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March 23, 2005

CAMACHO, MOURO & MULLHOLLAND
350 Fifth Avenue
Suite 4702
New York, NY

Attn: Andrea Camacho, Esq.

RE: **WALSH v. BALDOR SPECIALITY FOOD, et. al.**
Our File#: (UN) 42811

Dear Ms Camacho:

Enclosed please find a xerox of the daily copy for the testimony given by Dr. Andrew Merola in the trial of the above captioned action.

Dr. Merola is a graduate of Howard University Medical School, in Washington, D.C. Plaintiff's counsel doesn't bring this out on direct, he wants you to bring it out on cross.

He is a white male, boyish in his manner and appearance and looks younger than his age (approximately 41). If you have any questions, give me a call. If I can be of any help, I be glad to.

Good luck. I remain,

Very truly yours,

Philip J. Smith

PJS:pjs
Encl.

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MAR 31 2005
CAMACHO MAURO MULHOLLAND, LLP

SUPREME COURT OF THE STATE OF NEW YORK

BRONX COUNTY : CIVIL TERM : PART 26

ROBERT WALSH and ANDREW WALSH,

Plaintiffs,

-against-

Index No. 23286/01

BALDOR SPECIALTY FOOD, INC., PUBLIC SERVICE TRUCK RENTING and VINCENTE BAUTISTA,

Defendants.

TRIAL EXCERPT

January 20, 2005

Bronx Supreme Court
851 Grand Concourse
Bronx, New York

B E F O R E:

HON. NELSON ROMAN, Justice

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

SACKS and SACKS
Attorneys for the Plaintiffs
150 Broadway
New York, NY 10038
BY: HOWARD R. BOROWICK, ESQ.

MORRIS, DUFFY, ALONSO & FALEY
Attorneys for the Defendants
2 Rector Street - 22nd floor
New York, NY 10038
BY: PHILIP J. SMITH, ESQ.

Anne Marie Scribano, R.P.R.
Senior Court Reporter

(Whereupon, after direct examination of Robert Walsh and trial proceedings, the following occurred:)

COURT OFFICER: Jury entering.

(Whereupon, the jury entered the courtroom)

COURT OFFICER: Be seated.

THE COURT: All right.

Good afternoon, ladies and gentlemen of the jury. I hope you had a pleasant lunch.

I'm going to continue with the case on trial.

Now, if you recall, during my preliminary instructions to you, I told you that sometimes we have to take witnesses out of turn. Well, we're at that stage of the trial where that's exactly what's going to happen. We're going to take a witness out of turn.

The plaintiff's counsel has finished with the direct examination of Mr. Walsh and Mr. Smith is going to reserve his right to cross-examine at a later time.

And I'm going to allow the plaintiff to call the next witness at this time.

MR. BOROWICK: Dr. Andrew Merola.

A N D R E W M E R O L A, M. D., 36 Seventh Avenue, New York, New York, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

COURT OFFICER: Please state your name and affiliation for the record and professional address for the record.

THE WITNESS: Andrew Merola, M.D. 36 Seventh Avenue, suite 502, New York, New York.

THE COURT: Let the record reflect that the witness has been sworn.

Dr. Merola, good afternoon.

You're going to be asked questions by the attorneys. Listen to the question. Try and answer only the question that's posed. If there's an objection, please wait until I make a ruling on the objection before proceeding.

Also, the acoustics -- I'm not sure if the acoustics are very good, but I'm going to ask you to speak very loud so everyone in the room can hear you, even people in the back row.

Let's begin with direct examination.

DIRECT EXAMINATION

BY MR. BOROWICK:

Q Dr. Merola, I'm going ask you to keep your

voice up and answer the following questions, if you would.

What kind of doctor are you?

A I'm an orthopedic reconstructive spinal surgeon.

Q And what does that mean?

A That means I am a surgeon that does work on necks and backs. I reconstruct and fix them after they've had injuries and/or problems.

Q And what background education do you have that allows yourself to call yourself a -- allows you to call yourself an orthopedic surgeon?

A I went to medical school. Subsequent to medical school, I did a surgical residency. The remaining years of my surgical residency were spent doing orthopedic surgery. After I completed my orthopedic surgical residency, I went to University of Colorado, where I did a spinal surgical fellowship. And then I came back to New York City to practice spinal surgery.

Q Over the course of the time that you've been doing spinal surgery, what types of spinal surgeries do you do?

A I operate on the entire spine, from the bottom of your skull to the tip of your tailbone. I operate on pediatric deformity. I operate on tumors, fractures, infections, disk herniations. Any type of derangement or

slippage of one bone on another. Basically, any problem or issue that can involve the spinal column. That's the type of surgery that I do.

Q And are you in practice with other doctors?

A Yes, I am.

Q Do you know a Dr. Touliopolis?

A Yes, I do.

Q Is he a partner of yours?

A Yes, he is.

Q He operate out of the same facility?

A Yes.

Q Are you board certified?

A Yes, I am.

Q And what does that mean?

A Board certification is a process whereby we meet academic requirements that are set forth by the American Board of Orthopedic Surgery. Those requirements are an examination after you complete your orthopedic residency and training. And then, after you establish a private practice, you take an oral-based exam based on your cases and on your practice. After those exams are completed, the board meets to review your qualifications and, if you meet all of their academic requirements and qualifications, they certify you in orthopedic surgery.

Q And are you affiliated with any hospitals in

the City of New York?

A Yes, I am.

Q And which are those?

A I'm affiliated with State University of New York, Downstate Medical Center in Brooklyn, as well as St. Vincent's Hospital in Manhattan.

Q And what does it mean to be affiliated?

A Being affiliated with a hospital means that that hospital grants me rights and privileges to admit patients to that institution and operate upon them at that hospital.

Q And did you ever become a treating physician for a patient named Robert Walsh, seated here in the first row?

A Yes, I did.

Q And on the occasion that one of your patients has begun a litigation for an accident or injuries related to an accident -- are there occasions where that occurs, where you're called into court, like here, to testify as to your treatment?

MR. SMITH: Objection to form, your Honor.

THE COURT: Objection sustained.

Q Have you, in your experience, been called to court when a patient of yours sustains an injury and you're asked to explain your treatment?

MR. SMITH: Objection -- I withdraw the objection.

THE COURT: The question is this.

Have you testified before in court with respect to any treatment that you rendered to any of your clients?

THE WITNESS: Yes, yes, I have.

Q And when a patient -- are -- when that occurs, is it your practice to exact a fee from the law firm that calls you to compensate you for the time away from your practice?

MR. SMITH: Objection to form, your Honor.

MR. BOROWICK: I'll withdraw it.

Q Are you being compensated by my office for your time away from your practice?

A Yes.

Q And, sir, how did you come to treat Robert Walsh?

In other words, how did he -- do you know who referred him to you?

A Yes.

Q Who is that?

A Dr. Harrison.

Q And what role did you play, in particular, in the care and treatment of this man?

A I saw Mr. Walsh with respect to his neck and injuries that he sustained to his neck for surgical opinion.

Q And Dr. Touliopolis from your office, what was his specialty as it relates to the Walshes?

A Dr. Touliopolis, my partner, is a sports medicine physician. He treats injuries that are specific to knees, shoulders, ankles and those body parts.

Q Do you know if he ever treated Andrew Walsh?

A Yes.

Q Let's now focus on Robert Walsh.

When you first saw him -- when was it that you first saw him?

A I first saw Mr. Walsh in July of 2002.

Q I want you to assume that he had an accident on July 17th of 2001.

A year after his accident, what were his complaints to you?

A He had, at that time, neck pain or with pain radiating down into his left arm, index finger, as well as right knee pain.

Q And did you obtain from him -- I'm sorry -- what is a medical history?

A A medical history is when I interview the patient that comes to see me and I ask them questions

specific to their particular complaints, so that I can get an idea of what's wrong with them and what I can do to help them.

Q Is he still a patient of yours?

A Yes.

Q And how many times have you seen him over the course of the last two-and-a-half years?

A I've seen him five times over the last two-and-a-half years.

MR. SMITH: Objection. Your Honor, I have an objection at this point.

I'd like to bring certain things to the attention of the Court outside the presence of the jury.

THE COURT: Let's have a side bar.

(Whereupon, a discussion was held in the robing room off the record among the Court and counsel)

THE COURT: All right. There was an objection made, and I'm overruling the objection.

BY MR. BOROWICK:

Q Sir, can you -- by the way, do you have your office's charts in connection with your treatment of the Walshes?

A Yes.

Q If you need to refer to the chart relating to Robert Walsh in order to answer questions and refresh your recollection, I would ask that you do that.

With regard to Robert Walsh, when, for the first time -- you mentioned that you saw him in July of '02.

Did you see him at all in '03?

A Yes, I did.

Q And did you see him at all in '04?

A Yes, I did.

Q And let's take the first visit.

When you took him -- when you saw him for the first time, and I'm not sure if I asked this before, what was the history that you adduced from him?

A At that time, in July of 2002, Mr. Walsh indicated to me that he was involved in a motor vehicle accident on July 17th.

MR. SMITH: Objection, your Honor.

The witness is reading from a document not put into evidence.

THE COURT: All right, Doctor, you can use whatever notes you have to refresh your recollection, but you can't read from the document, all right. You can -- if you need to refer to it to refresh your recollection, you can do so, but you have to testify,

okay.

A That he had indicated to me that he had been injured in a car accident in July of the previous year. He came in with complaints of neck pain, pain radiating into his arm, as well as knee pain.

Q Have you had an opportunity to review the accident reports, the hospital records, as well as the reports of the other treating physicians?

A Yes.

MR. SMITH: I'm going to object to the leading of this witness as to what he could do.

THE COURT: I'll allow it.

Q And I want you to assume for a moment that Mr. Walsh has testified that, after the accident, when he got out of his car, he was standing by, on the road side, he began to feel -- and I'm going to limit my statements only and my questions and hypotheticals only to the neck, which is your specialty -- but he began to feel stiffness and pain in the neck and a radiation into the fingers.

And I want to ask you about the significance of the immediate onset of symptoms.

A That indicates that he has a traumatic event that is producing radiculitis or radiating pain into the extremities.

Q And from a spinal surgeon's point of view, why

is that significant?

A That tells me that he has pressure on the nerves, on the exiting nerves, from his neck that are going down into his arms. And that is significant insomuch as it can lead to nerve damage or spinal cord damage.

Q Now, with regard to your history, is it part of your history taking, are you trained to inquire as to a patient's past medical history preceding an event?

A Yes.

Q Did you do so in this case?

A Yes.

Q Did Mr. -- did Mr. Walsh have any relevant past medical history?

A Yes. He had no prior history of any type of neck pain whatsoever.

Q And why is that relevant to your treatment of a patient following a trauma?

A It gives me a very good idea of when are the start of their symptoms and for how long their particular problems have been going on.

Q Had he had any neck symptoms or injuries that you've ever become aware of?

A No.

Q Had he ever received any treatment for any condition relating to his neck, physical therapy, medical

treatment, surgeries, injections, or anything like that?

A No, none.

Q And I'm going to ask you, sir, do you know what this is?

A That is a spine model.

THE COURT: Let the record reflect that the witness is being shown what has been previously marked as Plaintiff's Exhibit --

MR. BOROWICK: 7.

THE COURT: -- 7.

MR. BOROWICK: I'm trying not to lift it until it's allowed to be in evidence.

THE COURT: But you have to, so the record is clear, you have to indicate what you're showing the witness.

Q And this model of the spine, have you seen it before?

A Yes.

Q Maybe not this one, but some other skeleton.

Can you tell the jury or tell the Court, first, whether or not this is a fair and accurate replica of the human spine?

A Yes, it is.

Q And would it be helpful for the jury if you were able to explain parts of your testimony about your

treatment and diagnoses of Mr. Walsh by using and demonstrating with this exhibit?

A Yes.

MR. BOROWICK: Your Honor, I'd offer it into evidence for the purposes of demonstration.

MR. SMITH: Objection to it being offered into evidence, but no objection to it being used to explain or to facilitate the testimony.

THE COURT: Well, it will be admitted for the limited purposes of -- for demonstrative purposes.

MR. SMITH: No objection to that, your Honor.

THE COURT: Okay.

MR. BOROWICK: Judge, can we deem it marked?

THE COURT: It's 7.

MR. BOROWICK: Yeah.

THE COURT: So --

MR. BOROWICK: But the tag says ID and I just don't want --

THE COURT: It's fine. It's 7.

(Whereupon, Plaintiffs' Exhibit 7 was deemed received in evidence)

MR. BOROWICK: With the Court's

permission, can Dr. Merola come off the stand and demonstrate?

THE COURT: Would that help you?

THE WITNESS: Yes.

THE COURT: Okay.

Q If you would, Doctor, can you give us a little bit of a background into the anatomy and the mechanics of the human spine?

THE COURT: Excuse me, Doctor.

If you could just step back so that -- that's good -- so that you're actually facing the court reporter so she can hear you and the noise isn't muffled -- your voice, rather.

THE WITNESS: Very good.

A I'm sorry.

I forgot your question.

Q Anatomy, mechanics of the human spine.

A Sure.

This is a model that represents the spinal column. At the top of the column is the bottom of your head. And down at the bottom is the pelvis. So your legs and your hips would be down here and the top of your head would be over here, and pretty much sits in you just like that. The cervical portion of the spine is up on top, right underneath your head. And it is these first seven

bones. And below that is the chest area or thoracic spine. And below that is the lumbar area or lumbar spine.

Q Now, there's a particular curvature associated with each of those.

What are they called and what does that mean?

A The curves that come with these, I'll make them a little bit more obvious, are here, so that your head can be balanced over your pelvis and your hips.

Q When you say "here," the record doesn't know what you're pointing to.

A In the neck, in the back, and in the lower back.

Each one of these areas has a curve that balances itself out so that the head can be positioned over the pelvis. In the lumbar -- in the cervical spine -- pardon me -- that's called cervical lordosis or a backward curve. In the thoracic spine, it's called kyphosis or a forward curve. In the lumbar spine, it's also called lordosis or backward bend.

Q Now, you pointed to bones. You called them bones.

What are they called, medically?

A The bones are referred to as vertebra. In between each of the vertebra of your spine is a special cushion that is made out of ligamentous or cartilage-like

material, and that is called a disk. And in between each bone in your back, there is a disk. The bones and the disks maintain your normal spinal alignment and your normal spinal architecture. That also protects this large yellow stripe, which runs through the spinal canal, or a special hole in back of each one of these vertebral bodies, and that spinal canal contains your spinal cord. That's responsible for moving your arms and legs around. And out of that spinal cord come each one of these little nerves that then have the responsibility of specifically moving portions of your arms and your hands and your legs. So the spinal column is there to protect and balance the spinal cord and keep your head perfectly centered over your pelvis.

Q Now, the anatomy of the spinal cord, you mentioned that -- you said some of those nerves come out and they allow you to move your arms and legs.

Besides the motor function, is there any other function associated with those nerves that come out of those holes?

A These nerves are pretty much responsible for doing everything that you're aware of with your arms and your hands and your legs. They enable you to feel, they enable you to touch things, they enable you to perceive what it is that you're touching. They will feel pain under

conditions where they've been injured or damaged. They're basically responsible for moving your body around and making it do everything that your brain wants it to do. And they come out of each section of your spine, adjacent to the area where the disks lie in between the bones.

Q Now, is that -- that system of nerves coming out of the spinal column, does that -- is that, as between one person and the next person and the next person, do those nerves particular to each disk -- particular to each vertebrae, do those activate or sense the same parts of the body?

A Yes.

MR. SMITH: Objection to the form, your Honor.

THE COURT: Well, I think it would be helpful. I know it's a little bit leading, but I'll allow him some latitude in the hope to speed things up a little.

MR. BOROWICK: Thank you, Judge.

A Each nerve has a particular number associated with it, so each nerve's number corresponds to where it ends up in your body.

For example, the C-6 nerve root, which is directly adjacent to the C-5 and C-6 vertebral body, comes all the way down your arm, like a stripe on a suit, into

the area between your thumb and your index finger. So that, if I see someone who's complaining about pain radiating into that area, I know immediately that that's the C-6 nerve root, and I can then concentrate on what I do to find out what the problem is with that particular nerve root. And that happens for each one of these little small nerve roots that go all the way up and down your spite.

Q What is dermatome mapping?

A The dermatome is that area that that nerve goes into. So that stripe-like area going down your arm in between your thumb and your index finger is known as the C-6 dermatome, because it's on the skin. And that's what dermatome means, on the skin.

Q Is that true for all humans?

In other words, C-6 -- C-5-6 is that stripe down the arm, is that true across the population?

A Yes.

Q And how does that help you in -- you mentioned it briefly, but I'd like to explore that a little more.

Somebody comes into your office, a lay person, not a doctor, not a medical person, comes into your office and says, "You know, I had an accident and my head kind of whipped back. Now I'm feeling this strange sensation in my thumb and my forefinger."

What about dermatome mapping?

Can it let you know if there's an injury to the nerve up here or if there's something wrong with the hand?

A Precisely.

If -- when that patient comes into the office, if they tell you that they're feeling pain coming down their arm into their thumb and index finger area, immediately that signals to me that it's a C-6 nerve root instead of an elbow problem or a wrist problem or a thumb and hand problem.

Injuries to the wrist or the hand or the thumb or the elbow show up differently in how you feel them, because of the way the nerves travel.

So, knowing that that pain is radiating -- and by "radiating" I mean coming down the arm like a stripe -- you can tell that it's neck origin and not coming from another portion of the body.

Q Are you able, through your experience, to establish or assess whether or not a condition, for example, the stripe going down the arm, the C-5-6 or the C-6 nerve root, whether or not that has occurred as a result of a trauma or as a result of a degenerative process? Are you able to do that?

MR. SMITH: Objection to the form of that question, your Honor.

THE COURT: Sustained.

Q Can a nerve root irritation, as you described, or an injury or some anomaly with the nerve root that causes the sensation, can that happen traumatically?

A Yes.

Q Can it happen degeneratively?

A Yes.

Q How do you know the difference?

A History. History makes a big difference in terms of how it's occurring and whether or not you think something is traumatic or degenerative.

Q Explain.

A For example, if we have a condition whereby you come into the office and you tell me, "You know, what, Doc? I've been at work and I've been at home and I've been noticing that, over time, my arm has started to bother me and now it kind of feels like that pain is coming down my arm into my thumb and my index finger," and that's progressed itself over a certain period of time with the absence of any inciting event, like a trauma, to me, that says this is a patient that may have a degenerative condition leading to radiculitis or a nerve root inflammation.

Q What is a degenerative condition in the first place?

A Degenerative means wear and tear. All our

bodies undergo wear and tear to some extent. And, over time, portions of our bodies can break down and then cause a problem.

Q Do they always cause problems?

A No.

Q What effect does aging have on our spines?

A As we age, that wear and tear process becomes evident in the bones and the disks and in the ligaments holding our spines together. So it's a normal part of the aging process.

Q What does the passage of time or aging, what does that do to the bony part of the vertebra?

A On the vertebra themselves, on the bony portions of the vertebra, it can cause bone spurs to form. And those bone spurs are areas where we see wear and tear. And we can see those on x-rays or on MRIs.

Q Is that something a person would have in their teens?

A No, not necessarily, no.

Q 20s?

A Less likely in the 20s.

Q 30s?

A You can start to see some bone spurring in the 30s.

Q 40s?

A You may see some more.
Q 50s?
A And, as time goes on, 50s, 60s and 70s, we are all going to develop some bone spurs on our necks and backs.
Q Are they necessarily symptomatic?
A The vast majority of bone spurs that we have are asymptomatic or don't cause any problems.
Q Are they necessarily disabling?
A No.
Q Are they necessarily limiting?
A No.
Q With regard to the other type of situation, where there's a trauma, could you tell the jury what types of -- what types of spinal cord conditions do you treat?
What is the range, first of all, of spinal cord conditions that you treat that are traumatically induced?
A Trauma can have a spectrum of problems that it can cause in the spine. At one end of the spectrum, we have fracture with complete paralysis, where the spinal cord is severed. And that's the most significant and severe end of that spectrum. Then, in between there, you can have different degrees of paralysis, nerve root injury, pain and derangement. And on the smaller side of traumatically-induced injuries, we can incur ligamentous

and disk disruptions and injuries.

Q Now, where does -- what is a herniated disk?

A Herniated disk --

Q And if you could use the model, that would be helpful.

A -- means -- each one of these little areas that lies in between the bones is a disk. A herniation specifically refers to a portion of that disk material breaking away or squeezing itself away from the disk.

If you think about the disk like a jelly doughnut, it's pretty much exactly like a jelly doughnut, only it's made out of cartilage instead of pastry and jelly. The disk has an outer covering that's rather tough and that's just like the pastry on a jelly doughnut. On the inside, there is a gelatinous material. That jelly can squeeze out of the pastry crust if the pastry crust is cracked or injured.

And a herniation specifically refers to that jelly exiting, leaving, going beyond the borders of that pastry shell. And that's exactly what a herniation is.

Q And is a herniation something that can occur degeneratively?

A You can -- you can, over time, degenerate your disk so that you can have protrusions and bulges and small herniations. But it's less common, far less common.

Q And would a herniated disk be likely to be symptomatic?

A Yes.

Q Would it likely cause any discomfort or pain?

A Yes.

Q Would it likely cause limitation?

A Yes.

Q And assume for a moment that Mr. Walsh never had a problem with his neck, never had a symptom with his neck, never had radiating pain, never had any testing on his neck, never had any treatment on his neck, never took medication or had physical therapy for his neck. Essentially, he never had a problem with his neck.

Do you have an opinion, based upon that prior history and the nature of the occurrence -- well, let me just show you those pictures.

Have you seen the pictures of the damage to the vehicle?

A Yes.

MR. BOROWICK: May I have that, Officer? Thank you.

Q I'm just going to ask you, when you see the evidence of an impact in a collision, such as exhibited in Exhibit 1 in evidence, with metal and damage and crushing to this vehicle, of what significance is the force that

would create that to you in assessing whether or not a herniated disk is traumatic or if it's degenerative?

MR. SMITH: Objection.

MR. BOROWICK: I'll withdraw it.

It was convoluted, Judge.

I'm sorry.

THE COURT: You can sit down.

Q Is a -- I want you to assume for a moment that there has been testimony supporting the introduction into evidence of this document, where all of the damage seen in this document resulted from an impact between a truck rear ending a car that was at a stop; that Mr. Walsh was a driver in that car and, as a result of this impact, he was thrown forcefully -- his body was thrown forcefully forward and his head whipped back; that immediately after that he had this onset of symptoms that he reported to the police and, within several days, to a doctor and a hospital; and that never before had a problem.

Would this -- and I'm going to break it down now. Would this, the magnitude of this impact, be significant to you in assessing whether or not that herniation or a herniation would be traumatic or degenerative?

MR. SMITH: Objection. Usurping the prerogative of the jury, your Honor.

MR. BOROWICK: I'm asking his opinion based on a hypothetical.

THE COURT: No. I'll allow it.

Ask him whether or not the impact would have -- would be -- would have relevancy --

MR. BOROWICK: Would have significance in that assessment.

THE COURT: In that assessment.

I'll allow it.

A Yes.

Q Why?

A The amount of force to destroy the rear portion of a car --

MR. SMITH: Objection, your Honor.

THE COURT: On what basis?

MR. SMITH: The issue of the effect of that impact is one aspect for a jury to determine. And this witness is to be -- testifying as to the injury that he found and a possible cause, but not to evaluate the impact, the effect of this --

THE COURT: I think he's saying what is the significance of -- what is the significance of an impact -- would an impact of an automobile collision have on an injury to the spine.

MR. BOROWICK: And the magnitude, your

Honor, the magnitude of the impact such as depicted here.

THE COURT: Let's get this straight.

There's not an impact depicted there. What the picture shows is damage to the back of the car.

All right. So, what is the significance of the impact and what, if anything, does the magnitude of that impact have on the cervical spine?

I believe that's the question that's being posed.

MR. BOROWICK: And the distinction between traumatic and degenerative.

THE COURT: Okay.

A That tells me that the neck problem is traumatically induced.

Q Now, if you looked at an x-ray or an MRI -- by the way, what is an x-ray?

A An x-ray is a film or a picture of the human body made by taking radiation, passing it through the body, and then capturing it on to a film, just like you would take a camera. A camera uses light; an x-ray uses radiation. They both take pictures. The x-ray can see through you; the camera can't. So an x-ray is a photograph utilizing radiation instead of light.

Q Now, you just said that it would be traumatic, in your opinion.

But what if, when you took the x-ray or the MRI, after the accident, there was degenerative disease in the area of the spine, in the vicinity of the herniation?

A You can have degenerative disease in the neighborhood of a herniation. That's -- that's a given, because we all have degenerative processes. So that can happen.

The x-ray will tell us whether or not there's a fracture, because x-rays are very good at looking at bone. It will tell us if there's a fracture or a dislocation.

An MRI, which is another way of taking a picture using magnetic means, gives us a good idea of what the disk or the softer portion of the spine looks like and what the nerves and the spinal cord adjacent to that area look like.

And on the MRI, that will tell us what the x-ray doesn't. So the x-ray will tell us is there a fracture or is there a dislocation. The MRI will tell us is there an injury to the disk, the nerve or the spinal cord.

Q And when you -- when you look at these films and you see degenerative disease consistent with a man who's 57 years old, but with no history, and you then have

the facts of an impact of that magnitude, as well as the immediate onset of symptoms that never existed before, of what significance is that picture that has just been described?

A That gives me a pretty clear history as to the etiology or cause of the disk herniation.

Q And -- I'm sorry. I cut you off.

A I was going to say, to me, that tells me, as a physician, that that disk herniation is a post-traumatically-induced herniation.

Q Now, if something's degenerative and it's already on an x-ray or an MRI within days or weeks or months of an accident, that means, does it not, that it was preexisting?

MR. SMITH: Objection, your Honor.

THE COURT: Sustained.

Q If you see degenerative evidence on a film within a week or a month or several months following an impact, does that degeneration happen within a week or a month or several months?

A No.

Q So, if an accident happens on July 17th of '01 and before the end of August of '01 there are films showing degeneration, would that degeneration force have been beginning and taking place in the aging process leading up

to that?

A Yes.

Q So then, now, if you have this impact superimposed upon a degenerative condition, which is asymptomatic, what effect would that impact and the herniation have on the person's, say, cervical spine?

A Now that cervical spine becomes symptomatic, produces symptoms and manifests itself as pain.

Q Well, how do you treat that?

A Depending upon how the symptoms are, we treat that -- we always start conservatively first, which means non-surgically and safe. We start with anti-inflammatory medicine, pain medication, sometimes muscle relaxants, physical therapy.

Q And when you -- is the medication that you give, is that a cure for the structural damage?

A No.

Q What does it do?

A It decreases the amount of swelling or inflammation that happens in the damaged area and it can decrease pain.

Q Does it necessarily decrease pain?

A No.

Q The physical therapy that you prescribe in a circumstance like a C-6 nerve root herniation, does

physical therapy eliminate the problem?

A No.

Q What does it do?

Why prescribe it if it doesn't?

A It has the ability to decrease pain and maintain function.

Q Does it always decrease pain?

A No.

Q Does it always maintain function?

A No.

Q If there's structural -- is a herniated disk structural damage?

A Yes.

Q Is it permanent?

A Yes.

Q Would you explain why a herniated disk is permanent structural damage?

A Since the disk is a shock absorber, that shock absorber has to be completely intact to function properly. Once the jelly material protrudes out of the disk, that disk is now injured. It's like a leaky shock absorber on your car. So that portion of your spine no longer behaves normally. The bones in that area don't move normally. It doesn't have the capacity to absorb normal stress and strain or shock. So it's a malfunctioning part.

Q Now, when it malfunctions and the jelly's out, what does that do to the height between the vertebrae on either side of it?

A The height between those two bodies decreases over time, and the bodies start to then collapse on each other.

Q And when they collapse on each other, does that have anything or any impact upon the nerve roots?

A The nerve roots are right next to those two bodies, and they leave from a small little hole. As the bodies collapse on each other, the hole becomes smaller.

Q How does that translate into symptoms?

A That pinches the nerve, and then you have radiating pain into the arms.

Q Let me ask you, short of surgery, is there any way to correct the structural damage or at least address the structural damage in a remedial way?

A You can decrease pain, but you can't alter that structural damage.

Q Now, once that structural damage has been done -- by the way, have you reviewed the MRIs in this case?

A Yes.

Q Did you actually send him out for MRIs?

A Yes.

Q And do the MRIs show the permanent structural

damage to the C-6 nerve root?

A Yes.

Q And would it be helpful for the jury to understand how you go about investigating the cause and etiology, as you said, of a disk condition and a -- and a spinal anomaly?

Would that help you -- or help the jury understand?

MR. BOROWICK: Strike that.

I'm sorry.

Q Would it be helpful for the jury to understand your testimony for you to explain using the demonstrative films in this case?

A Yes.

Q Do you have them with you?

And, at my request, did you enlarge certain portions of them for the purposes of demonstrating?

A Yes.

MR. BOROWICK: Your Honor, may the witness step down so that we can do that?

THE COURT: All right.

Before you do that, just show the exhibits to --

MR. SMITH: I haven't seen them.

MR. BOROWICK: These are the same thing as

I gave you yesterday.

MR. SMITH: Very quick voir dire, your Honor.

VOIR DIRE EXAMINATION

BY MR. SMITH:

Q Doctor, were these enlargements of the MRI -- thank you -- ordered back in July of 2002 of Robert Walsh?

A That is the MRI that I ordered of Robert Walsh. I believe those two particular enlargements are 2004.

Q A subsequent MRI?

A That's 2004, correct.

MR. SMITH: I don't have those.

MR. BOROWICK: That's what we gave you.

MR. SMITH: These, I don't have.

THE COURT: Wait.

Step up, please.

(Whereupon, a discussion was held in the robing room off the record among the Court and counsel)

MR. BOROWICK: Your Honor, I believe the next exhibit is 8, and I would ask they be marked 8A, B, C, D.

THE COURT: If there's no objection, I'm going to allow the questioning to proceed with these MRI films.

(Whereupon, Plaintiff's Exhibits 8A, 8B, 8C and 8D were marked for identification)

MR. SMITH: May I have a very short voir dire?

THE COURT: Sure.

MR. BOROWICK: I haven't offered them in evidence yet.

THE COURT: Okay. Let's wait until the application to have them admitted into evidence.

MR. BOROWICK: Okay.

DIRECT EXAMINATION (Continued)

BY MR. BOROWICK:

Q Doctor, in the ordinary course of your practice, do you send patients out to be filmed on MRI?

A Yes.

Q And when they accomplish that and you receive the MRIs back, is part of your training to read, review and assess MRIs?

A Yes.

Q And have you read, reviewed and assessed what is shown in these MRIs?

A Yes.

Q And are they -- excuse me.

Do they relate to this gentleman, Mr. Robert Walsh?

A Yes.

Q And do they evince the structural damage that you've described?

A Yes.

MR. BOROWICK: I offer them in evidence.

MR. SMITH: Objection, your Honor.

THE COURT: Let's -- I'm going to take -- I'm going to ask to excuse the jury for five minutes.

Can you put the jury in the jury room.

COURT OFFICER: All rise.

Jury exiting.

(Whereupon, the jury exited the courtroom)

THE COURT: Doctor, can you step down?

MR. BOROWICK: Do you want the doctor to stay?

THE COURT: No. I want him to step down.

I want to go back to the stipulation that they entered into with respect to the MRI films.

(Pause in proceedings)

(Whereupon, the court reporter read the requested portion of the record)

THE COURT: I just read the stipulation over that was entered into earlier before this case started. And the agreement was that whatever he was going to introduce at trial he was going to supply to

you so that your expert could review.

Now, that doesn't mean they're not entitled to ask him whether or not other MRIs exist or other MRIs were taken.

And that doesn't preclude you from making any motions that you feel appropriate, if it's disclosed that there were other films taken and they are not available and not part of the record.

I'll leave it at that.

MR. SMITH: Okay. Your Honor, I just want to point out one further thing.

It was my understanding that the only MRI films, as I already indicated, were from 2002, 2001, Dr. Merola and Dr. Harrison, respectively.

And even when counsel or even when Dr. Merola indicated he had seen this patient in 2004, I was making objection at that time. This was a surprise to us, and it's not even in the subpoenaed documents.

And, in conjunction with that, any films and the records of 2004 would also be a surprise.

So, in all good faith, I knew nothing about 2004.

For me to be accused of pulling a cheap trick and pulling stunts, which counsel has been very

free to, I'm not going to stoop to that, but this was something that should have been aboveboard and should have been presented.

THE COURT: Well, I think, for the future, it tells you, perhaps, you may not want to enter any such stipulations and let the plaintiffs bear the burden of whatever, with the laying of foundation and appropriate notice.

I understand what you're saying, that you basically tried to be a nice guy and you feel you're being shortchanged.

MR. SMITH: Thank you, your Honor.

THE COURT: Unfortunately, there was a stipulation where he says whatever he is going to introduce at trial he will turn it over so that you can take a look at it.

But that doesn't preclude you from asking the appropriate questions and perhaps making the appropriate application.

And I'm also mindful of the fact, and you should be mindful of the fact, rather, that he still has to lay the appropriate evidentiary foundation for it to be submitted.

MR. SMITH: Thank you.

THE COURT: All right.

MR. SMITH: One final thing, your Honor.

My request is I see all the films of Dr. Merola, including the ones from 2002. And I only received one film from 2004. And counsel has two sets of films. I'd like a copy of both films from 2004 now.

MR. BOROWICK: Okay.

MR. SMITH: I think that's another --

MR. BOROWICK: No, no.

They're ID.

THE COURT: No.

Provide him with copies.

MR. BOROWICK: What?

THE COURT: You need to provide him with duplicates.

MR. BOROWICK: He can take these.

THE COURT: Counselor, you're going to provide him with duplicates.

MR. BOROWICK: How can I do that now?

THE COURT: You're going to figure it out.

MR. BOROWICK: I'm giving him the one copy.

THE COURT: We're going to proceed to trial. We're going to proceed with trial.

He cannot testify about what he saw in the

MRI if they're not in evidence.

MR. BOROWICK: Judge --

THE COURT: You want to stop the testimony and you want to come back another day, is that what you're telling me?

MR. BOROWICK: Why would I do that, Judge?

THE COURT: So then sit down. Put it down.

Do what you have to do for trial and let's proceed.

MR. BOROWICK: Okay.

COURT OFFICER: All rise.

Jury entering.

(Whereupon, the jury entered the courtroom)

THE COURT: We need the doctor.

(Pause in proceedings)

THE COURT: Doctor, I'm going to remind you that you're still under oath.

Let's proceed with the direct examination.

MR. BOROWICK: Thank you.

BY MR. BOROWICK:

Q Dr. Merola, I want to try to tie together some of the concepts that you've given us.

With regard to degenerative versus traumatic,

and your diagnosis -- let's start with your diagnosis.

As a result of this accident, what is your diagnosis of the results of this accident?

A Herniated cervical disk, C-5-C-6 with radiculitis.

Q And was there any effect of this accident upon the degenerative part of his cervical spine?

In other words, did it -- did it excite anything, aggravate anything, exacerbate anything or did it have no effect on it?

MR. SMITH: Objection to leading, your Honor.

THE COURT: Objection sustained.

Q Did the accident and the trauma, other than causing the herniation which you described, did it have any effect upon the preexisting degenerative areas?

A It's made those preexisting degenerative areas symptomatic.

Q And when a trauma causes a herniation of a disk not previously herniated and causes degenerative areas to become symptomatic, what is it that you can do to alleviate -- and I'm not talking about physical therapy or --

MR. SMITH: Objection.

THE COURT: Objection sustained.

Q What is it that you can do to address his pain?

A I can remove the disk and fuse C-5 to C-6. That's a procedure known as an anterior cervical diskectomy and fusion.

Q And, sir, did you review -- have you reviewed this diagram or this chart, which I'm showing you, which is Exhibit -- Exhibit 6 for identification?

A Yes.

Q And is it a fair and accurate depiction of the procedure that you've just described and how it would be effectuated?

A Yes.

Q And would it be helpful for the jury to understand your testimony if you were able to demonstrate with this exhibit at your disposal?

A Yes.

MR. BOROWICK: I ask that he be permitted to use the document as a demonstrative aid.

MR. SMITH: Very short voir dire, your Honor?

VOIR DIRE EXAMINATION

BY MR. SMITH:

Q Doctor, where did you obtain this depiction, where did you get this?

A This is -- a blow-up.

Q Is that yours, Doctor?

A It's not personally mine, no.

MR. BOROWICK: Objection. Irrelevant.

Whose it is, Judge?

THE COURT: Let him --

Q Do you own it, Doctor?

MR. BOROWICK: Objection.

Who owns it?

Who cares?

THE COURT: I'll -- I'll allow the question.

Q Do you know whose this is, Doctor?

THE COURT: He said he doesn't know.

MR. SMITH: Nothing further.

THE COURT: All right. Do you have any objection?

MR. SMITH: No, your Honor, I have no objection.

THE COURT: All right.

MR. BOROWICK: Would you step down, please.

(Whereupon, Plaintiffs' Exhibit 6 was received in evidence)

DIRECT EXAMINATION (Continued)

BY MR. BOROWICK:

Q Doctor, take us through the procedure that you

have described.

A Anterior means through the front. So when you're looking at a patient, the anterior approach is done through the neck, through the front side of the neck, in order to get down to the bones and disks of the spine.

This rendition in the upper right-hand corner demonstrates what's known as the surgical approach to reach the cervical bodies and the disks.

After this portion of the procedure --

Q Excuse me.

Are you pointing to the left-hand corner or the right hand corner as you look at it?

A As you look at it, it's the upper left-hand corner. It's anatomically the right-hand diagram.

Q So, this portion of the diagram depicts the anterior anatomical approach to the neck or to the cervical spine.

An incision is made in the skin. The muscles of the neck are retracted out of the way. The vocal cords, windpipe, esophagus and other vital structures are retracted the other way. The bones of the neck are exposed. Special retractors are placed to hold everything out of your way while you can work.

The next portion of that case is the diskectomy portion.

This is a -- a cutaway of the neck, going across the neck. This is -- the front side is at the top of this diagram. The back side is at the bottom of the diagram. This is the wind pipe, the esophagus, carotid artery, internal jugular vein, vertebral body in the middle with disk, and behind that spinal cord and nerve roots.

A diskectomy portion of the procedure involves removing all of the disk material that is between the bones with a special tool called a bistoury, and that goes all the way back to the level where the nerve roots and spinal cord are, to take away any fragments or portions of disk that are in this area that are touching the spinal cord and/or the nerve roots. And this is the diskectomy portion of the surgery.

After that's done -- the lower-hand diagram is a side view of the neck. Where the hands are is the front side. Behind it here is the back side. This cord, this is the spinal cord in the middle of the diagram. These are the vertebral bodies. Here is C-5. This is C-6.

After the disk has been completely removed and the spinal cord and nerve roots freed up of pressure, a piece of bone is then inserted in between the C-5 and C-6 vertebral body to hold those two pieces of bone apart and to fuse them or weld them together. That's the fusion portion of the case. And to make sure that that doesn't

pop out or cause any problems after the operation, a small plate with screws is then applied to those bones to hold everything in place where you've operated, so that when the patient wakes up and they start walking around and moving, that piece of bone that you've put in between those two vertebral bodies doesn't pop out or cause any problems.

So this whole procedure is called an anterior, from the front, cervical, the neck, diskectomy, removal of the disk, and fusion with bone and a plate and screws.

Q Sir, would you tell the jury -- are you familiar with the cost of that procedure?

A Yes.

MR. SMITH: Objection, your Honor.

Q Have you done that procedure?

THE COURT: No.

There's an objection. Wait until I rule before you can ask the next question.

All right. I'll allow it.

You can answer.

THE WITNESS: I'm sorry.

The first question?

THE COURT: Repeat the question.

(Record read)

A Yes.

Q And what are the costs, soup to nuts?

I mean anesthesia, hospital fees, your fees, the hardware involved, rehab.

MR. SMITH: Objection, your Honor.

Q What are the costs, soup to nuts, for this procedure?

THE COURT: All right. There were multiple questions involved, so there's an objection.

MR. SMITH: Yes, your Honor.

I have an objection to that question and the -- specifically that point. It's all mixed up together.

THE COURT: Start the question again, and ask one question at a time.

Q Sir, are you familiar with the costs that would be incurred to have the procedure done under the usual and ordinary circumstances in the New York metropolitan area?

A Yes.

Q What is the totality of the costs involved for a patient, start to finish, beginning with the surgery and ending with concluding rehab?

MR. SMITH: I'm going to object.

Objection to the question, your Honor.

THE COURT: Well, let's begin with the first one.

The question is, what is the cost for the

procedure alone, the surgical procedure, total?

THE WITNESS: $15,000.

THE COURT: Now, what he wants to know after that is, can you tell us what are all the different portions of the procedures?

Divide the procedure up and let us know what it costs, each individual section of the procedure.

THE WITNESS: Yes.

THE COURT: Okay.

A Hospital -- let's start at the beginning.

Operating room. Operating room costs. The procedure takes in the neighborhood of about two hours. The operating room fee for approximately two hours' worth of use, give or take a little bit, would be in the neighborhood of between 5 and $8,000.

The surgical cost, the surgeon's cost for the procedure, is $15,000.

The cost for the implant, which is the plate and screws and the piece of bone that we would use -- we generally use a piece of cadaveric or donated bone. So the implant cost, plate, screws and donated bone, is in the neighborhood of 10 to $15,000, depending upon how hard it is to get donated bone at any given time.

The anesthesiologist, who is responsible for

putting the patient to sleep and then waking that patient up and monitoring them during the procedure, their cost ranges about $5,000.

There is a person known as a spinal cord monitor who is a person who wires the patient up to a special computer that's used during the operation in order to monitor spinal cord function. Since I'm operating on the spinal cord, I'd like to know if I'm doing anything bad to the cord. And that person is in the room with me and they tell me what the status of the spinal cord is. Their cost for the procedure is approximately $5,000.

So this is the day of operation.

After that, the patient is brought to the recovery room. The recovery room cost for about two hours' worth of stay, where an anesthesiologist and a nursing staff observe the patient to make sure that they wake up appropriately, is approximately $2,500.

After that, for this particular procedure, I -- I standard admit these patients to an intensive care unit overnight, so there is an ICU stay, which costs in the neighborhood of $8,500 for one night.

If the patient requires an additional stay, that would be an additional day's stay or another 8500.

They're generally on the floor, on a regular hospital floor, for about a day or so until they're up and

walking around normally with rehabilitation. And that cost is about a thousand dollars a day, depending upon what services are required on the floor, amount of medications, dressing changes, that type of thing.

And then, after that, they're discharged to home with pain medication and physical therapy for follow-up.

Q Can you approximate the cost of a regimen of physical therapy and a regimen of medication?

A Medication, the general medication I use is extra-strength Vicodin. That's taken by mouth. Usually it's about two pills every six hours. I normally prescribe about 120 pills or so for that early postoperative period. The pills run about a dollar to a dollar-twenty-five apiece. So that's in the neighborhood of about $150 or so for the medication.

The rehabilitation cost is a physical medicine physician evaluating the patient and rehabilitation at a physical medicine facility. Initial physical medicine visit would be about $180 and the cost of rehab is between 60 to $80 per session.

Q How many sessions would you expect in a procedure like this?

A I prefer three times per week for the first six weeks postoperatively.

Q And you said that was 60, $80?
A Per session, yes.
MR. BOROWICK: Thank you.
You can resume your seat.
Q Doctor, based upon your examinations of this patient, your eliciting history, your reviewing the medical records, me showing you the pictures of the vehicle, based on all of that, do you have an opinion, with a reasonable degree of medical certainty, as to whether or not Mr. Robert Walsh needs that procedure?
A Yes, I do.
Q What is your opinion?
A My opinion is that Mr. Robert Walsh does need an ACDF.
Q And is that an anterior cervical -- whatever -- what does ACDF --
A Anterior cervical diskectomy and fusion.
Q Now, when you look at Mr. -- by the way, was he a compliant patient?
A Yes.
Q When you look at him, do you see somebody who -- I mean --
MR. BOROWICK: Withdrawn.
Q He doesn't look that bad.
How can he need a fusion?

MR. SMITH: Objection.

THE COURT: Objection sustained.

Q Does he register -- when he sees you, does he register effusive complaints?

MR. SMITH: Objection.

THE COURT: Sustained.

Q Are there patients that you see in the ordinary course of your practice that have different levels or tolerances for pain?

A Yes.

MR. SMITH: Objection.

THE COURT: I'll allow it.

A Yes.

Q Describe what that means.

A Everybody has a different pain tolerance. I've seen patients that will come into the office and ask me for an operation and I don't have anything to operate on. They don't have a herniated disk. There's no what we call surgical pathology or something I can fix.

MR. SMITH: Objection to the answer, your Honor.

The question was, do people have different tolerances for pain, and he said they did.

MR. BOROWICK: He's explaining it, Judge. I asked him to explain it.

THE COURT: Can you just explain it in a very simple term?

THE WITNESS: Sure.

A Yes. Some people have a very high pain tolerance and some people have an exceptionally low pain tolerance.

So there are people that come in and are exceptionally painful and there are people that come in and basically just, for lack of a better term, just suck it up and proceed on with their lives.

Q Does that change whether or not the operation that you might perform on a person would be performed or not?

A No, that doesn't.

Q Whether they're stoic or they're whiners?

A No.

Q Why not?

A The purpose of the procedure is to prevent neurological injury, so whether or not they are stoic or have a low tolerance or threshold for pain doesn't impart upon the decision to protect the spinal cord and nerve roots.

Q What effect does exertion and activity have on a person with Mr. Walsh's spinal condition?

A It produces more pressure on the cord and the

nerve roots and can produce more pain.

Q And if --

MR. BOROWICK: Withdrawn.

Q Sir, over the course of time, have you been the treating physician on -- for patients who coincidentally are clients of mine?

A Yes.

Q Do you treat iron workers as a general class of patients?

A Yes.

Q And have I, in the past, when I've had somebody from the iron worker union as a client, have you been, coincidentally, their treating physician?

A Yes.

Q On those occasions, have I called you as a witness to the courtroom before today?

A Yes.

Q On a number of occasions?

A Yes.

MR. BOROWICK: Your Honor, I'd offer his chart into evidence.

MR. SMITH: Can I see the chart, your Honor?

MR. BOROWICK: And I have no further questions.

THE COURT: You have no further questions?

MR. BOROWICK: No.

Other than if he needs me to lay a foundation. If he objects, I'll lay a foundation and that's it.

MR. SMITH: Well, I'll make it simple.

Objection, your Honor.

MR. BOROWICK: Okay.

Q Sir, is this chart the chart kept in the ordinary course of the business of your practice?

A Yes.

Q Is it a fair and accurate and complete chart of the documents which are generated when you treat a patient?

A Yes.

MR. BOROWICK: Offer it in evidence.

MR. SMITH: Objection, your Honor.

THE COURT: Objection sustained.

MR. BOROWICK: Nothing further.

THE COURT: You don't have any other application with respect to any marked exhibits?

MR. BOROWICK: No, Judge.

THE COURT: Okay. Can you step up for a second?

(Whereupon, a discussion was held at the bench off the record among the Court and counsel)

THE COURT: Let's begin with cross-examination.

CROSS-EXAMINATION

BY MR. SMITH:

Q Doctor, can I see your records, please?

By the way, Doctor, you said that there are seven cervical vertebrae, is that correct?

A Yes.

Q In fact, all mammals have seven cervical vertebrae, except for in some ant eaters in South America, isn't that true?

A I'm not an expert on all mammals, but only people.

Q Well, people, whales, giraffes, if you're a mammal, you have seven cervical vertebras, isn't that true, except for some ant eaters in South America?

A I'll take your word for it.

Q All right. And is a lordotic curve -- please tell me the word -- how do you pronounce that?

A Lordotic.

Q And that's around area C-6-C-7, true?

A It's the entire aspect of the cervical spine.

Q And, as you grow older, that curve will tend to straighten, isn't that true?

A Yes, it can.

Q And that's part of the aging process, right?
A Yes.
Q And, by the way, Doctor, the -- this -- point of information, the length of the spine, that doesn't determine the height of a person, isn't that correct?
A It does, in some ways, determine the height of the person, yes.
Q What's the difference in the length of the spine between a seven-foot person and a five-foot person?
A The length --
Q A couple of inches, two inches?
A The absolute -- I can't tell you the absolute difference. It depends on what the height of each individual vertebral body is. But spinal length is a determinant of height.
Q Okay. And as we grow older, we're gonna get shorter?
A Yes.
Q I used to be six two, now I'm shorter.
Right?
How tall is Mr. Walsh?
A I don't know.
Q And did you take measurements as to what his height was when you first saw him back in July of 2002?
A I did not take a height measurement, no.

Q Isn't that important or wouldn't that be important in determining an aspect of the spine?

A No, not necessarily.

Q Well, where are your films, the MRI films that you took back in July of 2002?

A I don't know where the MRI film from 2002 is.

I did review the film and see it and the report is in my chart.

Q Well, Doctor --

MR. SMITH: Withdraw that.

Q In that report, you said, basically -- isn't the report that you're referring to the notation you made when Mr. Walsh came back to see you in January of 2003?

A No.

There's a report from the film.

Q Okay. You saw Mr. Walsh the first time in July 2002?

A Yes.

Q Next time you saw him was when?

A You have my chart.

I'd have to look at the dates.

Q Well, wouldn't it be fair to say the next time you saw him was in January of 2003?

A May I check the chart?

Q Sure.

A Yes.

MR. SMITH: Officer Smith, can I see the subpoenaed records from Dr. Merola?

Q And, at that time, Doctor, you said or you found that Mr. Walsh was neurologically intact without any changes from the time he'd seen you back in July of 2002, correct?

A Yes.

Q And you said, "Continue conservative management," true?

A Yes.

Q And then, in fact, the next time you saw Mr. Walsh was in September of 2003, right?

A Yes.

Q Eight months later?

A Yes.

Q And there came a time when you were served with a subpoena, isn't that true?

It was served by our office.

Do you remember that?

A I'm checking -- I think I do have a subpoena in the chart.

Q Well, Doctor, after September of 2003 -- by the way, you found him, at that time, to be neurologically intact, true?

A Yes.

Q And to continue with conservative management, correct?

A Yes.

Q By the way, you took no measurements of his height, either in January or September of 2003, true?

A Yes.

Q And when was the next time you saw Mr. Walsh, Doctor?

One further thing.

The last notation you have in that note of September 2003 is PRN, to be seen PRN, correct?

A Yes.

Q And that means "as necessary," true?

A Yes.

Q And that means when the witness or the patient -- I'm sorry -- comes to you, "Well, I'm having trouble, I have complaints," right?

A Yes.

Q Okay. When is the next time he came to see you?

A Next visit is 9/27/2004.

Q So he had no complaints, no calls, no contact with you for that whole year, correct?

MR. BOROWICK: Objection as to no -- he's

lumped -- number one, he's throwing documents.

But no -- number two --

MR. SMITH: I'll withdraw the question.

MR. BOROWICK: Excuse me?

THE COURT: He's withdrawing the question.

Sit down.

Q Doctor, in September of 2003 -- until September of -- until September of 2004, Mr. Walsh didn't call you with any complaints, didn't come in to see you, true?

A We did have contact in between those times, yes.

Q Well, was that in anticipation of his appearing here to testify?

A No.

Q Okay. Did you see him for any medical reason between September of 2003 and September of 2004?

A No.

Q By the way, Doctor, Mr. Walsh was referred to you by Dr. Harrison, correct?

A Yes.

Q Do you get a lot of referrals from Dr. Harrison?

A I don't know offhand how many.

Q You've got referrals before, correct?

A Yes.

Q Would it be fair to say those referrals were for structural iron workers?

A I'm not sure.

Q Well, you have treated structural iron workers before, correct?

A Yes.

Q And, at this point, you can't recall whether Dr. Harrison has referred to you any structural iron workers, is that correct?

A I'm not sure, no.

Q How many times have you appeared and testified just for structural iron workers?

A I'd say about five or six times.

Q And how many times have you been prepped or prepared to, perhaps, appear or advised that you may be needed to appear on behalf of a structural iron --

MR. BOROWICK: Objection as to prepped or advised.

THE COURT: Well, you need to clarify the question a little bit further.

Q Well, how many times have you talked with lawyers?

MR. SMITH: Withdraw that.

Q Before today or before appearing here to testify, you talked with Mr. Borowick, correct?

A Yes.
Q And you talked with Mr. Sacks, also, right?
A Yes.
Q You were outside in the hall talking with them before you came in and testified?
A Yes.
Q Who is Mr. Sacks?
A Mr. Sacks is part of the Sacks and Sacks law firm.
Q And have you talked to him in the past about appearing as a witness on other cases?
A Yes.
Q How much are you receiving --
MR. SMITH: Withdraw that.
Q Have you been paid for all of your bills up to the present time?
A I'm sorry.
Which bills?
Q Well, you saw Mr. Walsh back in July of 2002. You saw him in January of 2003. You saw him in September of 2003. You saw him again a year later in September of 2004.
When was the next time you saw him?
You saw him again in 2004, right?
A We spoke after the last MRI.

Q Well, the MRI, the ones you have the films for, that's October of 2004?

A Yes.

Q You know, Doctor, I just got to ask you, where are the firms for 2002?

A I don't know where the 2002 film is.

Q Back to that in a second.

But after the films that were taken in October of 2004, did you see Mr. Walsh again after that?

A No.

Q So you've seen him in total four times?

A Yes.

Q And you talked to him after the films that were taken in 2004, right?

A Yes.

Q Doctor, isn't it custom and practice -- or good practice that, when you take a study, study of the same patient and you have prior studies, you take that prior study, put it on the -- what do you call those, the big screen there --

A Light box.

Q -- shadow box, you put it on the shadow box, and then you take another study, the most recent study, and you put that on the shadow box and you look at the studies to compare, to see if there's been any changes, correct?

A We do sometimes compare for changes, yes.
Q I'm not asking what you do sometimes.
I'm asking you what's good and consistent practice.
A Comparison is good practice, yes.
Q Doctor, when did you graduate from medical school?
A 1990.
Q What year, what school?
A Howard University.
Q And upon graduation from medical school, where did you do your residency?
A SUNY Downstate in Brooklyn.
Q And what was -- was that a straight or a rotating residency?
A That's an orthopedic surgical residency.
Q How many years was that?
A Five years.
Q And upon completion, you then did a fellowship in spinal surgery at University of Colorado?
A Yes.
Q And how long did that take, Doctor?
A One year.
Q So you learned in that process how to specifically treat the spine, correct?

A Yes.

Q And didn't you learn that it's good practice to keep your films in order to compare changes in order to evaluate the situation on the condition of a patient?

A My general practice is --

Q Doctor, I'm only asking you --

MR. BOROWICK: Judge, I don't think he gets to interrupt the witness because he doesn't like the --

THE COURT: Counsel, sit down.

If there's an objection, raise an objection.

MR. BOROWICK: I ask the witness be able to finish his answer.

THE COURT: Is there an objection?

MR. BOROWICK: Yes, that --

THE COURT: Sit down.

All right. Don't interrupt the doctor when he's giving an answer, please. If you object to a response, if you want the response stricken based on not being responsive, you can assert that objection. But let him complete his answer.

MR. SMITH: I'm going to withdraw the question, your Honor.

MR. BOROWICK: Judge --

THE COURT: Sit down.

MR. BOROWICK: I object to that process.

THE COURT: Sit down.

With all due respect, Mr. Borowick, you did the same thing.

So I'll allow it.

The question.

Q Doctor, based upon your education, training and experience, specifically in the field of orthopedics and more specifically in the field of spinal surgery, do you have an opinion, with a reasonable degree of medical certainty, as to whether it is good and accepted practice for an orthopedist to keep his films of a patient and to compare those films to subsequent studies in order to evaluate the condition of a patient?

Do you have an opinion, yes or no?

A It's not a yes or no answer.

THE COURT: All right. So you can't respond in a yes or no fashion.

MR. SMITH: Okay. Fine.

Q Now, Doctor, the film that was taken back in July of 2002, you stated, when you saw the patient, in January of 2003, that you found a herniation, I believe, at C-5-C-6, is that correct?

A Yes.

Q Oh, by the way, Doctor, is it true among neurologists, neurosurgeons and orthopedists that sometimes you can tell it's a C-6 because you can actually form a 6 with your hand when you have a problem in those fingers?

A That's a good mnemonic or way to remember, yes.

Q And, Doctor, at that time, when you say that you saw a herniation, there's a difference between a herniation and a bulge, correct?

A Yes.

Q And, in fact, have you ever been at trial where you have testified as to you found a herniation and the other side testified that what you call a herniation they call a bulge?

MR. BOROWICK: Objection, Judge. Irrelevant.

THE COURT: Objection sustained.

Q And, Doctor, based upon your experience, have you found that there has been disagreements between orthopedists and neurosurgeons as to what one terms a herniation another may term a bulge?

MR. BOROWICK: Objection.

THE COURT: The question is, can there be disagreement among orthopedic surgeons as to whether or not a particular injury to the vertebrae is either a herniation or a bulge?

THE WITNESS: Yes.

THE COURT: Okay.

Q And the way -- the basis for this disagreement is -- both doctors are looking at the same film, correct?

MR. BOROWICK: Objection.

I don't understand that question.

MR. SMITH: Withdraw that.

Q Here you looked at the film that was taken --

MR. SMITH: I'm sorry, your Honor.

Q You looked at the film that you ordered and was taken back in July of 2002 and you say, in your opinion, that's a herniation, true?

A Yes.

Q And another doctor, if they had the opportunity to look at the that film, they may well find that that's a bulge, isn't that possible, Doctor?

A Yes.

Q But they're not going to be able to do that unless they can see the film, correct?

A Yes.

Q Where's the film, Doctor?

A I don't have the 2002 film.

Q Now, Doctor, you went on at great length in -- by the way, Doctor, how much are you being paid to appear here today?

A It works out to be somewhere in the neighborhood of about $400 per hour.

Q And how many hours -- did you cancel all your appointments for the day?

A I cancelled this afternoon, yes.

Q And did you talk with Mr. Sacks before today about this case?

A Yes.

Q And how long was that conversation?

A About an hour or so.

Q Were you paid for that?

A I have not been paid for that, no.

Q Are you going to be paid for that?

A I will submit my bill and then, hopefully, yes.

Q Now, when Mr. Walsh saw you in October of 2004, were you aware, at that time, that he was -- I'm sorry -- in September of 2004 -- I'm getting mixed up with the MRI films.

MR. SMITH: Withdraw it.

Q When you saw Mr. Walsh in September of 2004, were you aware, at that time, that this lawsuit was coming up for trial?

A Not to my recollection, no.

Q Were you aware that he had a lawsuit at that time?

A I had gotten requests for documents which are on the chart, so I knew that there were documents being requested.

Q Were you aware that Mr. Walsh had -- we call --

MR. SMITH: One moment, your Honor.

Q When you saw Mr. Walsh, Mr. Robert Walsh, for the first time, in July of 2002, were you aware that he had a lawsuit pending at that time?

A I don't believe so, no.

Q Doctor, I want you to look at your note for July of 2001 -- 2002.

I don't want you to read anything out loud. I just want you to look at the note. I think it's in the history section.

You were aware, at that time, that he was complaining -- his complaints arose out of a car accident, isn't that true?

A Yes.

Q Now, at that time, in 2002, you had already been doing work, appearing for structural iron workers at court, true?

A I don't know if I was appearing back in 2002, no.

Q Were you looking -- were you examining structural iron workers at that time?

A I may have very well been, yes.
Q On referral by Dr. Harrison?
A Sometimes, yes.
Q By the way, did you receive payment for the visit by Mr. Walsh back in July of 2002?
A I haven't checked.
Q Do you know who paid?
MR. SMITH: Withdraw that.
Q Do you have an outstanding bill for the treatment you rendered to Mr. Walsh back in 2002?
A I honestly don't keep track of payments for the patients. I like to treat the patients and keep the, you know, the monetary issues with my billing department and office managers. I'd rather not -- I don't usually worry about that section of things.
Q Do you receive payments from local 40 when you treat structural iron workers?
A If we bill them and they pay the bill, then we do receive payments from them.
Q I'm asking specifically, are you aware that you had billed local 40 for treatment that you rendered to structural iron workers?
A I honestly have not reviewed my payment records or bills, to give you an honest answer to that question.
Q I'm going to stay with this July record for a

moment, Doctor.

When a film is taken, do you get an opportunity to look at that film?

A Yes.

Q And then that film becomes part of the patient's record, true?

A The film itself does not always become part of the patient's record because the film is taken at a separate institution, an outside institution. And they make a copy of that film that goes on to their computer. The film is generally provided to us and I usually return those films to the patient, so that I don't have to store MRI films in my office.

Q And when you return it to the patient, isn't it good practice to make a notation to that effect in the record, yes or no?

A I note the MRI findings that are specific to my particular inquiry.

Q Well, isn't it good practice, though, to note whether you give the film back to the patient, because you may well need that film in the future, true?

A It's my usual and customary practice to return the films, so I do that with all my patients.

Q Well, did you make a notation -- you do that with all your patients?

A Yes.
Q You give them back the films?
A I generally give the patients the films because I don't have room in my office to store all my films.
Q Well, Doctor, do you generally do it or do you always do it?
A I generally give the films back to the patient.
Q But you didn't give back the films that you took in October of 2004, did you?
A I didn't --
Q Yes or no, Doctor?
A It's not a yes or no answer.
THE COURT: The question is -- what date --
Q The films that were taken in October of 2004, did you give those films back to Mr. Walsh?
THE COURT: That's the question.
Q Yes or no?
THE COURT: Do you know whether or not you gave them back to Mr. Walsh?
A I honestly don't remember offhand, no.
Q Did you bring them in with you today?
A They are here today, yes.
Q Did you bring them with you?
A I did bring them with me, yes.

Q Now, Doctor, you were testifying to a whole number of treatments that would be rendered to the patient if you were to perform that procedure you mentioned?

A Yes.

Q By the way, Doctor, you said that a patient's complaints of pain are not relative as to whether the surgery would be performed, is that correct?

A A patient's perception of their pain, how they tolerate pain, whether or not they are stoic or whether they are hyperaesthetic doesn't bear relevance on whether or not you do a procedure to prevent neurological injury.

Q Doctor, isn't it true sometimes that a patient's pain can impair that patient from doing a normal daily course of routine or activity, right?

A Yes.

Q And you can actually have two patients who have very similar conditions vis-a-vis presentation in a film but variances in their complaints and impairment in their activities, correct?

A Yes.

Q And, then, wouldn't it be fair to say that the amount of pain and the impairment that it produces may well be relevant as to whether a person will undergo a procedure or not, true?

A If there is surgical pathology present. It

depends on the case.

Q I'm sorry.

You didn't understand my hypothetical.

My hypothetical was, two patients present with the same anatomical dysfunction vis-a-vis films. Only one patient is complaining of such pain that it impairs him or her from doing his normal course of activity while the other patient can get along and do whatever he's doing.

MR. BOROWICK: Objection, Judge.

Do whatever he's doing?

MR. SMITH: Okay.

THE COURT: I think we're saying and continue in his daily activities --

MR. SMITH: Correct.

THE COURT: -- without much complaint.

I think that's what you're trying to say.

MR. SMITH: Yes, your Honor.

THE COURT: Okay.

Q And, Doctor, then, in that instance, the patient who presents with the pain would be a candidate for the surgery, correct?

A If both patients have nuclear material on their spinal cord, they're both candidates for pain(sic), irrespective of their complaint, because the nuclear material laying up against their spinal cord predisposes

them to paralysis. The indication is to prevent paralysis. It's not a pain indication at that point.

Q But if they're neurologically intact and they're functioning, it's not necessary to do any procedure, right?

A Not as an emergency.

But it is offered to prevent neurological damage.

Q Mr. Walsh, per your findings, was neurologically intact and you recommended continual conservative treatment in July of 2002, in January of 2003, in September of 2003. And the next time you saw him was in September of 2004. And you didn't even see him again until today.

Right?

A I don't understand the question.

I'm sorry.

Q He wasn't -- Mr. Walsh wasn't having any impairment or dysfunction; he was getting along quite well, isn't that true?

A Pain was his complaint. And he did not manifest any neurological damage for those visits.

Q And, Doctor, at the same time, he was growing older, correct?

A Yes.

Q And the natural degeneration of age was continuing, true?

A Yes.

Q And isn't it true, Doctor, that the complaints of trauma -- of what he presented and what he advised you in July of 2002 had, in fact, stabilized, had passed, and he was functioning quite well right through 2003, 2004 and, in fact, you ordered the films for October for the purpose of coming in here and testifying, as you have done in the past for other structural iron workers?

MR. BOROWICK: Objection.

THE COURT: Overruled.

THE COURT: Do you understand the question?

THE WITNESS: No.

THE COURT: Rephrase the question.

Q You know, Doctor, I didn't really get a good chance to look at your notes.

Can I have them now?

By the way, Doctor, when you received the subpoena from my office for your records, did you contact Mr. Walsh or Mr. Sacks or anybody at Sacks and Sacks or anybody down at local 40?

A No.

Q I'm sorry, Doctor.

I don't see your report for 2004.

A It's -- it may be on the other side of the folder in the loose papers that are on the other side of that chart.

Q These are your regular progress notes, right?

A Yes.

There is a 2004 note there, because I actually had it. I was looking at it before. It was loose. It wasn't -- it wasn't bound.

Q Well, isn't your normal practice to take the records of any patient and put them in the binders, Doctor? Isn't that your practice?

A Yes.

Q Why wasn't it done for the 2004?

A My secretary may not have gotten to it yet.

Q Doctor, in October of 2004, you note a bulge at C-3-C-4, correct?

A Can I look at my chart, please?

Q I'm sorry.

You don't have an extra copy of this, do you?

A No.

This? It's this?

Q Yes.

A This is a radiology report.

Q I'm sorry, Doctor.

Where is your report?

Doctor, I have -- you had a report for the visit in September of 2004?

A Okay.

Q Well, did you look at the films that were taken in October?

A Yes.

Q And did you write a report on your findings regarding those films?

A No.

Mr. Walsh and I spoke on the phone about the MRI films.

Q Doctor, I'm asking -- well, Doctor, I'm asking you, did you write a notation in your records regarding your findings of Mr. Walsh's films from the 2004 MRI?

A I didn't make a hand -- I didn't do an MRI reading that I billed for, so I didn't make an office record of that now.

Q Well, isn't it good practice that, when you're reading a film regarding a patient, for you to make a notation regarding your findings?

A That notation is required if you intend to bill for the MRI reading, but I don't always do that.

Q Doctor, you just said before you don't care about the billing at all, you just care about taking good

care of the patients.

A That's why --

Q So I'm asking you, is it good practice to make a notation regarding your findings of a patient's film, specifically this patient, Mr. Walsh, from his October '04 films?

A That's why I didn't write a note, because I really don't care about the billing, so I didn't bill for that MRI reading.

Q I'm not asking about the billing.

Billing is one thing.

I'm just asking about good medical practice.

I just want -- isn't it good for you to put your opinion down, because you're familiar with this patient, to make your notation in notes so that, if anybody comes along, I mean, if anybody comes along in the future, they can look at your notations and say that Dr. Merola saw this patient, read this film and his opinion was this?

Isn't that good practice?

Isn't that the basis of note keeping?

A Note keeping is there to make -- refresh my memory when I'm taking care of that patient, to help me make a surgical decision.

Q What about if you're not there and somebody else comes along and they want to know the opinion of the

spinal specialist who's been treating this patient since July of 2002 and they want to know his opinion, you, regarding the film that was taken October 2004?

Isn't it good practice, therefore, to make a notation in the record?

A I'd be happy to tell them if they asked me.

Q No.

Well, you're not around -- forget it.

Okay. Doctor, you've been on the stand a lot, haven't you, Doctor?

A No, I haven't.

Q Well, at least five times for the structural iron workers?

A That's not a lot in ten years.

Q You've been testifying for structural iron workers for ten years?

A No. I've been in practice ten years.

Q How long have you been testifying for the structural iron workers?

A I haven't kept track of all my testimony, because that's not part of my medical practice.

Q You have an accountant just for your testifying work?

A No, I don't have an accountant for testifying.

Q You use the same accountant for --

MR. SMITH: Withdraw that question.

Q But anyway, Doctor, this finding -- by the way, do you have the study that was taken back in July of 2002?

A What study is that?

Q It would be the reading by the -- when a film is taken, MRI, sonogram, x-ray, the radiologist reads that film also, right?

A Yes.

Q And you received that reading in addition to the film?

A Yes.

Q And it's important for you to receive the film because it's based on your experience.

You're as competent in evaluating these films as a radiologist, if not more so, true?

A Yes.

Q Because you have the clinical background to verify the films, true?

A Yes.

Q Okay. So what I was asking for, Doctor, where's the study that was taken back in -- here it is.

Doctor, back in July of 2002, you said that there was a herniation at C-5-C-6, correct?

A Yes.

Q But the radiologist, he said that it was a

bulge, isn't that true?

A Yes.

Q So you had a difference of opinion at that time, right, Doctor?

A Yes.

Q It would be helpful, then, to see that film, wouldn't it be, Doctor?

A That film was 2002. It's now 2005. The most important thing, if you're going to treat a patient, is to see what the most updated film is.

Q But, Doctor, back in 2002, July, there was a disagreement as to that very film, wasn't there?

A Yes.

Q In fact, there was no finding of any herniation at all by the radiologist back in 2002, isn't that correct, Doctor?

A Can I look at the radiologist's report?

Q You don't have an extra copy of that, do you?

A No.

The radiologist reads bulge.

Q No, no, no, Doctor. Don't read it.

THE COURT: You cannot read from the document.

He wants you to --

Q Is there any mention of herniation, Doctor?

A It's not a yes or a no.

Q All I'm saying, does the word "herniation" appear in that report?

A Herniation, no.

Q "Hernia"?

A No.

MR. SMITH: Thank you, Doctor.

Can I have that back?

Q Does the word "bulge" appear in that report?

A Yes.

Q By the way, Doctor, a bulge is associated with normal deterioration of the spine, true?

A That's not a yes or no, either.

THE COURT: Okay.

Q By the way, Doctor, who did that study anyway, Dr. Teslic?

THE COURT: Can you be more clear?

Q That was Dr. Teslic, T-E-S-L-I-C, correct?

THE COURT: Which study are you referring to?

MR. SMITH: I'm sorry.

Q The study that was done from the MRI that was taken on July 1, 2002 and the study that was done of that film, and the study is dated July 2nd of 2002, was done by Dr. Kornelia, K-O-R-N-E-L-I-A, Teslic, T-E-S-L-I-C, of the

Greater Metropolitan Diagnostic Imaging, correct?

A If she signed the report, yes.

Q And you were the one who referred Mr. Walsh over to Greater Metropolitan, true?

A Yes.

Q Do you know Dr. Teslic?

A No.

Q At that time, Dr. Teslic didn't find any kind of herniation, isn't that true, Doctor?

A The word "herniation" is not in that record.

Q In fact, didn't Dr. Teslic also find straightening of the lordotic curvature, of the cervical -- lordotic curvature?

A Yes.

Q Doctor, what is tonsillar, T-O-N-S-I-L-L-A-R, herniation?

A The tonsils are a portion of the lower part of your brain. Tonsillar herniation means that the lower portion of your brain, at the level of the tonsils, protrudes into the spinal canal. That's an abnormal position for the tonsils.

Q There was no tonsillar herniation found at that time?

A Correct.

Q You didn't send the patient back to Greater

Metropolitan in 2004; you sent the patient to Midtown Radiology, isn't that true, Doctor?

A If -- yes, I believe that is true.

THE COURT: Counselors, step up for a second.

(Whereupon, a discussion was held at the bench off the record among the Court and counsel)

MR. SMITH: Your Honor, at this time, I have nothing further.

I would just ask that I be provided with a complete copy of the doctor's records.

And I would ask, if possible, Doctor, make a further search to try to find those films or an explanation.

THE COURT: Okay. Do you have any other questions?

MR. SMITH: No.

THE COURT: No, no.

I'm asking Mr. --

MR. SMITH: No, your Honor.

THE COURT: Do you have any redirect?

MR. BOROWICK: No.

THE COURT: Okay, Doctor, you're excused.

(Whereupon, the witness was excused)

THE COURT: Ladies and gentlemen, that

completes the presentation of evidence for today.

We're going to recess and continue the trial tomorrow morning. Be here at 9:30 so we can get started right away.

The same admonitions apply.

Please do not discuss this case amongst yourselves nor with anyone else. If anyone tries to discuss it with you, you're to report that to me as soon as you're able to.

Again, don't visit the scene of the accident.

I don't know what the weather conditions are outside. Hopefully, they're not as cold as this morning. So please have a safe ride home.

And I'll see everybody here tomorrow morning.

COURT OFFICER: All rise.

Jury exiting.

(Whereupon, the jury exited the courtroom)

THE COURT: Anything you want to put on the record?

Wait. We have the jurors.

(Pause in proceedings)

THE COURT: Do you want to put anything on the record or do you want to speak to him before you

put it on the record?

(Whereupon, a discussion was held off the record)

THE COURT: Let's put it on the record.

There's two things that have been put on the record.

First, Mr. Smith requested a copy of the 2002 film, which your doctor relied on, the MRI film. He wants to see it.

MR. BOROWICK: He doesn't have them. He said he doesn't have them.

THE COURT: What are you saying, they're lost?

MR. BOROWICK: I have no idea.

It's not my job to keep track of films. I brought Mr. --

THE COURT: Counselor, it's not a question of whether or not it's your job or not, all right.

You're going to have to make the appropriate application, all right. Just make the appropriate application.

And what you do is, tomorrow, you bring me in case law, make the application on the record.

And, you know, the other thing is, no MRI films have been admitted into evidence.

MR. SMITH: I know that.

MR. BOROWICK: Judge, he objected, it was sustained, and I didn't even -- he precluded --

MR. SMITH: I appreciate that, your Honor.

THE COURT: You make the appropriate application, bring in case law, and we'll proceed from there. You asked for the document. Show me that it's been requested in the past and it wasn't produced. Make your record. Bring me in case law as to what the appropriate remedy is and I'll fashion a remedy.

MR. SMITH: Thank you, your Honor.

(Whereupon, a discussion was held off the record)

THE COURT: This I want to put on the record.

I want to put on the record that he's indicated that he has yet to have all the films produced so that his witness can review the films that you said you were going to use at trial.

There were two films that you presented during Dr. Merola's testimony or at least attempted to introduce.

MR. BOROWICK: And withdrew.

THE COURT: It doesn't matter.

You said you were going to give him a copy of whatever it is that you were going to bring in to court.

MR. BOROWICK: Which I did.

THE COURT: Now he indicated that he has not seen all the 2004 films.

MR. BOROWICK: Well, they're here. He's got 'em.

MR. SMITH: Now I have them. I took the two -- the two films and I put them in my package here. So now I have the 2004 films of Dr. Merola. I just took it out a couple minutes ago.

THE COURT: So you have Dr. Harrison.

And who else is coming tomorrow?

MR. SMITH: I had scheduled Dr. Manspeizer.

I'm going to be talking to Dr. Manspeizer tonight, going over these matters. He has never seen these films.

And, to tell you the truth, Doctor -- I mean, Judge -- the films we really were interested in were the July 2002 films, because that's the film supposedly that had a herniation.

And today, this afternoon, a whole bunch of awakenings, that other people looked at the film

at that time, didn't find them, and, more importantly, this doctor doesn't have the films and he does not know what happened to them.

THE COURT: Make the proper application.

MR. SMITH: All right.

MR. BOROWICK: Well, I don't know if there's an answer to your question.

If he's going to recommend that Manspeizer come, fine, he can go if the Court approves. If not, I can fill -- I will finish with my witnesses.

THE COURT: Just have Dr. Harrison and be ready to proceed with your -- we'll continue with the cross-examination of Mr. Walsh.

He's also requested a copy of Dr. Merola's --

MR. SMITH: Records.

THE COURT: -- records so he can have his expert review it.

And I'm directing to you produce a copy of those records for his expert's review.

MR. BOROWICK: Logistically, Judge, I don't know what Dr. -- once Dr. Merola leaves here and goes to dinner or whatever --

THE COURT: With all due respect, he's within your control.

I'm directing you -- I'm directing you to have a copy of his chart available for defense counsel's expert.

MR. BOROWICK: Judge, I will do my best. That's all I can promise you.

(Whereupon, the case was adjourned to Janauary 21, 2005)

Certified to be a true and accurate transcript of the foregoing proceedings

Anne Marie Scribano

Anne Marie Scribano, R.P.R.

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