SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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JOHN R. JANSEN and ANGELA JANSEN,

PLAINTIFFS,

-against-

SEBASTIAN LATTUGA, CRAIG LEVITZ, MICHAEL DUFFE, RPA, ALEXANDRA DeMOURA, XENOPHON XENOPHONTOS, ORLIN & COHEN ORTHOPEDIC ASSOCIATES, LLP and MERCY MEDICAL CENTER,

DEFENDANTS.

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December 19, 2005
10:40 a.m.

EXAMINATION BEFORE TRIAL of the Defendant, SEBASTIAN LATTUGA, taken by the Plaintiffs, pursuant to Order, held at the law offices of Garson, Gerspach, DeCorato & Cohen, LLP, 110 Wall Street, New York, New York 10005, before a Notary Public of the State of New York.

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S T I P U L A T I O N S

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties herein that the sealing, filing and certification of the within examination before trial be waived; that all objections except as to form are reserved to the time of trial.

IT IS FURTHER STIPULATED AND AGREED that the transcript may be signed before any Notary Public with the same force and effect as if signed before a clerk or a Judge of the court.

IT IS FURTHER STIPULATED AND AGREED that the examination before trial may be utilized for all purposes as provided by the CPLR.

IT IS FURTHER STIPULATED AND AGREED that all rights provided to all parties by the CPLR cannot be deemed waived and the appropriate sections of the CPLR shall be controlling with respect hereto.

IT IS FURTHER STPULATED AND AGREED by and between the attorneys for the respective parties hereto that a copy of this examination shall be furnished, without charge, to the attorneys representing the witness testifying herein.

S E B A S T I A N L A T T U G A, called as a witness, having been first duly sworn by a Notary Public of the State of New York, was examined and testified as follows:

EXAMINATION BY

MR. BERNSTEIN:

Q Please state your name for the record.

A Sebastian Lattuga.

Q What is your business address?

A 2001 Marcus Avenue, Lake Success, new York 11042.

MR. COHEN: At the request of plaintiff's counsel, in lieu of the doctor giving his home address my office will accept service of a subpoena for Dr. Lattuga on this case.

MR. BERNSTEIN: Thank you.

Q Good morning, Doctor.

A Good morning.

Q My name is Leigh Bernstein. I am with the law office of Dinkes & Schwitzer and we represent John and Angela Jansen in an action where you have been named as one of the defendants. I am going to ask you a series of questions this morning regarding

the care and treatment you rendered to John Jansen. If you don't understand the questions I ask, please let me know and I will be happy to rephrase the question. Please let me know if you need time for a break and we can make that accommodation as well. Please let me complete my question before offering a response because it's difficult for the reporter to take down two individuals speaking at the same time and kindly answer verbally because any nods or gestures cannot be interpreted as a response.

A Yes.

Q Are you currently a physician licensed in the State of New York?

A Yes.

Q When were you licensed, sir?

A Approximately 1991.

Q Can you tell me where you attended medical school and your inclusive dates of attendance?

A Stony Brook University Medical School, 1985 through 1989.

Q Upon completing your medical education did you participate in an internship program?

A Internship at Mount Sinai Medical

Center.

Q From what period of time, sir?

A I am sorry, where did I leave off the date?

Q 1985 to 1989.

A So, 1990 to 1991.

Q Then did you subsequently participate in a residency program as well?

A Yes, Stony Brook Orthopedic Residency, 1991 to 1995.

Q Did you achieve the level of chief resident?

A Yes.

Q After completing your residency program in 1995 what did you do next?

A Adult and pediatric spine surgical fellowship.

Q Where was that?

A University of Miami.

Q During what period of time?

A 1995 to 1996.

Q After completing your fellowship, sir, what did you do next professionally?

A I went into practice at Orlin & Cohen

Orthopedic Associates.

Q Did that commence in 1996?

A Yes.

Q To the current time?

A No, until approximately three years ago at which time I moved to my current location.

Q Where are you currently, sir?

A At 2001 Marcus Avenue.

Q What is the name of that practice?

A I am in practice alone, private practice.

Q Are you currently board certified?

A Yes.

Q When were you board certified, sir?

A Approximately 1998.

Q That is in orthopedic surgery?

A Yes.

Q Are you board certified in any other specialty?

A No.

Q Are there any subspecialties within orthopedic surgery for which you received board certification?

A There is no subspecialty certification

for spine. It's an accredited spine surgical fellowship program and there was no additional board examination required for that.

Q Have you ever been licensed in any other state other than New York?

A Florida during the period of time that I was a fellow.

Q Has your license in New York ever been suspended, terminated or revoked for any reason?

A No.

Q Do you currently maintain admitting privileges at any hospital?

A Yes.

Q Which hospital, sir?

A Franklin General.

Q Any other ones?

A That is all.

Q Were there privileges that you previously maintained which you no longer maintain?

A Yes.

Q Which hospitals?

A Mercy Medical Center.

Q Can you explain the circumstances under which you no longer maintain those privileges?

A I moved my practice.

Q Have you authored or coauthored any articles which have appeared in any medical publications or textbooks?

A Yes.

Q Approximately how many?

A Four, three or four.

Q What were the topics of those articles?

A One was bone and joint healing with ultrasound, one was hand surgical techniques and one was a chapter about gunshot wounds to the spine.

Q When you say it was a chapter, is that in a textbook?

A Yes.

Q The name of the textbook?

A Skeletal Trauma.

Q Do you maintain a current CV, sir?

A Yes.

Q Do you have one with you today?

A No.

Q Are the articles that you have published contained within that CV as well?

A No.

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MR. BERNSTEIN: I am going to ask you if you can provide counsel with a copy of your CV and that we be provided with that.

MR. COHEN: I take it under advisement. Please follow up with all demands in writing, please.

Q From 1996 to 2002 did you limit your practice in orthopedic surgery to any particular area of the body?

A Spine surgery.

Q Did there come a time, sir, that you saw a patient by the name of John Jansen in your practice?

A Yes.

Q Was it your custom and practice back at that time to maintain an office chart for patients that you saw?

A Yes.

Q Did you maintain such a chart for Mr. Jansen?

A Yes.

Q Is that chart here today?

MR. COHEN: By counsel, the chart would have been maintained by Orlin & Cohen.

Counsel for Orlin & Cohen advised us that the original chart is not available today. Christine was kind enough to allow us to make a copy of her chart which we can mark today which was previously provided to all counsel as I understand and perhaps at a deposition of one of the co-defendants the Orlin & Cohen chart can be produced so we can have an opportunity to review it.

(Whereupon, medical charts were marked as Plaintiff's Exhibits 1 and 2 for Identification as of this date by the reporter.)

Q I just want to show you what has been marked as Plaintiff's Exhibit 1 and ask you to identify that document?

A These appear to be copies of notes from a chart.

Q Was that the chart maintained for Mr. Jansen?

A It appears that that is what it is.

Q Did you have an opportunity to review the original or a copy of that chart before testifying today?

A A copy of the chart.

Q Did your review reveal that you, in fact, had made entries in Mr. Jansen's chart?

A Yes.

MR. COHEN: Off the record.

(Whereupon, a discussion was held off the record.)

Q Does the chart reflect, sir, the first contact that you had with Mr. Jansen as a patient?

A Give me a moment.

Q Sure.

MR. BERNSTEIN: Off the record.

(Whereupon, a discussion was held off the record.)

Q Can we identify this as a patient information sheet?

A Yes.

Q Was the custom and practice of Orlin & Cohen to have a patient or have this document completed by a new patient?

A Yes.

Q Does it indicate when Mr. Jansen first became a patient in the practice?

A Yes.

Q Was that April 27, 1999?

A Yes.

Q Does it indicate, sir, the mechanism of the injury for which Mr. Jansen sought treatment?

MR. COHEN: Referring to these documents does it indicate the mechanism?

THE WITNESS: Yes.

Q What does it indicate, sir?

A Twisted and fell inside truck.

Q Given that information that you just provided from the patient information sheet, does that refresh your recollection that, in fact, that was the history of the injury provided by Mr. Jansen?

MR. COHEN: As of April 27, 1999?

MR. BERNSTEIN: Yes.

A My answer with respect to what his injury is is based on what the notes say, not in my recollection of that event.

Q Do you have any reason to believe that the history as provided on this patient information sheet is inaccurate?

A No.

Q When did you first have contact with Mr. Jansen as a patient?

A 12/16/99.

Q Would it have been part of your custom and practice to review any prior notes authored by doctors who had seen Mr. Jansen before you in order to familiarize yourself with his history?

A Yes.

Q Would you have done that, sir, for the initial evaluation which was completed on April 27, 1999?

A Yes.

Q I just want to refer you to that note, Doctor, which on page 2 of the impression --

MR. COHEN: The one of December 16th?

MR. BERNSTEIN: No, April 27th.

MR. BERNSTEIN: Off the record.

(Whereupon, a discussion was held off the record.)

Q Do you see where I am referring to, sir?

A Yes.

Q Impression of a herniated disk lumbar spine with radiculopathy, do you have an independent recollection of that being the diagnosis at the time?

MR. COHEN: Well, the impression at

the time?

MR. BERNSTEIN: The impression at the time.

MR. COHEN: Of April 27th?

Q Yes.

A I mean, this is Dr. Levitz's impression of what he saw of the patient and I can only take at face value what his impression was at the time.

Q Before you came upon Mr. Jansen as a patient in December of 1999 did you ever speak to Dr. Levitz about Mr. Jansen?

A No.

Q There is an MRI report from Stony Brook Medical Imaging from May 6, 1999. Do you see that as well, sir?

A Yes.

Q Did you see that or did you review that document before you saw Mr. Jansen on December 16, 1999?

A It would be my custom and practice to review the films and MRI report at the time of my initial consultation and subsequent consultations.

Q So, when you saw Mr. Jansen, you would

have known that the impression was disk bulges at L3-4 and L5-S1?

A Again, I would make my own interpretation of the MRI. I mean, I review the report but I review my own MRI's, so my assessment would be based upon what my impression would be of my -- my impression based upon my review of the MRI and pertinent history and my review of the physical findings, not necessarily what the MRI report said.

Q Back in 1999 was it the custom and practice of Orlin & Cohen to receive not only the MRI report but the actual study from Stony Brook Medical Imaging?

A The patient frequently keeps their own MRI's, so I don't recall specifically.

Q Do you have a specific recollection of reviewing this actual study?

A Yes, in that I reviewed the study but not the specific details of the MRI at the time but then subsequently --

MR. COHEN: As you sit here today do you have a recollection of reviewing those films on December 16, 1999?

THE WITNESS: Yes.

Q If you had, in fact, reviewed the films, would they have then stayed wherein the confines of Orlin & Cohen's office?

A No, not necessarily.

Q What might have happened?

A If the patient brought them, then he would hold on to them. If they were sent -- I mean, those are all plausible things. If they were sent to the office, do you mind if I take my MRI's, I want to go for another opinion? Fine, take them. Basically, whatever the patient wanted.

Q If the patient did not want to take them, is one other plausible thing they would have been maintained at Orlin & Cohen?

A Yes.

MR. BERNSTEIN: I am going to ask counsel for Orlin & Cohen to conduct a search and see if the studies are maintained in the office and I would like to be provided with a copy at my expense.

MS. HICKEY: If you could just put it in writing.

Q Just so I am clear, sir, at the time you saw Mr. Jansen you would have been familiar with

the impression of the May 6, 1999 study?

A Yes.

Q Doctor, the Orlin & Cohen chart also reflects there was a December 8, 1999 visit?

A Yes.

Q That visit was I believe -- well, it seems to be a one page follow-up exam typed note but I don't think there is any name there.

MR. COHEN: I think it's two pages.

A It's two pages,yeah. There is a second page, yes.

Q I can't seem to find page 2. Is there any way you can tell?

MR. COHEN: By counsel, what has been marked today as Plaintiff's Exhibit 1, a copy of the Orlin & Cohen chart, there is a two-page note for December 8th.

Q Can the doctor just tell me then who was the physician that saw Mr. Jansen on the 8th?

A Dr. Fieder.

Q Who is Dr. Fieder?

A He was another physician in the Orlin & Cohen group.

Q Did you have any conversation with Dr.

Fieder regarding Mr. Jansen some time after this visit but before you saw Mr. Jansen on the 16th?

A No.

Q Can you turn to the visit of December 16th, sir?

A Yes.

Q Now, Doctor, because it's typewritten I don't need your assistance in reading it but I want to direct your attention to the three line note below follow-up exam 12/16/99 and I just ask you to read that to yourself, please.

A Out loud?

MR. COHEN: No, to yourself.

Q To yourself.

A Yes.

Q What is included in this note, sir, regarding his history, is there any change in the history as you note it from December 16th, actually, from the time that he first presented until December 16th?

MR. COHEN: That he has written in those three sentences versus what is contained in the prior notes?

MR. BERNSTEIN: By way of history or by

way of status.

A I think it's consistent with what his pathology is.

Q There was lower extremity radiation previously?

A I believe that is consistent with what his history was, yes.

Q Based upon your physical exam is that any different than the findings on physical exams previously?

A It's more or less consistent with the previous examination, yes.

Q The plan at this time was for discogram evaluation?

A Yes.

Q What is circumferential arthrodesis?

A Fusion of the spine.

Q In the plan you recommended that if the discogram was positive, then circumferential arthrodesis would be recommended?

A Yes, that is what I wrote.

Q Back on December 16, 1999 was there any alternative treatment rather than the circumferential arthrodesis in the face of a positive

discogram?

MR. COHEN: Can I hear the question back, please?

(Whereupon, the question was read back by the reporter.)

MR. COHEN: You can answer over objection, Doctor.

A Well, certainly this recommendation was given in light of all of his previous history that was documented, his having seen other spinal surgeons who recommended surgery, who saw other orthopedic surgeons who had placed the patient in those other treatments, alternatives. In other words, he was already involved in the alternative treatments and then going forward from this position, you know, the part of my surgical evaluation would include review of the alternatives to surgery.

Q What was your understanding at the time that you authored this note of the previous history as it relates to conservative care that he had undergone?

MR. COHEN: I object to the form. If you understand it, you can answer it over objection.

Lattuga

A Again, I think I answered that question before. He had been treated, he had been treated for this condition conservatively by multiple other physicians including surgeons who were involved in the overview care of this problem prior to having seen me. Do you follow?

Q I follow but are you referring to the doctors that he saw at Orlin & Cohen?

MR. COHEN: No. He said he was referring to the conservative treatment that he previously referred.

Q By physicians at Orlin & Cohen?

A All of the physicians.

Q That is what I am asking you. What is your understanding of the physicians that he saw before seeking treatment at Orlin & Cohen?

MR. COHEN: Do you want him to go through the chart and identify all of them?

MR. BERNSTEIN: Yes. I am going to need him to do that.

MR. COHEN: Off the record.

(Whereupon, a discussion was held off the record.)

A There are notes from a Dr. DeMoura as

a spine surgeon, there are notes from Dr. Ciruli who is a chiropractor, there are notes from physical therapists in the chart. This is all besides the notes the patient would articulate to me. These are things he had done, all of this prior, and that is all part of the information that you get prior to making decisions, therapist, chiropractors, other orthopedist surgeons, generalists all involved in his care.

Q Did you have conversations with Dr. DeMoura involving Mr. Jansen's condition?

MR. COHEN: Before December 16th or at any time?

MR. BERNSTEIN: Any time.

A He assisted me on surgery, so clearly that is a time that I would discuss the case with him.

Q When it was decided surgery would be performed, did Dr. DeMoura participate in that decision?

A I was -- there are already -- there was already documentation that Dr. DeMoura suggested surgery, that he thought surgery was a good option for the patient and the patient related he had

discussed having surgery with Dr. DeMoura, so I was aware of that. In general, most surgeons make this decision on their own accord to proceed with surgery, so it's not based upon the advice of another surgeon, it's based upon your own individual decision-making tree, so I thought it was one of the options that would benefit Mr. Jansen having surgery and I offered him that.

Q Did you see Mr. Jansen at any time before the surgery in March of 2000?

MR. COHEN: Between December 16th?

MR. BERNSTEIN: Yes.

A Yes.

Q What was the date of the next visit?

A I believe 1/13/00.

Q At that time your note indicates he had a positive discogram?

A Yes.

Q What does it mean when it's positive, sir, in terms of the pathology to each of the levels that are recorded here, L3-4, L4-5 and L5-S1? You asked him what were the results of the discogram on this patient. It says positive for these levels.

A Positivity on a discogram is twofold;

number one, it's a radiographic positivity which shows morphological outline of the disease of the disk and that morphological change was if we do review the report quote positive of L3-4, L5-S1, there is radiographic positivity that you're describing and there is the subjective patient complaints of positivity, so what you look for is a concurrence of symptoms and levels that you inject and so that is this positivity on two levels and he was positive at L3-4 and L5-S1.

Q How about L4-5?

A He was not positive at L4-L5.

Q When you say he was not positive at L4-5, was that both subjective as well as objective?

A Yes, according to the report, yes.

Q Now, when you say subjective, are you referring to the pain that he complains of?

A Yes. There is a provocative component to the exam. You're trying to elicit a pain response, so in a patient you do something and the patient has to describe some degree of pain, so he could -- there is some subjectivity to it. There is no reason to be dishonest. You inject the disk and he states he has pain, then it's positive.

Q Who performed the discogram?

A Lodespoto.

Q Do you know who that individual is?

A Not personally, no.

Q Did you speak with that individual regarding the results of the discogram?

A No.

Q Did you review the discogram yourself?

A Yes.

Q Is that something that is maintained at Orlin & Cohen?

A Not necessarily.

Q Where would you have reviewed that study?

A Generally the patient would have that study.

Q If the patient did not take it back with him, if Mr. Jansen did not take it, it's possible he could have left it at the facility?

MR. COHEN: Objection to possible. I think he testified before as to how sometimes they're taken by the patient or left at the facility.

MR. BERNSTEIN: That was about the MRI.

I want to make sure it was the same thing for the discogram as well.

Q Was there a reason you would not maintain it for any reason?

MR. COHEN: He said before the patient takes it.

Other than the patient taking the films with them, were discogram films sometimes left with Orlin & Cohen?

THE WITNESS: Yes.

MR. BERNSTEIN: So, to the extent that that study is with Orlin & Cohen, I am going to as well ask to be provided with a copy of that at my expense.

MS. HICKEY: Just put it in writing.

Q Doctor, referring you to the discogram report on the third paragraph the contrast nucleogram's bilocular configurations are effaced, particularly at L3-4 and L5-S1, what is that?

A That speaks to the positivity of the morphological change in the outline of the nucleus propulses. I described when you inject the dye, you see change in the morphology, the shape of how it outlines that suggests positivity. It's very

important criteria and it's positive L3-4, L5-S1.

Q What does it mean where injection pressures are considered loose?

A Consistent with it with the positivity. If you're injecting a liquid into a closed space, it's a tight injection pressure. When you inject it into a loose space or disordered space, dysfunctional or morphology space, it leaks out. That is consistent with that positivity that I described for L3-4 and L5-S1.

Q Does this finding speak to the pathology of the inner portion of the disk or outer portion of the disk or both?

MR. COHEN: That specific finding?

MR. BERNSTEIN: Yes.

A Both.

Q The next sentence where it says each disk possesses small broad-based annulus fibrosis bulging, does that mean those disks are bulging disks now?

A Yes.

Q What does it mean to be a bulging disk?

A That speaks to the -- a weakness in

the structure of the disk such that the annulus or the wall of the disk is not competent enough or sufficient enough to maintain its normal shape morphology and begins to buckle and weaken and that is what he is describing and, again, he injected all disks and ascribing that change or that visual change to those disks.

Q Further down where it says there are signs of internal annular derangements with circumferential fissuring, what does that mean, sir?

A Well, again, you know, not to belabor the point, but it's that change in the morphology, in the shape and structure of the disk. When you inject the disk, you see the outline of the dye in an abnormal shape. It tracks into those annular derangements, so that is the anatomical description of what the pathology is that is creating the change in the outline of the nuclear gram of the diskology.

Q Basically, the next two sentences describe the pain at the levels and L4-5 prove essentially asymptomatic.

MR. COHEN: You're referring to that one specific sentence?

MR. BERNSTEIN: Yes.

MR. COHEN: Because you incorporated the prior sentences before that.

MR. BERNSTEIN: I am trying to pass through it but if you want me to go through it on the record --

MR. COHEN: No, don't go through it but what is the question?

MR. BERNSTEIN: Basically, I had not asked the question yet.

Q The next sentence there is no dominant radicular symptomatology is reported, what does that mean, sir?

A Sometimes when you do -- I mean, I am only reading what it says. I can only interpret but it says no dominant. Sometimes when you do a test like this, it says it's all right side or it hurt, oh, all on my right side or, oh, on all of my left side. Not dominant is not all on one side or the other, it means both sides.

Q The last sentence that refers to whether or not there is any discrete encroachment, what does that mean, sir?

A Exiting neural foramina means there is no foraminal stenosis.

Q Does that mean no herniation?

A No. It says no stenosis. The bulging disk suggests some pathology at that level. It's a bony description. It's not describing -- the neural foramina is the bony exit tunnel for the nerve roots so that's the exiting neural foramina. He is describing the NF, he is not talking about the disk, are free from encroachment, meaning, he is not seeing anything in that foramina.

Q So, then, what I am asking is would a herniated disk, if there was such a finding, would that be something that would encroach the foramina?

A It could, yes.

Q So, since the exiting neural foramina is free from encroachment, does that mean there is no herniation?

MR. COHEN: Note my objection.

A Not necessarily. This test does not really evaluate disk encroachment on neural elements. It's not for that. It's for a disk, morphology disk, the MRI is more illustrative of.

Q Having reviewed the report and study itself what was your understanding of what the pathology was?

MR. COHEN: Other than what he testified to before?

MR. BERNSTEIN: Whether it changed it or not.

MR. COHEN: He testified after reading the report and films. He gave you what his impression was on January I think 13th.

Q Was there any one finding or any one study that assisted you more than another in terms of rendering your impression as to what was causing Mr. Jansen's pain?

A No, not necessarily. It was a compilation of all of the objective and subjective tests and physical exam and history, I mean, that allowed me to make my decision.

Q Doctor, this impression, lumbar discopathies with pain provocation, particularly L5-S1, what is a discopathy?

A Discopathy means sick disk. It's the incasement of everything he put up here. It's the most broadest expression of disease that you can use in medicine with pain provocation and it applies to those disks, L3-4 and L5-S1.

Q The recommendation that you indicated

in your note was a circumferential arthrodesis of L3 of the sacrum?

A Yes.

Q That would encompass L3-4, L4-5 and L5-S1?

A Yes.

Q How was it determined that all of those levels required surgical intervention?

A Based upon the patient's history, the clinical exam, based on his discogram, positive findings at L3-4 and L5-S1, based on his MRI findings of pathology at L3-4 and L5-S1, that is what was the basis for my selection of fusion of L3-4-5 -- I am sorry, L3-4, 4-5 and L5-S1.

Q Doctor, back in 1999 to 2000 was it the standard of care to include for this particular patient the L4-5 level in the procedure of the surgical intervention even though there were no positive findings on MRI or discogram?

MR. COHEN: I am going to object to the form but I will let him answer it.

A Yes.

Q Why was that the standard of care back then? Why would you involve a level of the lumbar

spine where there was no pathology?

MR. COHEN: Well, I will object to that. There has been some testimony regarding pathologies.

Q Where there was no positive findings on discogram.

A When a doctor performs a grafting procedure to try to get the spine to fuse, that procedure is not a guarantee that the spine will fuse. There are certain factors that will increase the fusion rate, the success of the surgery and there are certain factors that will diminish the fusion rate, okay. A doctor is not in control of those variables for the most part, so even a technically perfect grafting procedure it's listed as a fusion. We're not fusing it, we're grafting it, so it might graft in the fusion. That is our intent. It's not a guarantee that fusion is going to take place. The anterior posterior fusion technique has the highest yield for success on fusions. That was the --

MR. COHEN: He is asking why fuse L4-5?

A Okay. You need to -- 4-5 had to be incorporated into the fusion for two reasons; one,

because fusing a level above and below and leaving an intervening segment unfused in the hypermobile portion of the spine would lead to its inevitable degeneration. You're creating a fixed fused mass above and below and that would just almost without question lead to degeneration of the intervening segment. You will be creating a grinding machine on that intervening segment and the consequence of that would be more surgery at that intervening level, so if I chose -- you could choose to do that above and below but what you're saying to the patient is that we're going to allow this to occur and you're going to degenerate that unfused segment between and in five years you're going to need another operation, so that is not looking forward, so that in the estimation of an experienced spine surgeon would just be leading to another problem, so you eliminate that problem by just by incorporating the intervening segment and that is really the standard. You would not leave an unfused segment between two fused segments unless you had to and there was something else going on.

Secondly, because fusion is sometimes a difficult thing to get, okay, by having -- by

fusing the three levels together and block, you create a more stable platform for the fusion to happen and those are the two primary reasons and I think that if you read the report of the discogram, there was some abnormal findings at the L4-5 disk, so it wasn't a normal disk to start, so you would just assume if you fused above and below a disk that was already abnormal, you would just be asking for trouble in the future and that is why -- I would always include that in my fusion.

Q Other than the anterior posterior procedure were there other techniques available back in 2000?

A For fusion?

Q For fusion.

A Yes.

Q What other techniques were available?

A Posterolateral fusion uninstrumented.

Q Well, are those two separate ones you just mentioned?

A No, that is one.

Q So, posterolateral fusion --

A Uninstrumented. Posterolateral instrumented. Posterolumbar intrabody fusion,

anterior lumbar fusion, anterior lumbar fusion with instrumentation.

Q Those are in addition to the one you performed?

A No. The last one I performed, lumbar fusion with instrumentation -- I am sorry, anterior lumbar and posterior fusion.

Q In your opinion you had indicated that the last procedure or technique we just discussed the highest rate of success?

A Yes.

Q Why is that?

A Because you graft the spine from the front and the back, so you have two different areas, two mobile segments of the spine that are addressed. You -- there is some -- there is some similarities with the other techniques but you have access to, full access to, all of the disk material anteriorly so you can remove, so that gives you in my estimation a higher, better fitting of graft anteriorly, larger grafts, more bulk to the graft and that would more likely yield a higher fusion, placing instrumentation. Posterior fusion adds a posterior fusion component to that and instrumentation which

are screws and rods help to solidify that entire construct to give you a stable, rigid construct that the patient has the highest yield I felt on fusions.

Q The first technique you indicated, the posterolateral fusion without instrumentation, how is that performed or what is used for that technique?

A It's just an incision on the back and then part -- it's just incision on the back with fusing the transverse processes of the posterior aspect of the spine. That is also part of my --

MR. COHEN: He just asked what it involved.

Q Why was that not a viable technique to use in this circumstance?

MR. COHEN: Well, rephrase it.

Q Was this a viable technique to use in this circumstance for Mr. Jansen?

A Yes.

MR. COHEN: Again, he already testified these were other alternatives. They were viable. If you want to ask why he used one over the other.

MR. BERNSTEIN: I want to ask him for each one and why he chose.

Q Why did you not select this particular technique for Mr. Jansen?

A That technique alone, because that is part of my operation -- you see, that is so -- that is just one part. It's not enough to drive the fusion. The fusion rate is lower. That is called a stand-alone fusion. It's a lower rate of fusion. That is why.

Q The posterolateral fusion with instrumentation, is that incorporated in the technique you use as well?

A Yes.

Q In what respect is it incorporated?

A Anteroposterior fusion, the posterior fusion I do include posterolateral fusion with the instrumentation.

Q What instrumentation was used for this procedure?

A Pedicle screws.

Q Was there any other type of instrument that could have been used along with the pedicle views?

A No.

Q Was there anything that could have

been used in lieu of the pedicle screws?

MR. COHEN: In terms of instrumentation?

MR. BERNSTEIN: Yes.

A That was state-of-the-art then. There was older instruments they used in the past, plates and screws, but they're outdated but that was state-of-the-art at that time.

Q The anterior lumbar fusion, was that a technique that was somewhat incorporated in the procedure you performed?

A Yes.

Q That procedure alone would not have been appropriate for Mr. Jansen?

MR. COHEN: Objection. That is not what he said.

MR. BERNSTEIN: I am sorry.

MR. COHEN: That is not what he testified to.

Q Would that procedure alone have been appropriate --

MR. COHEN: Objection. Do you want to know why he chose that technique over that technique?

MR. BERNSTEIN: No, same question.

MR. COHEN: No. You're asking if one is appropriate or not. What he testified to before was to give the best chance of fusion.

Q Why did you not select this particular procedure?

A Because it has a lower fusion rate than the procedure that I chose.

Q The lower fusion rates with some of these techniques we discussed, was that based upon clinical studies or something else?

A It's a, you know, the signs of fusion of the spine was evolution, so that is a culmination of my clinical practice, my experience, my fellowship training, reports that are current and the national spine meetings and so, you know, there are surgical preferences. I mean, you know, my opinion in my hands with my patients, that has the highest yield of obtaining a fusion and that is the goal. That is why the patient is on the table and that is why I ended up choosing that procedure.

Q Doctor, generally speaking, when you perform a diskectomy, does it require fusion at any particular level?

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MR. COHEN: Well, when you say perform a diskectomy, are you talking about the context of this patient?

MR. BERNSTEIN: Yes.

A You know, this is a lumbar fusion procedure and so the way to obtain a fusion is to place inner body grafts between the vertebrae. To do that you remove the disk, you take out the cartilaginous human substance and put in intervening bone product, so you take the disk out to put the bone, the intervertebral device in which is bone.

Q What I am asking though is when the disk was removed in this particular case, did it require a grafting?

A Yes.

Q Why did it require grafting?

A The patient had fusion for back pain, for discopathy, removing the disk -- if you just take the disk out, you remove the cushion between the vertebrae, you create further instability. The disk is supposed to be there. If you remove the disk and leave nothing, the vertebrae collapses and so the damaged disk as you saw by the discogram created extra motion and painful motion. Just by removing

the disk creates more painful motion. You need to stabilize the vertebrae and that is why you do a fusion.

Q What type of material was used for the graft?

A Cadavery bone grafts.

Q Were there other types of material that could have been used for the graft in this instance?

A At that time there may have been metallic spacers available.

Q Anything else?

A No.

Q Could you have used any portion of Mr. Jansen's bones?

A Well, that was -- yes, you can use bone.

Q Where would the donor site generally be in a patient such as Mr. Jansen?

A By and large -- you could use the hip but no one would do that because the inner body device requires a structural graft which is a large groove, a very large piece of hip bone mostly for anterior type of surgeries. We would take cadaver

grafts meaning from cadaver bone.

Q When you say from the hip, are you referring to the iliac crest?

A The iliac crest, that's right.

Q Based upon your experience and the studies for this type of procedure in 2000, was there a higher percentage or rate of successful grafts with the use of iliac crest as compared to cadaver bone graft?

A That is very site specific and fusion specific, so in general your own bone is the best bone; however, getting enough of your own bone to put into the intervertebral space so if you end up taking your own bone but could not get enough, then the fusion rate goes down because the disk space is quite large and if you are doing one, two, three levels, you have to harvest so much bone and you create a defect in the patient's crest and destabilizing and potentially leaves you with a problem of not having enough bone to put, so most spine surgeons switched to cadaver bone because of its advantages and there is no significant decrease in the fusion rate if you take into account the factors of using enough of it, large enough grafts, et cetera and Mr. Jansen fused,

so clearly that was the right decision.

Q Referring again to your January 13th note, paragraph 2 says that you're recommending circumferential arthrodesis L3 to the sacrum and that was including the technique that we discussed?

A Yes.

Q The risks, benefits and alternatives have been explained. He had a 20-minute comprehensive consultation and he understands and is willing to proceed with surgery?

A That is what I wrote in the note, yes.

Q Can you explain now the risks, benefits and alternatives that you discussed with Mr. Jansen?

A You know, it was my custom and practice to review what the patient's options are and, basically, essentially, it boils down to three options, you can choose to live with the pain and do nothing and just go forward and the potential consequences of that, you can continue to use chiropractic physical therapy, analgesic pain management and that is an option, so option 1, nothing, option 2, pain management physical therapy or option number 3, surgery. Surgical option I will

discuss the nature of the surgery, that it requires two incisions, the nature of exactly what I am doing with the grafts, exactly what I am doing with the screws, hospitalization, length of stays, convalescence, rehabilitation, all of those things have to be reviewed and then we talk about risks and benefits and when we talk about benefits of the surgery, obviously, one of the benefits of surgery is you might feel better, we discuss maybe that the intention of surgery was to make you feel better but certainly there is no guarantee of that. Then that leads you into the risk conversation. In the surgery you imply there is no guarantee, that is, there is a failure rate to surgery. Not everyone feels better. One of the biggest risks of spine surgery you don't feel better, you might get a reduction of pain or you might not get any relief from surgery and that is possible even with a perfectly done surgery that one of the risks you don't feel better. That leaves me to the next thing. Even if things are done right, there is a risk you might feel worse and you might be worse after surgery, risk of anesthesia, risk of nerve damage, paralysis, death, bowel and bladder problems after surgery, risk of chronic pain after

surgery and then the discussion what are the implications of that. For example, if you have an infection, you might need more surgery to remove infection. All of these types of things are discussed with the patient and then, you know, it's tabled for the patient, these are your choices, nothing, intervening treatments, intermediate treatment or surgery and the patient makes the choice as to what based on the information that I give him what is the best thing for him.

Q What you just discussed in terms of risks, benefits and alternatives, is that based upon your custom and practice or do you have a specific recollection of having that conversation with Mr. Jansen?

A I have a specific recollection of having had that conversation and it's my custom and practice to say those things on every presurgical case.

Q When you spoke with Mr. Jansen regarding the risks, benefits and alternatives, was he alone or was his wife with him?

A I don't recall on this particular date. I know his wife was present on several visits

to the office.

Q Doctor, you're familiar with an intradistal electro thermo therapy?

A Yes.

Q What is that, sir?

A IDET is a percutaneous procedure that is done to try to use heat energy to repair disk tissue. It's technically a repair procedure on one hand and a pain nerve oblation procedure on the other. That is kind of how it might work. It's generally done on the lumbar spine. It has an X-percentage rate of success, I would say 70, 80 percent, and --

Q Was that something that was available as an alternative for Mr. Jansen back in 2000?

A It might have been. I know that is around the time it was coming out, the procedure. I don't specifically remember if I had that conversation with him but if I was doing that procedure at the time, I would have offered it to him. It's not as effective as surgery and there are some people that wouldn't get the IDET, so not everybody that has the problem gets IDET.

Q Based upon your understanding of that

procedure would Mr. Jansen have been an appropriate candidate for that procedure back in 2000?

A No.

Q What is that?

A Because the disk pathology was too great at L5-S1.

Q Did you see Mr. Jansen at any time after the visit of January 13th and before the surgery on March or in March?

A 2/28/00.

Q That was a follow-up for preoperative evaluation?

A It's another opportunity that we had to discuss the risks and benefits of surgery.

Q What does it mean he's an extremist today in pain?

A Patient was expressing more pain.

Q Did you perform a physical exam of Mr. Jansen at the time of this visit?

A Yes.

Q Are any of the findings indicated?

A They're not indicated but based upon my, you know, my evaluation it's clear it was enough for me to switch him to a pain killer, so clearly he

had a lot of pain.

Q As you sit here today do you have an independent recollection of any of the visits that we went over?

A No.

Q Do you have an independent recollection of this particular visit?

A No.

Q Now, in the Mercy Medical Center which we have had marked as Plaintiff's Exhibit 2 there is an operation summary as well as an op report I believe. That is the summary and that is the report, so I wanted to ask the doctor if there is any particular difference in these two documents?

A Actually, these are two op notes because there is my operative note which is, you know, which is this one (Indicating) and this is the one that is Dr. Xenophontos, the approach surgeon, so on the anterior lumbar and body approach, the ventral approach --

MR. COHEN: He just asked --

MR. DINKES: Wait. He is doing the right thing. I was going to ask him that anyway.

MR. COHEN: Let him do his work and ask you the next question.

THE WITNESS: I am sorry.

Q Why are there two reports?

A Because the approach surgeon does his own op report.

Q Which one would be the first report?

MR. COHEN: I don't understand the question. Whose part of the operation would go first?

MR. BERNSTEIN: Yes.

A It's not really an accurate question. We operate simultaneously, so we just create two different operative notes because we're two different specialists, so we list what we do separately and I refer to his part of the operation and mine and he refers to my part of the operation. I just say refer to Dr. Xenophontos.

Q When you say you're two different specialists, in what way is Dr. Xenophontos? What type of specialty is Dr. Xenophontos?

A He is a vascular surgeon.

Q Without reading the actual report can you briefly explain how this procedure is performed?

A It starts with anterior retroperitoneal approach to the spine.

Q Who performs that?

A Dr. Xenophontos with me assisting him on this approach to the spine. Once the spine is exposed by Dr. Xenophontos, then I perform the diskectomies at each level and place the intervertebral grafts, then Dr. Xenophontos closes the abdomen, the patient is turned over, second incision is made on the -- over the lumbar spine, the vertebrae are accessed by me.

Q Who makes the second incision?

A I do.

Q Over the lumbar spine?

A Yes.

Q Is Dr. Xenophontos finished in terms of --

A Yes, yes.

Q So, he only does the anterior approach?

A Yes. Then the posterior aspect of the spine is exposed and the posterior aspect of the spine is grafted and fused and instrumented.

Q When you say instrumented, you're

talking about the pedicle screws?

A Yes.

Q How many screws were used in this case?

A Eight screws.

Q Are there situations where either more or less screws would be utilized?

A No.

Q Eight is a standard?

A That is the number for this type of procedure.

Q Other than yourself and Dr. Xenophontos Dr. DeMoura also was assisted in the surgery?

A Yes.

Q How do you know Dr. DeMoura?

A Well, he is a spinal surgeon. He was a spinal surgeon at Mercy.

Q How did it come to pass that he assisted in this particular surgery?

A He just -- surgeons have assistance and it's not infrequent that a spine surgeon would ask another spine surgeon to assist on a procedure.

Q Did you request Dr. DeMoura to assist?

A Yes.

Q Did you know Dr. DeMoura before this procedure?

A Yes. We were both attending spine surgeons at the same hospital.

Q Had you ever worked with Dr. DeMoura previously?

A I believe so.

Q Can you explain the nature of the assistance that Dr. DeMoura provided?

A Assistance in gaining exposure, retraction, suction and in that regard.

Q Did he assist in the instrumentation?

A I don't particularly recall. Usually assist in -- just assist in the holding instruments and the primary surgeon is the placer of the instrument.

Q What does it mean, Doctor, I am referring to the operation report or the operation summary under operation mini open retroperitoneal lumbar spine, what does mini mean in that regard?

A That is the part Dr. Xenophontos does and that is how you turn the approach open and mini open meaning it's a less invasive technique we use to

gain exposure to the spine.

Q The next two lines, anterior lumbar interbody decompression and fusion, one says L3-4, L4-5 and L5-S1. The next one just refers to L4-5 and L5-S1. Can you explain that?

A It has to do for billing purposes. They have billing codes, so you have to list them separately. The primary level gets the 5A code. It's just for billing purposes but L3-4, L5-S1 were the levels we did.

Q But the implants were placed at those levels as well?

A Yes.

Q More cellized bone graft paste, is that different than cadaver or is it the same?

A Semi-liquid paste form of same -- of bone. It's pulverized and liquidized. It's made into a gel and you inject it into the spaces where there is a void to create more substance of fusion.

Q Further down almost at the bottom where it says procedure mini open retroperitoneal exposure lumbar spine to be dictated by Dr. Xenophontos, why would he have dictated that portion of the procedure?

MR. COHEN: He testified to that earlier.

Q Did he do the anterior approach?

A That is it, the mini open, mini open retroperitoneal is the approach portion and that is what he did.

Q Doctor, can you explain how the patient is after the anterior approach is completed, how the patient is then turned onto his stomach so that the lumbar portion, I mean, the posterior portion would be performed?

A You bring the second operative table over with the frame, with the Wilson frame, which is the prone position in frame and the roll is just for four people. It has to do with the anesthesiologist controls the head, I generally catch, there is my assistant like Dr. DeMoura, whoever is assisting me, would be on the other side and someone is in charge of the feet, one or two in charge of the feet, and very coordinated log roll technique, the patient is slowly turned in a log roll fashion into my arms and the arm lay over the log roll so he is placed into my arms and brought onto the Wilson frame and we'll adjust him on the frame, the head, the foot,

depending on how to get the optimum position on the Wilson frame and in terms of the head for equipment to protect the head and eyes and only when it's properly positioned and that determination is made by myself and the anesthesiologist and he is secure and placed onto the Wilson frame.

Q Are there any risks associated or risk of injury to any other body part associated with this type of movement to the patient?

A Certainly when the patient is under anesthesia the OR staff is responsible for the patient positioning and anything could happen if it was uncontrolled but this is a completely controlled circumstance. Every millimeter of his motion is controlled by three physicians and an entire OR room full of staff.

Q I am not sure what page here, Doctor, but part of this report refers to rod insertion and fixation. There was rod insertions in this case?

A That is the pedicle screws assembly.

Q So, it's not just screw insertion, it's inserted through a rod?

A The screw is inserted into the bone and the rod inserted into the screws and that is what

creates the bond, constructed between the screws, yes.

Q That goes from L3 down to S1?

A Yes.

Q Are post-operative X-rays taken, sir?

A Intraoperative X-rays for positioning of screws, yes.

Q Any other intraoperative studies other than the X-ray? Any other intraoperative subjective or objective studies performed other than the X-ray?

A No, not necessarily, no.

Q Was one such X-ray taken in this case?

A Yes.

Q Now, the disk that was removed, it was sent to pathology?

A Yes.

Q Do you have a copy of that report?

A Yes.

Q It refers to three specimens, L5-S1 --

MR. COHEN: One second. Wait for us to get to that page.

MR. BERNSTEIN: Sure.

Q L5-S1, L4-5 and L3-L4.

A Yes.

Q Under the gross description there are different measurements of the material that was sent?

A Yes.

Q Can you explain why there are three different measurements form each level?

A They're all within normal, what you would expect for normal amounts. There is a range of normality that can be extracted from the disk depending on the size of the patient, remaining disk, how much the nurse pulls off. Sometimes it gets stuck in the instruments but there's a range of normality.

Q What would be the range generally of the disk material that is in a man six foot, 210, the age of Mr. Jansen?

A Considering all of the variables I told you anywhere between two and twelve.

Q Upon performing the diskectomy would the complete or the total amount of the material that was removed be sent to pathology or only a portion of that material?

A Actually, it's variable for institution to institution. It's not a critical element of the operation. It's just sent to pathology, so the answer is it could be some of it or

all of it depending on whatever the circumstances are of the hospital.

Q Who would be the individual who would have sent the material to pathology?

A The OR staff.

Q Did you have a conversation with Mr. Jansen at any time after the surgery but before he was discharged?

A In the hospital?

Q Yes.

A Yes.

Q Would you have authored any notes in the hospital chart based upon those visits with Mr. Jansen?

A Yes.

Q Can you turn to that?

(Whereupon, a discussion was held off the record.)

A There is a post-op note.

Q Can you read it, please, sir?

A It says indication, pre-op note, diagnosis, post-op diagnosis, procedure, physician, specimen, drain, patient's condition, pertinent findings which I list what the procedure was, an

anterior posterior fusion, that was the pre-op diagnosis and surgeons involved, myself, Dr. Xenophontos, Dr. DeMoura. There was disk for specimens. We left a drain in, Jackson Pratt drain. His condition after surgery was stable. Anything pertinent on the note to write and I said no, nothing.

Q Is that the only note that you have authored post-operatively before you saw Mr. Jansen?

A Yes, on the floor, yes.

Q How many times did you see Mr. Jansen before he was discharged?

A Well, he was seen by me, my physician assistant and an associate from my office each day that he was in the hospital.

Q When was the date of discharge?

A I believe it was the 26th.

Q In your opinion, sir, was that a normal or standard hospitalization for this type of surgery?

A Yes.

Q Did you author a note referable to the visit that you had with Mr. Jansen?

A Yes.

Q Can you read that note, please?

A Spine note, vital signs stable, without complaints, continue antibiotics, 3/24/00.

Q When you say without complaints, was there ever a complaint of pain that you recall?

A He had, obviously, would have post-operative pain but there was nothing there that was concerning me in terms of unusualness of his complaints based upon the report that I got from the physical therapist that he walked, apparently walked, 250 feet that day and was doing very, very well considering.

Q What was the date of that note, sir?

A 3/24.

Q Did you walk with Mr. Jansen on that day?

A It's my custom and practice to walk with all of my patients after surgery.

Q Do you have a recollection of the distance that you walked with him?

A I mean, I don't have an independent recollection of how far I walked with Mr. Jansen that day but I walk all of my own patients after surgery.

Q Did you have a discussion with Mr.

Jansen during the walk that you recall?

A I don't have a specific recollection but I have a custom and practice of having a conversation about rehabilitation post-op in those visits when I am walking them.

Q Do you have any independent recollection of anything that you discussed with Mr. Jansen at the time that you saw him and/or during the walk that you had with him?

A No.

Q Did you speak with Mrs. Jansen at that time?

A I don't recall.

Q Was Mr. Jansen still on post-op medication?

MR. COHEN: During that hospital stay?

MR. BERNSTEIN: Yes.

A Yes.

Q What was he taking at that time?

A Specifically what type of medicine?

Q Please, and the dosage.

MR. COHEN: This is on March 24th.

A He was on Percocet, 2 tabs every three hours and Torido 30 milligrams IM Q6.

Q Who else saw Mr. Jansen post-op from your office before he was discharged?

A Michael Duffe, PA, and probably Dr. Lieberman if I am reading the signature correctly.

Q Did you have any discussions with either Mr. Duffe or Dr. Lieberman regarding Mr. Jansen's status?

A Yes.

Q Do you have a recollection of any conversations that you had with those gentlemen?

A No.

Q After Mr. Jansen was discharged you saw him --

MR. COHEN: If you're done with that admission, can we take a five-minute break?

MR. BERNSTEIN: Yes.

(Whereupon, a recess was taken.).

Q Doctor, March 31, 2000, was that the first in-office post-op visit that you had with Mr. Jansen?

A Yes.

Q Did you perform a physical examination at that time?

A Yes.

Q What did that consist of, sir?

A Neurological exam which was unremarkable, dermatological exam, unremarkable.

Q Can you just tell me what the neuro exam consisted of?

A Motor sensory reflex examination of the lower extremities.

Q How did you perform that?

A Patient is -- exam his ambulation, muscle strength of the lower extremities, each muscle group is tested individually for power and then sensory examination is to generally -- it's to gross touch, sensory dermatome, each of the dermatomes and a reflex exam of the patella and ankle jerk reflexes. Dermatological is different. You look at the skin. It's post-op. You examine the skin of the wounds and for any abnormalities there. Vascular exam you are checking pulses to see there is good color to the legs and they're well profused, musculoskeletan is involved with the ambulation, how they walk, move their knees, ankles, that is part of, that is implied in that. Gait is specific to musculoskeletal. It's how they walk and then the spine exam which is neck, thoracic, which at this time is not part of his

problem but he didn't have any complaints about and lumbar exam as I write here complaining of pain and tenderness along incision, incision is clean and dry.

Q Did you note your findings on any of these systems anywhere in the chart?

MR. COHEN: I don't understand the question.

Q Well, the systems that he examined, neurological, dermatological, vascular, the findings you had on neuro exam, other than indicating unremarkable and non-contributory, did you write them down in the patient's chart?

A No.

Q As you sit here today do you know what the neuro exam findings were?

A Based on my review of the note I would review -- my note documents what the exam was that day.

Q Other than the note that you indicated unremarkable and non-contributory what I am asking is what is the range on a finding of a neuro exam?

MR. COHEN: That is a fairly broad question. All of the possible findings?

MR. BERNSTEIN: No.

Q On the exam that he would have performed on this particular patient, what would be some findings you would indicate?

A Well, he had a normal post-operative exam, you know. Normal in a post-operative setting you have to take into consideration what the symptoms were before. We are looking for changes in the neuro exam. There were, as I stated here in my note, they were unremarkable and non-contributory.

Q Explain to me one type of neuro test you would perform.

MR. COHEN: Other than what he testified to before?

MR. BERNSTEIN: No, including what he would?

Q Explain the exact nature of the test you performed on Mr. Jansen.

MR. COHEN: You asked him before to explain what the components consisted of and he gave you answers. Are you asking in addition to that that what he already told?

MR. BERNSTEIN: Can we go back to his answer?

(Whereupon, the answer was read back

by the reporter.)

Q Doctor, specifically for the neurological exam how would you perform the sensory examination?

A You know, light touchs. Light touch and deep touch are important components, so I would stroke his skin with my fingers to determine if he had light touch in that dermatome which is a very good finding or you could use the back of the reflex hammer has a certain little point on it. You can use that, for example, and that is light touch and deep touch would be further pressure and those are the kinds of things that we do to determine touch, for example, sensory.

Q Is there a range of a response that you would expect to find?

A Post-surgically?

Q Yes.

A Again, to answer that question, the patient had numbness and tingling pre-op. He had numbness before, so he is going to say he had it after. Is the numbness different? That is why I said unremarkable. Was it something new or concerning here? The answer at the time I felt that

exam was consistent with what his preoperative exam was and consistent with someone that had surgery a week ago.

Q Where you had unremarkable, that didn't necessarily mean he didn't have numbness?

A That's correct.

Q Are you using the word unremarkable to mean that his complaints have not changed from what they were pre-operatively?

MR. COHEN: I think he just testified to that.

MR. BERNSTEIN: I want to know generally if he is using the word unremarkable in what way.

MR. COHEN: In this context on this exam he just testified to that.

MR. BERNSTEIN: Read it back to me, please.

(Whereupon, the answer was read back by the reporter.)

Q Doctor, how would you use the word unremarkable for the dermatological exam?

A In a similar fashion, there was nothing that I would note to be of concern that I

wanted to make a notation of that was a particular problem.

Q But when you say dermatological exam, are you talking about the incision site?

A It includes the incision site, yes.

Q So, in that regard it would be different than it was pre-operatively because there was no incision site, correct?

A Yes.

Q What concern did Mr. Jansen have when you spoke with him at the time of this visit?

A Well, I will tell you he came in complaining of -- he was a week post-op -- he complained of severe low back pain and spasm.

Q Do you have an independent recollection of this particular visit or is this based upon review?

A As a reminder -- I have an independent recollection reminded by this note.

Q So, it refreshed your recollection?

A Yes.

Q So, I am going to ask you to read that note, Doctor.

MR. COHEN: Even though it's

typewritten?

MR. BERNSTEIN: No, not out loud, just to refresh your recollection.

A Yes.

Q Has your reading of this note refreshed your recollection of what transpired at that meeting that is not contained in this note?

A Not necessarily. The images are evoked by this note.

Q I want to make sure there is nothing in addition that you left out of the note that you now recall?

A Not necessarily that I can think of.

Q Mrs. Jansen was present at the time that you spoke to Mr. Jansen; is that correct?

MR. COHEN: Ask him do you recall if Mrs. Jansen was present or not.

A A family member was present, yes, and I believe it was her.

Q Was it your understanding or your opinion at that time that the complaints that Mr. Jansen had were not consistent with what you would expect the patient to have had at this time post-operatively?

A I think my note states I was concerned with his expression of how much pain he was having at the incision site and his expression of the degree of pain that he was having there and about his having had, you know, his post-operative pain was an issue for him.

Q Did he ever indicate to you that the post-operative pain was more severe than the original pain?

A I mean, I don't have an independent recollection of that but in general surgical pain is usually more painful than the original pain so.

Q Doctor, I just want to refer you to the second page of this note and ask you upon what did you base your opinion that his predominant complaints represent diminished and inappropriate expectation of what his immediate post-operative course should represent?

A That is based upon my history of having been a surgeon and resident and dealing with patients that have surgery. I felt his unwillingness to understand that he was supposed to have incisional pain, that the actual incision site would hurt a week later, he just seemed to -- I wanted to get that

across to him.

Q Was it your understanding that the complaints of pain were simply incisional in nature or did they include the lower back as well?

A I can't really answer that because the incision is in the low back, so it's not distinguishable. It's a unified pain.

Q Did you consider at this time performing any post-operative objective studies?

A I considered them, yes.

Q What did you consider possibly at that time?

A Well, all patients that have surgery a week or two later are candidates to receive blood tests, MRI's, but in this case I did not feel there was anything in particular that would warrant the need for those tests.

Q Did you consider whether or not the pain that he had might be due to the procedure that was performed?

MR. COHEN: I object again to the form did you consider.

Off the record.

(Whereupon, a discussion was held off

the record.)

Q Doctor, in the last paragraph, the first sentence, this particular patient has no complications, what were you referring to when you said that?

A Basically, I was being explicit in my note that I did not feel that he had on that date a complication that was warranting his extreme pain. Rather, I felt that his pain was post-operative in nature.

Q When you say no complication, are you referring to intraoperative complication, post-op complication or something else?

A All of those.

Q How were you able to rule out any post-op complications?

A X-ray, so you look for, you know, you look for -- basically, X-ray.

Q Was Mr. Jansen sent for any post-operative X-rays?

A Yes. He had -- usually -- patients come in post-operatively will obtain a history like I did, do the physical exam which is also a way to assess for complications. In addition to X-rays, I

get an overall opinion as to what their course of treatment was and we had an X-ray immediately post-surgically which showed a good positioning of the implant, so I had that already, that was part of my knowledge base seeing the patient, so based on that I could be confident that we had good graft position, good screw position, neurologically he walked 250 feet in the hospital, was fully ambulatory. His neuro exam was unremarkable. His wound was essentially clean on that visit, so all of the things you would be concerned about post-operatively were par for the course or moving according to what I would expect after surgery.

Q What you just explained, that was including the X-ray, that was performed post-operatively but prior to discharge on the 26th, correct?

MR. COHEN: I think he testified when the X-ray was performed.

Q Post-operatively would --

MR. COHEN: No. He said intra-operatively.

Q Before discharge?

A Yes.

Q Were any X-rays performed post-operatively after discharge but before the visit on the 31st?

A I don't recall.

Q Based upon these complaints did you send Mr. Jansen for any post-op X-rays after this visit?

MR. COHEN: At any time or in relation to this visit?

Q With relation to this visit.

A No.

Q When did you see Mr. Jansen next?

A 4/20 I believe, yes.

Q Was there any change in Mr. Jansen's status between the visit of 3/31 and 4/20?

A As I told Mr. Jansen and predicted, he would have some reduction in post-operative pain. I document he is doing much better than his previous visit, although he still continued to have the pain syndrome as one would have post-surgically, back pain, leg pain and I documented that here.

Q So, the findings that you had which are indicated in the first paragraph referable to the continued back pain, leg pain and some numbness, were

findings that you found were consistent with this type of surgery?

MR. COHEN: In other words, some intermittent numbness is what is written here.

A These were symptoms he had before surgery and symptoms that you can continue to have after surgery, yes

Q The radiograph it refers to, was this taken at your office or somewhere else?

A Our office.

Q That was taken on this day?

A Yes.

Q Where it says some early incorporation was visible on the L5-S1 interspace, is that referring to fusion of the bone?

A It's the first process that occurs in a fusion, yes.

Q Did you have discussion that you can recall with Mr. Jansen at the time of this visit?

A You know, as refreshed by this note I think we were both pleased. We went from a circumstance where he was taking high levels of Percocet and as I counselled him before he should make a significant attempt to reduce it and I said in

my impression he is doing well, weaned himself off a considerable amount of narcotic medicine which is what I suggested on the previous visit which is what happened, so we were pleased by that, yes.

Q Was he alone or did his wife accompany him at the time of this visit if you recall?

A I don't recall.

Q Did you next see Mr. Jansen on June 1, 2000?

A Yes.

Q Do you recall if you had any contact with Mr. Jansen between the visit of April 20th and the visit of June 1st?

A No.

Q If you had any contact with Mr. Jansen, would that be something you would have documented whether it be personal or a phone conversation?

A That was our custom and practice generally, yes.

Q In your note, Doctor, you indicated that Mr. Jansen continues to be symptomatic with respect to his back and lower extremities?

A Yes.

Q To what were you referring in terms of being symptomatic?

A The symptoms would be consistent with what he had stated previously, back and leg findings, some numbness. All of the same complaints he had before, they continued to some extent.

Q It indicates as well that he had difficulty ambulating, sitting for long periods of time and standing for long periods of time. Did you find, was it your impression that these findings were consistent with a patient such as Mr. Jansen post-operatively?

A It's one of the realm of possibilities of outcomes of surgery, so I was not surprised by this. There is still some degree of improvement considering the way he was before but he still has complaints of pain and I documented them.

Q In your opinion, sir, was he progressing as you would have anticipated?

A Again, it's one of the realm of possibilities and you never know how people do after surgery and this was just the way he was doing.

Q The X-rays you referred to in this particular note, were they taken at the time of this

visit?

A You're talking about 6/1?

Q Yes, sir.

MR. COHEN: Off the record.

(Whereupon, a discussion was held off the record.)

Q Doctor, referring to my copy which has been marked as Plaintiff's Exhibit 3, it refers to X-rays which demonstrated perfect placement of screws with expanding arthrodesis, no abnormalities. What does it mean expanding arthrodesis?

A Fusion process was occurring.

Q Would it be your understanding, Doctor, that that X-ray was taken at your facility?

A Yes.

Q The next visit appears to be June 22nd. Do you have that in your record, sir?

A Yes.

Q Before we get to that actual note, do you have a recollection of any conversation that you may have had with Mr. Jansen on June 1st?

A No.

Q Do you know if he was alone or was he accompanied by his wife?

MR. COHEN: On which day?

MR. BERNSTEIN: On June 1st.

MR. COHEN: I don't think you asked that before.

A I don't know.

Q Let's turn to your June 22nd visit.

MR. COHEN: That is not his.

Q Who is Dr. Shah?

A Another physician with Orlin & Cohen at the time.

Q What was his experience at that time if you know regarding spinal surgery?

MS. HICKEY: Objection.

MR. COHEN: Let's hear it back again?

(Whereupon, the question was read back by the reporter.)

MR. COHEN: Dr. Shah never performed spinal surgery. It's not an issue in this case. Dr. Lattuga performed the surgery.

MR. BERNSTEIN: He is following up with his patient that underwent spinal surgery.

MR. COHEN: You can ask the knowledge of Dr. Shah seeing spinal surgery patients post-operatively which is the issue here as

opposed to --

MR. BERNSTEIN: I will adopt that question.

A Dr. Shah is an orthopedic surgeon and spine surgery is part of orthopedic surgery. Surgeons do cover for each other. This is within his realm of expertise to evaluate post-op patients and make clinical judgment as to what the occurrences were.

Q Doctor, back in 1999, 2000 what was your position at Orlin & Cohen Orthopedic Associates?

A I was a physician with the group.

Q Did you have any ownership interest in the group?

MS. HICKEY: Objection.

A 2000? I don't recall specifically.

Q Some time after 2000 did you have an ownership interest?

MR. COHEN: No, during the care of this patient.

MR. BERNSTEIN: Yes?

A I don't recall specifically what the dates were.

Q Well, was there a period of time, was

there not, where you had an ownership interest?

A Yes.

Q Doctor, referring to your June 22nd note --

MR. COHEN: It's not his, it's Dr. Shah's.

MR. BERNSTEIN: I am sorry.

Q Did you review the June 22nd note during the time that you were caring for Mr. Jansen post-operatively?

MR. COHEN: After June 22nd?

MR. BERNSTEIN: Yes.

A Yes.

Q Doctor, having reviewed this note does it indicate that there was any change in Mr. Jansen's status from when you last saw him on June 1st until the time of this visit?

A Yes.

MS. HICKEY: Objection.

MR. COHEN: Can I hear the question back, please?

(Whereupon, the question was read back by the reporter.)

Q In what way was there a change,

Doctor?

A He describes a new injury to his back.

Q Are you referring to a new injury or an exacerbation of the same injury or something else?

A Well, at the time he described new injuries. He said that the history that I gave Dr. Shah and subsequently to me he went back to work and then injured his back and so at the time it's, you know, it was much worse than -- and the X-rays did not show any change in the position of the hardware, so, therefore, there must be new trauma in his back.

Q Did you speak to Dr. Shah regarding his findings on this exam?

A I don't recall but I had access to the note.

Q Was there anything contained in this note which would have led you to seek out Dr. Shah and speak with him regarding the examination and the visit that he had with Mr. Jansen?

A I don't recall that that happened, no.

Q The next note is dated June 29th and that appears to be your note; is that correct, sir?

MR. COHEN: Before we get to that, I want to take a quick break.

(Whereupon, a recess was taken.).

Q Doctor, the visit that you next had with Mr. Jansen was June 29, 2000; is that correct?

A Yes.

Q He continues to be symptomatic at the time of this visit?

A Yes.

Q Were the symptoms the same as you had previously described in terms of the numbness, tingling and pain?

A Except that it was worse now.

Q I am sorry?

A Except it was worse now.

Q You indicated here he had an exacerbation. Is that what you were referring to previously regarding the subsequent injury?

A I wrote exacerbation but based on the fact his X-rays showed no change in the position then, you know, I would have to say his pain symptoms were certainly worse than they were before.

Q The pain that you are referring to, is it in the same area where the surgery was performed?

A More or less, yes.

Q Were any X-rays taken at the time of

this visit?

A No.

Q So, the X-rays that you referred to in this note were the ones on June 22nd; is that correct?

A Yes.

Q Do you recall if you had any conversations with Mr. Jansen at the time of this visit?

A No independent recollection of the conversation, no.

Q Does this note refresh your recollection of anything else that may have transpired at the visit which is not referred to in this note?

A No.

Q The next visit appears to be July 13th. Do you have that, sir?

A Yes.

Q This was a scheduled follow-up visit?

A Yes.

Q The second sentence that refers to complaining today that apparently he was at work and he had injured himself in the rock pile, is that the

subsequent injury that you're referring to or is this a third injury?

MR. COHEN: I am not clear on the question.

Q Is it your understanding that there was a subsequent injury that he sustained when he returned to work; is that correct?

A Yes.

Q The injury that you're referring to in this note, is that from that subsequent injury or is this a separate and independent injury?

A I can only go by the note. It suggests there was a second post-surgical incident. I am relaying what the patient told me.

Q This note also refers to radiographs of the lumbar spine. Do you know when those radiographs were taken?

A This most probably was taken on this day.

Q The radiographs that were taken at your facility, would they still be maintained at your facility?

MR. COHEN: It's not his facility.

MS. HICKEY: Objection.

Lattuga

Q The radiographs that were taken at Orlin & Cohen, do you have an understanding as to whether or not in the normal course of business those X-rays would still be maintained at Orlin & Cohen?

MR. COHEN: That is a question for Orlin & Cohen.

Q Well, he was working there at this time and based upon his understanding of the practice at that time I think he is competent to answer that question.

MR. COHEN: He wouldn't have access to see if the patient subsequently signed them out or sent anywhere after his care at issue.

MR. BERNSTEIN: I think the question was based upon custom and practice with the exception of, I mean, the question speaks for itself.

MR. COHEN: You had asked him based upon custom and practice would the X-rays still be there. I don't think he can answer that question.

MR. BERNSTEIN: I think he can to the extent unless they were taken out by the patient, then he would know. Then they would

be there.

MR. COHEN: But he wouldn't know that or anything else that transpired at Orlin & Cohen after he left there.

MR. BERNSTEIN: I am not talking about anything after he left there. At the time he was there based upon his custom and practice would it have been Orlin & Cohen's practice to maintain those records now. Of course, they could be signed out in which case he will say unless they were signed out.

MR. COHEN: Or anything else that could have happened after he left. Do you want to ask what the custom and practice would have been regarding the X-rays on that day, I will let you ask that. Anything that would be after he left there, that is not a fair question to be asked of him.

Q Based upon the custom and practice of Orlin & Cohen back in 2000, were X-rays that were taken by the patient maintained by Orlin & Cohen?

A Yes.

Q Do you have any recollection of any conversations that you may have had with Mr. Jansen

at the time of his visit?

A No.

Q Did you request authorization for an MRI of the lumbar spine at the time of this visit?

A Yes.

Q Was an MRI of the spine performed at Stony Brook Medical Imaging?

A I believe so, yes. Yes.

Q That was on July 26th, sir?

A Yes.

Q Doctor, the body of this report refers to Harms cages?

MR. COHEN: Show him the report.

A Yes.

Q Do you know what that is, sir?

A I know -- I know what a Harms cage. It's a mistake. It's not a Harms cage.

Q What is a Harms cage?

A A Harms cage is a cylindrical mesh metallic cage that is placed in the inner body space and it's proprietary name for the implant and what Mr. Jansen has is a bone dowel, it's a different device, but sometimes the radiologists say Chevy when they ought to say Mercedes. That is all that is

happening.

Q The Harms cage, was that a device that was utilized back in 2000 during the performance of the procedure that you performed?

MR. COHEN: He testified to that. Objection.

A It's a metallic device that you place, yes.

Q Was that one such device that you could have used under these circumstances?

A Yes.

Q Was the dowel that you used for the graft, was that used in lieu of the Harms cage?

A Yes.

Q Why was it that you selected the dowel rather than the Harms cage?

A It's a surgeon's preference in terms of comfort with using the inner body devices. They're both inner body devices and both acceptable. It's my preference to use a bone dowel and my opinion is it has a higher fusion rate and that is why I chose the bone dowel.

Q Are there more risks associated with the use of Harms cage as opposed to the dowel?

A In my opinion it has a lower fusion rate.

Q What about in terms of neurological complications, would one as compared to the other have a higher risk of neuro complications?

A I would say they should be equal.

Q Did you review the report?

A Yes.

Q Did you review the actual study?

A Yes.

Q Did the report or the study refer to a secondary injury that Mr. Jansen may have sustained?

A May I look at the MRI report?

Q Sure.

A No.

Q Did you have a discussion with Mr. Jansen regarding the findings of this MRI?

A Yes.

Q Would that have been at the July 27th visit, the next day?

A Yes.

Q In your note that day, Doctor, in addition to noting that he continues to be symptomatic with respect to back pain, you also note

that he describes a pulsing sensation in his back and in his leg. Was that something that was a new complaint or symptom at the time of this visit or was that something that was continuing?

A It was an unusual description of something, so I put it in the note. It is not inconsistent or it's consistent with what his circumstances was, it was just a new phrase he used, so I put it in the note.

Q As part of your examination of the lumbar spine you indicate there is tenderness and muscle spasm?

A Yes.

Q And that the range of motion is markedly restricted in all plains?

A Yes.

Q Were these findings consistent with a patient such as Mr. Jansen who is now greater than three months post-op?

MR. COHEN: Are you finished with the question?

MR. BERNSTEIN: Yes.

MR. COHEN: Let me hear the question back, please?

Lattuga

(Whereupon, the question was read back by the reporter.)

MR. COHEN: Including all of the other history that was noted in the prior notes after the surgery?

MR. BERNSTEIN: No. I am talking about just these complaints.

MR. COHEN: But you said post-op and you're also asking the doctor to include with that is it consistent with that and the surgery and what is noted to have happened subsequently.

MR. BERNSTEIN: I see what you're saying, yes.

MR. COHEN: So he understands, do you want to reask the question?

MR. BERNSTEIN: He may understand the question.

MR. COHEN: Off the record.

(Whereupon, a discussion was held off the record.)

MR. BERNSTEIN: I will withdraw the question and ask this.

Q The tenderness and muscle spasm, did

you correlate that to the surgical procedure that Mr. Jansen had underwent?

A No.

Q What did you consider that to be a complaint referable to?

A Referable to his low back but from his new injury, I mean, I think that that contributed to why he was complaining this way.

Q In light of the MRI taken the prior day --

MR. BERNSTEIN: Mr. Cohen, do you want me to continue?

MR. COHEN: Let me just read something. I am sorry, go ahead.

Q In light of the MRI performed the previous day, was it your impression that the tenderness and muscle spasm was related to any disk pathology?

A You know, subjective and objective complaints are multi-factorial. His surgery on MRI and X-ray showed that everything was exactly as one would anticipate, so I attributed his new spasm pain and symptoms to his new rock pile/new injury that occurred after the surgery.

Q Was it your opinion that the complaints were muscular in nature?

A Yes.

Q The range of motion which is indicated to be markedly restricted in all plains, did you quantify that in any way?

MR. COHEN: Other than what is written there?

MR. BERNSTEIN: Yes.

A Only what I have written in the note.

Q Do you recall if you had a conversation with Mr. Jansen after this visit or at the time of this visit but after your examination?

A No, I don't recall.

Q Did you have any plan other than requesting authorization for vocational training or retraining, a plan for Mr. Jansen with respect to treating his complaints of pain?

A Well, we are restricting him from painful activities, for example, returning to work and can be consulted on things to avoid in terms of avoiding things to his back. The MRI we just obtained was normal. It shows no new pathology to the level of the back, no new disks above the level,

so, basically, his options at that point would be pain management and intervention to alleviate his symptoms.

Q Was Mr. Jansen undergoing any physical therapy post-operatively from the time after you performed the surgery up until the date of this visit?

A Physical therapy is part of the rehab, post-op rehab, yes.

Q Was that something that you had referred Mr. Jansen to?

A Yes.

Q Where did you refer Mr. Jansen?

A I don't recall.

Q Did you follow with the physical therapist in terms of his progress?

A I would follow with the patient, how they do clinically, how they respond.

Q Well, did you have any contact with the physical therapy people regarding his status and his progress?

A I had no verbal communication with them, no.

Q Did they ever send to you copies of

any records that were made referable to the therapy that he underwent?

A I don't recall.

Q If they had sent copies of records regarding his status of physical therapy, would that be something you would make a part of the chart?

A If it was sent to my office, then they would put it in as part of the chart.

Q The therapy that Mr. Jansen was undergoing, that was something that was recommended by you or was the type of therapy that was performed or offered to Mr. Jansen decided upon by the therapists?

A The therapists are very skilled in managing therapy post-operatively. I would give referral to evaluate and treat. They would be aware of the diagnosis and then they would help rehabilitate the patient.

Q Did you have any input into the type of therapy that Mr. Jansen would undergo with the physical therapist?

A Again, by and large with the exception of certain restrictions, the therapists are trained and skilled with post-surgical care spine cases and

they're allowed a lot of latitude depending on what the patient's abilities are. I mean, it's different from person to person.

Q Did you have any input though is the question?

A I have some input. I don't have an independent recollection of what the input was at the time.

Q Generally what would the input be given this type of patient?

A To mobilize the patient, have the patient walk, strengthen their legs, increase aerobic capacities. They become cardiovascularly unfit after surgery. We recommend treadmill and weight training and exercise of the legs, those types of things.

Q Did you next see Mr. Jansen on September 21st?

A Yes.

Q Was that visit based upon a scheduled visit or was it something else?

A The note says follow-up, so I assume it's a scheduled visit.

Q That approximate two-month period, would that be a routine type of time frame in which

to see a patient?

A Yes.

Q At the time of this visit you noted that he is still symptomatic with respect to his back and leg, correct?

A Yes.

Q On the examination of the lumbar spine there is tenderness and spasm over the lumbar spine, correct?

A Yes.

Q Do you know if that was any different than the complaints of tenderness and spasm from the July visit?

A It was similar.

Q Did you note or quantity the decreased range of motion?

A On this visit, yes.

Q Zero to thirty degrees of flexion, how is that decreased?

A It's less than 50 percent of normal.

Q What would the normal range be?

A Zero to 90.

Q What about with extension?

A Zero to 45.

Q Now, flexion, is that bending at the waist forward?

A Yes.

Q Extension is bending backwards?

A Yes.

Q Left and right turns, left and right to the sides, correct?

A Yes.

Q Let's go back to extension. What is the normal range?

MR. COHEN: He answered that. I will let him answer over objection.

A Around 45 degrees.

Q What about left and right turn?

A Sixty to seventy degrees.

Q On the neuro exam sensation is intact, correct?

A Yes.

Q The dermatomes, L2-3, 4-5 and S-1?

A Yes.

Q The deep tendon reflexes are 2 plus bilateral and symmetrical; is that a normal finding?

A Yes.

MR. COHEN: Regarding the deep tendon

reflex.

MR. BERNSTEIN: Yes.

Q To what did you attribute the decreased range of motion in terms of flexion, extension and turns?

A From his pain and spasm.

Q These findings on range of motion exercises, would they be consistent with a patient who underwent the surgery that you performed at this time of the evaluation absent the second injury that you believe occurred?

MR. COHEN: Let me hear it back, please?

(Whereupon, the question was read back by the reporter.)

MR. COHEN: I will ask you to rephrase it, please.

Q Were these findings on physical exam consistent with a patient such as Mr. Jansen given the type of surgery you performed upon him absent the intervening incidents that you believe occurred?

MR. COHEN: Let me hear it back, please?

(Whereupon, the question was read back

by the reporter.)

Q Doctor, X-rays were taken of the lumbar spine on this date; is that correct?

A Yes.

Q That was taken at the facility of Orlin & Cohen?

A Yes.

Q Would you have reviewed those X-rays?

A Yes.

Q Doctor, to what did you attribute the decreased range of motion to be associated with?

MR. COHEN: On the visit on September 21st?

MR. BERNSTEIN: Yes.

A From the pain and spasm in his back.

Q Did you have an opinion at that time as to whether or not the decreased range of motion was associated in any way with the surgery that you performed?

MR. COHEN: I will let him answer over objection.

A You can have normal range of motion after fusion.

Q I am sorry?

A You can have normal range or near normal range of motion after a fusion.

Q But at this time did you attribute the decreased range of motion with the surgery that you had performed?

MR. COHEN: Or something else?

MR. BERNSTEIN: I am asking him that specifically.

MR. COHEN: We just had a long discussion as to why I objected to a similar question to that before.

MR. BERNSTEIN: The fact that you may object to it doesn't mean that I have to adopt the question that you ask. If he wants to say no, he'll say no. It's not that it's something else.

MR. COHEN: Ask him what do you attribute the decreased range of motion.

MR. BERNSTEIN: He said to the spasm and the --

MR. COHEN: To the pain and spasm in his back, so I thought you were going to then ask what did you attribute the cause of that and we would have gotten there.

Lattuga

MR. BERNSTEIN: I understand what you're asking but I don't have to give him alternatives to what it is.

MR. COHEN: I am not asking to give alternatives.

MR. BERNSTEIN: You are. You're asking was it that, was it this, was it this. You're asking me to ask him out of any of these three alternatives which one do you believe if one or all.

MR. COHEN: My question was fairer. It did not give any alternatives. It just said what did you attribute that to and mine did not give any alternatives. It was what did you attribute that to.

MR. BERNSTEIN: I asked that and he said spasm and pain.

MR. COHEN: The follow-up question could have had the same form without suggesting anything and it could have been a fair question.

MR. BERNSTEIN: There was nothing wrong with the question I asked.

MR. COHEN: I believe there is. Ask

your question again and let's see where we get.

MR. BERNSTEIN: What was the question that I asked? Can you go back and look at it, please?

(Whereupon, the question was read back by the reporter.)

(Whereupon, a discussion was held off the record.)

Q Doctor, at this time approximately six months post-op --

MR. COHEN: I think it's five. I could be wrong. No, it's six.

Q Did you have certain expectations within a range of expectations as to the complaints that you might find a patient such as Mr. Jansen to have?

MR. COHEN: You're talking such as Mr. Jansen before those events we talked about post-operatively that occurred?

MR. BERNSTEIN: Yes.

MR. COHEN: If you understand the question, you can answer in that form.

A There is a range of expectations of

people post-surgically all of the way from excellent, some complaints, no complaints as I testified to prior, no resolution of symptoms whatsoever, so all of those are within the realm of normal after surgery and some patients end up in whichever category they end up in. What confounds the issue with Mr. Jansen he clearly had several, at least one, subsequent injury, so then, therefore, you know, based on the way I thought he was tracking that those injuries played a significant role in why he continued to have pain at this point.

Q What is your understanding as to how many intervening injuries, subsequent injuries, to the surgery Mr. Jansen sustained?

MR. COHEN: As of September 21st?

Q Correct.

A I believe there were two different episodes as the notes reflect that. I am just going by the notes.

Q What was your understanding as to what the complaint of tenderness and spasms were caused by as of September 21st?

A The causality here is vague but I am attributing them to his injuries after the surgery.

Q Were you rendering or did you suggest any treatment for his complaints of tenderness and spasm over the lumbar spine?

A Again, he had been in treatment all along and I was just continuing to recommend those treatments.

Q Did you perform any diagnostic tests other than the MRI's that we went over before specifically for what you deemed to be a first or a second, and/or second, intervening injury?

MR. COHEN: Other than the tests that were done that he already testified to such as the X-rays on June 22nd?

MR. BERNSTEIN: Yes.

MR. COHEN: And the X-rays done on September 21st.

A Other than the X-rays and MRI, no.

Q As of September 21st was it your understanding that the complaints of tenderness and spasm over the lumbar spine were muscular in nature and not spinal or disk like in nature?

A That was my understanding, yes

Q The following note is dated November 16th and at the bottom it has your name as well as

Mr. Duffe?

A Yes.

Q Did you see Mr. Jansen on this date or did Mr. Duffe see him or something else?

A We both would see him.

Q Why would this be a visit where you both would have seen Mr. Jansen?

A Mike was the PA at the office and Michael sees the patients, gathering history, doing a physical exam, and I would overview that process and that is just how physician assistants work with physicians. They work in conjunction with them.

Q Did Mr. Duffe see Mr. Jansen on prior occasions where you saw Mr. Jansen?

MR. COHEN: Do you want office visits?

MR. BERNSTEIN: Yes. Let me just continue with that question.

Q Or would Mr. Duffe only see Mr. Jansen if his name appeared on the note?

A It's variable. He could see the patient and his name not appear on the note, that is a possibility, yes.

Q Who performed the physical exam, Doctor? Was it yourself or Mr. Duffe?

MR. COHEN: The note of November 16th?

MR. BERNSTEIN: Yes, sir.

A If both our names are there, both of us were involved with the visit.

Q Apparently the range of motion restrictions are the same as the prior visit; is that correct?

A It appears so, yes.

Q The tenderness and muscle spasm, does that appear to have changed in any manner from the prior visit?

A He continues to have those symptoms, yes.

Q The muscle strength is now documented as four out of five on the left side?

A Yes.

Q Is this the first time that you have documented or quantified the findings?

A Yes.

Q Did you formulate an opinion at that time as to what the findings were associated with?

MR. COHEN: Which findings?

MR. BERNSTEIN: All of the findings on physical exam.

A Again, this is how Mr. Jansen was --

MR. COHEN: One second. Off the record.

(Whereupon, a discussion was held off the record.)

Q I am referring to the November 16th findings on physical exam, right?

MR. COHEN: What do you want to do with that question that did not get answered?

MR. BERNSTEIN: Withdraw the question, please.

MR. COHEN: And the partial answer. Thank you.

Q Doctor, to what did you associate these findings on physical examination?

A I thought they were consistent with the injuries that had occurred after surgery.

Q Did you have a conversation with Mr. Jansen at any time after the examination but before he left on the 16th?

A I don't have a recollection of that.

Q Anything about the contents of this note that refreshes your recollection as to anything that occurred at that visit which was not documented?

A No.

Q The next visit at the office was December 28th and that was with Mr. Duffe; is that correct?

MR. COHEN: I am sorry, the date?

MR. BERNSTEIN: December 28th.

A Yes.

Q Would it have been your practice to have reviewed this note during the time that you were caring for Mr. Jansen?

A Yes.

Q Are the findings that are contained in the physical examination portion of the note consistent with the findings at the time of the previous visit?

A More or less, although the TH strength had returned to five over five. Other than that it's essentially the same.

Q What does the TH stand for?

A Tibialis anterior.

Q Where is that anatomy found on a person?

A It's the foot. It dorsiflexes the foot. It brings the foot up.

Q The next visit that was at your office where you participated, Doctor, I believe is February 8, 2001; is that correct?

A Yes.

Q The findings on physical exam, Doctor, are they consistent with the findings at the time of the last couple of visits, certainly the one on December 28th?

A Yes.

Q Doctor, on the impression lumbar radiculopathy, is that associated with the original injury for which Mr. Jansen underwent surgery or is that radiculopathy from a subsequent injury if you're able to tell?

A I am attributing to his subsequent injuries.

Q What is radiculopathy?

A It means disorder of the nerve root, meaning, a pain, numbness, weakness or loss of reflex.

Q Were you able to determine the level of the radiculopathy based upon the complaints that Mr. Jansen had?

A No.

Q Generally, the complaints that Mr. Jansen had, what level would that be associated with?

A Well, he had nonspecific, I mean, his complaints of back and leg pain were nonspecific in the dermatome, they were back and lower extremities consistent with a lumbar sprain and radiculopathy but not specific to any one particular level.

Q How many levels are there on the lumbar spine?

A There are five.

Q L1-2, 2-3?

A 4-5.

Q Was there any treatment that could have been provided to Mr. Jansen to address the lumbar radiculopathy?

MR. COHEN: This is based on the February 8, 2001 visit?

MR. BERNSTEIN: Yes.

A This was not inconsistent with the previous visits, so my response is similar, the same suggestions I was making previously, which was pain management, medicines. He had gotten Darvocet, pain killers, so he was being treated in this exam and my recommendations were the same here as they were on my

previous visits for these problems.

Q What about chiropractic adjustment for the lumbar spine, was that something that could have been provided to Mr. Jansen?

A Again, it's always in my custom and practice to review what options there are and, as I testified to previously, one of the options for spine-related pains is continued physical therapy, chiropractic, medicines, pain management and that is something that would repeat on each visit, what his options are. It's part of my evaluation and counselling of the patient on each visit.

Q Was that based upon your custom and practice that you would suggest under these circumstances that Mr. Jansen undergo chiropractic adjustments or is that something you have a specific recollection about?

A It's just my custom and practice.

Q Given the surgery that Mr. Jansen had undergone, could spinal manipulation of the lumbar spine at L3 to S1 be provided? Was that a legitimate alternative to care?

MR. COHEN: Are you asking chiropractic care?

MR. BERNSTEIN: Yes.

MR. COHEN: He is an orthopedic surgeon, to his understanding of what the chiropractor would do.

MR. BERNSTEIN: As an orthopedist he can certainly determine whether or not in his opinion as an orthopedist given the fact Mr. Jansen underwent the surgery with the fusion, whether or not Mr. Jansen was an appropriate candidate for manipulation.

MR. COHEN: I think that is something you may want to ask a chiropractor about other than asking him what his understanding would be in terms of what a chiropractor would testify to. I don't see it referring to chiropractic care.

MR. BERNSTEIN: Certainly, that would. Certainly that would be a response he could give if he wasn't able to speak as to what modalities would be --

MR. COHEN: As a chiropractor as opposed to a spinal surgeon.

MR. BERNSTEIN: As a spinal surgeon and given his experience and education he is

certainly competent to determine what type of modalities can be, treatment modalities can be, provided to a patient such as Mr. Jansen who underwent spinal fusion.

MR. COHEN: Go ahead and ask him the question.

MR. BERNSTEIN: I can't remember it now.

MR. COHEN: Ask a fresh one.

Q Doctor, in your opinion as a spinal surgeon was Mr. Jansen an appropriate candidate given the surgery that he had undergone for spinal manipulation of a lumbar radiculopathy?

MR. COHEN: By a chiropractor?

MR. BERNSTEIN: Yes.

MR. COHEN: Over objection you can answer.

A I am just unclear as to the word spinal manipulation. It has multiple indications. Gentle massage and digital palpation is acceptable. A hyper, you know, bench twisting, hyper extending maneuver would exacerbate his condition, so that is the best I can answer that question.

Q According to the note, Doctor, what I

believe to be the last visit was March 22, 2001?

A Yes.

Q That was a visit that you had with Mr. Jansen?

A Yes.

Q As well as Lou Allen?

A Yes.

Q According to this note it indicates, and I quote, I did get a report from the therapist which states that he really has had no overall change in improvement. Do you see what I am referring to?

A Yes.

Q Does that refer to you or Mr. Allen if you know?

A Both of us.

Q Do you recall seeing such a report from the physical therapist referring to Mr. Jansen's overall progress?

A I don't have an independent recollection, no.

Q That note based upon your prior testimony would be something that would generally be maintained in the patient's chart; is that correct?

A If it makes it into the chart, yes.

If it's mailed to us, it's supposed to be put into the chart, so the answer is yes.

Q Do you have an understanding as to why that note is not in the chart?

A No.

MR. COHEN: We haven't established it's not in the chart.

Q Well, based upon your review of the chart did you come across a report from the therapist regarding Mr. Jansen's status?

MR. COHEN: Off the record.

(Whereupon, a discussion was held off the record.)

A I don't --

MR. COHEN: Off the record.

(Whereupon, a discussion was held off the record.)

Q Based upon your review in preparation for today's proceeding did you come across a note from the physical therapist regarding Mr. Jansen's status?

A Yes.

Q Can you turn to that note, please?

A Yes.

Q Doctor, the note from the physical therapy, is it two pages or two separate notes?

A I guess it's a two-page note.

Q The diagnosis is status post spinal fusion?

A Are you asking me is that what she wrote, yes.

Q Was this the only note that is contained in the patient's file from physical therapy?

A There are other notes. There are other notes.

MR. COHEN: Off the record.

(Whereupon, a discussion was held off the record.)

Q Doctor, other than the two-page document that you have in front of you from the Stony Brook Physical Therapy Department, do you recall seeing any other notes from the physical therapist?

A No.

MR. COHEN: Again, we have not had a chance to go through this chart page by page but I will let him go based upon his memory.

Q Did you ever speak to Mr. Jansen

regarding this physical therapy note?

A I don't -- it wouldn't be my custom and practice to pull out a note and show it to him. That is not my custom and practice.

Q Having received that note did you contact anyone from the Stony Brook Physical Therapy Department to discuss the contents of the note?

A No.

Q The physical exam, was that performed by you and Mr. Allen?

A Yes.

Q Under the impression you have status post fusion, possible herniated disk, thoracic spine. At what level were you considering the possible herniated disk?

A I don't recall.

Q Well, given the fact that L3 to S1 were diskectomy, what other levels could there possibly be where there might be a herniation?

A This is the thoracic spine. That is a different segment of the spine, so you have twelve possible levels in the thoracic spine.

Q Given the complaints did that limit the level to which you considered a possible

herniation?

A Again, I don't recall at the time.

Q Did you request authorization for MRI of the thoracic spine at that time?

A Yes.

Q The complaints that Mr. Jansen had, were they consistent with thoracic spine herniation?

A Consistent with thoracic pain. In my note it says thoracic pain, stiffness and also cervical pain and stiffness. That is what he was complaining of on that day.

Q Was this the first time Mr. Jansen had presented with complaints of thoracic pain?

A To me.

Q Did you have a discussion with Mr. Jansen after this visit?

A No, I don't recall.

Q Was he alone or did his wife accompany him if you recall?

A I don't recall.

Q Did you see Mr. Jansen any time after March 22nd?

A I don't believe I did, no.

Q Did you ever speak with Mr. Jansen at

any time after the last visit on March 22, 2001?

A No.

Q Did Mr. Jansen come to your office and request copies of records?

MR. COHEN: Well, while he was at Orlin & Cohen?

MR. BERNSTEIN: Yes.

A I don't -- I don't know.

Q Doctor, in preparation for today's proceeding did you review any other documents other than the Orlin & Cohen office records and the hospital chart?

A A copy of the record and a copy of the hospital chart.

Q Did you review the plaintiff's transcript of his examination before trials?

A All I reviewed was the copy of the Orlin & Cohen chart and a copy of the Mercy record.

Q Do you recall a time frame approximately when you first became aware of the lawsuit?

A No.

Q After you became aware of the lawsuit, did you review the original chart at Mercy Hospital?

A No. That wouldn't be my custom and practice, no.

Q Have you ever reviewed the original chart at the hospital?

A As part of perhaps my housekeeping activities for the chart and my obligations to Mercy Medical Center? The answer is probably yes, at the time of his immediate time around his surgery.

Q No. What I am asking after the surgery was completed, any time from 2000, what was it, March of 2000 was the surgery, so any time from April of 2000 to today have you ever had an occasion to go back and look at the chart of Mercy Medical Center?

MR. COHEN: I think he answered that.

MR. BERNSTEIN: He said unless he had some housekeeping.

Q Would you have had housekeeping responsibilities referable to this chart a month after the surgery was performed?

A That could happen, yes.

Q Under what circumstances would that be?

A For example, this doesn't necessarily apply to this case but cosigning an order, telephone

order, in the chart review they would pick up the charts, review them, things like telephone orders that need to be cosigned and that might not happen for three to four weeks or even longer than that.

Q Did you ever review the original chart at any time after you became aware of this lawsuit?

A No.

Q Do you know Dr. Labyiak?

A Yes.

Q Did you ever have any discussions with Dr. Labyiak regarding Mr. Jansen's care?

A No.

Q How do you know Dr. Labyiak?

A He was -- when I was a resident at Stony Brook, he was a junior attending there and that is where I first met him and, you know, he is a colleague, surgeon on Long Island, spine surgeon so.

Q Did you ever speak with anyone from the Workmen's Compensation Board regarding Mr. Jansen?

A I might have. I don't recall.

Q Did you ever write any letters to the Worker's Compensation Board on behalf of Mr. Jansen?

A I might have. I don't recall.

Q If you had written such letters, would they be contained in the Orlin & Cohen Orthopedic records by custom and practice?

A Yes.

Q Doctor, have you ever held any teaching positions?

A I had teaching obligations as a fellow at the University of Miami.

Q No responsibilities in that regard at Stony Brook or Mercy?

A No, no.

Q Were there ever M & M conferences held at Mercy Hospital that you participated in?

A Yes.

Q Would Mr. Jansen's case have been one such case that was discussed at an M & M?

MR. COHEN: Objection, education law.

MR. BERNSTEIN: Only the contents, not the fact whether one was conducted or not. I won't go into what was discussed.

MR. COHEN: It's all privileged. The only thing you're entitled to is if he ever made any statements at such a conference regarding this patient.

Lattuga

MR. BERNSTEIN: So, first I have to find out if there was one.

MR. COHEN: Just ask him did you ever make any statements.

Q Did you ever make any statements at an M & M --

MR. BERNSTEIN: You're wrong.

MR. COHEN: I will show you --

MR. BERNSTEIN: It says the contents of what was discussed at the conference is not discoverable.

MR. COHEN: Except for party statements.

MR. BERNSTEIN: But the question I asked was there one held for Mr. Jansen.

MR. COHEN: You can ask him if he made any statements at a conference regarding Mr. Jansen.

Q Did you?

A No.

MR. BERNSTEIN: Off the record.

(Whereupon, a discussion was held off the record.)

MR. COHEN: Does anyone have any

questions?

MS. HICKEY: No.

MS. CRISCITO: No.

MS. HARBERT: No.

MR. BERNSTEIN: I don't have any either.

MR. COHEN: Why don't I give this to counsel for Orlin & Cohen; is that fair? I am going to give what was marked as Plaintiff's Exhibit 1 which is a copy of the Orlin & Cohen chart to counsel for Orlin & Cohen to hold onto.

Thank you.

(Whereupon, at 2:40 p.m., the examination of this witness was concluded.)

_____

SEBASTIAN LATTUGA

Subscribed and sworn to before me

this _____day of _____, 2006.

_____

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INFORMATION AND/OR DOCUMENTS	PAGE/LINE
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Production of films	27/12

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PAGE / LINE

None marked

C E R T I F I C A T E

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

I, MARLEINE LAMEY, a Notary Public for and within and for the State of New York, do hereby certify:

That the witness whose examination is hereinbefore set forth was duly sworn and that such examination is a true record of the testimony given by that witness.

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

IN WITNESS WHEREOF, I have hereunto set my hand this 27th day of December, 2005.

Marleine Lamey

MARLEINE LAMEY

ERRATA SHEET

Page	Line	Original Text	Correction

(Witness Name) (Witness Signature)

Subscribed and sworn to before me
this _____ day of _____, 2005.

NOTARY PUBLIC

Look-See Concordance Report

UNIQUE WORDS: **1,863**
TOTAL OCCURRENCES: **7,323**
NOISE WORDS: **384**
TOTAL WORDS IN FILE: **19,983**

SINGLE FILE CONCORDANCE

CASE SENSITIVE

INCLUDES ALL TEXT OCCURRENCES

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