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SUPREME COURT OF THE STATE OF NEW YORK

BRONX COUNTY: CIVIL TERM: PART 45

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REYNAULD RIVERA and ELIZABETH RIVERA,

Plaintiff(s), INDEX NO. 7233/99

-against-

RAMON BARCENE, JOHN MARTINS and YONKERS CONTRACTING COMPANY, INC.,

Defendant(s).

Trial Testimony of Dr. Merola

----------x

February 4, 2002
851 Grand Concourse
Bronx, New York

B E F O R E:

THE HONORABLE DOMINIC MASSARO,

JUSTICE.

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

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(Appearances continued on next page.)

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Catherine Mercorella,
Senior Court Reporter

A F T E R N O O N S E S S I O N

(Whereupon, the Jury enters the courtroom.)

THE COURT: Good afternoon. Mr. Clerk, please call the case.

THE COURT CLERK: Case on trial. Reynauld Rivera and Elizabeth Rivera, plaintiffs, versus Ramon Barcene, John Martins and Yonkers Contracting Company, Incorporated, defendants.

Let the record reflect the presence of the sworn jurors and alternates and the continuing presence of the respective counsels.

THE COURT: Mr. McCrorie, you may proceed.

MR. McCRORIE: Your Honor, plaintiff calls Dr. Andrew Merola.

THE COURT: Dr. Andrew Merola to the witness stand.

THE COURT OFFICER: Left hand on the Bible, raise your right hand, face the clerk.

D R. A N D R E W M E R O L A , having first been duly sworn, testified as follows:

THE COURT OFFICER: Thank you. Be seated. In a loud, clear voice, state your

first and last name, spell your last name.

THE WITNESS: My name is Andrew Merola, M-E-R-O-L-A.

THE COURT: Good afternoon, Doctor.

THE WITNESS: Good afternoon.

THE COURT: Sit back, be comfortable, keep your voice up. Be as direct and succinct as possible in your responses.

MR. McCRORIE: May I inquire?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. McCRORIE:

Q Good afternoon, Dr. Merola.

A Good afternoon.

Q Dr. Merola, have you and I ever met prior to your involvement with Reynauld Rivera's case?

A Yes.

Q Prior to your involvement with this case?

A Oh, no.

Q Have you ever testified before a jury in court ever?

A No.

Q Please tell the jury something about your educational background, and just for clarity, the jury knows what an internship is and they know what

a residency is. So if you could take us from your education to where you currently are working now and what you do.

A I did my internship and residency at Kings County Hospital Center in Brooklyn, New York; State University of New York, Downstate Medical Center. That's where I did most of my training.

Subsequently, I went to the University of Colorado in Denver to do a spine surgical fellowship. After I completed my fellowship, I returned to Kings County Hospital, SUNY Downstate in Brooklyn, as well as St. Vincent's Hospital in Manhattan where I practice spine surgery. I'm the Director of Spine Surgery for the Department of Orthopedic Surgery at SUNY Downstate, Kings County Hospital.

Q Do you have hospital privileges elsewhere?

A Yes, I do.

Q Where do you have hospital privileges?

A I have privileges at Kings County, SUNY Downstate, Long Island College Hospital, New York Methodist Hospital, St. Vincent's Hospital and Brookdale Hospital.

Q And do you have any teaching or academic positions?

A Yes, I do. I'm Assistant Professor of Orthopedic Surgery at SUNY Downstate as well as an Assistant Clinical Instructor of Orthopedics at New York Medical College.

Q Where did you go to medical school?

A Howard University College of Medicine, Washington, D.C.

Q And how about undergraduate?

A Undergraduate, New York University.

Q Please tell us about any licenses that you hold.

A Currently I hold a medical license here in the State of New York, New Jersey and Colorado.

Q Are you board certified in any areas?

A I am board certified in orthopedic surgery and spinal surgery.

Q Was that a separate board certification, the one for spinal surgery?

A Yes, it was.

Q Have you ever authored any textbooks?

A Yes.

Q Author or editor, and, if so, tell us what and when.

A Yes, I have. Currently I am editing a textbook concerning surgical atlas of spinal

approaches and anatomy. I have edited a two-volume set on the biomechanics of the spine. I have been a coauthor for several spinal surgical chapters in various spinal surgical texts.

Q How many texts would you say you have been either a coauthor in or had part in?

A Approximately four to five texts.

Q Are you published in the area of spinal surgery?

A Yes, I am.

Q Just tell the jury briefly something about your publications.

A Most of my publications are either in the Journal of Bone and Joint Surgery or spine, and they deal with topics relating to spinal surgical problems and spinal reconstruction.

Q Approximately how many publications do you have in the Journal of Spinal Surgery?

A I would say in excess of ten to fifteen publications.

Q What is the American Academy of Orthopedic Surgeons?

A The Academy of Orthopedic Surgeons is a fellowship of all the orthopedic surgeons in the United States that are currently board certified and

practice orthopedic surgery.

Q Are you a member of that?

A Yes, I am.

Q How about the Orthopedic Trauma Association, what is that?

A The Orthopedic Trauma Association is an association of orthopedic traumatologists who deal primarily with injuries and problems occurring with fractures or derangements of the musculoskeletal system.

MR. McCRORIE: Although Dr. Merola has never been in a court or been certified as an expert, I ask your Honor accept him as an expert in the area of orthopedic surgery, specifically orthopedic spinal surgery.

MR. COHEN: I have no objection, Judge.

THE COURT: There being no objection, based on education, training, and experience, this witness is so declared an expert in the field of orthopedics, more particularly orthopedic surgery.

Q We know you haven't testified. Have you been involved in any cases where litigation is involved where you have had to provide a narrative

report?

A Yes.

Q Approximately how many times a year in your practice would you have to provide a narrative report?

A I'd say in the neighborhood of maybe three to four times.

Q Are you charging for your time in court today?

A Yes, I am.

Q Did you have to reschedule patients and/or cancel surgeries today?

A Yes, I did.

Q And, incidentally, you were supposed to go on in the morning. Do you have patients currently waiting in your office?

A Yes, I do.

Q How much are you charging for your time away from your practice?

A It's $6,000 for the day.

Q And how much did your office charge my office to prepare a narrative report?

A $600.

Q And how about to meet -- withdrawn.

You and I met prior to testifying here today;

correct?

A Yes, we did.

Q I also bought you an egg salad sandwich in addition to all of the other?

A Yes, you did.

Q And we talked about the case at lunch?

A Yes.

Q Your testimony?

A Yes.

Q When did we meet physically for the first time?

A Sometime last week.

Q And where was that?

A In my office.

Q Was I charged for that?

A Yes, you were.

Q And how much was that testimony preparation fee?

A $800.

Q How long did that last?

A A number of hours.

Q Approximately how many spinal surgeries do you do per year, Doctor?

A In the neighborhood of 150 to 175, depending upon the year.

Q Is Mr. Rivera a patient of yours, Reynauld Rivera?

A Yes, he is.

Q How did Reynauld Rivera come to be a patient of yours?

A Mr. Rivera was referred to me by Dr. Charles DeMarco for evaluation.

Q And when he was referred by Dr. DeMarco for an evaluation, what was he referred for, specifically?

A Problems with his neck and his arms.

Q When he was referred, what, if anything, did Comprehensive Care -- well, what, if anything, did Dr. DeMarco or Dr. DeMarco's office send to you for your review?

A They sent an initial M.R.I. report on him.

Q And when, if ever, did you view the M.R.I. films that correlate to the initial M.R.I. report?

A I reviewed his films prior to his surgery.

Q How many times -- the jury knows when the surgery was in July of 2001. Approximately how many times -- withdrawn. Do you have your file here today?

A Yes, I do.

Q Is that your full file?

A Yes.

Q And is that file kept in the regular course of your business?

A Yes, it is.

Q And are you aware of your office's record-keeping procedures?

A Yes, I am.

Q Did you physically retrieve that file from the office today?

A Yes, I did.

MR. McCRORIE: Your Honor, I'd offer Dr. Merola's file in as Plaintiffs' 37.

THE COURT: Share it with defense counsel.

MR. McCRORIE: Yes, they have looked at it before.

MR. COHEN: Subject to any redactions, I have no objection.

THE COURT: Ma'am?

MS. GOLDER: No, no objection.

THE COURT: Likewise.

What has previously been marked as Plaintiffs' Number 37 is now offered and received in evidence as Plaintiffs' Number 37.

(Whereupon, Plaintiffs' Exhibit

Number 37, Dr. DeMarco's file, was received in evidence and marked.)

THE COURT OFFICER: So marked as indicated.

Q Doctor, your file is now in evidence and if you need to read from it, you can.

Doctor, did you, other than speaking to Dr. DeMarco, take a history from Reynauld Rivera?

A Yes, I did.

Q And when was your first visit -- when did Reynauld Rivera first come into your office and meet with you?

A February 2, 2001.

Q And at that time he was being referred specifically for a cervical condition?

A Yes.

Q Do you know when -- withdrawn.

What was the history as taken?

A Mr. Rivera indicated to me that he was a truck driver who had been involved in a head-on motor vehicle collision on July 14 of 1998 and had suffered neck pain and some weakness and symptoms in his arms and hands since that accident.

Q Doctor, why is the mechanism of an injury important?

A Mechanism is very important because it gives me some kind of an idea on what I'm dealing with in terms of magnitude of the problem, what created the problem and what possible solutions I could come up with for that problem.

Q And did Mr. Rivera tell you he struck his head on the windshield? Did he ever indicate that in another report?

A Yes.

Q And you have seen the pictures of the car. I showed them to you; right?

A Yes.

Q What was your initial diagnosis of Reynauld Rivera's condition based on what he had told you and Dr. DeMarco told you?

A My initial diagnosis was one of cervical myelopathy.

Q Tell the jury what myelopathy means?

A Myelopathy means there is a problem with the spinal cord and nerve roots of the neck secondary to a neck problem.

Q And on February 2, 2001 what was that cervical myelopathy secondary to, according to your initial diagnosis?

A Giant herniated disk.

Q Did there come a time when you reviewed the M.R.I. films that correlate to the 2001 -- I'm sorry, excuse me, correlate to the 1999 report of Dr. Sprecher that is in your file?

A Yes.

Q And did you do that before the surgery?

A Yes.

Q When, if ever, did you order a follow-up M.R.I. prior to the surgery?

A I had seen several M.R.I.s before the surgery that happened after that '99 M.R.I.

Q And when was surgery first discussed with Mr. Rivera?

A We actually talked about surgery in February of 2001.

Q Did you actually fill out an authorization to request the surgery in February of 2001?

A I don't remember exactly when the request was put in.

Q Would it be located within your file?

A Yes.

MR. McCRORIE: Your Honor, if it's not in his file, I'm going to have this marked as 38-A -- 38, I'm sorry.

THE COURT: I believe the doctor

found it.

MR. McCRORIE: Continue?

THE COURT: He found it.

A February 5, 2001, request for surgery.

Q And was that to the Workers' Compensation Board?

A Yes.

Q And what type of surgery were you requesting on February 5, 2001?

A Anterior cervical diskectomy and fusion.

Q What type of surgery did you do in July of 2001?

A Anterior surgical diskectomy and fusion.

Q What does cervical spondylitic myelopathy indicate or mean?

A It indicates a problem with the spinal cord and nerve roots at multiple levels within the cervical spine.

Q Doctor, when a disk herniates at one level, are the disks at the levels above and below more susceptible to degeneration or to injury?

A Yes, they are.

Q Why is that?

A What happens is when you have a problem with the disk at one of the levels, the other levels

that are adjacent to it need to take up the stresses and strains that were originally taken up by the disk injury at that given level. So those other levels are under more stress and strain, and they have to move more and in a different fashion to compensate for the area that's been injured.

MR. McCRORIE: Your Honor, I'm going to have these marked 38 and 39.

THE COURT: Plaintiffs' 38 and 39.

MR. McCRORIE: For identification. They are the M.R.I. films. I would like them to go into evidence as all the others have.

THE COURT: We'll move them at the appropriate moment.

MR. COHEN: Judge, can we approach?

THE COURT: Yes.

(An off-the-record discussion was held at the bench.)

(Whereupon, Plaintiff's Exhibit Numbers 38 and 39 were marked for identification.)

THE COURT: Mr. McCrorie.

MR. McCRORIE: Yes. I'm sorry. 38 and 39, they are right there.

THE COURT: Do we have any

objection?

MR. COHEN: I object, your Honor.

MS. GOLDER: I join.

MR. McCRORIE: I'll go through the questioning.

THE COURT: Yes, all right. Objections are noted.

Q Doctor, we have been putting them up --

MR. COHEN: Your Honor, there is an objection.

THE COURT: First, have you moved them into evidence?

MR. McCRORIE: No, your Honor.

THE COURT: You're not? They're just for identification.

Q Doctor, you are being shown 38 and 39 for identification and identification only. Did you review those films from July of 1999 prior to doing the surgery on Mr. Rivera? Yes or no?

A Yes.

Q And did you render your own interpretation of those films prior to looking at the second set of films as well of June 29, 2001?

A Yes.

Q And did you, when I was in your office,

compare the blow-ups that are before you to the original M.R.I. films with a shadowbox?

A Yes.

Q And is what's before you, 38 and 39, an exact replica of certain views of the cervical M.R.I. of July of 1999?

A Yes.

Q And are they the exact views just larger so the jury can see them?

A Yes.

MR. McCRORIE: I move them into evidence, your Honor.

MR. COHEN: I object, your Honor. Improper foundation.

MS. GOLDER: I join.

THE COURT: Over the objection of defense counsel, what's previously marked as Plaintiffs' 38 and 39 for identification is now so marked as having been moved into and received in evidence as 38 and 39, Plaintiffs, and the exceptions of both counsel are noted.

(Whereupon, Plaintiffs' Exhibit Numbers 38 and 39, blowups of July '99 M.R.I.s, were received in evidence and marked.)

THE COURT OFFICER: So marked as

indicated.

Q We could take down the dermatome chart and the other M.R.I. behind it or we can put these up right next to it. That's fine. Thank you.

Doctor, we will put 38 on the left and 39 on the right; and if I ask you to mark anything, it will be with the blue pen, blue marker.

Doctor, looking at 38 -- withdrawn. Looking at 39 on the right, what, if anything, is significant about the C3-C4 disk level?

A The C3-4 disk level -- should I mark it out?

Q Yes. First tell the jury what is significant about the C3-4 level from the 1999 film?

A The C3-C4 disk level indicates an extrusion of discal material into the spinal canal up against the spinal cord.

Q Could you please circle that one on the right, which is 39, could you please circle that extrusion that you're talking about.

(The witness is complying.)

Q Right next to that write the word "C3-C4."

(The witness is complying.)

MR. McCRORIE: Thank you, Doctor.

Q Now, at the C4-C5 level, the level below

it, what, if anything, is significant?

A There is an extrusion of discal material into the spinal canal at the 4-5 level as well.

Q Okay. Please circle that and indicate where the 4-5 level is.

(The witness is complying.)

Q And what about at the C5-C6 level on the '99 films?

A The 5-6 level also indicates an extrusion of discal material into the spinal canal.

Q Can you please indicate where the C6 level is.

(The witness is complying.)

Q Doctor, in the film next to that, 38, you don't appear to see the C3-C4 herniation. Is it still there?

A Yes, the herniation is still there.

Q Please circle where the C3 -- well, withdrawn.

Please indicate on 38, Plaintiffs' 38, where C3-C4, C5-C6, all of the levels you have previously indicated for the jury, and tell us what you're indicating?

A We normally count down from the top. C2 is always very easy to see, so we use C2 to count

from. That's C2. This is C3. Below that, C4.

Q And where is the extrusion at C3-C4?

A You see an edge of the extrusion here.

Q And how do you explain only seeing an edge where we see it in full on the view right next to it?

A These represent multiple cuts or sections through the neck taken at different depths as you go across the neck from side to side, and what happens is this and this little shadow area down here tells you where that particular cut is taken.

As it cuts across the neck, different areas of that disk herniation come into view. So it's like looking at it from different angles.

Q Doctor, can I stop you.

If one were to look at the C3-4, one might miss the herniation if they didn't look at all the levels? You can miss a herniation; correct?

A Yes.

Q Okay, continue, please.

A This is the C5 level.

Q Do we see the protrusion you spoke about on this?

A Yeah, it's right here.

Q And just make sure you leave some space

after the protrusion so you don't cover it with the pen.

How about the C5-6 level, do we see a protrusion in the '99 films?

A Yes, we do. There is also discal material observed here protruding behind the C5-6 level.

Q What does the term "contiguous" mean?

A Contiguous means a part of or joined to.

Q Is the material at the C5-C6, the disk material that you just testified, is that contiguous with the disk material?

A Yes, it is. It's absolutely the same piece of material.

Q Just don't draw on that because we'll need it for the other witnesses.

Do you see any osteophyte pressing at the C5-C6 level into the thecal sac?

A There is no osteophyte visible at 5-6, at the 5-6 level.

Q We're going to get to the surgery a little later.

When you did the surgery, you could actually see the C5-6 level?

A Yes.

Q Were there any osteophytes, other than the

M.R.I.s, when you physically looked at the C5-6 level?

A No.

Q So if a doctor were to come in here and testify that not only does he see them in '99 and that's what was pushing in there, he would be incorrect according to you?

A Yes.

Q The man who actually went in and saw the neck; correct?

A Yes.

THE COURT: May the doctor be seated?

MR. McCRORIE: Yes. Doctor, thank you.

Q Were the risks of surgery explained to Mr. Rivera?

A Yes.

Q And is that an elective surgery?

A Yes.

Q What does elective surgery mean?

A Elective surgery means that it's not life or death. It's something where we sit down together and both the patient and I go over the good things about surgery and the bad things, and then that

allows the patient an opportunity to make a decision about whether or not they want to undergo an operation.

Q What are the risks of an anterior cervical diskectomy and fusion? We are going to discuss what those words mean. What are the risks? What were they as described to Mr. Rivera?

A The risks of surgery are essentially the risks of any surgery because they involved anesthetic and a general anesthetic; and the risks of any general surgical procedure are the risk of anesthesia, the risk of infection, the risk of bleeding, the risk of having a medical problem happen either after or before the operation.

The risks specific to cervical disk surgery involve the risk of neurological damage because of the surgery, the risk to the overlying structures within the neck itself, the esophagus, the windpipe, the vertebral arteries. Since I'm doing a fusion, gluing the bones together, there is a risk that fusion may not heal and that it may need to be redone. There is also a risk that since I'm altering the mechanics of the neck, that the levels that are adjacent to that area that are operated on may degenerate over time and require another

operation.

Q Doctor, I'm sorry. Are you done?

A Yes.

Q Was another M.R.I. -- withdrawn. We know the other M.R.I. was done. Did you ever see the M.R.I. of 6/29/2001?

A Yes.

Q Doctor, I'm going to put up Plaintiffs' 25 in evidence.

Doctor, Plaintiffs' 25 in evidence is the 6/29/01 film. The levels are already marked.

With your blue pen, can you please indicate -- withdrawn. What was significant on your interpretation of the 6/29/01 films with regard to what was previously called the giant herniated disk at C3-C4?

A The M.R.I. from 6/29/01 shows us that there has been resorption of that extruded material at C3-4.

Q Tell them what that word means?

A That means the body has kind of eaten up that material and dissolved it from within the spinal canal so that you no longer see that material in there.

Q And is the disk still herniated?

A The disk itself remains damaged and herniated with the exception of that material that's been resorbed from the cervical canal.

Q And please indicate on any of the views where the C5-C6 level is, the level you did the surgery at a month after this M.R.I.

A Sure. This is the --

Q Could you circle that, please.

A This is the 5-6 level down here.

(The witness is complying.)

Q Why did you do the surgery at the C5-C6 level, Doctor?

A Prior to the surgery itself, that was his most symptomatic level.

Q Tell them how you know the C5-C6 was symptomatic prior to the surgery?

A His hand complaints, his arm and hand complaints.

Q And the jury has already seen a dermatome chart. Why would hand complaints be significant in talking about a C5-C6 -- withdrawn, because I'm going to use a word. You said these were protrusions. Are they herniations?

A Yes.

Q Is it a herniation at the C5-C6 in July of

'99 according to your interpretation before you even did the surgery?

A Yes.

Q And is there a herniation at the C4-C5 on the other films that we looked at, the '99 films?

A Yes.

Q And is there a herniation on the '99 films at the C3-C4 level?

A Yes.

Q And are there herniations at all three levels at the 2001 films?

A Yes.

Q Do you see any osteophytes at C4-C5 on Plaintiffs' 25, 2001?

A No.

Q If an osteophyte happened to be there, is it ever possible that the osteophyte got knocked off by a new herniation and fell down the spinal canal? Is that even possible?

A No.

Q Can an osteophyte be knocked off and fall down the spinal canal?

A No.

Q So you would also disagree if another doctor were to come in here and say that what we

looked at on Plaintiffs' 25 is not a herniation but osteophytes that are pushing in on the spinal canal?

A Yes.

Q How about disk desiccation on the older films? Did you note any disk, significant disk desiccation at the C5-C6 level on the films from '99?

A Disk desiccation is not present on the '99 films.

Q How about at the 3-4 or the 4-5 levels?

A No, there is none.

Q And how about at the ones you just marked, Plaintiffs' 25, the 2001, is there significant disk desiccation, yes or no, at the 3-4?

A No.

Q The 4-5?

A No.

Q The 5-6?

A Disk space collapse with a mild amount of desiccation at C5-6.

Q Can the disk space narrow through trauma, say, a head hitting a windshield at a high speed?

A Yes.

Q And if a disk had been herniated a year before and it took a year because of authorizations

to get an M.R.I., could the disk get narrow within that year?

A Yes.

Q Doctor, did we go over several illustrations when I met with you that would aid you in discussing what a cervical anterior diskectomy is?

A Yes, we did.

MR. McCRORIE: Your Honor, for identification only, previously shown to defense counsel, I would like these marked as Plaintiffs' 40 and 41 for I.D. only.

THE COURT: Deemed for identification only.

MR. McCRORIE: They are deemed 40 and 41.

MR. McCRORIE: I don't know which one is 40 and 41.

Q Using Plaintiffs' 40 first, and we'll mark them later for identification, please put it up with the other and you can stay at your seat and just describe what we see.

What are we looking at there, Doctor?

A We are looking at two vertebral bodies with a disk being removed in the middle of those

vertebral bodies.

Q Obviously, that disk is a herniated disk?

A Yes.

Q How do you remove the disk once you get into the neck, and we are going to go through your operative report, but how do you remove the disk?

A You take some very small instruments that can fit into the disk space and then start to kind of pick away and remove portions of discal material. When you have removed about a half of it or so, you bring a microscope into your operation and then use a microscope to remove the portions that you actually can't see with your eyes until you get all the way back into the spinal canal where the spinal cord is.

Q And then do you take the disk out to relieve any pressure on the spinal cord?

A Yes.

Q Plaintiffs' 41 looks like there is a drill involved. Please tell the jury what happens to someone's vertebral body once the disk is out?

A After the disk is removed, what I do is take a drill with this rotating drill bit bur on the outside of it and then bur down or remove the upper and bottom most portion of that vertebral space to

prepare that space to accept a bone graft or a cage or something to keep that space separated and glue the bones back together again. This is the fusion portion of the procedure.

Q And the patient is under anesthesia obviously?

A Yes.

MR. McCRORIE: Plaintiffs' 31, the record of St. Vincent's Hospital, is already in evidence, your Honor. I'd like these deemed and we can mark them later 31-A, B and C, the operative report.

THE COURT: So deemed.

Q Doctor, I'm going to put the operative report up and maybe you can stand and just explain, go through the surgery as it was done on Mr. Rivera on July 16, 2001.

Well, first of all, this is your report just unsigned?

A Yes.

Q And you dictated that report?

A Yes.

Q Please tell the jury what procedure was performed, first of all, and you can, if you need to point, you can point with the marker.

A Sure. The procedure performed was an anterior cervical diskectomy and fusion with plate and prosthetic spinal device, bone graft, intraoperative fluoroscopy, intraoperative somatosensory-evoked potential monitoring.

Q We have already spoken about the fusion, the plate. What is intraoperative fluoroscopy?

A That involves using an x-ray machine during the operation to make sure that I'm at the appropriate level and the instrumentation that I put in there is where it has to be, where the screws need to be and where the actual plate and devices are so that I know I have done the job that I think I have done.

Q And the word under, intraoperative somato --

A Somatosensory-evoked potential monitoring.

Q What does that mean?

A That is during the case I have a neurological technician hook the patient up to a computer that monitors their brain and their spinal cord during the case and that does two things. Number one, it tells me that I'm not doing anything bad to their spinal cord during the procedure, and it also tells me if and when I relieve pressure, if

I have done a good job of relieving pressure.

Q Doctor, the anesthesia is called -- what is that right there, the word?

A General endotracheal.

Q Just tell the jury what type of anesthesia that is, general?

A It means the patient is put to sleep and the anesthesiologists are breathing through a tube for them.

Q What was your preoperative diagnosis and postoperative diagnosis?

A Preoperative diagnosis is cervical spondylitic myelopathy, and the postoperative diagnosis is the same.

Q And I know it's on the page after this, but what level did you do the fusion at?

A C5-6.

Q Why didn't you do the other levels that you say are still herniated at the time you did the C5-C6?

A What I like to do is, generally, my philosophy regarding surgery is to do the least amount of surgery for the most good. So I usually operate on the level that's the most symptomatic. You can operate on all these levels, but the more

surgery you do, the more you increase your postoperative complication rate and the more you may increase the chances of having degeneration below the areas that you have operated on because you're making a stiffer, longer cervical spine.

Q Prior to the second M.R.I. of June 2001 did you know which level you were definitely going to operate on?

A Say that again, please.

Q Prior to looking at the second M.R.I. where we see that the C3-C4 previously called giant had sucked some of itself back in, had you known exactly which level you were definitely going to operate on?

A No.

Q And is that why the second M.R.I. was useful to you?

A Yes.

Q Please continue with -- actually, you could skip it if it's very basic, but please go through the operative report.

A Sure.

Q And what you dictated?

A Okay. So I start off with an indication of why I'm doing the procedure which essentially

says that I'm operating on a 48-year-old gentleman who has had difficulty with his hands, dropping some objects, and weakness in both his hands and upper extremities.

Physical examination was significant for what's known as a Lhermitte's sign and positive pathological reflexes.

Q What are Lhermitte's signs?

A Lhermitte's signs basically when you move the patient's neck, if you put pressure on their cord or their nerve roots, you can stimulate electrical sensations going into the hands. It's what we call a provocative test to tell you you are operating on the right thing basically.

Q And just to move it along, it just states here he was put up on the operating table, and anything you feel is significant you can please read to us.

A Basically, after the patient is positioned, I do an approach to the cervical spine which involves splitting the muscles of the neck, getting down to the area of the neck that we are interested in operating on, confirming that I'm at the right level with the fluoroscopic picture.

After that's done, I put all my retractors in

there to hold everything open so that I can do the procedure without having to hold on to things. I remove the disk. I fashion the end plates with the bur, as we saw before. I then take the instrumentation and bone graft, size it so that it fits his neck and his bones, place it down onto his neck and his bones, take a confirmatory fluoroscopic view after that. If everything looks great, close the wound that I have created and then wake him up and bring him to the recovery room.

Q Please describe in more detail the spinal prosthetic mesh cage?

A That is a spacer that you fill with bone graft. It looks a lot like chicken wire. It's very small. It's very light. It's hollow on the inside, and it has a lot of holes in it so you can fill that up with bone graft. It keeps the vertebral bodies apart and gives the bone graft that's on the inside that you put in between the vertebral bodies a chance to heal while helping give the neck immediate stability so that they can cough, sneeze, move around after the operation and not have to worry about having your neck fall apart.

Q And the spinal needle that was put into him, that was just for purposes of the

intraoperative fluoroscope?

A The needle is the first thing I put into the disk to localize that disk. If I'm at the wrong level, the needle doesn't do any damage and I can make sure I go to the right level.

Q And this next page is telling us he was sutured then?

A Yes.

Q Doctor, I'm going to ask you some hypotheticals, and then we are almost through.

Assume with regard to the first M.R.I. of July of 1999, assume that Mr. Rivera was in a head-on collision where he came up out of his seat and hit the windshield of his truck after a head-on collision. He was not belted.

Assume that he had immediate onset of neck pain that he had never had before. Assume further he had never been to a neck doctor. There are no records of any doctors that he had ever been to; that he had previously been able to work and provide for his family.

Assume further that he started treating with a doctor -- withdrawn. Assume that he went to two emergency rooms complaining of neck pain. Assume further that he had pain in his arms in a clinic

five days later and that a few months after that he started treating with Comprehensive Care of New York for radiating pains down his arms and that he had never had this beforehand.

Assume further after authorization is given the M.R.I. is done and it shows the herniations. Let's just speak about the 3-4 one, the giant one.

Do you have an opinion with a reasonable degree of medical certainty as to the cause of the C3-C4 herniation as it existed on the July 6, 1999 M.R.I.?

A My opinion with respect to the C3-4 disk herniation and that M.R.I. is that the motor vehicle accident that he was in was the cause of that giant disk herniation.

Q All of your opinions, Doctor, will be with a reasonable degree of medical certainty unless you state otherwise.

How about at the level below it, the C4-5? What is your opinion with regard to that as to the cause?

A The C4-C5 disk herniation was caused by the accident.

Q And how about in July of '99, the C5-C6 herniation that you testified to, what was the cause of that?

A The C5-C6 herniation was caused by the accident.

Q Doctor, assume further that Mr. Rivera continues treating, continues feeling pain and weakness in the extremities and radiating pain down his arms for another two full years. Assume he had a minor car accident and that the symptoms hadn't changed from before the car accident in April of 2001 until after the car accident in 2001, and they didn't change up until the time the second M.R.I. is done on June 29th, 2001.

Do you have an opinion -- withdrawn. And assume further that the car accident didn't require emergency room care and that Mr. Rivera, in fact, waited to even speak to his doctor about it until his regularly-scheduled Workers' Compensation approved appointment a few days later spaced out.

Do you have an opinion with a reasonable degree of medical certainty as to what the cause of the C3-C4 herniation is as it exists on the June 29, 2001 M.R.I.?

MR. COHEN: Your Honor, I object to the phraseology in the hypothetical.

THE COURT: If the witness understands, I will allow it.

Q Does your opinion change with respect to the herniation, the cause of the herniation at the C3-C4 level with a reasonable degree of medical certainty on the second set of M.R.I. films that you reviewed?

A My opinion does not change, no.

Q How about at the C4-C5 level, does your opinion change with regard to the herniation at C4-C5, the cause of it?

A No, it does not.

Q What is your opinion, for the record, I know the jury knows it, but for the record the cause?

A That the primary motor vehicle accident was the cause of the herniated disks.

Q What date would that motor vehicle accident be, the April 2001 or the July 14, 1998?

A July 14, 1998.

Q And how about the herniation at C5-C6 as it exists on June 29, 2001, the one you say has no osteophytes and has contiguous disk material pushing outward, what would be the cause of that with a reasonable degree of medical certainty?

A Also the July 14, 1998 accident.

Q Now, had the herniation not been there and

had there been a new car accident, just knowing those facts in and of themselves, you wouldn't be able to state with certainty that the cause was the first accident?

Assume Dr. Sprecher's report is correct and there is nothing wrong. So assume it's not as you say it is and it's not as Dr. Kolb says it is. Assume it's wrong and Dr. Sprecher's report is correct and now a herniation shows up and there is a car accident, minor or not minor, would you be able to state with a reasonable degree of medical certainty as to what the cause was?

A No, I would not.

Q What is your prognosis with regard to Mr. Rivera's neck condition?

A My prognosis with respect to his neck is guarded.

Q And what about the levels above it that haven't been operated on, the two herniations that haven't been operated on, with a reasonable degree of medical certainty, and we know there is no crystal ball and that's why we do it with a reasonable degree of certainty, what is your opinion as to whether Mr. Rivera will require surgeries at those levels?

A My opinion is that those levels need to be watched over time to see whether or not they progress into symptomatic levels or incur a neurological problem.

Q And do you have an opinion with a reasonable degree of medical certainty as to whether he will need surgeries at those levels?

A It is my opinion that as he ages the probability of him requiring further surgery is good.

Q "Good" meaning likely or unlikely?

A More likely than not.

Q And at which levels would that be?

A Either 3-4 or 4-5.

Q And, again, we discussed those other levels above, do the levels below the 5-6, is there any prognosis with regard to them? Does the fact that a surgery has been done above them affect, have any affect with a reasonable degree of medical certainty?

A The levels below are also at risk, but having two damaged levels up on top of the area where the fusion is, it's more likely that those levels will cause a problem in the future.

Q With regard to Reynauld Rivera going back

to the work force and driving, we're just speaking about working as a driver, would it be advisable, with a reasonable degree of medical certainty, for a man who has had the prosthetic plate in his neck who still has two herniations, is it advisable for him to stop working in a job where he would need to keep his head erect for hours at a time?

A Yes, it is advisable for him to stop that.

Q How about any type of manual labor, assuming he's required to work for hours at a time?

A I would not recommend manual labor.

Q How about working on a computer or talking on a phone, assuming he has to work for hours at a time and is not given the opportunity to break whenever he wishes?

A That's also pretty difficult having this type of a condition.

Q Would you expect, with a reasonable degree of medical certainty, into the future for a man who has the injuries as you have described and who has had the surgery as you have described to have pain after sitting for periods of time?

A Yes.

Q And how about after standing for periods of time?

A Yes.

Q How about lifting or bending?

A Yes.

Q How about sudden movements of the neck?

A Yes.

Q Or repetitive movements of the neck?

A Yes.

Q For what period of time with a reasonable degree of medical certainty would you anticipate Mr. Rivera will continue to feel pain to the areas injured in the accident of July 14, 1998, albeit sometimes better than worse but pain?

A I would anticipate that he may have pain for the rest of his life.

Q And for what period of time -- okay, withdrawn.

How much did the surgery cost, forgetting about who paid for it?

A $7,800.

Q In the future if Mr. Rivera needs to pay for his surgery, how much will it cost, assuming the cost of living increase, but each surgery would be $7,800?

A Yes.

Q How much is a follow-up visit at your

office?

A Between $75 and $110.

Q And with a reasonable degree of medical certainty, how long would you anticipate Mr. Rivera will have to follow-up or -- withdrawn.

How long should he follow-up, assuming he continues his medical care, how long should the intervals be to follow up with you to monitor his neck condition?

A He should be seen at least quarterly and maybe more.

Q Quarterly, four times a year?

A Four to five times a year.

Q How about future physical therapy, with a reasonable degree of medical certainty does Mr. Rivera require future physical therapy?

A Yes, I would say so.

Q And for what period of time would he require future physical therapy?

A He would require physical therapy really for the life of his neck.

Q Does the plate and prosthetic device that is in Mr. Rivera's neck limit his movement at all, his range of motion?

A It restricts range of motion at the C5-6

level.

MR. McCRORIE: I have no further questions, your Honor.

THE COURT: Mr. Cohen.

MR. COHEN: Yes. Thank you, Judge.

CROSS-EXAMINATION

BY MR. COHEN:

Q Good afternoon, Doctor. Lucky I'm tired so we are going to try to move through this as quickly as possible.

Now, when you drafted your report for Mr. McCrorie, your report that's August 13, 2001 -- it should not be in your file.

MR. McCRORIE: No, his report is here.

Q I'm going to hand it to you and ask you to review it if you need to to refresh your recollection, but you can't read it and please don't put it in the file because it's not in evidence.

Now, in your report you noted M.R.I. of the lumbosacral spine showing a disk herniation at L4-5 and a bulge at L5-S1; correct?

A Yes.

Q And let me ask you a question. Do you have any way of knowing with medical certainty based

upon your care and treatment of Mr. Rivera whether the disk herniation at L4-5 and the bulge at L5-S1 preexisted the accident of July 14, 1998?

A It's difficult to say precisely, yes.

Q Okay. Difficult to say whether it preexisted or whether it came because of the accident; correct?

A Yes.

Q Would you agree, sir, that people can have bulges and herniations in the lumbar spine without symptoms?

A Yes.

Q And if we assume that to be the case, would it be a true statement that the fact that Mr. Rivera did not have prior lumbar symptoms would not be conclusive of whether the herniation and bulge was there before the accident; correct?

A I don't know if I exactly understand what you're asking.

Q Let me withdraw and rephrase the question.

People can have herniations and bulges in the lumbar spine with symptoms and without symptoms?

A Yes.

Q So if I asked you to assume that prior to

the July 14, 1998 accident Mr. Rivera had no lumbar symptoms would the fact that he had no lumbar symptoms be conclusive on the issue of whether the herniation at L4-5 and the bulge at L5-S1 was there prior to the accident?

A It's not conclusive.

Q So he could have had it even if he had no symptoms; correct?

A Sure.

Q And certainly that would be true if he did have symptoms prior to the accident; correct?

A Sure.

Q In fact, would it make it more likely that the herniation at L4-5 and the bulge at L5-S1 preexisted the accident of July 14, 1998 if indeed Mr. Rivera had lower back symptoms prior to that accident?

A With symptoms it would be more likely.

Q Now, sir, during the period of time that you treated Mr. Rivera from February when you first saw him until your August 13, 2001 report to Mr. McCrorie, the lower back was not symptomatic; correct?

A His lower back was not the substance of what I was treating Mr. Rivera for.

Q That's not what I asked you. You did a report to Mr. McCrorie, did you not?

A Yes.

Q And in your report I believe you noted that the lower back was not symptomatic; correct?

Take a look at Page 4. See if that refreshes your recollection.

A Correct, yes.

Q So during the six months from February '01 to August 15, '01, Mr. Rivera, although it was not the focus of your attention, he had no symptoms in the lower back; correct?

A Yes.

Q And, sir, even though it wasn't the focus of your attention, you did do some examination of the lower back; correct?

A Yes.

Q And I believe you said that the range of motion of the thoracolumbar spine was fluid; correct?

A Yes.

Q What is the thoracolumbar spine? I may be pronouncing it wrong. I have a tendency. Is that correct, thoraco?

A Thoraco.

Q Tell the jury what the thoracolumbar spine is.

A It's the upper portion of your back and the lower portion of your back as it goes down into your pelvis and leg area.

Q And what does it mean when you say that the movement was fluid?

A It means he was able to perform a range of motion without any interruption in that range of motion.

Q Interruption due to something like pain; correct?

A Yes.

Q And there was also good range of motion of the hips, the knees, the ankles and the feet; correct?

A Yes.

Q Even though that wasn't the focus, I know, of your effort.

Now, you did straight leg testing on Mr. Rivera; correct?

A Yes.

Q Straight leg testing relates to the lumbar spine; correct?

A Yes.

Q Tell the jury, just quickly, what straight leg testing is?

A It's extending the leg at the knee and at the ankle so that you can try to put some stress on the nerves that go into the leg, basically the sciatic nerve, to see if it's irritated or problematic.

Q When straight leg testing is positive, it suggests some nerve root irritation in the lumbar spine; correct?

A Yes.

Q And you did this test on Mr. Rivera and the straight leg testing was negative bilaterally; correct?

A Yes.

Q So there was no nerve root irritation, based on your test, on the left or on the right?

A Yes.

Q Now, you also tested deep tendon reflexes on the lower extremities; correct?

A Yes.

Q And why would a doctor do that? What are you looking for?

A To see if there are any problems with any of the nerves going into his legs.

Q And I believe that the reflexes were brisk in both quadriceps, sir?

A Yes.

Q And in the Achilles as well?

A Yes.

Q So again there were no abnormal findings on your test?

A Yes.

Q Tactile sensation was intact; correct?

A Yes.

Q What does that mean, tactile sensation?

A That means when I touch him and ask him if he can feel me touch him in his lower legs he says yes and I couldn't detect any sensory abnormalities.

Q And sensory abnormalities in the case of the lower legs, the extremities, would stem from the lumbar spine; correct?

A Yes.

Q But everything there was normal; correct?

A Yes.

Q And then there were no focal deficits or deficiencies otherwise appreciated; correct?

A Yes.

Q So then based on your exams of Mr. Rivera and his visits with you, there were not only no

complaints relating to the lower spine, but there were no findings that you made with respect to the lower spine; correct?

A Yes.

THE COURT: What's the date you are reading from, Counselor?

MR. COHEN: I'm sorry?

THE COURT: The date you are reading from.

MR. COHEN: I'm reading from my notes.

THE COURT: Would you direct a date to the doctor so we can have a chronology.

MR. COHEN: Yes.

Q Doctor, we are talking about over the course of your treatment from when you first examined Mr. Rivera in February of 2001 up until the time that you rendered your report to Mr. McCrorie in August of 2001. Was that your understanding, sir, when you testified?

A Yes.

Q Okay. Now, Doctor, in regard to the cervical spine, we'll move past the lumbar spine and talk about the cervical spine, you told the jury that there was an M.R.I. report from Dr. Stanley

Sprecher dated July 6 of 1999 that you were provided with when the referral came from CCNY; correct?

A Yes.

Q And in your report to Mr. McCrorie you note that according to Dr. Sprecher we have a large herniation at C3-4; correct?

A Yes.

Q There is some protrusion at C4-5; correct?

A Yes.

Q And there are no findings with respect to the disk at C5-6; correct?

A Uh-huh.

Q In fact, the doctor found no herniation and no bulge at 5-6; correct?

A By report.

Q Sorry?

A By report, yes.

Q By report. And it's your testimony, sir, that you then went and took a look at those films; correct?

A Yes.

Q And when you had to look at those films you determined that in your opinion Dr. Sprecher was wrong at C4-5 and there was really a herniation there; correct?

A Yes.

MR. McCRORIE: At C5-C6.

MR. COHEN: No, I said 4-5.

Q You also determined at C5-6 Dr. Sprecher was wrong when he said that there was no herniation or bulge and you said that there was; correct?

A Yes.

Q Now, certainly these films were available to you before the surgery in July of 2001; correct?

A Yes.

Q So they would have been available to you at the time that you wrote your report to Mr. McCrorie; correct?

A Yes.

Q So when you discussed the M.R.I. studies in your report to Mr. McCrorie and you laid out what the findings were of the treating radiologist, the radiologist that the treating doctor asked for an interpretation from, you didn't say in that report that I disagree with Stanley Sprecher, did you?

A No, I didn't say I disagreed with him.

Q You didn't say there is a herniation at C4-5; correct?

A I said there is spondylitic changes.

Q Did you say there was a herniation like

you did today before the jury?

A Spondylitic.

Q Did you say there was a herniation, sir?

THE COURT: Yes or no.

A The word "herniation" was not used, no.

Q That's the word I'm looking for. That is at C4-5; right?

A Yes.

Q You didn't say at the C5-6 that there was a herniation there either; correct?

A Yes.

Q And you provided a diagnosis in your report, did you not?

A Uh-hum.

Q And I believe your diagnosis was a herniated cervical disk with giant extruded fragments at C3/C4; correct?

A Yes.

Q And, number two, cervical spondylitic myelopathy; correct?

A Yes.

Q In your diagnosis did you say that there were herniations at C4-5 or C5-6?

A No.

Q Even though you had reviewed the films by

this time and you disagreed with Dr. Sprecher about his findings at those levels?

A Yes.

Q Now, in your report to Mr. McCrorie you note also that the surgery that you did represented a stabilization of the neck as well as the injured C3-4 herniated discal segment; correct?

A Yes.

Q Did you mention in that paragraph that there was any injury to the disk at C4-5?

A Which paragraph are we talking about?

Q The last paragraph on Page 3.

A "Likelihood of future surgery"?

Q Yes. My question to you, Doctor, is, did you mention when you were discussing the injured C3-4 disk that there was an injury at C4-5.

A No.

Q Did you mention when you were discussing the injury at the C3-4 disk an injury at C5-6?

A No.

Q And, Doctor, on the last page when you discuss your ultimate findings, your findings were of a rather large cervical disk herniation with concomitant cervical spondylitic myelopathic disease; correct?

A Yes.

Q And that's at C3-4; correct?

A That's the entire spine.

Q The rather large cervical disk herniation that you referred to is the giant disk herniation that was seen on the '99 M.R.I. film at C3-4; correct?

A That's the giant disk herniation, yes.

Q And that's the rather large cervical disk herniation you're referring to in your report; correct?

A Yes.

Q Your report doesn't refer to any disk herniation at C4-5; correct?

A Correct.

Q And it doesn't refer to any herniation at C5-6 either; correct?

A Correct.

Q Now, did Mr. McCrorie tell you before you went on the stand that there was testimony previously about the findings of Dr. Sprecher and disagreements among the doctors as to what those findings were?

A We talked about disagreements amongst M.R.I. findings, yes.

Q That would include the findings at C3-4, C4-5, C5-6 on the '99 films interpreted by Dr. Sprecher; correct?

A Yes.

Q It's your testimony that you always felt that there were herniations at all three levels, it's not something that you just came up with before you got on the stand today; correct?

A Right.

Q Even though none of that is mentioned in the written report that you did for Mr. McCrorie in August of 2001?

A It is in the written report.

Q In the form of myelopathic disease?

A Yes.

Q Not in the form of herniation at C4-5 or herniation at C5-6?

A Correct.

Q Not in the form of I disagree with Dr. Sprecher's findings, I see something else?

A Correct.

Q Now, you had the M.R.I. films from June 29 2001 before you did the surgery; correct?

A Yes.

Q And we know that those films did, in fact,

show a herniation at C5-6; correct?

A Which film is that?

Q The 2001 films.

A Yes.

Q Showed a herniation at C5-6?

A Yes.

Q And I believe under Mr. McCrorie's questioning he asked you if you assume that Dr. Sprecher is correct and that there was nothing wrong at C5-6 in '99, you couldn't state with medical certainty that the subsequent automobile accident didn't cause the herniation that you see on the 6/29/01 film; correct?

A Yes.

Q All right. So just to restate then, if the findings of the radiologist, Dr. Sprecher, who interpreted the '99 films for the treating neurologist is correct and that there was no herniation at C5-C6 and no bulge at C5-C6, then it would be impossible for you to say with medical certainty that the herniation that you operated on in July of -- I'm sorry -- 2001, wasn't caused by the second automobile accident?

A Yes.

MR. COHEN: Okay. Your Honor, may I

just approach because I wanted to get behind the witness to those exhibits.

THE COURT: You may.

MR. COHEN: Excuse me one second, my back, please.

(Brief pause in the proceedings.)

MR. COHEN: Judge, I'm sorry. I'm looking for 26.

MR. McCRORIE: Number what?

MR. COHEN: 26. Judge, I'm sorry. I can't find it, Number 26.

MR. McCRORIE: Some are marked on the back. It's a three-view one, so it's got to be a big one.

(Brief pause in the proceedings.)

(The clerk has brought it in.)

THE COURT: Is that it, Counselor?

MR. COHEN: Yes. Thank you, your Honor.

If I may.

THE COURT: You may.

Q Doctor, with respect to the large herniated disk at C3-4 that existed in July of 1999 pursuant to Dr. Sprecher's interpretation, it was your testimony, I believe, on direct examination

that there was some resorption of that disk material so that the body actually either resorbed it or it dried out and came back in a little bit?

A Yes.

Q Referring to Plaintiffs' 26 in evidence, which would be the June 29th, 2001 M.R.I. studies, and specifically the middle image because this is something that one of the other doctors talked about, you see the C3-4 level?

A Yes.

Q And there is a disk material between the vertebra C3 and the vertebra C4; correct?

A Yes.

Q And we've got the spinal cord, which is the light gray straight line running down the middle; correct?

A Yes.

Q Now, do you see, Doctor, any impingement from the C3-4 disk on this film on the spinal cord itself?

A Yes.

Q Okay. Now, can you point that out to the jury?

A Sure.

(The witness is complying.)

MR. McCRORIE: Just indicating using the blue pen, just for the record.

A This is -- you know, can I make a point about this M.R.I. image just to clarify?

Q Sure.

A On this M.R.I. image you'll notice this portion of it where the cord is and the canal has a dark line around the spinal cord and the other images have a very bright line around the spinal cord. This particular imagine, it's a T-2 image, so it's weighted to pick up fat and fatty changes, and it's not as good for picking up cervical spinal fluid like the other images are, so the findings here, it's a little bit more difficult to see from far away because although the thecal sac is indented and impingement is occurring here, you don't get a sense that it's a major type of impingement. It's what we call a T-1 weighted image, but you can see discal material coming beyond the borders of the cervical vertebral bodies into the spinal canal in the area where the sac that contains the cord is.

Q So the impingement that you see between 3 and 4 on the Exhibit 26 would be material, disk material, coming into the thecal sac?

A Into the thecal sac area.

Q And we know from other doctors, and correct me if I'm wrong, the thecal sac houses the cerebrospinal fluid?

A Yes.

Q And it represents the space or the canal between the disks and the vertebra on one side and the cord on the other side; correct?

A Yes.

Q And you can have disk material which impinges on the sac; correct?

A Yes.

Q You can have disk material which impinges on a nerve root; correct?

A Yes.

Q And you can have disk material which impinges right past the sac into the cord; correct?

A Yes.

Q Now, the original interpretation of the cervical spine from the '99 films showed impingement from the material right through the thecal sac into the cord itself; correct?

A Yes.

Q This film, however, two years later shows that the disk material having resorbed partially is impinging on the sac but not on the cord itself;

correct?

A There is actually --

Q Let's go by this.

A Yes.

Q That's what that shows?

A Yes.

Q This is the one we talked about. Are you suggesting on this one you can see a little bit?

A There is a little bit on that section.

Q I'm sorry for my back.

A There is the border of the spinal cord that I'm outlining with the tip of the blue pen and that's 2, that's 3, that's 4. This you can see. There appears to be something that's coming up alongside the cord there at 3-4.

MR. McCRORIE: Just for the record, indicating and making a marking on the third image to the right on Plaintiffs' 26 with a blue pen.

THE COURT: So indicated.

MR. COHEN: He didn't make a mark.

THE COURT: So pointed.

Q So, Doctor, if we focus on the middle image, we have an impingement on the sac but no impingement on the cord, and if we focus on the

right we have a little impingement on the cord. In either case, this represents a vast improvement over what we saw from 1999; correct?

A Yes.

Q And that was based on resorption of the body at C3-4; correct?

A Yes.

Q And Mr. Rivera's body did that on its own without any surgical intervention?

A Yes.

Q Now, I'm almost done. I just wanted to ask you, you mentioned in your report there were EMG studies done on July 14, 1999; correct?

A Yes.

Q And those EMG studies were done both with respect to the cervical spine and the lumbar spine; correct?

A I'm just checking. Can you focus me on a page, please?

Q I'm sorry. It's Page 3, sort of like down the middle, a little bit lower.

A Yes, nerve conduction EMG studies.

Q Did they provide you, by the way, CCNY, with the EMG report?

A Yes, I have a copy of the EMG graphs, yes.

Q And the EMG study for the cervical spine showed that it was normal?

A I don't know if I have the cervical EMG.

Q It's in evidence, so I can show it to you, sir.

A Okay.

MR. COHEN: Your Honor, can I show the witness my copy?

MR. McCRORIE: That's fine.

Q Sir, hold it to yourself. I have highlighted it and I have numbers. I don't want the jury to see that.

MR. McCRORIE: Just so the record is clear, it's in 36, CCNY.

MR. COHEN: It's in that file, yes.

A Okay.

Q Now, the EMG study that was done with respect to the cervical spine one year after the accident exactly on July 14, 1999 showed that everything was normal; correct?

A Yes.

Q There was no evidence of any nerve root irritation or nerve root injury in the cervical spine; correct?

A By electromyography, yes.

Q And, in fact, if we focus on C5-6, this finding of electromyography study on July 14, 1999 would be consistent with Dr. Sprecher's finding of no disk herniation and no disk bulge at C5-6; correct?

A That's a tough question to answer. Can I explain why?

Q Sure.

A Okay. EMG studies are excellent studies for looking at peripheral nerve entrapment. They are beautiful for doing that. An EMG involves putting needles into the arms and legs and then looking at how the nerves in the arms and legs function. It's not very good for picking up cervical or lumbar nerve root problems, so we never use it in terms of ruling in or ruling out cervical or lumbar nerve root damage.

In fact, I only use it to make sure that I don't have a concomitant nerve root problem in the arm or the leg that may be masquerading as a cervical or lumbar radiculopathy, so to answer that question that it is or is not consistent with that, I can't. I mean, that's a tough question to say it is or it isn't.

Q I get it. I got it. So you can have

false negatives, if you will, with EMG studies?

A Yeah, you can have a false negative or a false positive with an EMG.

Q Would you consider an EMG study to be the gold standard to determine if there is nerve root irritation?

A No, I would not.

Q So on the one hand a negative EMG study in the cervical spine would not necessarily mean no nerve root irritation in the cervical spine, correct, a negative EMG?

A A negative EMG in the cervical spine --

Q Would not necessarily in your opinion mean or correlate to no nerve root injury or no nerve root irritation?

A Yes.

Q And, likewise, a positive finding on EMG would not necessarily correlate to, again, a nerve root irritation or a nerve root injury; correct?

A It needs to be compared with the history and the physical.

Q What about the other diagnostic tests like an M.R.I.?

A M.R.I. is kind of a different story. It depends on what we are talking about with respect to

the M.R.I.

Q All right. Let's get off that because I don't want to get bogged down. I want to get done, and I know you want to leave and I know the Judge wants me to finish.

So would you agree that when Mr. Rivera first came to see you he had certain cervical complaints?

A Yes.

Q And in your report you mention bilateral upper extremity weakness as one of the complaints?

A Yes.

Q And he had pain radiating into his hands; correct?

A Yes.

Q And with neck movement there was also electric shocks going into both hands; correct?

A Yes.

Q Can we agree to call these the preoperative complaints that he had?

A Yes.

Q And you had done the surgery on July 16, '01; correct?

A Yes.

Q And would it be fair to say, Doctor, that within about five weeks after the surgery, according

to your records, Mr. Rivera's preoperative complaints had pretty much been significantly alleviated?

A Diminished, I think I said they were diminished.

Q It's in evidence. Take a look at your August 12, '01 note, if you would.

A Yes.

Q Pretty much, "Mr. Rivera's preoperative complaints have pretty much been significantly alleviated"; that's what you wrote?

A Yes.

Q That's about what, six weeks after the surgery; correct?

A Yes.

Q Would it be fair to say, Doctor, that at least to the extent that the preoperative complaints were pretty much significantly alleviated by the surgery, that the surgery got to the cause of those preoperative complaints?

A Yes.

Q Okay. And the surgery was done at C5-6; correct?

A Yes.

Q So if we go back to Dr. Sprecher's

interpretation of the '99 M.R.I. and we assume that that was true, would you agree, then, that you could not state with medical certainty that the preoperative complaints emanating from 5-6 or the operation done at 5-6 were causally related to the accident of July 14, 1998?

A Yes.

Q Okay. So that even if Dr. Sprecher is right, if Dr. Sprecher is right, the preoperative complaints at 5-6 and the operation at 5-6 to fix those complaints could have been caused by the subsequent automobile accident of March 29, 2001?

A If Dr. Sprecher is correct.

MR. COHEN: Thank you, Doctor. You know what, I'm going to end it there. I thank you. You're very kind. I appreciate it.

MR. McCRORIE: Does Ms. Golder want to question?

THE COURT: I'm going to ask her.

MS. GOLDER: One moment, Judge.

(Brief pause in the proceedings.)

MS. GOLDER: No questions, your Honor.

REDIRECT EXAMINATION

BY MR. McCRORIE:

Q Doctor, I promise to be very brief.

The report that's in evidence, the operative report, this too doesn't state that there is a herniated disk at C5-C6, the operative report. The diagnosis is spondylitic myelopathy; correct?

A Yes.

Q But it says you did a fusion at C5-C6; right?

A Yes.

Q And in your record, if I could just direct your attention, there is the pathology report from, it's also in evidence as the St. Vincent's. Is there a pathology report in here?

A Yes. Here it is.

Q What does the pathology report that's also in evidence in St. Vincent's or in evidence in your records, what does that state was going on with regard to herniations in C5-C6?

A It says, "C5-6 herniated nucleus pulposus, myelopathy, degenerated fibrocartilage."

Q And you also have an authorization that was requested by Mr. Cohen's office and you responded to that, you gave them your whole file; correct?

A Yes.

Q Or your office did?
A Yes.
Q And that's in your file?
A Yes.
Q That was dated August 2001 when you gave Mr. Cohen's office all of that about the herniated disk at C5-6?
A I believe so, yes.
Q Okay. Finally, we are just going to go to the sagittal views -- these will be the last questions -- Plaintiffs' 23 being the '99, and I'll keep Plaintiffs' 27 down, but they already appear to be marked, the C3-C4, C4-5, C5-6. Plaintiffs' 23 in evidence, the one on the bottom left, is that the C5-C6?
A Yes.
Q Okay. Do you see the herniation on the '99 film on the C5-C6?
A Yes.
Q Where is it? Is it where the other doctor indicated an arrow?
A Yes, it is.
Q A red arrow?
A Correct.
Q And that's in '99?

A Yes.

Q And we also see the one they call a giant?

A Yes.

Q Would you agree that that's a big herniation?

A Yes.

Q As big as they come?

A It's a frightening herniation, yes.

Q On the axial view as opposed to the other ones that look fine, is there a herniation at C4-5 in '99?

A Yes, there is.

Q When you go to the 2001 films --

THE COURT: What exhibit is that?

MR. McCRORIE: I'm sorry, your Honor. That is Plaintiffs' 27.

Q Is the C4-C5, is that herniation depicted here?

A Yes.

Q Now, we just looked at views of the sagittal views. Do you see the herniation at the C3-C4?

A Yes.

Q Do you see it better than you see it on the sagittal views?

A Yes.

Q At the C3-C4 level?

A Yes.

Q How about the C5-C6 level? I can't even see where that is.

(The witness is marking it.)

A C5-6, this is the 5-6 level here.

Q Is that the level that you took out?

A Yes.

Q And you're indicating that with a blue marker on Plaintiffs' 27?

A Yes.

Q So the reverse of Mr. Cohen's assumption. Assume now that Dr. Sprecher was wrong and the herniation was there in July of 1999 and there is a second accident and the herniation is still there in June of 2000.

Can you state with a reasonable degree of medical certainty that the cause of the herniation at C5-C6 was the accident of July 14, 1998, the first accident?

A Yes.

Q And was the reason you did the surgery?

A Yes.

MR. McCRORIE: I have no further

questions.

THE COURT: Mr. Cohen.

MR. COHEN: Yeah, Judge, just quickly.

RECROSS-EXAMINATION

BY MR. COHEN:

Q The 2001 films at 5-6, was there more of a herniation than there was in your opinion from the '99 film?

A Not really, no.

Q Was there impingement from '01 as opposed to '99?

A There is. Actually, we see impingement on both.

Q Is the impingement worse in '01?

A Not really, no.

Q So you would have operated at C5-6 based on the '99 films regardless of what was in the '01 films; is that your testimony?

A Matching that up with his complaints and symptoms and everything else, yeah, 5-6.

MR. COHEN: Thank you, your Honor. I have nothing further.

THE COURT: Ms. Golder?

MS. GOLDER: No.

MR. McCRORIE: Nothing, your Honor. I promise to get you your file back. That does need to remain.

THE COURT: Doctor, you are excused. You may stand down.

THE WITNESS: Thank you very much. Thank you.

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CERTIFIED to be a true and accurate transcription of the stenographic notes.

Catherine Mercorella
Senior Court Reporter