discs that are involved at C4/C5 and C5/C6  
4 are identified and confirmed with an X-ray. And then the discs  
5 themselves are dissected, that is they are removed as you  
6 approach the area where the spinal cord and the nerves are to the  
7 point where you can visualize the spinal cord and the nerves as  
8 you are removing disc from the spinal canal and nerve areas so  
9 that you are taking the pressure off of those areas. And then  
10 you are making what we call a cord and root decompression by  
11 removing portions of the bones that have sandwiched the discs in  
12 between them. So, C5, C5 and C6.

13          Q     What the spinal model help you at all?

14          A     Sure. So, if you are approaching the spinal cord which  
15 is located on the back side through the front side because the  
16 discs are located here, you are removing everything that is  
17 located in the front area as much as you can safely remove  
18 without causing any significant damage in order to be able to  
19 decompress or expose the nerves and the spinal cord. So, that's  
20 the decompression portion of the procedure.

21          Q     When you're saying decompressed the portion where the  
22 cord is, can you explain how careful you have to be and why?

23          A     So, when we are doing that, we do use what are called  
24 loupe magnification which is described in the operative report.  
25 Which is a magnifying apparatus that you wear on your head. It

1 is like a special pair of glasses that act like a microscope with  
2 a light so that you can illuminate the area that you are working  
3 on and you can magnify the area that you are working on. So that  
4 you can remove only those parts of the discs and the bones that  
5 are necessary so that you can freely and clearly decompress the  
6 spinal cord and the nerve roots.

7 Q Please continue.

8 A Now, the thing about the neck is that because you are  
9 doing this from the front, the reason you are doing it from the  
10 front side versus the back side is the spinal cord is a very  
11 sensitive organ. The disc herniations are located on the front  
12 part of the spinal cord. So, to thoroughly decompress the cord  
13 and roots without touching the spinal cord, you need to come  
14 through the front side.

15 Q What happens if you touch the spinal cord?

16 A So, if you put pressure on the spinal cord, you can  
17 cause spinal cord damage which could result in paralysis. So,  
18 you don't really want to put any type of pressure or cause any  
19 injury to the cord itself.

20 Q Did you explain that to Edgar Cifuentes?

21 A Sure. The thing about the neck is because you have to  
22 take those things out in order to take pressure off the spinal  
23 cord nerves, you don't have any remaining portions of disc that  
24 are gluing the bones back together again. So, you have to, in  
25 this case, rebuild those areas and recreate what was there by

1 putting something that we call a biomechanical device in place.  
2 Which is just a fancy name for a shim. If you ever put a shim  
3 under your furniture to balance your furniture out, you are kind  
4 of doing the same thing here. We want to balance the bones back  
5 into a position where they belong by essentially placing this  
6 thing in between them what we call a biomechanical device or  
7 cage. It is there to make sure that those bones are back into a  
8 more normal position and won't collapse down onto the cord or the  
9 nerves. And make sure that those shims that were putting in  
10 there don't move around or pop out, we put a clip on there that  
11 hold the bones together. It's a titanium clip plate that is  
12 fixed down onto the bones to hold them stable. So that after  
13 surgery, the patient can get up and walk and start doing their  
14 normal activities without fear of having this fall apart or cause  
15 more damage. So, you have done a decompression, taking the  
16 pressure off the nerves and a stabilization to hold everything  
17 together so that no more damage occurs.

18 Q Please continue.

19 A And then after that is all done, you basically sew the  
20 skin back together again and then the patient is awoken.

21 Q Now --

22 THE COURT: Mr. Schwitzer, is that from the  
23 doctor's chart, Lennox Hill or something else?

24 MR. SCHWITZER: Both.

25 MR. WHITELEY: No objection.

1           **THE COURT:** Without objection.

2           **MR. WHITELEY:** Thank you, Your Honor.

3           **THE COURT:** What number is that?

4           **MR. SCHWITZER:** 20D.

5           **THE COURT:** In evidence.

6           **MR. SCHWITZER:** Yes, in evidence.

7                   (Whereupon, Plaintiff's 20D, was moved into  
8                   evidence)

9           **Q**     So, the surgery is in '18. Can you tell the jury what  
10           this is?

11           **A**     This is a post-operative X-ray. A front to back view  
12           and a side-view of Mr. Cifuentes' neck.

13           **Q**     Okay. Can you explain what wasn't there before you did  
14           the surgery, what is there now and why?

15           **A**     So, the first thing you will notice on the x-rays is  
16           that there is this thing here that looks like a clip plate.  
17           That's the front to back view and the side-view. So, that plate  
18           or clip device that is basically locking everything together so  
19           that it doesn't move around. And now on the side-view, it's a  
20           little bit easier to see on the side-view. There are these  
21           little things that look like metallic pillars. That's the shim  
22           or the biomechanical device. And on the side-view you can see  
23           that there is a gray bone that is growing in between the device  
24           and into the other bones on both sides. That's what we call  
25           fusion. Fusion is eventually the healing process where bones

1 grow back into and around all the areas that you have operated  
2 on. That's the ultimate goal of stabilization is fusion. Fusion  
3 basically means the regrowth or the new growth of bones into the  
4 areas that have been operated on. So, you can see that here on  
5 the side-view. You can see that the neck is put back into its  
6 more normal contour and positioned with the replacement of those  
7 discs area that were otherwise removed.

8 Q So, are these screws?

9 A So, to hold this clip plate in place, there is three  
10 sections where there are screws that are placed into the  
11 vertebral bodies in order to essentially plaster it up and hold  
12 it fixed and solid to the bones.

13 Q Do you know what that is made out of?

14 A They are titanium.

15 Q And why titanium?

16 A Yes, titanium. So, an MRI is a fancy magnet that your  
17 body is placed into to take images of. Titanium is not  
18 ferromagnetic. It's a metal that you can put into an MRI scanner  
19 and still get an image from it. It also doesn't heat up when you  
20 put it in an MRI scanner. Like if you have a piece of stainless  
21 steel or steel or something like that and you put it in an MRI  
22 scanner, it gets hot and it won't generate an image. It will  
23 look like a big dark black cloud. Titanium doesn't do that. It  
24 is not ferromagnetic. You can get an image and it is MRI  
25 compatible and safe.



1 Q Could you explain again why it is you need to put the  
2 plate and screws in?

3 A So, you can stabilize -- that's one of the important  
4 things that we do with spines in this case is stabilize the spine  
5 so you can prevent that area from continuing to cause any more  
6 problems. You can promote or stimulate the healing process which  
7 we call fusion. You will prevent the shims or the biomechanical  
8 devices from moving out of place.

9 Q Doctor, that plate and screws, that's permanently in  
10 his body, correct?

11 A Yes.

12 Q Doctor, you said the word fused. How many levels -- if  
13 you can take the model, the spine model. How many levels are  
14 there to the cervical spine again?

15 A So, there are seven bones in the cervical spine. In  
16 between each bone is a level. So 2/3, one level. 3/4, two.  
17 4/5, three. 5/6, four and 6/7, five. So, there are five  
18 separate levels in the cervical spine.

19 Q Now, doctor, in your world, you would call this a  
20 two-level fusion?

21 A Yes, that's a two-level fusion.

22 Q And obviously, there is something called a one-level  
23 fusion?

24 A Yes.

25 Q What's the reason in his case you had to go do a

1 two-level as opposed to a one level?

2 A So, the primary nerve roots and areas that were causing  
3 the clinical problem here were the C5 nerve roots which are  
4 located essentially between C4 and C5 and the C6 nerve roots  
5 which are located between C5 and C6.

6 Q Okay. Are there certain areas of -- strike that.

7 Loading mechanism. Can you explain to us what that  
8 is?

9 A With respect to?

10 Q To the cervical spine?

11 A When you say loading mechanism --

12 Q Strike that. Strike the whole question?

13 A Okay.

14 Q Are there areas of the cervical spine that with a  
15 normal healthy person are used for more activities of daily  
16 living than other areas of the cervical spine?

17 A Yes.

18 Q Okay. Can you tell the jury what levels that they are  
19 and why?

20 A Okay. So, two different -- now it's a little bit more  
21 complicated now because there are two parts to the cervical  
22 spine. Even though all of these bones are lined up on top of  
23 each other, there is actually two separate parts. There is what  
24 we call the top part of the spine which is where your head  
25 attaches to your neck. And then there is the middle part of the

1 spine which is everything else. So, the middle part of your  
2 spine is kind of like the straight area that connects your head  
3 to the rest of your body. So any time you got stress or motion  
4 between your head and the rest of your body, it is going through  
5 this section of your spine. Straight up portion of your spine.  
6 Any time you move your head around like if you want to look to  
7 one side or the other side or move your head up or down, just  
8 your head, you are moving the top part of spine here. And they  
9 work together, right? But most of the time your, shall I say,  
10 the shock absorption portion of your spine is in the subaxial  
11 area and the head and neck area of motion is in the top part of  
12 the spine.

13 Q Now, when you performed this surgery at these two  
14 levels, once you performed it, what happens to the motion that  
15 you had at those levels before the surgery?

16 A So, you're blocking motion in that area. You're  
17 stiffening that area up.

18 Q Well, when you say, "blocking motion," are you taking  
19 the motion away from that area?

20 A Yes.

21 Q When you say, "fused", does that mean those areas don't  
22 move any more?

23 A They will grow together as one piece of bone, so they  
24 will behave like one piece of bone and no longer move, correct.

25 Q So, you have no motion left at those two levels,

1 correct?

2 A That's correct.

3 Q So, explain to The Jury why you as a patient would say  
4 okay doc, go ahead --

5 MR. WHITELEY: Objection.

6 THE COURT: Sustained.

7 Q Can you explain the reason why a patient would agree or  
8 this patient would agree --

9 MR. WHITELEY: Objection.

10 Q Mr. Edgar Cifuentes would agree to undergo this surgery  
11 knowing you were taking motion away two levels of his cervical  
12 spine forever?

13 THE COURT: If the objection is as to what was in  
14 Mr. Cifuentes' mind, is that it?

15 MR. WHITELEY: Among other things, yes.

16 THE COURT: Well, that's the only one which I  
17 would say sustained.

18 MR. WHITELEY: Thank you.

19 Q Doctor, can you explain to the jury the reason that you  
20 would recommend to a patient undergoing the two levels spinal  
21 fusion surgery knowing that they are going to lose motion to  
22 those areas forever as opposed to not doing the surgery?

23 MR. WHITELEY: Objection.

24 THE COURT: Overruled.

25 A Sure. So, it's the risk of the surgery versus the

1 benefit of the surgery. So, the risk of the surgery here is your  
2 arms and your hands are going to get worse over time because you  
3 are going to lose sensation and function of your arms and your  
4 hands. Versus we can take pressure off of the nerves and then  
5 stabilize the mid-portion of your spine to prevent your arms and  
6 your hands from getting worse. And we may also be able to  
7 decrease some of the pain and symptoms that you have. So, every  
8 time you do something, there is always a trade off. So, there is  
9 a risk and a benefit. Something that you are trading for  
10 something else.

11 **MR. SCHWITZER:** Your Honor, I think this is a good  
12 stopping point.

13 **THE COURT:** Great. Ladies and gentlemen, we are  
14 going to recess for the weekend.

15 Sir, you remain under oath. Please don't discuss your  
16 testimony with anyone between now and when you come back.  
17 We will see you on Monday morning at 9:30.

18 In the meantime as always, don't discuss the case  
19 amongst yourself or with anyone else. Don't do any  
20 research about any of the parties, issues, contentions.  
21 And don't have any contacts I have asked you not to have  
22 with parties, attorneys, witnesses and staff. We will see  
23 you. Thanks.

24 **COURT OFFICER:** All rise. Jury exiting.

25 (Whereupon, the jury is exiting the courtroom)

(Whereupon, the witness steps down from the  
witness stand)

**THE COURT:** All right. Thank you for your work.  
See you on Monday.

(Whereupon, the case was adjourned to Tuesday, May 27,  
2025 at 9:30 a.m.)

\* \* \* \* \*

IT IS HEREBY CERTIFIED THAT THE FOREGOING IS  
A TRUE AND ACCURATE RECORD OF THE PROCEEDINGS.

- - - - -  
NADONNA V. FERGUSON  
Senior Court Reporter

<p>BY MR. SCHWITZER:: [3] 456/20 469/20 516/9  COURT OFFICER: [12] 453/12 453/14 455/14 478/17 480/15 515/13 516/1 516/3 538/19 538/21 538/23 574/23  MR. SCHWITZER: [92] 431/22 433/12 448/21 450/18 452/1 453/3 454/1 454/4 454/15 455/20 455/23 456/18 460/3 460/9 461/8 462/15 462/19 462/23 463/2 463/7 463/20 464/1 464/4 464/15 465/15 466/7 468/8 468/12 468/25 469/3 469/17 477/22 478/1 479/12 479/17 480/3 480/9 480/13 480/21 480/23 481/4 499/11 500/4 503/22 506/15 506/23 507/6 507/10 507/13 508/7 511/18 511/21 511/24 512/3 512/7 514/5 514/7 515/4 522/4 529/22 530/2 530/13 531/6 531/18 532/2 532/5 532/9 536/23 537/1 539/3 539/7 539/16 550/10 550/16 550/20 551/2 551/5 551/8 551/10 555/5 555/8 557/1 557/8 557/14 557/16 557/25 561/24 564/12 567/23 568/3 568/5 574/10  MR. WHITELEY: [91] 419/7 431/24 433/13 448/20 449/23 450/3 450/7 450/9 450/20 450/22 451/1 451/20 452/5 452/12 452/18 453/8 453/16 453/23 454/2 461/9 461/11 461/20 461/25 462/4 462/9 462/13 462/17 462/21 462/25 463/16 463/23 467/19 468/21 477/5 477/7 477/9 477/13 477/17 478/25 479/4 479/7 479/21 480/7 480/11 481/9 481/12 499/10 499/13 503/15 504/4 504/6 506/20 506/25 507/2 507/9 513/14 513/17 515/15 517/23 518/2 518/8 521/17 521/19 528/12 528/16 529/18 530/5 530/10 531/9 531/23 531/25 537/2 539/9 541/11 550/8 550/11 550/13 554/21 555/2 555/10 555/14 557/4 561/15 561/21 567/24 568/1 573/4 573/8 573/14 573/17 573/22  MS. YUEN: [5] 419/6 434/8 454/11 506/22 557/5  THE CLERK: [27] 418/24 419/14 419/19 419/24 420/1 420/5 420/7 434/13 434/17 434/23 435/1 456/1 456/5 456/9 456/14 464/11 469/6 469/12 469/16 479/16 480/1 480/6 480/8 481/3 511/25 512/5 530/15  THE COURT: [371]  THE JURY: [1] 455/22  THE WITNESS: [212]</p>	<p>1</p> <p>10 degrees [2] 494/13 524/23  100 percent [2] 514/1 529/7  10017 [1] 418/14  11 [1] 482/18  11/28 [1] 556/23  11201 [1] 418/7  11215 [1] 469/16  11249 [1] 420/11  11557 [1] 456/14  11570 [1] 435/1  1184 [1] 456/13  11th [1] 498/10  12 [11] 431/21 461/22 461/23 464/14 466/20 467/23 468/7 468/20 468/21 502/7 544/22  12-1 [1] 464/18  12/19/15 [2] 488/16 561/19  12A [1] 464/14  12A-1 [1] 464/19  12s [1] 468/21  12th [4] 431/21 432/6 432/23 551/22  13 [7] 466/20 466/24 467/1 479/25 480/3 481/7 516/14  14 [7] 479/25 480/7 480/8 480/11 481/2 481/5 511/23  15 [3] 488/16 532/18 561/19  16 [10] 418/7 428/13 430/12 512/6 512/7 512/11 530/1 530/23 531/2 531/5  17 [5] 511/10 511/13 530/18 536/16 539/3  18th [1] 514/10  19 [1] 539/4  1990 [1] 471/8  1996 [2] 471/8 521/7  1st [1] 548/19</p> <p>2</p> <p>2/3 [1] 570/16  20 [1] 557/18  2015 [2] 485/9 562/7  2016 [9] 418/5 482/18 487/4 497/16 506/8 514/22 516/14 529/11 532/18  2017 [1] 550/11  2018 [3] 556/15 556/19 558/13  2025 [3] 418/7 428/24 575/6  20A [2] 557/20 558/10  20B [2] 559/16 559/17  20C [1] 562/12  20D [2] 568/4 568/7  21ST [5] 418/18 430/13 432/9 433/5 433/6  21st that [1] 432/13  21th [1] 428/24  23 [4] 429/7 429/21 432/9 432/20  23rd [1] 545/23  240 [1] 418/5  25 [3] 428/15 430/16 475/23  27 [1] 575/5  27th [1] 548/18  28 [3] 432/4 529/11 556/23  28th [4] 436/4 522/15 526/12 558/13  29th [1] 512/13  2:15 [2] 515/9 515/17  2nd of [1] 447/12</p> <p>3</p> <p>3/12/25 [1] 430/16  3/21/25 [1] 428/15</p>	<p>3/21/25 is [1] 429/2  3/4 [1] 570/16  30 [5] 521/8 523/13 523/17 523/21 525/12  30 degrees [3] 524/2 524/8 525/6  30 percent [3] 498/24 499/1 522/10  314 [1] 420/10  35 [1] 526/13  35 degrees [1] 505/12  35TH [1] 418/5  360 [1] 418/6  37 [2] 460/14 460/16  375 [1] 458/4</p> <p>4</p> <p>4/5 [1] 570/17  4/9 [1] 448/5  40 [1] 525/15  45 degrees [2] 524/6 525/15  4:30 [1] 557/23  4:40 [1] 442/1</p> <p>5</p> <p>5/6 [1] 570/17  50 [2] 483/14 525/11  500 [1] 461/15  500776/16 [2] 428/13 430/12  55 [1] 434/25  55 degrees [1] 523/20  567 [1] 469/15  5A [1] 557/10</p> <p>6</p> <p>6/7 [1] 570/17  60 degrees [3] 523/12 525/4 525/11</p> <p>7</p> <p>7 degrees [2] 523/5 523/7  70 percent [1] 522/11  77 [1] 418/18</p> <p>8</p> <p>820 [1] 418/13  8th [3] 498/11 504/13 506/8</p> <p>9</p> <p>9/15/16 [4] 530/1 530/23 531/2 531/5  90 degrees [1] 526/16  9:30 [3] 557/23 574/17 575/6  9th [3] 437/15 439/17 439/24</p> <p>:</p> <p>:500776 [1] 418/5  :500776/2016 [1] 418/5  :INDEX [1] 418/4</p> <p>A</p> <p>a.m [1] 575/6  abandon [1] 495/12  abdomen [5] 446/5 446/5 446/9 446/9 491/3  ability [6] 486/23 486/24 490/12 494/20 564/20 564/20  able [20] 425/17 431/10 439/18 441/23 474/1 493/16 497/11 508/2 508/4 523/10 523/11 523/18 525/2 526/15 532/12 543/13 544/1 562/11 565/18 574/6  abnormal [4] 493/21 494/4 497/2 511/6</p>
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