2 of 2 DOCUMENTS

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FRANK GILLESPIE, Plaintiff(s), -against- VIRGINIA C. MUSCO, Defendant(s).
FRANK GILLESPIE, Plaintiff(s), -against- UNIVERSAL LAWN MAINTENANCE INC. and JOSEPH MADAFFARI, Defendant(s).

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March 23, 2005

Trial Transcript

VIEW OTHER AVAILABLE CONTENT RELATED TO THIS EXPERT: LATTUGA, SEBASTIAN

COUNSEL: [*1] RICHARD M. KENNY, ESQ., Attorney for Plaintiff(s), New York, New York.

KELLY, RODE & KELLY, LLP, Attorneys for Defendant Musco, Mineola, New York, BY: LORIS ZEPPIERI, ESQ.

MARTIN, FALLON & MULLE, Attorneys for Universal & Madaffari, Huntington, New York, By: PETER D. GARONE, ESQ.

JUDGES: Before HON. JOHN M. GALASSO, County Court Judge

EXPERT NAME: SEBASTIAN LATTUGA, M.D., F.A.C.O.S.

TITLE: TRIAL TRANSCRIPT - SEBASTIAN LATTUGA, M.D., F.A.C.O.S.

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TEXT: 3
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2 THE CLERK: Is there an application?
3 MR. ZEPPIERI: Yes, there is, Judge. I have
4 an application with regards to the witness that is
5 testifying today, the plaintiff's orthopedic
6 surgeon.
7 During his treatment of the plaintiff, the
8 surgeon took x-rays on several [*2] occasions after the

November '98 surgery but before the motor vehicle accidents. These x-rays although they have been subpoenaed from Dr. Lattuga and from Orlin and Cohen are not in the courtroom, and I would object to the surgeon making any reference to these x-rays that are not going to be in evidence.

THE COURT: Want to be heard?

MR. KENNY: Yes, Your Honor.

THE COURT: Any chance of getting them?

MR. KENNY: We have subpoenaed them. I think both defense firms have subpoenaed them. There was a very --

THE COURT: There's x-rays coming over.

MR. KENNY: I don't think they're those. There was a bad break up between Dr. Lattuga and his former practice that being Orlin and Cohen. I advised Mr. Zeppieri Monday when picking a jury of

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that fact. That the x-rays were in limbo because I looked downstairs and in the subpoena record room beforehand and they were not there.

He makes mention in the records of him reviewing the x-rays on three separate occasions. Those records have been reviewed by their expert. They have been given Dr. Lattuga's records. [*3] Their experts make reference to the fact he reviewed his records in that regard, but doesn't say he look at the x-rays because apparently he did not.

I thought we had an understanding yesterday. I don't mean to make a misrepresentation regarding the records in this case, and apparently I must have been mistaken, Your Honor. I would have had my investigator at least be here today to tell the Court what efforts we made.

THE COURT: That happens. They're missing.

MR. ZEPPIERI: My expert hasn't seen the films. If he had, it would be a different story.

THE COURT: He would see the report not the films.

MR. ZEPPIERI: My expert hasn't seen the films. Certainly not the plaintiff's attorney

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fault these x-rays aren't here, but that doesn't stop the prejudice to the defense here. He mentioned to me the x-rays weren't here only because I asked him where are Lattuga's x-rays. Then he mentioned, I don't know, I think they're

Orlin and Cohen, but they're not the subpoenaed record.
MR. KENNY: Did I not tell you there being a break up between them, I didn't [*4] know where the x-rays --
MR. ZEPPIERI: But I am putting no blame upon plaintiff here. I never conceded I wouldn't raise this objection.
MR. KENNY: He didn't, Judge.
THE COURT: Nothing much I can do.
MR. GARONE: I of course join.
THE COURT: I know. I figured that. Nothing I can do because the Appellate Court held the doctor cannot testify without the presence of the x-rays.
MR. KENNY: If I had known, as I said --
THE COURT: It's not your fault. So, I got to sustain the objection. I'11 give you time to --
MR. KENNY: In view of the fact, I have my

doctor here, they know I have my doctor here for one morning, it's not surprising.
THE COURT: -- time to make calls, see if your investigator --
MR. KENNY: Never be able to get them here before the doctor leaves. He can't come back for several weeks. Not surprising the motion is made.
THE COURT: I can understand his feelings.
MR. KENNY: Ready to proceed.
THE COURT: Anything else.
MR. GARONE: Just two things. Prior to the original jury being selected in [*5] this matter, there was an agreement between plaintiff and counsel for defendants in the action of Gillespie against Universal Lawn and Joseph Madaffari, that in exchange for that concession of liability plaintiff's counsel capped damages at the policy limit which is $ 500,000.
MR. KENNY: So stipulated.
THE COURT: All right.
MR. GARONE: May I have marked the two Bills of Particulars that I --
THE COURT: We have them.
MR. GARONE: -- made reference to yesterday.

THE COURT: All right. We will mark it as Court exhibits.
Anything else? I will bring the jury up.

MR. GARONE: No.
THE COURT: Send for the jury.
THE COURT OFFICER: Jury entering.
THE CLERK: Please be seated.
THE COURT: All right. Plaintiff call your next witness.
MR. KENNY: Thank you, Your Honor. We call as our next witness Dr. Sebastian Lattuga.
DR. **SEBASTIAN LATTUGA,** called as a witness by the Plaintiff, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:
DIRECT EXAMINATION
BY MR. KENNY:
[*6] THE CLERK: State your name, spell your last name and give your office address.
THE WITNESS: **Sebastian Lattuga,** 2001 Marcus Avenue, Lake Success, New York.
THE CLERK: Spell your last name.
THE CLERK: L-A-T-T-U-G-A.
THE COURT: You may inquire.
MR. KENNY: Thank you, Your Honor.

Q. Good morning, doctor.
A. Good morning.
Q. You're a physician licensed to practice medicine in the State of New York?
A. Yes.
Q. Do you have a field of specialty, doctor?
A. I am an orthopedic surgeon, Board Certified. I am a fellowship trained spinal surgeon.
Q. Could you briefly describe your educational and work related background to date, sir?
A. Educated at College Medical School SUNY Stonybrook, Mount Sinai Internship. Stonybrook residency, University of Miami fellowship. Obtained my license approximately 1991, Board Certification approximately 1997. I am attending spinal surgeon North Shore LIJ system. I hold chief spinal surgery in the North Short LIJ system. Director of spinal development for the system.
Q. You have indicated [*7] you're board certified. Can you explain to the jury what that means, how one in your position becomes so certified?
A. Board certification is a process of written and oral examinations. It takes place after you completed your training, after you completed a certain prescribed amount of time and surgical procedures in private practice. Those cases are reviewed by a review panel who examines them and

they pass judgment on whether or not you get approved for certification or not.
Q. Doctor, how many times have you testified in the course of your career?
A. In a trial situation like this, five or six times.
Q. When you do appear in court is it always on behalf of your patients?
A. Yes.
Q. Do you do any independent reviews for defense firms or other plaintiffs firms?
A. I do not do independent medical examinations. I am a treating physician.
Q. In order to be here today, did you have to make special arrangements with respect to your schedule?
A. Yes. Wednesday is normally my operative day.
Q. At my request, sir, did you postpone performing [*8] those surgeries in order to appear here today?
A. Yes.
Q. Have I had to compensate you for that?
A. Yes.
Q. Doctor, I am going to be asking you a series of questions here this morning about your treatment of the plaintiff in this case, Mr. Gillespie. Before we do that,

I'd like to spent a few moments discussing certain terms the jury is going to hear this morning somewhat on a constant basis.
Can you describe what a vertebra is?
A. Vertebra is the name of one of the bones of the spine.
Q. What an is a disk?
A. Disk is the organic structure which exists between each vertebra, allows for stabilization between the segments and curving effect and allows some motion at that level.
Q. What is the sacrum?
A. Sacrum is the terminal in setting, one of the terminal setting of the spine, right before the coccyx. It's also part of the spine but they're fused oppose to they don't have individual disks between each segmental segment. It's one piece of bone.
Q. The lumbar spine. Where is that?
A. That is the low back area.
[*9] Q. What about an laminectomy. What is that?
A. Laminectomy is a surgical procedure where you remove part of the existing spine to gain access to the nerves or disks, and removal of that portion of the spinal cord called the lamina.
Q. A fusion?

A. A fusion is a, it's a surgical procedure commonly referred to as fusion procedure where a surgeon will intervene, and it's actually a grafting procedure, intervene, he will do some technical maneuver to the spine to get the spine to fuse and actually what he's doing is a grafting procedure, then the body goes on to fuse thereafter.
Q. Allograft?
A. In performing fusions, sometimes physicians will add extra bone because you're asking the bones to grow together and you actually can take bones from different parts of the bodies or from transplant patients, cadavers, grab some bone which is sterilized, add it to that area and it helps to facilitate the bones to grow together.
Q. Arthrodesis?
A. Arthrodesis is fusion. Another word for fusion.
Q. Pseudoarthrodesis?
A. Pseudoarthrodesis are words that [*10] basically describes a circumstance where the bones ultimately were fused no longer fused or don't become fused.
Q. Fracture fusion?
A. Fracture fusion means, that suggests the mechanism by which someone would have something that was fused then it fractured. That is all it is.
Q. Doctor, I'd like to direct your attention to the

medical, to your office records pertaining to Frank Gillespie.
Am I correct you brought them with you here this morning?
A. Yes.
Q. When did he first come under your care?
A. I believe 6/16/98 first time he came to the office.
Q. Did he give you a history at that time as to why he presented himself on that date?
MR. GARONE: May we clarify. It seems the doctor was saying that Mr. Gillespie first came to the office June sixteenth. It's not clear as to whether he saw him at that time or someone else did.
THE COURT: You could have brought that out on cross. I don't want to interrupt the plaintiff. The objection is overruled.
Go ahead.
Q. Did you see him that day?
A. My partner [*11] Isaac Cohen saw him.
Q. What history did he present on that day?
A. Forty-nine year old man worked as a carpenter involved in an accident while at work when he fell into a

25 hole and injured his chest wall as well as his cervical spine
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2 area, developed restriction of motion and tenderness.
3 Q. Did he return to the office of Orlin and Cohen on
4 July 7, 1998?
5 A. Yes.
6 Q. Did you treat him on that date or your partner at
7 that time?
8 A. It was my partner.
9 Q. Did there come a point in time he ultimately comes
10 under your care and you become his primary physician at the
11 office of Orlin and Cohen?
12 A. 7/15/87, in Rockville Centre.
13 Q. Do you continue to follow and monitor Mr.
14 Gillespie's prognosis over the course of the next several
15 weeks, if not months?
16 A. Yes.
17 Q. Am I correct, sir, that you make a recommendation
18 due to the injuries he sustained as a consequence of that
19 construction accident that he undergo a cervical fusion as
20 well as a lumbar fusion?
21 A. Yes.
22 Q. Am I correct, sir, that you performed the cervical
23 fusion [*12] at Mercy Hospital on Mr. Gillespie in October of 1998?
24 A. Yes.
25 Q. You also performed a lumbar fusion in November of
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2 1998, and if we may at this time I would like to discuss that
3 procedure.
4 A. Yes.
5 Q. Can you describe for the jury exactly what you did
6 on November 16, 1998?
7 A. Patient underwent what is called an anterior lumbar
8 inner body fusion. And, essentially what that is an
9 operation, it's an incision you make on the abdomen of the
10 patient. The spine really is in the middle of the body.
11 Everybody thinks it's the back. The spine sits in the middle
12 of the body with your belly in back of the spine in the
13 middle. So, the area where the disk is, which is where the
14 surgery was, removing the disk and performing a fusion
15 procedure. That is sort of the middle of the body. Easiest
16 to get in from the front, you know, and so through an
17 incision in the front of the abdomen you're really not
18 exposing your internal organs, but you make an incision, then
19 all those organs are sought of retracted away, and that
20 exposes the vertebra, the vertebra and the disks, and then
21 [*13] through that exposure, I am able to gain access to the
22 vertebra and disks. And his problem was the disk was

23 injured. Okay. It was no longer functional. Okay. So, the
24 treatment we had at the time was to try to get the bone, to
25 remove the disk and put an implant into that disk space and
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2 get those two bones to grow together.
3 So, the disk sits between the two vertebra. It moves
4 normally. If it's injured, with motion you get pain, and the
5 solution to that, ultimately, it's not the first thing you
6 do, the last thing you would do, if you can get the bones to
7 stop moving abnormally, then the patient generally stops
8 complaining of pain. Okay. So, the operation is removing
9 the old disk and putting in a bone space which is called a
10 dowel. That is just a technical name. You know, remove the
11 old disk, scrape up the bone and put the dowel in. That is a
12 piece of bone that comes from transplant patients, the same
13 patient you get a heart or lung. It's sterilized and
14 screened, you screw it in, sounds gross but that is what you
15 do. You scrape it, screw it in, it has a fit to it, and then
16 it's closed. That [*14] is the operation. Then the patient is
17 discharged.
18 Over the course of several months that whole thing I
19 did, the fusion procedure, it all grows together, the
20 vertebra, the patient's own vertebra with the new device I
21 put there, which happens to be a transplant piece of bone,
22 and then the vertebra below which was the sacrum, L5, you
23 know, it's the technical thing, but all the vertebra grow
24 together as one solid piece of bone. When those bones grow
25 together the patient has a reduction in pain, generally
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2 speaking, because the abnormal motion from the damaged disk
3 has been eliminated.
4 Q. Now, this fusion that you performed, was that the
5 L5-S1 space; am I correct?
6 A. Yes.
7 Q. Now, that is the level that separates the bottom of
8 the lumbar spine from the top of the sacrum; am I correct?
9 A. Yes.
10 Q. Now, doctor, you just described a surgery called a
11 fusion. Have you ever performed these beforehand?
12 A. Over a thousand.
13 Q. Are there other types of fusions you performed as
14 well?
15 A. I do all manner of spinal surgeries, perform
16 surgeries on cancer [*15] patients with tumors, scolioses surgery,
17 in all parts of the spine. The neck, the middle of the
18 spine, trauma usually, fusion even though it sounds like an
19 ugly word, if you get the bones to grow together the patient
20 stops complaining. That is one of the most common components

to this spinal surgery.
Q. With respect to this procedure, am I correct there's certain risks associated with this procedure that you as a surgeon must sit down with a patient and discuss before hand?

A. Yes.
Q. What are those risks?
A. One of the main risks of spine surgery, any time patients have pain, is an issue, they don't always get relief of their pain. So, that is one thing you tell patient up front, even though the bones may fuse together, you may not have relief for their pain.
Number two, because I am doing this grafting procedure doesn't mean the bones are going to grow together. I am doing it correctly but it's really God and your own makeup, physical makeup. There are some variables that determine whether or not it will fuse. There is no way to know ahead of time. You [*16] can't say which one you think, you know, will fuse on which one and which one wouldn't.
Also just generally the risks of surgery, you can bleed to death, you can die from the anesthesia, anesthetic related complications, nerve damage and paralysis. There quoted risks. They don't happen commonly but it is a known risk of the procedure. Blood clots in your legs, chronic pain. All these issues are common. We discuss infections.
Q. What about the incidence of failure rate. Is that something you discuss with your patients?
A. Yes. Again, when doing this grafting procedure that I do, depending on how you try to get the vertebra to fuse, you get different success rates. There are lots of different techniques for getting the bone to grow together. You can do an operation from behind. You can do an operation from the front. You can put in screws. You can not put in screws. You can put in your own bone. You can put in someone else's bone. Then you apply this to a group of people.
So, there are variables in success rates. Generally, in my practice, the way I do things, basically a [*17] slam dunk, at the time I gave Frank over a ninety percent success rate that the bones would grow together and fuse.
Q. Is that typical in your practice, doctor?
A. For that exact operation, yes.
Q. Doctor, am I correct the incident of failure rate is also contingent on the area fused?
A. Yes.
Q. And, have you had occasion in the course of your career in performing these over thousand fusions to have

performed fusions on other individuals at that same exact level?
A. Yes.
Q. And, could you approximate the success rate at that level?
MR. ZEPPIERI: Objection.

MR. GARONE: Objection.
THE COURT: Overruled.
A. Again it's over ninety percent.
Q. Now, doctor, in this particular fusion, you utilized an allograft?
A. Yes.
Q. Which was a bone graft from a cadaver; am I correct?
A. Yes.
Q. How long does it typically take for the fusion involving an allograft at this particular portion of the spine to begin healing?
A. I would say again healing, it happens within a few weeks. I mean, [*18] an average patient takes about three months to fuse, plus or minus a month. Average person. Lots of variables. Age, sex, obesity, what we call comer factors, other illnesses, if they have diabetes, if they're on medicines, they're all issues that relate to making it longer or less, the fusion time.
Q. Certain non surgical factors assist you in being able to arrive at a diagnosis before whether someone would be a successful candidate?
A. There are factors that influence the fusion rates.
Q. All right. Was Mr. Gillespie's age a factor

mitigating against his recovery?
A. No.
Q. That being early fifties?
A. No.
Q. The fact he didn't smoke, was that also a factor?
A. Yes. Smokers have a higher rate of non healing, non fusing. He wasn't a smoker.
Q. Was he diabetic?
A. No.
Q. Was he taking any non steroidal inflammatory drugs?
A. No.
Q. That would also be a factor, am I correct?
A. Yes.
Q. Was his weight a factor which would mitigate against full recovery?
A. He had none of those factors.

[*19] Q. Now, doctor, is a patient with a fusion at risk for a pseudoarthrosis if involved in a trauma --

MR. ZEPPIERI: Objection.

THE COURT: I will allow it. He is an expert. I will allow him to answer.

A. You know, the human body is subject to injury, and whether it's a natural state or state where someone had surgery already, those areas are subject to trauma, subject

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to trauma, and can respond to that trauma, and certainly if you, just because someone had a fusion doesn't mean if you're involved in an accident that you couldn't injure that area again. Or the same as saying, didn't have a fusion could you injure that disk. The answer is yes, if they had surgery could you re-injure. That answer, the answer is yes, always a possibility.

Q. Doctor, after you performed this fusion on November sixteenth, did you continue to follow him?

A. Yes.

Q. And, I would like to draw your attention, if I may, to the December 21, 1998 entry in your records?

A. Okay.

Q. Under the history before present illness section, what is your initial sentence indicate, doctor? [*20]

A. I have 23rd. I am sorry. December 23rd is it, you have 28th, unless it's a little blurry. 12/23 or 12/21.

Q. Do you have the 12/21 note, doctor?

A. Yes.

Q. First sentence under history, present illness?

A. Presented to doing well.

Q. Did he give you, on a scale one to ten, what his pain level was at this time?

A. Three out of ten.

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Q. Did you test his gate, doctor?

A. Yes. Found no abnormalities.

Q. Can you describe for the jury, first off, how one in your position would test a patient's gate, and why you do that?

A. I test gate on all my patients. It gives you an overall view of how they're moving, just to watch someone walk back and forth, you can see if they're limping, if they're in pain, how fluid their motion is. It's hard to really mask underlying real pain. And it's hard to fake a real painful walk. So, usually by walking you can get insight on how the patient is doing in one's own life and how they move around. So, for me it's one of the most important tests of assessing overall pain and overall function.

[*21] Q. Did you also perform a series of neurological tests upon him?
A. Yes.
Q. What is the purpose of performing these tests, doctor?
A. Purpose of neurological testing is two fold. Sometimes you need to define, you know, where the disease is on one level versus another. It can be very specific or, on the other hand, it can be overall, he's moving well, nerves and muscles are working well. You want to make documentation

for that.
Q. Did you arrive at an impression after seeing him that particular day and giving him these various tests?
A. Yes.
Q. Am I correct you conclude he was doing well?
A. Yes.
Q. Doctor, am I correct you then saw him December 23rd, then you saw him again January 14th of the following year, 1999?
A. Yes.
Q. Once again you performed a series of neurological tests and they were normal?
A. Yes.
Q. You arrived at an impression on that date that once again he was doing well; am I correct?
A. Which day now? I am sorry.
Q. January fourteenth?
A. Yes. Doing well.
Q. Let [*22] me ask you this, doctor. We're now roughly two months post surgery. On the situations you dealt with prior patients who had pseudoarthrosis fusion failures, was there a time frame one would typically expect to see those?
MR. GARONE: Objection.
THE COURT: Sustained.

Q. Have you had occasion to treat people who suffered from pseudoarthrosis?
A. Yes.
Q. Is there time frame one typically would expect to see failure rate to come into play?
MR. ZEPPIERI: Objection.
MR. GARONE: Objection.
THE COURT: Based upon a reasonable degree of medical certainty, I will allow the question.
A. Generally patients with pseudoarthroses, they just don't really get better. You start to see improvement of symptoms as you start to see the bones fuse together.

Remember I said the bone moves normally, then there is pain. My putting the dowel in affords stability. But the bones aren't healed, they're moving inside, as they start to heal, as they move less and less the patient say they're doing better and better. If the bones don't heal they just basically say [*23] I don't feel better. They come in, I don't feel any better. You wait around to see if the bones are going to heal. That is what happens.

Q. I direct your attention to February fourth, if I may, doctor.

A. Yes.

Q. Once again you do a series of neurological tests on

him, everything is normal; am I correct?

A. Yes.

Q. Is he making any complaints to you that alerted you or alarmed you in any manner at all?

A. No.

Q. Am I correct, sir, that you arrived at an impression after seeing him on February fourth that he was doing well?

A. Yes.

Q. Doctor, April ninth, approximately two months later, you performed a thorough examination on him on that date; am I right?

A. Yes.

Q. You list gate is normal, meaning there is no problems with his ability to walk?

A. Yes.

Q. Neurological testing is normal within limits; am I correct?

A. Yes, it's a normal exam.

Q. Anything about this particular exam that alarmed you, alerted you to the fact that perhaps he was suffering from a pseudoarthrosis?

[*24] A. No.

Q. Now, doctor, have you and I ever met before this

morning?

A. No.

Q. Your next entry is dated July 22, 1999; am I correct?

A. Yes.

Q. If I may digress for a moment. If a patient called into the office with a complaint of severe pain or some other problem relating to a post surgical procedure, I am sorry, in a post surgical state, you would make a notation of that?

MR. ZEPPIERI: Objection.

THE COURT: Sustained.
Q. Did you have a typical practice you would follow back in 1999 if a patient called in with a complaint? Would you note it?
MR. GARONE: Objection.
THE COURT: Overruled.
A. Well, generally, they don't speak to us, it's a big office. I am in surgery most of the time. Patient came in and says my neck hurts, can I see Dr. Lattuga, they would just say, okay, he is here on Thursday, come in. If he expressed it was a certain sense of urgency, they would give an appointment to see him or put him on for one of the doctors, if it's an emergency, put him on with one of the doctors.

Q. Okay. [*25] After April you have nothing until your next note of July twenty-second; am I correct?
A. Yes.
Q. Now, you had a chance to review this not before appearing here this morning?
A. Yes.
Q. You indicate on the history of present illness, he was involved in a motor vehicle accident sustaining an injury to his back?
A. Yes.
Q. Now, this is dated July twenty-second. What have you concluded by virtue of reviewing --
MR. ZEPPIERI: Objection.
MR. GARONE: Objection.
THE COURT: Sustained.
Q. Doctor, had he been involved in any accidents before August 27, 1999, to your knowledge?
A. No.
Q. Is it possible this is simply a --
MR. ZEPPIERI: Objection.
MR. GARONE: Objection.
THE COURT: Let him finish the question.
Q. -- typographical error with respect to the date?
MR. ZEPPIERI: Objection.

MR. GARONE: Objection.
THE COURT: Sustained. Anything is possible.
Q. Well, doctor, you indicate on this date he was involved in a car accident; am I correct?
A. Yes.
[*26] Q. Do you have any other notes which indicate he was involved in an accident on July twenty-second or anywhere in that time frame?

A. No.
Q. You performed an exam on him on that date?
A. Yes.
Q. Am I correct that there's been a chain in his physical well-being you document in this particular report?
A. Yes.
Q. What do you note?
A. There is a general increase in the pain level on this visit.
Q. Once again, the history provided was having been involved in a car accident?
MR. ZEPPIERI: Objection.
MR. GARONE: Objection, Your Honor.
THE COURT: Asked and answered. Sustained.
Q. Your next visit or documented visit I should say is September 17, 1999; am I correct?

A. Yes.
Q. How did he present on that particular day, doctor?
A. Complaining of significant neck and back pain.
Q. Did he have any difficulty doing certain menial tasks?
A. He complained of difficulty lifting, carrying, standing, bending, grabbing objects. He had some tenderness extending his upper and lower extremities. Those [*27] were his complaints.
Q. Did you perform an exam on his lumbar spine?
A. Yes.
Q. What did that reveal, doctor?
A. Point tenderness to percussion and palpation with diminished range of motion of the lumbar spine.
Q. Did you also test his gate on that date?
A. Yes.
Q. What did you note now with respect to his ability to walk?
A. He walked with a flexed posture, bent forward. Came in stooped forward.
Q. Did you arrive at an impression that particular day, doctor?
A. Yes.
Q. What was that?

A. Cervical lumbar spine trauma secondary to MVA which means motor vehicle accident.
MR. GARONE: Ask you strike all testimony with regard to cervical area as Mr. Kenny has advised the Court there is no claim for cervical injury in connection --

THE COURT: But it's part of his general examination. I will allow it.
MR. KENNY: So the Court is aware and the jury, we're not making any claim for neck injury.
THE COURT: I understand.
Q. December 23rd -- pardon me. I am sorry. November twelfth, [*28] if I may?
A. Yes.
Q. How did he present on that particular day?
A. Continued to be symptomatic secondary to his recent motor vehicle accident. High grade back pain extension to lower extremities, consistent with his preoperative pain syndromes. Continued to be symptomatic despite four conservative treatments through that time period.
Q. Doctor, his condition on that date such a degree you indicate in your report that you were very concerned?
A. Yes.
Q. On November thirteenth, doctor, did you fill out a

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prescription for him to go for physical therapy?
A. Yes.
Q. Am I correct in that prescription form you diagnosed him as suffering a fracture of the L5-S1 fusion mass?
A. That's correct.
Q. Now, doctor, there's been some discussion here in opening statements yesterday and it will be further discussed during the course of this case as to use of the term pseudoarthrosis and fusion.
Can you explains how in some of your records you use the term pseudoarthrosis and other areas you use the term fusion, I am sorry, fracture?
[*29] A. Yes. I use those words analogously. It's, you know, it's doctor parlance. Easy to say the word pseudo. When we say pseudo it means something that was fused and then fell a part, or something that never quite fused. So, the word pseudoarthrosis implies there was a segment of the spine that you either attempted to fuse, repeat myself, attempted to fuse that didn't fuse, or that was fused and something happened to disrupt the fusion.
The words fracture fusion mass in that note basically just was like I described earlier on, was an attempt to relate the mechanism how it happened. I may have used that

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in some of my notes. To say, fracture fusion mass L5-S1, but the implications are the same. There was a fusion that was there, and then was disrupted by something. In this case the motor vehicle accident.

Q. Doctor, I would like to direct your attention to your next with entry, that being December 23, 1999?
A. Yes.
Q. Under mystery, doctor, can you read to the jury what you have indicated?
A. Status post motor vehicle accident. Sustained fracture of his fusion mass. [*30]
Q. Under plan, doctor, what did you recommend he undergo?
A. Further surgery at this time which was recommending posterior spinal instrumentation infusion.
Q. Did you relate his symptomatology on that date to a certain incident or event?
A. Yes, to the motor vehicle accidents.
Q. Doctor, am I correct that on February 16, 2000, Mr. Gillespie was admitted to Mercy Hospital at which point in time you performed the surgery on him?
A. Yes.
Q. Now, doctor, how is this surgery that you did on this particular date different than the initial surgery that

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was performed in November of 1998?
A. Like I stated previously, I prefer to go abdominally which means through the front of the abdomen. That gives you the highest fusion rates. Everything I am doing attempts to get bones to heal, it's not a guarantee. So, from the front highest success rate. Once you go to the front, going back in through that same approach, through that same incision, has a much higher risk of complication rate. So, especially bleeding because the main vessels go down to the [*31] legs, aorta vena cava, the ones that bring the iliac artery, that carries blood to and from the legs. They scar after surgery. They're on top of the vertebra. When you try and move them, you rip, the tissue is soft. When you move them with even with a sponge, they'll rip and the patient bleeds to death. You want to avoid that.
Other techniques, remember I said the other technique for getting the bones to fuse together, you can do it from behind which I think is generally the inferior way to do it, okay, but given the risk and benefits, since I wanted to provide him with an operation with a reasonable success rate, with a very low complication rate that is obviously what you want to do with spine surgery. You don't want anybody to get worse. We went the more safer route with that procedure, and that is the procedure where you make an incision on the back,

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and you open up the, retract the muscles that expose the back of the spinal canal. We use screws, look like the screws you

put in a wall, and rods, and you screw the vertebra together. Then you will do a grafting procedure, take bone, other [*32] bone, you will pack it in that area, and that is called a posterior spine fusion, and we choose to do the area, during the surgery we noticed, I noticed there was instability which confirmed my diagnosis of a fracture of the fusion mass. So, I went in there, you can move the bones, you wiggle them and it's moving. It's not suppose to move. That confirmed my suspicions there was a pseudoarthrosis or fracture fusion mass, and then part of my work up, part of my evaluation before was there was a suggestion from, you know, either these two accidents, he injured the disk above and we had to test that and said he injured the disk above also. So, you re-fuse the level below, and I fused newly, for the first time, the level above. That is why he had that operation L4, 5-S1 posterior spine fusion.

Q. So, we are all clear on this, doctor, when you performed this second fusion on him, you went in through his back now and you fused, you re-fused the initial area, L5-S1, and you now have to fuse a separate level that was uncompromised beforehand; am I correct?

A. Yes.

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Q. So, there was a new [*33] injury; am I correct?

A. Yes.

MR. ZEPPIERI: Objection.

MR. GARONE: Objection.

THE COURT: Overruled.

Q. So, as a consequence, doctor, of this surgery, he now has two levels in his lower spine that are fused together?

A. Yes.

Q. Is there a consequence to that in terms of his mobility or ability to bend, flex, things of that nature?

A. There's certain implications if you fuse the spine there's less motion to a certain extent, that's true. But generally what you're doing, you're removing their extra motion so they have less pain. So, it isn't, you know, I am going to argue it isn't that dispositive to someone's body to have a fusion because they complain they have less pain. So, ultimately, they're better off, even if they have less motion.

Q. Does the plaintiff have a permanent scare on his back as a consequence of his surgery?

A. Yes.

Q. How long is that scar?

A. It's about eight inches.

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Q. Hardware inserted into his lumbar spine permanent?
A. Yes.
Q. Doctor, I want you to assume for purposes [*34] of the following question that the plaintiff has testified that on August 27, 1999, while sitting in traffic his vehicle was violently struck from the rear with such force and veracity it crushed the rear portion of his car and bent his steering wheel he was holding onto. That afterwards he went to Mercy Hospital, went to your office, went to physical therapy, as well as seeing a colleague of yours, Dr. Nadya Swedan. Then, approximately fifteen days later was involved in a second motor vehicle accident, on September 11, 1999, which his vehicle was T boned or hit from the driver's side with such force that it ended up pushing the vehicle onto the sidewalk.
Assuming those to be true, and based on your multiple examinations of him, your familiarity with his history, do you have an opinion with a reasonable degree of medical certainty as to why Mr. Gillespie required the fusion you performed in February of 2000?
A. Yes. I believe that as a result of the, either of those motor vehicle accidents or both together he re-injured the L5-S1 space, fracturing the fusion that I had done, and then [*35] he also, additionally, injured the level above L4,5 that

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required, ultimately, the pain that he had and the fact he needed to have more surgery, yes.
Q. With respect to the defendant's contentions in this case, doctor, he was suffering from a preexisting pseudoarthrosis, would you care to respond to that?
MR. ZEPPIERI: Objection.
MR. GARONE: Objection.
THE COURT: Sustained.
Q. Did you continue to follow Mr. Gillespie post surgery, sir?
A. Yes.
Q. Would it be fair to say, sir, you have seen him in total both before and after this accident approximately thirty times?
A. I haven't counted but I have seen him on and off for the last several years.
Q. Sir, I want you to further assume for purposes of this question Mr. Gillespie has testified that his pain level has increased now since these accidents, since this surgery, over the course of the last year or two, now, and puts his pain on a scale of one to ten as a ten oppose to he indicated three to one of your visits, and a five in response to one of the questions I posed yesterday.
[*36] Do you have an opinion with a reasonable degree of

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2 medical certainty as to whether this increase in pain is
3 related to these accidents?
4 MR. ZEPPIERI: Objection.
5 MR. GARONE: Objection.
6 THE COURT: He can answer that question.
7 Overruled.
8 A. First thing I said when you asked me what are the
9 risks of surgery, sometimes people don't feel better. If I
10 get the bones to fuse together it doesn't mean they'll say
11 they have less pain. He has pain now, obviously, you know,
12 my conclusion, you can say the surgery didn't help his pain.
13 That is how you would assess it.
14 Q. Doctor, I want you to assume for one moment that
15 the plaintiff's car accidents of August 27th and September
16 11th, 1999 didn't happen. Do you believe he would have
17 required the second more invasion fusion?
18 MR. ZEPPIERI: Objection.
19 MR. GARONE: Objection.
20 THE COURT: Sustained.
21 Q. With respect to his current complaint, doctor, I
22 want you to assume for purposes of this question he testified
23 he has bilateral radicular shooting pain about both legs,
24 loss of flexion especially in the right [*37] hip, lose of
25 strength, inability to walk in the same manner he had been
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2 able to beforehand. Much greater level of pain.
3 In your opinion doctor, do you believe these are related
4 to these two car accidents?
5 MR. ZEPPIERI: Objection.
6 MR. GARONE: Objection.
7 THE COURT: I will allow it.
8 A. Yes, I do.
9 Q. What is the future for this gentlemen?
10 MR. ZEPPIERI: Objection.
11 MR. GARONE: Objection.
12 THE COURT: Able to tell with a reasonable
13 degree of medical certainty.
14 MR. ZEPPIERI: The last time the doctor saw
15 the patient was 2001?
16 A. I have seen him more, more recently than that.
17 Q. In fact, am I correct you saw him in 20002, 2003,
18 and also in 2004?
19 A. Yes.
20 MR. ZEPPIERI: We don't have those records.
21 If we can look at these before we start cross
22 examination I'd appreciate it.
23 THE COURT: The objection is overruled. You

24 can answer the question?
25 A. I am sorry the question, please.
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2 Q. Essentially, doctor, my concluding question, what
3 is the future have in store for this man? Does he expect [*38] to
4 get better or stay the same?
5 A. Pretty cut and dry. Either you get better after
6 surgery, after a point, you give it six months, the fact he
7 hasn't responded, it's more than a year after his surgery,
8 the pain he's suffering what you would expect is not going to
9 get better in the future.
10 Q. Are you familiar with the term malingering?
11 A. Yes.
12 Q. You have any reason to think he is malingering?
13 MR. ZEPPIERI: Objection.
14 MR. GARONE: Objection.
15 THE COURT: Sustained.
16 MR. KENNY: I have nothing further.
17 THE COURT: All right.
18 CROSS EXAMINATION
19 BY MR. ZEPPIERI:
20 Q. Good morning. My name is Loris Zeppieri and I
21 represent of the defendants in this case. We have never met
22 before today, have we?
23 A. No.
24 Q. Certainly never discussed this case, correct?
25 A. No.
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2 Q. You mentioned earlier today that there's a fee for
3 your testimony the plaintiff is paying you?
4 A. Yes.
5 Q. How much is that fee?
6 A. I believe it's $ 10,000.
7 Q. Would that be for just the half day of testimony?
8 A. [*39] Yes.
9 Q. Should we require to you to go into the afternoon,
10 which I don't foresee, but should we require you to go into
11 the afternoon, would there be an additional fee for that?
12 A. Yes.
13 Q. Additional $ 10,000?
14 A. I think so, yes.
15 Q. You began treating the patient you mentioned in
16 July of 1998. That is when you first saw him, correct?
17 A. Yeah. Yes.
18 Q. He had been to see your partner, Dr. Cohen, in June
19 of 1998; correct?
20 A. Yes.
21 Q. Now, in reviewing your words records, it appears

there was fairly continuous treatment up until May of 2001. Is that about right?
A. Yes.
Q. The next report I see after May of 2001 is a report

that you authored in April 2004. Were there any treatments in between?
A. You have to go through the note specifically. Hold on one second. Repeat the question for me, please.
Q. Between May 2001, and April of 2004, how many times did you see the patient?
A. Let me go through, let me get the May 2 0 01. Between May of 2001. I am ready for the question. I am sorry. And --
[*40] Q. And April of 2004?
A. 2004.
Q. Right.
A. How many times did I see him?
Q. Yes.
A. I have a 6/2002 note.
Q. Six?
A. 28/02.
Q. Okay.
A. Note here in this record. That is only thing I'd be able to testify to.
Q. Okay. Was there a report that you authored in April of 2004 at an attorney's request?
Do you have a copy of that in your file?
A. It might be here. I wouldn't know where to find

it. It seems like a narrative if that is what you're suggesting. It was a narrative.
Q. Yes?
A. So show it to me and I will say I did it.
Q. Is it fair to say that since May of 2001 the only time that you saw, that you treated the patient was June of 2002?
A. Yes.
Q. Now, the November 1998 surgery was inner body fusion of L5-S1?
A. Yes.
Q. You removed the L5-S1 disk?
A. Yes.
Q. You put a dowel in place?
A. Yes.
Q. That's an attempt to create a fusion between the vertebra, the top and the bottom and the dowel, correct?
A. Yes.

Q. There [*41] is essentially three pieces, three components?
A. Yes.
Q. Top vertebra, the bottom vertebra, and the dowel?
A. Yes.
Q. Fair to say that type of surgery is a fairly

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serious surgery?
A. Yes.
Q. Is it fair to say that type of surgery can have permanent restrictions on a person?
A. Again, I think as I suggested to the other counsel I would never testify as a result of one of my surgeries you would be worse off because I don't believe that is possible you'd be worse but generally speaking if you have a solid fusion, if you had real pain before, disk back pain, you get a solid fusion, you're at least, if you get a solid fusion, you're going to be better off than you were before.
Q. So, maybe we can agree on this. Based on the injury that he suffered as a result of June 1998 accident, and fact that that injury was serious enough to require an inner body fusion, that in itself could cause permanent restrictions in the future, correct?
A. But that is not generally the case. It's possible but that is not generally the case.
Q. In this [*42] case though as a result of his June 1998 accident, the plaintiff was unable to return to work, correct?
Are you aware of that fact?
A. I believe that is correct, yes.
Q. Now, before these motor vehicles accidents, I am

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referring to the ones in August and September of 1999, is it fair to say, sir, your prognosis for the patient was guarded with regards to him ever returning to a full level of function?
A. That's correct.
Q. Correct?
A. Yes.
Q. You said that in your records in December of 1998, correct?
A. Yes. I said he had a guarded prognosis.
Q. When you say the patient had a guarded prognosis, does that mean there is a chance he may never return to full level function?
A. That is what guarded means, yes.
Q. This is eight or nine months before these car accidents took place he had that guarded prognosis true?

A. Yes.
Q. Now, following the November 1998 surgery, the plaintiff continued to complain of pain to the lower back area; is that true, sir?
A. Yes, he had. Yes.
Q. And, he was treating [*43] with Dr. Swedan as well, correct?
A. Yes.

Q. And Dr. Swedan was also affiliated with Orlin and Cohen at the time?
A. Yes, she is the one of the doctors that's in charge of rehabilitation and physical therapy.
Q. She is a medicine and rehabilitation specialist?
A. Physiatrist.
Q. Do you know if the plaintiff was complaining to Dr. Swedan about pain in the lower back area from November of 1998 up until the car accidents in August and September of 1999?
A. Well, I mean I don't want to testify what she wrote. I have a, you know, my impression from reading my notes is that he was feeling better but he still had complaints of pain. That is basically how it panned out.
Q. I'd like to direct your attention to the note of April 9, 1999.
Are you there, sir?
A. Yes.
Q. You were questioned about this on direct examination, I believe, and you were asked if it was, I have, impression that the patient was, plaintiff was doing well at that point?
Do you recall that, sir?
You don't recall that specific question?

[*44] A. That specific question, that date, there's so many dates.
Q. Did the plaintiff complain of back pain when he came in that day.
A. Yes.
Q. Did he complain of difficulty lifting, carrying and bending?
A. Yes.
Q. In fact, did he tell you, sir, that all levels of his difficulty were curtailed?
A. Yes.
Q. Did he also complain of lower back pain radiating into his lower extremities?
A. Yes.

Q. You note that specifically in your records, correct?
A. Yes.
Q. When you say radiating into the lower extremities that means pain travelling down into both of his legs, correct?
A. Yes.
Q. This again was four or five months before these motor vehicles accidents, true?
A. Yes.

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Q. The plaintiff also complained of difficulty going up and down stairs and difficulty walking?
A. Yes.
Q. I would like to direct your attention, sir, to July 22, 1999, the next time you saw the plaintiff, correct?
A. Yes.
Q. You took a history from the plaintiff, correct?
A. Yes. [*45]
Q. On direct examination you read from various histories the plaintiff had given you, true?
A. Yes.
Q. Is it fair to say, sir, that you rely upon taking an accurate history from the patient, true?
A. Yes.
Q. It's true that you rely on the patient to be honest and up front and open with what is bothering him and what is going on in his past?
A. Yes.
Q. It's important. It's important for any physician when they're seeing a patient to ask the history, that the patient be open and honest with them correct?
A. Yes.
Q. Now, you referred to a motor vehicle accident, the notes refer, that the patient told you about a motor vehicle

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accident he had been involved in?
A. Yes.
Q. Is it correct that is before either one of these motor vehicles accidents that are the subject of this lawsuit, correct?
A. I don't know that to be true.
Q. Based on the date on the report?
A. I mean there's no yes or no. My impression, this is, there's some kind of typographical error with the date with respect to this. I mean this [*46] would appear to be a note that was after the accident. So, the date is wrong. It appears to me the date is wrong on here.

Q. If the date would be wrong, it's July 22nd?
A. Yes.
Q. If it was a wrong by a month it would have been August 22nd. That is still before the car accidents?
A. You. See --
Q. Just if you can answer that specific question. If it was 8/22, it's still before the accident? Yes?
A. Yes.
Q. If it's 9/22, it's after the car accidents and you had just seen the patient on 9/17/99?
A. Yes.
Q. It's not likely you saw the patient five days apart

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in September, correct?
A. Yes.
Q. Now, the complaints of pain the plaintiff made to you at this point, he complained of lower back pain, correct?
A. Yes.
Q. He complained of spasm, correct?
A. Yes.
Q. And tenderness?
A. Yes.
Q. And pain again shooting into the lower extremities?
A. Yes.
Q. Also reports difficulty with standing, lifting, carrying and bending?
A. Yes.
Q. I would like to talk about [*47] the surgery you did in November of 1998. You said that carries risks with it, correct?
A. Yes.
Q. One of the risks is that even if you performed the surgery perfectly the dowel and the vertebra wouldn't fuse together?
A. Yes.
Q. That could happen from either end, the top vertebra

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may not fuse to the dowel, or the bottom vertebra may not fuse to the dowel or either end?
A. Correct.
Q. You stated on direct examination that that is a condition called pseudoarthrosis?
A. Yes.
Q. Would you agree that the success rate of the surgery or the -- withdrawn.
Would you agree that the failure rate of the surgery can be as high as ten or fifteen percent?

A. For that surgery, my hands, it's about eight percent. I'd say ten percent. But I reviewed my first hundred cases and I found my pseudoarthrosis to be eight percent.
Q. Every patient is different?
A. Eight percent represents my end, my collection, my series of patients with single level anterior --
Q. Did you go in and be as specific as to allografts?
[*48] A. All done with bone dowels. Everyone is identical. Once I start, I roll into a specific protocol so I can judge my results after my every hundred cases.
Q. Would you agree, sir, when an allograft is used opposed to an autograph that the failure rate is slightly higher?

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A. That is arguable. I can give you an argument if you want. It's debateable. In general, the answer is yes. But specifically using a milk bone dowel versus a, you know, because there is no -- for vertebra inner body grafting in the lumbar spine you need something the size of like a silver dollar. It's hard to harvest a silver dollar. It has to be the perfect size. In allographs they come in numbered sizes, they come nine, ten, eleven, twelve thirteen. When you have a person's disk exposed, you put your devices in, what size do I need. I need a 23 millimeter by 20 millimeter graft. You know, it's not like the surgeon in back of you looks on. You look on the board, you grab the exact size dowel, and you put it in.
I would argue that that surgical technique yields you a higher fusion rate than me having to go [*49] to the patient's hip and start cutting out a big piece of bone and going on a back table where you have to start cutting it and shaping it, and then, oh darn, you cut to much or not enough. That is less precise. So, the middle allograft, I would argue, I know what you're referring to, but the middle allograft gives you a higher fusion rate in my hands but --
Q. You actually argued the opposite, an allograft gives you higher fusion rates?
A. Yes, because you can be much more precise in

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targeting and sizing. Those studies you're referring to people, suggest their studies refer to autograph, allograph, which one has --
Q. I will do better and refer you to a study, if I might. Are you affiliated with any website, sir?
A. Right.
Q. Your website does have something called neck reference dot com?

A. On neck reference dot com certain questions that are posed. That is neck. This is lumbar.
Q. You think it's different between the neck and lumbar?
A. Remember I told --
Q. Whether the allograph and the autograph has fusion rates, it would [*50] be different between the neck and the back?
A. Yes.
Q. Instrumentation or hardware often used with regards to fusion surgery?
A. Yes.
Q. You didn't use instrumentation or hardware in November of 1998, did you?
A. Correct.
Q. You could have had you opted to?
A. Well, I was really the first surgeon in the New

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York Metropolitan area to do inner body grafting surgery. That is how I got --
MR. ZEPPIERI: Move to strike as nonresponsive.
A. Okay.
Q. My question, had you opted in November of 1998, there was nothing preventing you from using instrumentation?
A. Correct.
Q. Would you agree with me, sir, that when you use instrumentation, the success rates are higher for fusion?
A. Yes.
Q. Would you also agree then the L5-S1 disk space has with it the most incidence of non union?
A. With posterior fusion, not --
Q. Inner body fusions you feel it's the same at any level?
A. When you do a single level, single level L4, 5 single level L5-S1 the fusion rates are comparable. When you get [*51] -- if you do, only fusing one level, two, three and three, four, you have slightly lower fusion rates. Has to do with the motion of the --
Q. L5-S1 compared to L3, L4, carries with it a higher degree of, or higher rate of non union?
A. No, higher fusion rate. We're pretty sure it's

55

going to fuse when you do inner body grafting from the front.
Q. Sir, you prepared an operative report with regards to your February 16, 2000 surgery, correct?
A. Yes.
Q. Do you have that operative report with you?

A. Not as nice as yours. Which operation is this.
Q. 2/16/2000?
A. Yes.
Q. Under your findings?
A. Yes.
Q. Sir --
THE COURT: Didn't put this in evidence.
MR. KENNY: It's a blow-up, Judge.
MR. ZEPPIERI: It's in the hospital record.
THE COURT: All right.
MR. KENNY: Is that 2/16 surgery.
MR. ZEPPIERI: Yes.
THE COURT: Blow-up of one of the pages contained therein. You have no objection?
MR. KENNY: No, sir.
THE COURT: Okay.
Q. Sir, under findings you list pseudoarthrosis? [*52]
A. Yes.

Q. You don't indicate at that point that there was a fracture of the fusion mass?
A. I believe I testified earlier I use those words synonymously or analogously.
Q. Did you use those words fracture of a fusion mass when you put those words on the --
A. I don't understand.
Q. Did you simply -- would you agree with me that under findings, it does not say fracture of the fusion mass?
A. Yes.
Q. Now, on the third page of that operative report, is it fair to say where you do an op. report, you describe every level or everything you see?
A. Yes.
Q. And, on page three of the report, you had an opportunity to describe what you saw, L5-S1 level?
A. Yes.
Q. Correct?
A. Yes.
Q. You said there was motion at that level?
A. Yes.
Q. That means there was, that the vertebra and the dowel were not connected, correct?
A. Yes.

Q. Did you describe at that point, sir, a fracture at that site?
A. Again posterior or from behind there is no direct visualization. [*53] This does not mean to imply I was looking at

the bone dowel and the vertebral inner plate. You couldn't see it. All I am describing are activities where you grab the bone. You grab with the screw, L4-S1, you wiggle them and if they move that means they're unstable. When it's fuse there is no motion.

Q. If I understand you correctly, did you not have a view at that point of the actual vertebra and dowel?

A. That's correct.

Q. So, what you did was take the sacrum and the vertebra and you shook because you wanted to see if there was motion?

A. Yes.

Q. Would it therefore be fair to say at that point all you could do is see that they're not connected?

A. That's correct.

Q. You can't see why they're not connected, right? In other words --

A. Yeah, the why comes from the history.

Q. Okay. At this point, from the surgery, you can't see why they're not connected, correct?

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A. Yes.

Q. Had they fused and been fractured, or had it never fused at all, you would have gotten the same response, true?

A. Yes.

Q. Would you [*54] agree that pseudoarthrosis is a condition in which the vertebra do not fuse?

A. I think I testified to that before several times that.

Q. Point of reference, would you agree with that definition?

A. Yes.

Q. If the surgery had been successful with regards to fusing the vertebra to the dowel?

A. Yes.

Q. Had there been a trauma which fractured or broke the vertebra and dowel apart, would you agree that would be a painful condition for the patient?

A. Yes.

Q. Would you also agree, sir, that would be very painful, breaking either the vertebra o r the dowel?

A. Patient would complain their back hurt, yes.

Q. Are you aware, sir, an ambulance was called following the September 11, 1999 --

A. No.

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Q. Car accident?

A. No.

MR. ZEPPIERI: If I may approach and hand the witness this.
Q. I'd like you to look at Plaintiff's exhibit 3 which is the emergency room records following the September 11, 1999 accident. I turned to a specific page which is the pre-hospital care report.
Doctor, you're [*55] familiar with looking at these types of reports?
A. Point out what you want me to read.
Q. That is a report the EMT physician would prepare at the scene of the accident.
A. Okay.
Q. Under chief complaint on the left hand side of the page, can you read what it says there?
A. My neck and chest hurt.
Q. Are there any complaints or, under chief complaint or anywhere in that report that the plaintiff complained of lower back pain following the September 11, 1999 accident?
A. No.
Q. Now, you're aware the plaintiff was taken to the emergency room, correct?
A. Yes.

Q. And, again you have those records in front of you. That is Plaintiff's exhibit 3.
I ask you to look at the first page which is the intake sheet. Do you see, sir, under ED Triage, Emergency Department Triage, middle of the page?
A. Yes.
Q. Does it say along the right hand side, plaintiff complains of neck and chest pain?
A. Yes.
Q. Does it make any mention there the plaintiff complained of lower back pain?
A. Complains of neck [*56] and chest pain.
Q. Again on the bottom of, towards the middle of the page, it's timed 11:15 note, that the patient was seen by Dr. Kessler, and on the third line, patient complains of neck and chest pain.
Do you see that, sir?
A. Yes.
Q. Doctor, is there any indication in that report that the plaintiff complained of any lower back pain?
A. I can read it for you.
Q. If you look at it, sir, does it make any mention of lower back pain?
A. No.

Q. Turn to the second page, sir, up on top under the history section. Does it state 51 year old male presented via EMS?
A. Yes.
Q. He was a seat belted driver, correct?
A. Yes.
Q. He T boned another vehicle, correct?
A. Yes.
Q. Moderate damage to car?
Am I reading it correctly?
A. Yes.
Q. Windshield intact, correct?
A. Yes.
Q. No injuries at the scene. Does it state that, sir?
A. Yeah, I believe that is what it says.
Q. Patient did not strike head or chest on car interior. See that, sir?
A. Yes.
[*57] Q. Complains of defuse neck pain and upper chest pain, correct?
A. Yes.
Q. Once again, sir, there is no indication that the patient complained of any lower back pain at that time,

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correct?
A. Yes.
Q. Did they take an x-ray at North Shore University Hospital following that September 11, 1999 accident?
If you turn the page over, it will have the radiology report?
A. Yes.
Q. Is it true, sir, they took only an x-ray of the neck?
A. I mean I would only go by whatever you show me.
Q. In the records. There's only an x-ray of the neck?
A. That's right.
Q. Following the August 27, 1999 accident, the plaintiff went to the hospital. Are you aware of that, sir?
A. I believe he went to the hospital, yes.
Q. I am going to show you plaintiff's exhibit 2 in evidence and ask you to look at that document. Specifically, sir, I'd like you to look at the radiology department's report where they took an x-ray of the lower back.
Do you see that, sir?
A. Yes.
Q. Was the impression of the radiologist on that date [*58] no evidence of recent fracture?
A. Yes.

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Q. On the first page of that report, sir, when the patient comes in, they do a physical examination?
A. Yes.
Q. Is that indicated by PE?
A. Yes.
Q. Along the middle of the page?
A. Yes.
Q. Does it say, five lines down, LS spine, that is referring to the lumbar sacral spine, correct?
A. Yes.
Q. Range of motion normal?
A. That is what it appears it says.
Q. Doctor don't always have the best handwriting, right?
A. Yes.
Q. NS, is that an abbreviation for normal?
A. Yes.
Q. Look at the second page, what looks like the nursing triage, and thankfully nurses write neater than doctors, under assessment of chief complaint does it say, sir, complains of neck pain?
A. Which is the page? Yes.
Q. And, again, sir, would you agree there is no mention of any complaints of lower back pain in that record?

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A. Yes, his neck.
Q. Other than the neck?
A. Yes.
Q. In fact, under medical history, it says, plate in [*59] neck, 1998?
A. Yes.
Q. And, apparently the plaintiff didn't give a history he had a fusion in his lower back at that time?
A. Yes.
Q. Sir, one of the things that you did on a fairly consistent basis when you examined the patient throughout the years is doing a range of motion testing; is that true?
A. Yes.
Q. I'd like to direct your attention to your records, and court officer if you'd take that?
THE COURT OFFICER: Both exhibits?
MR. ZEPPIERI: Certainly.
Q. Specifically, sir, on February 4, 1999, turn to that.
A. Yes.
Q. You did (under lumbar spine, range of motion testing for flexion, extension, and left right turn?

24 A. Yes.
25 Q. And flexion is when you ask the patient to bend
65
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2 forward?
3 A. Yes.
4 Q. Extension is when you ask him to go backwards?
5 A. Yes.
6 Q. Left right turning is turning to the left and
7 right?
8 A. Yes.
9 Q. Under flexion on February 4, 1999, plaintiff went
10 from zero to sixty degrees, correct?
11 A. Yes.
12 Q. And, extension, went from zero [*60] to twenty degrees,
13 correct?
14 A. Yes.
15 Q. And left and right turning was zero to forty-five?
16 A. Yes.
17 Q. This was six and seven months before the car
18 accidents in 1999, correct?
19 A. Yes.
20 Q. Now, if you can turn to April 9, 1999, the next
21 time you saw the patient you also took range of motion
22 testing, correct?
23 A. Yes.
24 Q. Can you tell us, sir, what the flexion results were
25 at that point?
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2 A. Zero to thirty degrees of flexion.
3 Q. So, it had gone from zero to sixty, two months
4 earlier to zero to thirty two months later, correct?
5 A. Yes.
6 Q. His range of motion was cut in half, correct?
7 A. Well, it's technically, it's not half, but
8 diminished.
9 Q. It's not half of normal but it's half of what he
10 had?
11 A. Yes.
12 Q. That diminished before either one of these car
13 accidents, correct?
14 A. Yes.
15 Q. His range of motion was getting worse, correct?
16 A. On this exam it was less, yes.
17 Q. You also did an extension, and he was thirty to ten
18 degrees, correct?
19 A. Yes.
20 [*61] Q. That is also worse than what it had been two months
21 earlier when it was thirty to twenty?

A. Yes.
Q. Left and right turning was the same, correct?
A. Correct.
Q. If we can turn to September 17, 1999, and this is
67
the first visit after both of the car accidents. Am I correct about that, sir?
A. I believe that is.
Q. Now, you took a history from the patient again, yes?
A. Yes.
Q. And, he reported to you an accident on August 27, 1999?
A. Yes.
Q. Right?
A. Yes.
Q. Did he report to you an accident on September 11, 1999?
A. I didn't make note of it.
Q. Would that indicates you did not, that he did not report that accident?
A. It could have said to me. I, because, it was just another accident, I may have omitted it in my note. It's possible or, you know, it's hard to tell.
Q. Did you do range of motion testing?
A. Yes.
Q. Range of motion, flexion on that date was zero to fifty, correct?
A. Yes.
68
Q. So, it went from zero to thirty in April of 1999 [*62] to zero to fifty after the accident, correct?
A. Yes.
Q. It got better, his rage of motion with regards to flexion actually improved from April of 1999 to September of 1999, correct?
A. Yes.
Q. And his extension on September 1999 was zero to twenty correct?
A. Yes.
Q. It also improved from what it had been in April of 1999, correct?
A. Yes.
Q. Left right turning was the same as it always had been zero to forty-five, true?
A. Yes.
Q. Did the plaintiff make complaints in September of lifting, carrying, standing and bending?

A. Yes.
Q. And, sir, aren't those similar complaints to what he was making before the time of the accident?
A. On some days he made those complaints. Other days he said he felt better.
Q. After that September 17, 1999 visit, you sent the
69
plaintiff for an MRI?
A. Yes.
Q. True?
A. Yes.
Q. And, you felt that the hardware may have been displaced?
A. I sent the patient for an MRI, yeah.
Q. Is it because you felt the hardware [*63] might have been displace, under plan, sir, on page three of the September 17, 1999 report?
A. Hardware refers to the neck. You know. Hardware means metal. If he got a plate in his neck, it referred to the neck.
Q. You sent him for a neck MRI?
A. Yes.
Q. You saw him again November 12, 1999. You have that report?
A. Yes.
Q. And, did the plaintiff complain of lower back pain with extension to his lower extremities?
A. Yes.
Q. Do you state, sir, right in the report "consistent with his preoperative pain syndromes?"
A. Yes.
70
Q. What you were saying, the complaints he was making now, after the car accident, were similar to what the complaints he was making before he had the November 1998 surgery?
A. That's right.
Q. At that point you gave the plaintiff a prescription for a discogram?
A. Yes.
Q. You thought there was, your diagnosis at that time you said fracture of the fusion mass?
A. Yes.
Q. And you thought that the discogram would help determine the issue whether there was a fracture [*64] or not a fracture or non union or union?
A. Not really. That is not why I did the discogram.
Q. Part of the reason you did it?

A. No, no. Discography, there's no disk --
Q. The discogram doesn't have a CAT scan with components. Isn't a scan taken?
A. Yes.
Q. Can't you tell there's a fracture or a union or non union at that area?
A. CAT Scan is one of the ways to tell, suggest, but it's more than one test to tell.

Q. After you did the February 2 000 surgery, did you see the patient again on April 28th of 2000?
A. Yes.
Q. Do you state under history, patient states he was doing much better from his preoperative status?
A. Yes.
Q. Sir, we know that the plaintiff is making current complaints of pain limitation I think you were asked to assume those complaints in a hypothetical question by plaintiff's counsel.
Do you recall that?
A. Yes.
Q. Was it, is it your opinion here today that the complaints the plaintiff is making are directly related to one or both of these motor vehicle accidents?
[*65] A. Ask me the question.
Q. Is it your opinion here today that the complaints the plaintiff currently has --
A. Yes.
Q. are directly related to one or both of these motor vehicle accidents?
A. Yes.
Q. Sir, if I can ask you to turn to your June 6, 2000 report, and specifically, I know it's lengthy, I'd ask you to

turn to page 6 of that report.
Is there a report, sir, that you authored after all of the accidents the plaintiff was involved in?
A. Yes.
Q. Is there a report you authored after all of the surgeries you performed on the plaintiff, true?
A. Yes.
MR. KENNY: Objection. May we approach with respect to this.
THE COURT: Take it in the back. I will give the jury a break. It's twenty after.
Don't talk about the case among yourselves or with anybody else.
(Whereupon, the following takes place outside

16 the presence of the jury.)
17 MR. KENNY: Your Honor, I have an application
18 at this point in time. The application is
19 Mr. Zeppieri made reference to a June 6, 2000
20 reports that was written by the witness [*66] in
21 connection with his construction related
22 litigation. It's a narrative report that was made
23 in connection with that litigation and served on
24 defendants.
25 MR. ZEPPIERI: This should be outside the
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2 presence of the jury I believe.
3 MR. KENNY: I am simply going to ask that no
4 questions be posed with regards to this because the
5 Court already ruled that there should be no mention
6 of this lawsuit whatsoever in this case.
7 MR. GARONE: Precisely the reason why I
8 opposed that application yesterday because there's
9 more than one litigation going on.
10 MR. ZEPPIERI: I don't intend asking the
11 witness why he prepared the report. I'm going to
12 use it to impeach his testimony because the report
13 says something different than what he just said on
14 the stand. It's for impeachment purposes only.
15 THE COURT: Is this in evidence?
16 MR. KENNY: No.
17 MR. ZEPPIERI: I'm going to impeach him with
18 it, I'm not looking to put it in evidence. You can
19 impeach an expert with his narrative whether it
20 goes into evidence, it's a prior inconsistent
21 statement. Just I set it up in my [*67] last question to
22 him.
23 THE COURT: You can ask him did he make such a
24 finding.
25 If it is an inconsistent statement he is
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2 entitled to use it. Can't put the report in.
3 MR. KENNY: Can I just ask for some type --
4 how is he going to refer to this?
5 MR. ZEPPIERI: Going to ask, the next question
6 I am going to restate what he just said, that he
7 made an opinion today that his complaints are
8 related to the motor vehicle accidents. I have a
9 blow up of what he said on that report. I am going
10 to say on June 6, 2000 did you state, and read from
11 his report.
12 THE COURT: You can't use that chart.
13 MR. KENNY: It's not in evidence.

MR. ZEPPIERI: Okay. I am going to --
THE COURT: Ask him about the statement.
MR. GARONE: I intended to ask him whether he prepared a report for lawyers. In light of Your Honor's ruling we can't talk about the other accident, which as I say, this is really the crux why those other accidents are relevant. I intend to ask him with regard to this report, if Mr. Zeppieri hadn't gone through it in its entirety whether he [*68] prepared a report and sent it to lawyers.
THE COURT: Prior inconsistent statement. If

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it is an inconsistent statement, he is entitled to use it.
MR. KENNY: I understand, Judge. Not going to object in that regards. I am trying to assure we don't get anything out there that is, I'm just trying to find out how the questioning process --
THE COURT: Have any objection to if he says to lawyers?
MR. KENNY: No.
MR. ZEPPIERI: Why can't I use the blow-up?
THE COURT: Because the original document is not in evidence.
MR. ZEPPIERI: Just for illustration purposes.
THE COURT: No, not a show and tell jury. What is in evidence can be shown. In fact my prior rulings was the blow-ups were not to be shown to the jury unless there's permission and they're introduced into evidence.
MR. ZEPPIERI: We agreed on that before.
MR. KENNY: I have no problem.
HE COURT: Okay.
THE COURT OFFICER: Jurors entering. Be seated.
THE COURT: You may continue.

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MR. ZEPPIERI: Thank you, sir.
Q. Just for point of reference, [*69] doctor, before we took the break you were telling us it was your opinion that the plaintiff's current complaint and limitations were related to one or both of the motor vehicle accidents in 1999, correct?
A. Yes. Yes.
Q. I was referring you to a report that you authored on June 6th of 2000?
A. That's correct.
Q. This was after the surgeries and after the car

accidents?
A. That's correct.
Q. And, in fact, in that report you summarize your treatment of the patient throughout the years, correct?
A. Yes.
Q. At the end of that report, sir, do you state as follows. "Plaintiff lives in chronic pain as a result of the work related injury on June 12, 1998?"
A. That's correct.
Q. And, sir, at this point you did not relate any of the patient's pain to either of these motor vehicle accidents, did you, sir?
A. No, I did not.
Q. You were free to do so if you felt that was your
77
opinion, correct?
A. Yes.
Q. Do you also state, sir, in that same report, all of his current symptoms are directly related to the accident [*70] on June 12, 1998?
A. Yes.
Q. I'd like to refer you, sir, to July 7th of 2000, the note that you wrote for that day. Do you see that, sir?
A. Yes.
Q. Did the plaintiff come in complaining of lower back pain and limitations?
A. Yes.
Q. Do you state, sir, again, "All of these symptoms are a direct result from a work related injury?"
A. Yes.
Q. At that point in time, again, sir, did you not attribute any of the limitations to either of these motor vehicle accidents, true?
A. That's correct.
Q. Now, I believe you said earlier that before the motor vehicle accidents, the patient's prognosis was guarded, correct?
A. Yes.
Q. What would you say the patient's prognosis is today
78
with regards to returning to average daily function?
A. Well, I mean I think he is performing average daily functions. Today he is able to walk in and out of the courtroom. So, I would consider that average daily function.
Q. Would you say, sir, he has a good prognosis with regards to returning to activities of daily living? [*71]
A. Yes.

MR. ZEPPIERI: Nothing further.
THE COURT: All right. Universal Lawn Maintenance and Joseph Madaffari.
CROSS EXAMINATION
BY MR. GARONE:
Q. Good morning, doctor.
A. Good morning.
Q. Sir, in your December 23, 1999 note, you have that in front of you?
A. Yes.
Q. On direct examination you made reference to motor vehicle accidents plural.
A. Yes.
Q. In fact, in the note, you refer to motor vehicle accident, singular, correct?
A. Yes.

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Q. You billed the --
MR. KENNY: Objection.
Q. Surgical procedure in February of 2000 --
MR. KENNY: Objection.
Q. -- to the September eleventh accident, did you not?
THE COURT: Basis of the objection.
MR. KENNY: I withdraw the objection. Concerned about something else.
THE COURT: Okay. Go ahead. Continue.
A. I have no knowledge as to the billing in which I don't involve myself. It's a large group. I don't involve myself with collecting or billing. I have no clue where they're billing or how it would be charged to the [*72] patient. Wouldn't be involved in that.
Q. Do you have information, Orlin and Cohen you were affiliated with at the time billed this procedure, the February 2000 procedure to the September eleventh accident?
A. Again, I wouldn't have no knowledge of that. I wasn't involved with that.
MR. GARONE: May we see the Orlin and Cohen records number one.
MR. ZEPPIERI: I am sorry. Could we approach?
THE COURT: He's got it.

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MR. ZEPPIERI: I have an issue, Judge.
THE COURT: Take it in the back.
(Whereupon, the following takes place outside the presence of the jury.)
MR. ZEPPIERI: Entire implication talking about billing no fault and it's really irrelevant

whether Orlin and Cohen billed the surgery to one accident or another, or whether anybody paid for it under a certain accident or another. It's improper. He is attempting to show that somebody's taking responsibility for the surgery.
THE COURT: I know he is asking the question. Apparently this doctor doesn't know the answer anyway.
MR. ZEPPIERI: He doesn't know.
[*73] MR. GARONE: Was affiliated with Orlin and Cohen.
MR. ZEPPIERI: Didn't do the billing.
THE COURT: Said he had no knowledge of the billing.
MR. ZEPPIERI: Before we go further and prejudice the jury with any more.
MR. GARONE: I think, Judge, since he was connected with that entity at the time of the
81
surgery and the billing was done right to look at their records and authenticate those records at least refresh his memory as to whether the billing was done under that.
MR. ZEPPIERI: Entire billing is irrelevant. That is the whole point.
MR. GARONE: Thought the billing was relevant.
MR. KENNY: They're helping me by pointing a finger at each other.
THE COURT: I don't see where it has any probative value.
MR. KENNY: I think he can authenticate them.
THE COURT: He can't say -- you can show him a record saying it was billed to one accident, he's going to say, I don't know.
MR. KENNY: He will.
MR. GARONE: May say that. I don't know that.
MR. KENNY: Tell you right now.
MR. ZEPPIERI: It's still irrelevant. [*74]
THE COURT: I am going to sustain the objection because we're going to get far afield. He has no knowledge.
(Whereupon, the following takes place In open court.)
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Q. Doctor, earlier you testified to the fact that the surgical procedure in 1998 was the final step in the process, correct?
It wasn't the initial form of treatment that you would

have --
A. Yes.
Q. -- recommended?
When, for the first time, did Mr. Gillespie complain about his low back at Orlin and Cohen?
A. Well, my initial evaluation he had I believe he had --
Q. Would you take a look at that?
A. All right. I think the first note is 11/6 that mentions his low back.
Q. When was the lumbar fusion done?
A. 11/16.
Q. Ten days later?
A. Yes.
Q. Was any treatment rendered to Mr. Gillespie's low back in the interim?
A. Yes.
Q. Between 11/6 and 11/16?
A. He was being treated for his low back prior to that.

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Q. Not at Orlin and Cohen?
A. I mean the notes don't reflect his complaint, but [*75] he had the existing back and neck injury. What happens with the Worker's Comp., they're sorted by cases. So lots of times you have to be very specific with body part. If you mention the wrong body part, he'd get their benefits cut off.
I think this reflects a problem with conforming to Worker's Compensation guidelines, and I don't have a answer specific answer for why there's no previous lumbar note but it's never, never the case someone has back complaints today and they have surgery the next day. I am sure the patient had previous back treatment for and prior pain prior to 11/6/98.
Q. Sir, the Orlin and Cohen records make no mention of the back before 11/6?
A. I said that.
Q. You also said that you speculate that it was said but it wasn't listed?
A. There is no record, there's no mention of his back prior to 11/6/98, no.
Q. Doctor, prior to that surgery and immediately afterward were MRIs of the low back done?
A. I would have reviewed an MRI prior to the surgery,

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yes, unless he couldn't get an MRI, you know, for example, couldn't get a CAT [*76] Scan.

Q. Doctor, was there a finding by MRI of 11/5/98 of degenerative disk disease and desiccation at L4, 5?
A. If you're reading from the MRI report, I am sure what that is is what it is.
Q. Referring to records that are in Orlin and Cohen's subpoenaed records?
A. Okay. If you have the MRI report to show to me I will concur with that. I don't have it in front of me.
Q. Getting back to that, was there an MRI done at Mercy Hospital on December fifth which found desiccation at L4, 5, and a tear of that disk?
A. Again December 5, 1999?
Q. '98?
A. '98. I don't have the MRI in front of me. I can look through the record here, see if I can find it, but if you have, you can produce it, I will be happy to, yes.
Q. Could you tell us what it is, the three documents you were just handed. What it is?
MR. KENNY: What is he referring to by the way any of these in evidence?
MR. GARONE: The other records should be in evidence.

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THE COURT: He is reviewing stuff not in evidence?
MR. GARONE: To refresh his memory.
[*77] THE COURT: If he needs it. He didn't do the MRI I am assuming.
Q. Doctor, were there MRI performed at the request of Orlin and Cohen prior to and immediately subsequent to the November of 1998 surgery?
A. Yes.
Q. And, did those MRIs find disk bulges, disk herniation and tear at L4, 5?
MR. KENNY: Objection.
THE COURT: Sustained.
A. Yes.
THE COURT: The answer is stricken.
MR. KENNY: Thank you.
Q. Didn't Mr. Gillespie suffer from disk bulges or herniations prior to August of 1999 at the level of L4, 5.
MR. KENNY: Objection.
THE COURT: Sustained.
MR. KENNY: Move to strike.
THE COURT: Stricken.
You don't have to answer that question.
Q. May I see those reports, doctor.

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MR. GARONE: Your Honor, at least as far as the December fifth MRI, it's part of the Mercy record which should be fully in evidence by both counsel agreeing.
MR. KENNY: I am not sure what you're referring to.
MR. GARONE: 1998 admission.
MR. KENNY: If it's part of the record, then I have no problem. [*78]
Q. On December 5th of 1998, doctor, at Mercy Hospital, was an MRI done?
A. Yes.
Q. Tell us what findings were made with regard to the L4, 5 level?
A. L4, 5 disk shows desiccation and a tiny linear tear.
Q. What is a tear?
A. Cover of disk outside cover which is like a rhine which is like an orange peal, you can get a little nick or tear in the cover of the disk.
Q. That permits the material, the gelatinous material inside to leave the disk?
A. It could, but that is not what always happens.
Q. That was a condition involved the area, that level,

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L4, 5, is the level where you claimed on direct examination a new injury was sustained by Mr. Gillespie, correct?
A. Yes.
Q. There was a condition, a pathology, already in existence at that level as early as December of 1998, correct?
A. This is considered minor pathology, a tiny linear tear is not considered a surgical leisure.
Q. Desiccation. What does that mean?
A. Means the disk is, because the disk inside of the jelly is mostly water so on the MRI [*79] it shows bright white. So, when you don't see it, doesn't look as white, it looks less white or gray turning black then it's called desiccation. It's not something generally surgical.
Q. When the disk loses that moisture, that liquid, doesn't provide the same degree of support and shock absorption when it's a fully healthy disk, correct?
A. Again it's, you can't answer that question, that has to do with how much it's desiccated. That is a big component to making that kind of conclusion.
Q. Depending on the amount of desiccation, it could create physical problems for an individual, could it not?
A. Yes.

25 Q. And, desiccation doesn't improve over time. It
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2 only worsens over time?
3 A. That is not true. Depends on degree. The tear can
4 heal. If it heals, the desiccation of the body materials
5 then it can be restored.
6 Q. Restore fluid to a desiccated torn disk?
7 A. Yeah, that is what happens in all the time with
8 athletic, young athletes, people younger.
9 Q. How about fifty year old men?
10 A. It's possible, because we don't follow most linear
11 [*80] tears. They don't become long term problems. We don't MRI
12 everyone to see how the prognosis is. That is the only
13 injury, four five disk, nothing else going on. I got an MRI
14 that says thin linear tear. 99.9 percent of those would not
15 go on to need surgery.
16 Q. We know you found a problem at that level when you
17 went back in 2000?
18 A. Yeah, I ordered a discogram. That's correct.
19 Q. So, that the likelihood is that the condition
20 worsened over time, correct?
21 A. Well, my conclusion was, it wasn't causing pain the
22 initial time otherwise I would have operated on it.
23 Q. Condition worsened between December of 1998 or
24 November of 1999, when you went in and February of 2000 and
25 when you went in again?
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2 A. The car accidents.
3 Q. Yeah, I understand that, doctor. Did the condition
4 worsen between those dates?
5 A. I am sorry. Which dates is that now?
6 Q. November of '98 and February of 2000, did the
7 condition at L4, 5 worsen?
8 A. Yes.
9 Q. On February 4, 1999, Mr. Gillespie's symptoms in
10 the low back were fairly mild?
11 A. The note says doing [*81] much better with diminished
12 symptoms.
13 Q. However, on April 9, 1999, Mr. Gillespie was
14 complaining of low back pain extending into both legs,
15 difficulty climbing stairs, descending stairs and walking,
16 correct?
17 A. Yes.
18 Q. His range of motion was decreased from February,
19 correct?
20 A. Yes.
21 Q. July 22nd, his complaints had increased even beyond
22 what they were on April ninth, correct?

A. I think I testified to this note before.
Q. On July twenty-second, his complaints had increased beyond what they were on April ninth, correct?

A. That is what the note says, yes.
Q. Range of motion was still at that same reduced level from April ninth?
A. Yes.
Q. His symptoms were worsening, correct, over the first half at least of 1999?
A. My interpretation was he was getting much better. He did have episodes where he had an exacerbation of back pain. Overall his clinical course I felt was improving.
Q. Do your notes reflect there was improvement or worsening of symptoms?
A. I think I testified, you pointed out one note [*82] in particular, I said doing much better. I think there's notes saying --
Q. Tell me which note as you progress from the February 4th of 1999 note through the July 22nd of 1999 note, tell us which ones show improvement?
A. Okay. 2/4/99, patient doing better with dimin. symptoms.
Q. From that date through the July 22nd note?
A. Again that there is only one other note. Next note you pointed out was the one that he had exacerbation.
Q. So, there is no showing in the notes of any improvement between February 4th and July 22nd in fact?

A. Yes.
Q. The notes reflect that the symptoms are increasing; correct?
A. Yes, for the, yes, for the 4/4/99 note.
Q. Doctor, beginning in March of 2000, isn't it a fact that each and every one of your notes relating to Mr. Gillespie visits indicate that his gate was normal?
MR. KENNY: I will stipulate to that, Judge.
Q. Would the doctor agree?
A. Okay. Yes.
Q. In May 7, 2001 notes, would you take a look at that, doctor?
A. Yes.
Q. Did you indicate that Mr. Gillespie [*83] continued to be doing extremely well?
A. Yes.
Q. Same thing March 28, 2003, correct?
A. I am sorry. I don't have that note. Thank you. Doing extremely well.

Q. Doing extremely well. In April of 2004, he was still doing reasonably well, was only intermittently symptomatic, correct?
A. Again, I don't have that note. It may be here but it's --

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Q. Do you have that?
A. No, I said I don't have the note.
Q. Still doing reasonably well intermittent pain only?
A. Continues to be intermittently symptomatic with back pain, numbness --
Q. Sir, intermittent?
A. Reading from the note. Patient continues --
Q. I understand. I asked you a question though whether there was intermittent symptoms?
A. Yes.
Q. Doctor, the pre August of 1999 diagnosis was lumbar radiculopathy, correct?
A. Yes.
Q. The post September of 1999 diagnosis was lumbar radiculopathy?
A. Yes.
Q. Doctor, July 7, 2000?
A. Yes.
Q. Was it your opinion at that time that all of Mr. Gillespie's symptoms were [*84] a direct result from a work related injury?
A. As the other notes that was alluded to.
Q. Doctor, yes or no, is that what you indicated in that note, in those words?

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A. Yes.
MR. GARONE: No further questions.
THE COURT: Any redirect?
MR. KENNY: Yes, Your Honor, if I may.
REDIRECT EXAMINATION
BY MR. KENNY:
Q. Specific types of x-rays you would typically order with respect to a fusion patient in order to ascertain whether or not that is pseudoarthrosis or a fracture fusion?
MR. ZEPPIERI: Objection, based on the prior ruling.
MR. KENNY: Not going into it.
THE COURT: Overruled.
MR. GARONE: Also beyond cross.
MR. KENNY: Asking him about the x-ray done at Mercy Hospital.
MR. ZEPPIERI: ER x-ray?

MR. KENNY: Yes.
MR. ZEPPIERI: Okay.
Q. You were asked a question about the x-rays that was performed at Mercy Hospital; am I correct?
A. Yes.
Q. That didn't suggest a fracture at that time; is that right?
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A. Yes.
Q. Specific type of x-ray done when the patient [*85] is put into a fetal position in order to ascertain the status of a fusion?
A. Yes, called a flexion extension x-ray of the spine.
Q. And, none of those were done at any of the hospitals at or about the time of these two accidents; am I correct?
A. No.
Q. In your opinion, doctor, am I correct that is the most, perhaps one of more thorough ways of ascertaining whether a pseudoarthrosis or fractured fusion --
MR. GARONE: Objection, leading.
THE COURT: Overruled.
Q. Doctor, am I correct, referring to your November 12, 1999 note, you reviewed an MRI of the lumbar spine that you ordered after his September eleventh accident which revealed a suggestion of a possible fracture fusion mass?
MR. GARONE: Objection.
THE COURT: Overruled.
A. Yes.
Q. Did that assist you in arriving at the diagnosis you told this jury here today that he did, in fact, suffered
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a fracture fusion as a consequence of these car accidents?
A. Yes.
Q. With respect, doctor, to your notes of March twenty-eight and April sixteenth, initially [*86] discuss your March 28, 2003 note.
Am I correct you have characterized him as suffering chronic sacral radiculopathy?
A. Yes.
Q. What is a chronic mean?
A. It's a persistent condition beyond six or eight weeks that is chronic, it continues with time, despite treatment.
Q. Also indicate he continues to be moderately symptomatic in back, legs, numbness, tingling and weakness?
A. Yes.

Q. Also indicated he is engaged in activities but is disabled by his pain intermittently?
A. Yes.
Q. Last exam of April of 2004, did you indicate in here that he continues to be intermittently symptomatic with pain, numbness and tingling of the extremities?
A. Yes.
Q. Also indicates that the pain was made worse by certain exertional activities, lifting, carrying, bending,

things of that nature?
A. Yes.
Q. While he had done reasonably well, that was something that you drew a conclusion on based upon his status as someone whose undergone two fusions; am I correct?
MR. GARONE: Objection.
A. Correct.
[*87] THE COURT: With a --
Q. Reasonable degree of medical certainty?
A. Yes.
THE COURT: Objection is overruled.
Q. Doctor, is there any reason why you didn't use instrumentation in the initial procedure you performed in November of 1998?
A. At the time inner body grafting was considered the least invasive way to achieve a solid fusion. So, if you're just going to go anteriorly which means through the front there was no instrumentation available for an anterior only fusion. There was instruments, plates and screws for the lumbar spine, not the neck, but for the lumbar spine be hadn't been developed. We were just applying these technologies to the lumbar spine.
Q. You also used the term slam dunk earlier in response to one of the question regarding a fusion of the

type you just described was at the L5-S1 level?
A. Yes.
Q. What did you mean by that?
A. Whenever you operate on people you're never sure of the outcome. You don't know what is going to happen obviously, your experiences with surgeries, certain operations, certain people do better. [*88] That is how you guide a patient along, and when it comes to fusing one level opposed to multiple levels, you know, at L5-S1, it's probably one of the more reliable operations. You can say to the patient, look, if I do this operation you can expect by week four this will happen, by week eight, this will happen, by three months it will be fused with let's say eight percent,

if you just, that is what I told Frank at the time eight percent failure rate. So, you can feel pretty confident. So, you can convey that confidence to the patient.
If you're doing multiple levels and the patient had diabetes or is a smoker you consider that a slam dunk. Here's the statistics, you have a failure rate of this much, you're a smoker, you're over weight, you might be more likely to be that eight, ten percent that doesn't fuse.
The slam dunk expression just goes to convey my confidence with successful outcome. You know, a fusion at L5-S1.

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Q. Finally, doctor, is it normal to see periods of exacerbation of symptoms over a period of time when dealing with a fusion patient?
A. Frequently, I [*89] mean there are patients could have a solid fusion and they can come back and they'll clean out their garage on the weekend and they'll come in and say did I do something to my back. It's basically a local neck sprain like you sprain your angle or sprain your back, but they'll come in, that is when they'll come in to complain. Then a few days later it's gone. It's not a big issue.
Q. It's not abnormal to see patients with this type of procedure come into your office and make complaints depending upon what they did previous, whether it be that weekend or earlier that day?
A. That is what brings them in. Lot of notes sound as good as the patient actually looks.
Q. They can be asymptomatic most of the other times?
A. Yes.
MR. KENNY: Thank you, doctor.
RECROSS EXAMINATION
BY MR. ZEPPIERI:
Q. Two things. With regards to the x-rays that were done at Mercy Medical Center following the ER visit, it's better to do a flexion extension view to try to find if

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there's a fracture fusion mass, correct?
A. Unless you're a spine surgeon, you're not going to pick [*90] up a fracture fusion mass on a plain x-ray because even the radiologist is not going to pick it up.
Q. You can see one, it's not impossible to see a --
A. It's not impossible.
Q. With regard to the September 24, 1999 MRI, which is in evidence as plaintiff's exhibit 8, with regard to the radiologist, just for convenience purposes I will hand you my copy with regards to the radiologist that reviewed the MRI.
Would you agree, sir, radiology is a subspecialty of

medicine like orthopedic surgery?
A. Yes.
Q. Radiologists, all they do is review films?
A. Yes, that's correct.
Q. I understand as an orthopedist you review films as well?
A. Yes.
Q. Radiologist specializes in just reviewing films.
A. Yes.
Q. Were there two radiologists who countersigned that report?
A. Yes.
Q. Did they indicate in their report there was a

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fracture of the fusion mass?
A. No.
MR. ZEPPIERI: No further questions.
MR. GARONE: Nothing further, Your Honor.
THE COURT: Any redirect on that?
MR. KENNY: [*91] Yes, if I may, Your Honor.
REDIRECT EXAMINATION
BY MR. KENNY:
Q. Referring to the -- officer, thank you -- your MRI report previously made reference to what's suggested in that MRI report, doctor, of the finding that you indicate in your report that being November twelfth of a fracture of the fusion mass?
A. I review my films so it would be my interpretation of the film that would make the assessment, not any review of another physician's report.
Q. Is it your normal practice when you perform surgery or are treating a patient to also look at films independent of a radiologist?
A. I would, a gross majority of the time, I don't look at the report. I would look at the films. I make my own interpretation. I am looking at it from my own perspective. Radiologist "is looking "from one' s own perspective" and I am looking at it from a different perspective. So, I wouldn't

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use, I would say I wouldn't, the majority of the time I would not refer to the radiologist. They're very competent but I wouldn't refer to the report to make my assessment of what to do, or what the [*92] pathology is because I am looking from a more subspecialized viewpoint.
Q. It's your independent review of the films themselves that lead you to that conclusion?
A. Yes.
RECROSS EXAMINATION

BY MR. ZEPPIERI:
Q. Would you agree, sir, your interpretation of the films is not the same as those radiologists' interpretation of the films with regard to a fracture of the fusion mass?
A. That's correct.
Q. Would you agree, sir, two physicians can look at the same films and reasonable minds differ on what the films show?
A. That's correct.
MR. ZEPPIERI: Nothing further.
MR. GARONE: No.
MR. KENNY: No, thank you.
THE COURT: You're execution.
(Witness excused.)
THE COURT: Take a lunch recess at this time.

Don't talk about the case among yourselves or with anyone else.
MR. KENNY: Perhaps we should discuss scheduling before you let the jury go for lunch. The next witness is scheduled to appear tomorrow morning.
THE COURT: You will have the afternoon off. It's going to snow anyway. All right. So you [*93] have the afternoon off.
THE CLERK: 10:30.
THE COURT: 10:30 tomorrow.
* * * *

This is to certify that the foregoing is a true and accurate transcript of the proceedings as reported by me.

Mary Ocskai
Senior Court Reporter

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