SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : CIVIL TERM : PART 25
----------X
ALEKSANDER JANDA,

Plaintiff,

-against-

Index No.
12146/06

Trial

MICHAEL RIENZI TRUST RIENZI & SONS, INC.,
MICHAEL RIENZI, JR., ANGELA RIENZI,
JOSEPH RIENZI & LUIS RIENZI,

Defendants.
----------X

Supreme Courthouse
88-11 Sutphin Boulevard
Jamaica, New York 11435
February 9, 2009

COPY

B E F O R E:

HONORABLE BERNICE SIEGAL,
Justice, Supreme Court

(And a jury of six, plus two alternates)

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

BRAND, BRAND, NOMBERG & ROSENBAUM, L.L.P.
Attorneys for Plaintiff
286 Madison Avenue
New York, New York 10016
BY: BRETT J. NOMBERG, ESQ.

WISON, ELSER, MOSKOWITZ, EDELMAN & DICKER, L.L.P.
Attorneys for Defendants
33 Gannett Drive
White Plains, New York 10604
BY: DONALD G. DERRICO, ESQ.
ALLYSON A. AVILA, ESQ.

NICOLE C. ROBINSON, CSR
-and-
NORA CAMPISI,
Senior Court Reporters

allow it in.

MR. NOMBERG: The better course.

THE COURT: The Court agrees with plaintiff, she is going to allow it in over the exception of the defendant, and it is preserved for the record. After the end of testimony we will also mark in the notice, this is -- that we have agreed that have been previously served to defendant.

MR. DERRICO: Very good, thank you, your Honor. Note my exception.

THE COURT: We are going to complete this doctor today, so if we have to go over a little bit, we are going to go over a little bit. You have strict time periods in here, so let's move.

MR. NOMBERG: I will get the doctor. Thank you.

(Pause in the proceedings)

(The jury enters the courtroom at this time)

THE COURT: Good afternoon, thank you. Please be seated.

Plaintiff, you may call your next witness.

MR. NOMBERG: Thank you, your Honor.

Your Honor, I call Dr. Andrew Merola to the stand.

A N D R E W M E R O L A, M.D. a witness called by the

Plaintiff, after having been first duly sworn, testified as follows:

THE CLERK: Doctor, for the record, state your name, spell your last name.

THE WITNESS: Andrew Merola, M-e-r-o-l-a.

THE CLERK: Business address, please.

THE WITNESS: 36 Seventh Avenue suite 502, New York, New York.

THE COURT: Thank you very much.

You may begin. Good afternoon.

MR. NOMBERG: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. NOMBERG:

Q Dr. Merola, I ask you to please speak up, I am going to -- my goal is to have you done with my testimony in the next hour, so I may push along.

Doctor, could you please tell us, are you licensed to practice medicine in the State of New York?

A Yes, I am.

Q Are you licensed in any other state?

A No, I am not.

Q When did you become licensed?

A 1992.

Q Okay, and where did you attend medical school?

A I went to Howard University College of Medicine

in Washington D.C.

Q Why don't you tell us your educational background, to move things along?

A Sure. After medical school I went to SUNY Downstate Medical Center in Brooklyn, where I did my general surgical residency, followed by an orthopedic surgery residency.

After that was completed I went to the University of Colorado in Denver, where I did a spinal surgical fellowship.

And after that, I came back to New York City where I started to practice spinal surgery at SUNY Downstate, and St. Vincents Hospital in Manhattan.

Q Are you board certified in any area of medicine?

A Yes, I am board certified in orthopedic surgery.

Q And just briefly, what does it mean to be board certified in that area?

A Board certification is a process whereby you are educationally and clinically certified by the American Board of Orthopedic Surgery. What that means is that after you finish your education and training as a resident, you take a written examination to test your knowledge in the field of orthopedic surgery.

After you pass that examination and you have been in practice, and doing surgical procedures for at least

the minimum of 2 years, you then bring your surgical cases to Chicago, and you are examined in front of a board. It is an oral examination, the examiners ask you questions about your surgical cases, so that they get an idea of your clinical skills, and whether or not you are able to practice surgery in an appropriate fashion. When you passed both of those parts, then you are considered to be board certified.

Every 10 years after you are certified, you need to recertify. So I just recertified because I have been in practice for 13 years. So my 10 years expired, I just took my recertification exam, and 10 years from now I will be hopefully taking another recertification exam.

Q Have you ever had any academic appointments?

A Yes, I have two academic appointments. One is at SUNY Downstate in Brooklyn where I am an associate professor of orthopedic surgery. The other is at New York Medical School through St. Vincents Hospital, where I am also an assistant professor of orthopedic surgery.

Q Have you ever been on any hospital committees?

A Yes, I have.

Q What are they?

A I was on the search committee for the chairman position at St. Vincents Hospital in Manhattan. And I am also on the residency review committee and medical student

evaluation committee at SUNY Downstate.

Q Have you ever held any teaching positions?

A Yes.

Q Please tell us?

A I teach at both SUNY Downstate Medical Center and at New York Medical College.

Q And have you ever had -- withdrawn.

Do you have hospital privileges at any hospitals?

A Yes, I do.

Q What hospitals?

A I am at St. Vincents Hospital in Manhattan, New York, SUNY Downstate Medical Center in Brooklyn, New York, Methodist Hospital in Brooklyn.

Q Just explain what does it mean to have hospital privileges?

A Hospital privileges are the ability for you to admit patients to a hospital. And in my case not only admit them, but operate on them and treat them in the hospital setting.

Q Doctor, have you ever written any articles in the area of spinal surgery?

A Yes, I have.

Q Approximately how many?

A My CV, which is a list of articles and textbooks that I have written is 13 pages long. I think I have

about 35 or 40 publications.

Q And have you ever been actually noted in any publications?

A Yes.

Q What publications?

A I am in most of the orthopedic publications, and I am also listed in the Castle Connolly Guide to Best Doctors in New York City.

Q And do you have a private practice right now?

A Yes, I do.

Q How long have you had that private practice for?

A I have been in private practice for 13 years.

Q And do you have any -- where are your offices located?

A My offices are in Manhattan, Queens, and Brooklyn.

Q And do you have a staff that work for you in those offices?

A Yes, I do.

Q And if you weren't here, what were you going to be doing today?

A Today is a day when I see patients preoperatively and post-operatively. So patients that require surgery, I am seeing them and indicating them for surgery, and patients that have had surgery return to the office so I

can see them after the operations are done.

Q And how often are you in the OR performing surgery?

A I am in the operating room 3 days a week, Tuesday, Wednesday and Thursday.

Q And approximately how many surgeries are done on a given day?

A I can tell you that in a week, I have performed somewhere in the neighborhood of about six to eight surgeries.

Q And what kind of surgeries are these?

A These are all spinal surgeries.

Q Cervical, lumbar, thoracic?

A Yes, neck, upper back, and lower back, both children, pediatrics, and adult.

Q Do you do any other surgery other than involving the spine?

A No, I do not.

Q And how long have you been performing surgery on the spine, for how many years?

A 13 years.

Q And have you testified in Court before?

A Yes, I have.

Q And for those times that you have testified in Court, what kind of things have those involved?

A Those usually involve patients that have asked me to come into Court to testify on their behalf.

Q Will you agree, Doctor, to limit your opinions to only those you can state with a reasonable degree of medical certainty today?

A Yes.

Q And could you just tell generally what is your role as an orthopedic spinal surgeon?

A My job is looking at the neck and back in terms of its structure, the way it is put together, and its neurology, what are the nerves that are connected to it, and whether or not I can do something from a surgical point of view, to either make things better or prevent further deterioration.

Q Doctor, did you treat Aleksander Janda?

A Yes.

Q Is he currently still a patient of yours?

MR. DERRICO: Objection, leading.

THE COURT: Overruled.

Q You may answer?

A Yes.

Q Do you have your office records for Mr. Janda?

A Yes.

Q Okay, do you have them with you right there?

A Yes, I do.

Q Were those records made and maintained in the regular course of your business practice?

A Yes.

MR. NOMBERG: Your Honor, I offer that chart in evidence.

MR. DERRICO: Your Honor, I have not had an opportunity to review the doctor's chart. I can do it between cross and direct, if we can wait to -- until that, if that's okay.

THE COURT: Yes, we will mark it at that time. Thank you.

MR. NOMBERG: I assume, your Honor, we can use his notes though, regardless?

THE COURT: He may use his notes at this point. If there is an issue I am sure Mr. Derrico will let me know, if there is one, yes.

MR. DERRICO: Thank you.

Q Doctor, were you asked by my office to come in to Court to testify regarding Mr. Janda's care and treatment by yourself?

A Yes.

Q And --

THE COURT: So the record is clear, let's just mark it Plaintiff's 18 for identification, so that it is clear, and then if it is going to go into

evidence, we will so move it into evidence.

MR. DERRICO: If you like, I don't know how big it is, I can take a quick look at it right now.

THE COURT: Is that the entire record?

THE WITNESS: Yes.

THE COURT: I think that will --

MR. DERRICO: I can do it in about two sections.

THE COURT: We will let Mr. Derrico look at it. (Handing)

MR. DERRICO: Can we just approach for one brief second?

THE COURT: Yes.

(Whereupon, there was an off-the-record discussion at side bar between counsel and the Court)

THE COURT: So it is stipulated into evidence as Plaintiff's 18. You are not stipulating? It is being offered in evidence as Plaintiff's 18.

MR. DERRICO: With the reason stated forth, that there are one or two items in there that I did not receive.

MR. NOMBERG: Objection, your Honor, his statement is on the record.

MR. DERRICO: Can I finish what I was saying?

THE COURT: Yes.

MR. DERRICO: There were one or two items in the records that I did not receive, therefore, I would object to them going into evidence.

THE COURT: And the Court will properly redact it after, if necessary, after testimony.

MR. NOMBERG: Thank you.

THE COURT: It is marked in as 18.

(Whereupon, items received and marked as Plaintiff's Exhibit 18 in evidence, as of this date.)

MR. NOMBERG: May I inquire?

THE COURT: Yes.

Q Doctor, when was the first time you saw Mr. Janda?

A September 15th, 2008.

Q And in what office did you see him in?

A Astoria, Queens.

Q And, Doctor, you can always use your notes to refresh your memory. Basically, tell us when Mr. Janda first came to your office, what was the reason that he stated that he was there?

A Mr. Janda came in for persistent and significant pain in his back, with pain radiating into the lower extremities or legs.

Q And what did you then do for him, if anything?

A I performed what is known as a physical examination. So I looked at him, and then did some physical tests to try to get a feel for what was causing his pain. And I also had an opportunity to review some records that he had brought into the office with him.

Q And what was your plan of treatment at the end of that visit?

A At the end of that visit, because he had been having progressive pain, my plan was to obtain a new magnetic resonance imaging scan of his lower back.

Q And did you eventually review that lumbar MRI?

A Yes, I did.

Q And, Doctor, I would like to show you what has been marked into evidence as No. 12. (Handing) And ask you to take a look and see if that is the MRI film that you reviewed?

A Yes, it is.

Q Okay, now, that actually, that film doesn't need a light box, does it?

A Correct.

Q That is -- explain why?

THE COURT: Excuse me.

MR. DERRICO: For the record, can we have a date on that film, is that the 8/19/08 film, MRI?

THE WITNESS: Yes, September 19, 2008.

MR. DERRICO: So the record is clear.

THE COURT: Plaintiff's 12 in evidence.

Q And could you just explain --

MR. NOMBERG: Judge, you don't need a light box for that.

A This is a, it is a print, it is an actual photographic print of the MRI.

Q When did they start doing that, to your knowledge?

A They actually just started doing this recently in order to save money on printing film, because it is, it is less expensive for them to make a photographic print than it is for them to go through a developing process whereby you have images like a typical x-ray or typical MRI film.

Q Is there any difference in the reliability that you see?

A No.

Q So Doctor, maybe if you could use that film, and explain -- withdrawn.

When you saw the patient did you review that film?

A Yes.

Q Okay, and are you able to read films?

A Yes.

Q How long have you been reading films involving

MRIs, involving the spine?

A 13 years.

Q And why is that necessary, if at all, for a spinal surgeon to know how to read an MRI film?

A Since I am a surgeon, and since I have the opportunity to see and examine and treat a patient, as well as operate on them, it is important that I correlate their symptoms and their physical findings to diagnostic studies like MRIs. So the MRI is a very important part of what I do, and as an orthopedic spinal surgeon we are trained to read the MRI with particular emphasis on the, what we call surgical pathology, or problems that require surgical intervention, or may not require surgical intervention.

Q So, for other areas of the body that is not in your education mostly, or just the spine; correct?

A That is correct, yes.

Q All right, so could you take a look at those images, and tell us what you see?

A Sure, there are two basic sets of images. One of them is a side view image of the lower portion of the spine, the actual, the lower portion of the upper back and the entire lumbar spine. And what we see on the side view images are squares, and these squares are the vertebral bodies. They should normally be square, except for one

particular vertebral body that appears as a triangle. It appears as a triangle because it is fractured and crushed.

In between the vertebral bodies, what we see are these things that look a little more oblong or ovoid, and these are discs, these are located in between vertebral bodies. And the discs, unlike the vertebral bodies are made up of cartilage, and they are softer and more spongy, and they are very much analogous to a jelly donut. There is an outer covering to the disc and then there is an inner jelly-like portion to that disc.

Behind the bones, in the discs we see this white stripe area, and this white striped area is the area where the nerves are, that go down into your legs, that is called the spinal canal.

And in looking at the side view of the MRI, what we see is in the upper portion of the film is a fractured or compressed vertebral body, that is now turned into a triangle where it should be a square.

Behind that vertebral body we can see that in the spinal canal itself there is a, fragments of bone from fracture, that is in the canal area and it indents the canal area where the fracture is. And that is the T12 vertebral body.

Then as we go down the canal, we are looking at the area where the nerves come out of the lower back, and

going to your legs. What we see all the way down at the lower portion of the spinal canal is, between the L5 vertebral body and sacrum, also known as S1, there is disc material that is squeezed out beyond the margin of the vertebral bodies, and is in the canal area where the nerves are.

These side views kind of slice a patient like a balloon, if yu will, in a deli machine, and each one of these slices is a particular segment, looking at the side view.

And when we look at these we also want to look at what are called axial views, that is this sheet of paper. The axial view looks down the spinal canal and across the spinal canal, so the side view looks side to side, and the axial view looks down the canal. What we see is a round area at the top of the picture, and that round area at the top of the picture is where the vertebral body is. Behind that we see this white, it looks like a balloon, a white circular balloon with little gray dots in it. That is the spinal canal, and the nerve roots.

And if we go down to L5 and S1, we see that there is what looks like a black shadow, kind of eclipsing the balloon area where the nerves are. That is a disc herniation, and that material comes into contact with the spinal nerve that goes down into the leg. And in this

case it comes in contact with both sides, but a little more so on the right side than the left side, and that that is the S1 nerve root, or the sciatic nerve that goes down into the leg.

(Whereupon, the following testimony was recorded by Nicole Robinson, Official Court Reporter:)

DIRECT EXAMINATION

BY MR. NOMBERG:

Q And, Doctor, did you take a history from Mr. Janda as to how he had his accident?

A Yes.

Q And what did you learn?

A That he sustained these injuries as a result of a fall of approximately 12 feet or so.

Q I want you to assume that Mr. Janda also testified -- sorry. I want you to assume that there are records from the Elmhurst Hospital that he landed on his gluteus maximus actually from the emergency -- EMS when he fell. Can you explain how, if at all, that can cause injury to the thoracic bone?

A Sure. So, when the patient falls and the spinal column is really very much like a column, like a column that supports the roof of this building. When you fall and there is load transferred to that column in a very abrupt fashion because it is -- it's hit so when the body hits the ground, the force and weight of that body as it falls through the air transfers a lot of energy and load to the spinal column. The bones and the discs and the joints in the body absorb this energy and they absorb this force. If that force goes beyond the capacity of your bones and your joints to absorb it, what happens is you acquire a fracture and a herniation as well.

So, absorbing that force, if it goes beyond what your body can absorb, you get a fracture. It is not unlike if you knock your hand up against a hard object and you got a cut in your hand. What that cut really signifies is the fact that the skin couldn't absorb all the energy from that hard post that it hit and it failed and the failure was that cut. And in the same way that mechanism produces a failure of the bones, the joints, the ligaments and the disks in your back and that's what we see as a fracture and as a herniation.

Q Are you familiar with exactly the type -- withdrawn. Did the force cause in your opinion the pieces of the thoracic bone to actually break apart?

A Yes.

MR. DERRICO: Objection. Leading.

THE COURT: It's sustained.

MR. DERRICO: Move to strike.

THE COURT: Stricken from the record.

Q Do you have an opinion as to what was the result of the fall concerning the injury to the thoracic bone?

A Yes.

Q And could you tell us what that opinion is regarding what happened to the thoracic bone?

A Yes.

Q Please do, Doctor.

A So, what's happened to the vertebral body, the T12

vertebral body is that it is fractured and what that means is, it means that it's broken up into pieces, so it is compressed, it no longer looks like a square, it looks like a triangle and in addition to being compressed and squashed into a triangle, it is also broken apart, and that's what a fracture means. Fracture means it is broken apart. If you were to drop a porcelain plate off a desk and it hit the ground it would fracture into many pieces. That's exactly what's happened to that T12 vertebral body. It's broken into many separate pieces and that's what we see on the MRI, and we can see those pieces going into the spinal column and coming out around the area and that's how we know it is a fracture.

Q Were you able to see on the films how many pieces the fracture broke up into?

A Yes. When you look at the CAT scan and when you look at the X rays and when you look at the MRI, you can tell that it's broken up into at least eight pieces or so. One large piece of the vertebral body is -- has retropulsed or gone into the spinal canal area and the other portions of the fracture are now in and around the area where the vertebral body was. So, very much like a plate breaks or cracks, those pieces will go all over your floor. Same thing happens here in the spine. Those pieces have a tendency to go all over the place where that vertebral body was once normally in

place and intact.

Q What, if anything, is the significance of a piece of that bone entering the spinal canal?

A When that piece of bone --

MR. DERRICO: Objection.

THE COURT: What's the objection, Counselor?

MR. DERRICO: Did he specifically say it did enter his spinal column?

THE COURT: Yes. Overruled.

MR. DERRICO: Withdrawn.

THE COURT: Oh, withdrawn. Thank you very much. Withdrawn.

A When that piece of bone comes into the spinal canal, it now does two things. Number one, that piece of bone actually produces trauma to the contents of the canal and the contents of the canal are the nerves. When the bone is pushed in there it is not gently pushed into there. It is rapidly pushed in there at the time of the fall. So, it produces trauma to the nerves surrounding the area where the fracture; number one.

Number two, it also takes up room in the spinal canal so it produces impingement in and around the area where those nerves are at the T12 segment and that impingement is generally known as what we call stenosis, which -- so it is taking up room in the spinal canal. It is someplace where it

doesn't belong and by being there, it's taking up room like I'm taking up room in this chair.

Q Did you have any conversations with Mr. Janda concerning what your opinions were regarding treatment, if anything?

A Yes.

Q What did you tell Mr. Janda?

A Mr. Janda has basically two separate issues, two separate problems. One is the mechanical or bony structure of the spine is altered and different because of the fracture. So, whereas your spine between your upper and lower back should essentially be straight, what we call zero degrees of angulation, there shouldn't be any angulation there, it is angulated because of this wedge of triangular bone now instead of being a square. There is a structural issue with the back and that's what we called a central or mechanical axial issue. So, the structure of the column is thrown off. That's one problem.

And then the second problem is that he has a sciatic issue with his leg. He's got sciatica of his leg because of the herniation which is found lower down in the spine between L-5 and S-1. So, those issues need to be treated separately because they are actually distinct things. They are distinct treatments for one of those things.

Q What, if anything, did you tell Mr. Janda regarding

treatment for let's say first the thoracic region?

A The fracture in the thoracic region requires a major spinal reconstruction and by that what I mean is that it would require multiple --

MR. DERRICO: Objection.

THE COURT: What's the objection?

MR. DERRICO: This is not contained in any of these reports.

MR. NOMBERG: Your Honor, they are.

THE COURT: Let's just do a side-bar, please.

(Whereupon, an off-the-record sidebar discussion was held.)

Q Do you remember the question, Doctor?

A I think I was talking about reconstructing the T-12 fracture.

Q Yes. Go ahead.

A In terms of reconstructing the area that's fractured, what that would require is multiple rods and screws placed from behind the spine in order to bring that area as close to zero degrees as possible and to support the pure or back part of the spine with a process we call a fusion. A fusion basically means gluing the bones of the back together so they heal together like one big bone, and this would also involve taking the vertebral body itself and turning it as close to a square as you could possibly make it

once again. That's a reconstructive procedure of the actual structure of the spine and that would require implants, rods, screws and cages. That's for the structure around the fracture cite and the fracture.

Q Doctor, could you just explain to the jury first of all is that something that requires an admission to a hospital?

A Yes, that would require an admission to a hospital with surgery, with a stay in the hospital to recover from the effects of the surgery with postoperative physical therapy and rehabilitation --

MR. DERRICO: Objection.

THE COURT: What's the objection?

MR. DERRICO: None of this is covered in the reports.

MR. NOMBERG: Your Honor, again, I don't want to start addressing things in front of the jury about this. I would ask that all this detail does not -- is not required for a physician when he is saying he needs to go into the specifics. It is reasonable detail not giving the entire transcript of what the doctor is going to testify. That's what the CPLR requires, nothing more, not every single question that he wants answered.

THE COURT: I'm going to overrule the objection. We are going to continue.

Q You may continue.

A So, postoperative physical therapy and rehabilitation and then watching him from a surgical part of view to make sure the bones heal together and go on to fuse or become one solid piece of bone.

Q And, Doctor, is that a surgery that's done under anesthesia?

A Yes.

Q What type of anesthesia?

A That's a general anesthesia so that the patient is asleep when the operation is conducted.

Q Doctor, could you tell us what are the potential benefits of the surgery to Mr. Janda?

A The potential benefits of the reconstruction are basically two things. Number one, to prevent further collapse at that area where the fracture is and number two, to decrease the what we call axial back pain, the pain that's in the area of the back where the fracture is.

Q And, Doctor, could you explain what, if any, risks are there to Mr. Janda having this surgery under general anesthesia?

MR. DERRICO: Objection.

THE COURT: What's the objection, Counsel?

MR. DERRICO: Again, it is not contained in any of the reports that I've seen, any of this

testimony, proposed testimony.

THE COURT: I think you're -- you're overruled. Exception is noted for the record.

MR. DERRICO: Thank you.

A So, this operation would require somewhere in the neighborhood of about four to six hours worth of anesthesia and there are some issues that arise with anesthetic, anesthesia time, blood loss, transfusion, infection, postoperatively some of the things that we worry about are some medical complications from an operation of that magnitude and that could include deep venous thrombosis or a blood clot in the legs, a pulmonary embolus which means a blood clot going up in the lungs, heart attack, pneumonia, in some cases with that kind of operation can be associated with blindness. Those are the short-term potential risks of surgery.

The long-term potential risks of this operation is that the bones do not heal. That is a condition called a sue dough arthrosis or a failure of the bones to heal and we would note that on X rays and CAT scans and if that happens, the rods and/or the screws can crack or break and they may need to be replaced and there are what we call a revision surgical procedure would be indicated and needed.

Q Doctor, is this a surgery that you are recommending for Mr. Janda at this time?

A No, not at this time.

Q Why is that, Doctor?

A Mr. Janda is right now 40 years old. The fracture itself is at this point in time stable. He has not had a progression of his thoracicolumbar.

MR. DERRICO: May we approach for one brief second?

THE COURT: Sure.

(Whereupon, an off-the-record sidebar discussion was held.)

Q Sorry. Did you finish answering your question?

THE COURT: Could you read back the answer, please.

(Whereupon, the requested portion of the record was read back.)

A Pain.

Q Continue, Doctor.

A Or neurological deficits at the thoracicolumbar junction or T-12 area. Because there are some very significant serious potential down side risks to that major reconstruction, we need to have a good reason to do that reconstruction, and we don't have what we call a good reason to do it at this time. So, when we weigh the potential benefit of surgery versus the risk of surgery, right now the risk of surgery outweighs the potential benefits.

Q Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether or not this future surgery on the thoracic spine would be medically necessary?

MR. DERRICO: Objection. Totally speculative. If he is stable, he's stable.

MR. NOMBERG: Your Honor, with all due respect, that's the doctor and I'm going to ask that defense counsel please --

THE COURT: You don't have to ask defense counsel anything, all right. I just want both of you to just approach for a moment.

(Whereupon, an off-the-record sidebar discussion was held.)

Q Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether Mr. Janda in the future will need this surgery that you just mentioned on the thoracic region?

MR. DERRICO: My objection is noted for the record.

THE COURT: Yes, it is.

MR. DERRICO: Thank you.

A Yes.

Q And what is that opinion, Doctor?

A That he will require this type of reconstruction in the future.

Q And could you explain to the jury why that is?

A As time goes on and he -- as I said he's 40 years old now, but as time goes on and he ages at least within the next 10 to 15 years there will be stress at the junction between the thoracic and lumbar spine and to a reasonable likelihood that area will continue to go off of neutral alignment and become progressively more bent and then as that happens, it will become progressively more painful and when that process starts to happen. That's when the surgery will be needed.

Q And what type of pressure are you talking about, Doctor?

A The pressure of being up and walking around. Your spinal column supports your head over your pelvis as you're up and you're walking, so any time you're basically up and out of bed, your spinal column is absorbing force and moving and vibrating as you move and that force and wear and tear as time goes on will lead to progressive degenerative changes and collapse at the T-12 area.

Q Is that an opinion you can say with a reasonable degree of medical certainty?

MR. DERRICO: Objection. Leading.

THE COURT: Sustained.

A Yes.

MR. DERRICO: Move to strike.

Q Doctor, that last opinion --

THE COURT: The objection was sustained. Let's strike the question and answer from the record. You may ask another question.

Q Doctor, do you have an opinion as to whether or not for the answer that you gave that stress will lead to the need for a future surgery to Mr. Janda? Do you have such an opinion?

A Yes.

Q And can you state that opinion to a reasonable degree of medical certainty whatever it is?

A Yes.

Q What is that opinion?

A That he will require future surgery because of that.

Q And when you say future surgery, what surgery to be clear for the record?

A The reconstructive surgery that I just described.

Q I want you to assume that Mr. Janda over the next 10 or 15 years is not working in any construction field. Does that affect your opinion at all?

MR. DERRICO: Objection to the form of the question.

THE COURT: Yes. Please rephrase. Thank you.

MR. NOMBERG: Yes, your Honor.

Q Do you have an opinion as to whether or not -- withdrawn. I want you to assume that hypothetical. I want you to assume that Mr. Janda over the next 10 or 15 years will not be working any type of full-time job, just go with that hypothetical. With that assumption, does that change your opinion as to whether this future surgery will be required?

MR. DERRICO: Objection.

THE COURT: You have a difficulty understanding the question?

MR. DERRICO: Yes. Working in any way? I don't --

THE COURT: I'm not sure it's clear enough.

MR. NOMBERG: I'll rephrase it, your Honor.

THE COURT: Thank you.

Q I want you to assume, Doctor, that Mr. Janda will not be working in any gainful employment over the next 10 to 15 years. With that assumption, does that affect your opinion in any way regarding whether or not Mr. Janda will require the future surgery on the thoracic spine?

MR. DERRICO: Objection to the question.

THE COURT: Well, overruled. I'll allow the answer.

Q You may answer.

A No.

Q And, Doctor, you mentioned that there is now another issue in addition to the thoracic region. Let's go to the lumbar region. What, if any, treatment do you have an opinion about regarding the need for treatment to the lumbar area?

A With respect to the lower back area or the sciatic pain or the radiculopathy because of herniation, that does require a laminectomy or decompression at this time.

Q What is that?

A That is taking the pressure off the nerve by making a small opening in the lower part of the back between L-5 and S-1, finding the nerves to make sure that they can exit their normal openings without any impediment and looking at the disk and shaving down that small portion of disk material that's sticking out into the spinal canal on the nerve root.

Q Explain what that surgical procedure will involve?

A That surgical procedure involves --

MR. DERRICO: Objection.

THE COURT: Objection to what, Counsel?

MR. DERRICO: Same as before. It was not laid out in any report.

THE COURT: You're overruled.

MR. DERRICO: Thank you.

Q You may answer.

A So, that procedure involves admission to the

hospital, a surgical procedure with a general anesthetic whereby I make an approach to the lower part of the back surgically, identify the segment involved, L-5/S-1, make an opening in the spinal canal that's called a laminectomy, identify the nerves, enlarge the opening for the nerves, that's known as a neuroforamenotomy, look at the disk and shave down that portion of disk that's touching the nerve and that's called a partial discectomy.

Q Are there any risks to that procedure?

A That procedure has risks to it. There is the risk of a general anesthesia, there is the risk of infection, blood loss, what we called a dural leak because they are pressed upon by the disk. Those nerves can leak after that disk is removed. If that happens, then that needs repaired and fixed and then after the surgical procedure, the same risks of anesthesia apply which are a blood clot, pneumonia, heart attack, and those types of things.

Q What are the potential benefits of that surgery on Mr. Janda?

A Two potential benefits. The first is to decrease the sciatic pain, make that better by getting the pressure off the nerve and getting the disk material away from it. And then the second benefit of surgery is to prevent further deterioration in the nerve itself from persistent pressure.

Q Could you explain to us what you mean by sciatica?

A Sciatica is inflammation or irritation of the sciatic nerve. That's the nerve that comes down the back of your leg down your foot. It comes down your out of your lower back, goes into your buttock, goes down the back of your upper leg, through your calf muscle and then down into the back part of your foot.

Q And, Doctor, do you have an opinion as to whether or not this surgery if successful will remove all the pain that Mr. Janda has in the lower back area?

MR. DERRICO: Objection.

THE COURT: And what is your objection?

MR. DERRICO: Pain is subjective, not objective.

THE COURT: I am overruling the objection.

Q You may answer.

A Yes, I do have an opinion.

Q What's that opinion?

A That the surgery will ameliorate or decrease the leg pain, but will not remove it all.

Q Why is that?

A The chronicity or the long-term pain that he's been having since the time of the accident make it less likely that all of the pain will go away.

Q Do you have an opinion as to what is actually causing the pain regarding his present complaints in the

lower back region?

A Yes.

Q What is that?

A The disk herniation.

Q And, Doctor, do you have an opinion as to whether or not Mr. Janda will require any other future surgery on his lower back region, if at all?

A With respect to the lower back itself, after you've had a herniation and a partial discectomy, there is a possibility and potential what we call a recurrent disk herniation and if a recurrent --

MR. DERRICO: Objection.

THE COURT: Objection is sustained. It will be stricken from the record and the jury is directed not to consider it.

MR. DERRICO: Thank you.

Q Doctor, do you have an opinion as to whether the disk herniation that Mr. Janda has as shown in that 2008 MRI is causally related to Mr. Janda's accident involving the 12-foot fall?

MR. DERRICO: Objection.

THE COURT: What's the objection to that?

MR. DERRICO: I will withdraw it. I could say it out loud or approach if you'd like.

THE COURT: Approach.

(Whereupon, an off-the-record sidebar discussion was held.)

THE COURT: I will allow it in subject to connection. You want to continue?

MR. NOMBERG: Yes.

Q Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether or not the lumbar disk herniation that Mr. Janda sustained as shown in that MRI of 2008 whether that is causally related to Mr. Janda's accident in 2005 involving the 12-foot fall?

A Yes, I do.

Q What is that opinion?

A That the disk herniation is causally related to the fall.

Q And, Doctor, I would like to show you --

THE COURT: Before we proceed and put that away, I have a concern that since there were multiple pictures in Plaintiff's 12, I think that's what we were looking at that, we should park these 12A and B.

MR. DERRICO: That's fine, your Honor.

THE COURT: The ones that were --

MR. NOMBERG: Of course, Judge.

THE COURT: I would so direct the court reporter to do so and then we can move on. Thank you.

(Whereupon, the MRIs were marked in evidence

as Plaintiff's Exhibits 12A & 12B.)

Q Doctor, I want to show you Plaintiff's Exhibit 2, the Elmhurst Hospital chart, specifically one page in there. Do you know what that one page is?

A Yes.

Q Could you tell the jury what that is?

A This is a side view print of the thoracic and lumbar spine of Mr. Aleksander Janda done at Elmhurst Hospital.

Q Doctor, could you also keeping that page just right there, could you also pull out any films that I just gave you that show the lumbar MRI for that hospital admission as well?

A Yes.

Q Have you done that?

A Yes.

Q And could you tell the jury -- are you able to read that film?

A Yes.

Q And could you tell us what --

THE COURT: Is that from Plaintiff's 13?

MR. NOMBERG: That's 13A, your Honor. Actually, 17A.

Q Looking at 17A, could you tell us, read it for us?

A Sure.

MR. DERRICO: Could we have a date on that,

the film.

THE COURT: Yes. Is there a date on the film that you're looking at because I think there were several films in 17A.

THE WITNESS: Yes. This is the MRI of the lumbar spine and the date is October 7th of 2005.

THE COURT: Thank you.

MR. NOMBERG: If I may stop you, if I may get the light box, your Honor.

MR. DERRICO: May we approach right before he starts?

THE COURT: Yes.

(Whereupon, an off-the-record sidebar discussion was held.)

THE COURT: Could you read back where we were so I know where we are.

(Whereupon, the requested portion of the record was read back.)

THE COURT: With the proviso that I already indicated at side-bar.

MR. NOMBERG: I'll rephrase the question.

Q Doctor, I want you to take a look at the MRI, just show us all the thoracic injuries that are shown in this.

A So, this is an MRI film unlike the picture that we saw before. This is a film of the thoracic and lumbar area

of Mr. Aleksander Janda date is October 7th of 2005, and once again we're looking at the structure of the lower back and the squares are the bones and at the top of the spine what we see is one bone that's brighter than all the other bones. All the other bones appear to be gray. This particular bone appears to be white and it is also significantly collapsed and turned into a triangle rather than being a square, so this is indicative of a fracture of the T-12 vertebral body.

Q Doctor, could you tell the jury what a disk degeneration is?

A Disk degeneration is a term that refers to the disk specifically over time losing what we call water signal intensity. The MRI scan relies very heavily upon the water content of the various tissues in your body. We are made up mostly of water, but every piece of your body is made up of more water perhaps than other pieces. For example, your bones have very little water in them, but your cerebral spinal fluid because it is a fluid contains a lot of water, and the differences in the amount of water in the various tissues show up as different signals on MRI, they show up as different shades of gray. Things that show up very white or light up are high in water content. Things that show up gray or black are low in water content in general.

Q Is that something you can see in an MRI, Doctor?

A Yes.

Q And, Doctor, did you look at that MRI to see whether you see any disk degeneration anywhere in those films?

MR. DERRICO: Objection.

THE COURT: Overruled. I'll allow that question.

MR. DERRICO: Thank you.

A Yes.

Q And what is that opinion, Doctor?

A This MRI does not show any evidence of disk degeneration.

Q That is at every level?

A That is at every level, correct.

Q Now, Doctor, I want to show you the hospital records and if you could go to -- let me take that from you. If you could just explain to the jury what this record is that I'm showing you. It says on the top patient discharge information record.

A Yes. This is from Elmhurst Hospital Center. It is a patient discharge information record and it documents what is told to the patient in terms of what type of follow-up they're going to require after they leave the hospital.

Q And what, if anything, does that discharge instruction indicate regarding follow-up treatment, if any?

A It indicates an appointment has been made for

neurosurgery and that the patient is given Tylenol with codeine for pain, and it indicates some restrictions that he's under; for example, no lifting, no pushing heavy objects.

MR. DERRICO: May I approach the witness, so I can see what he is referring to?

THE COURT: Yes.

Q I ask you to look at the other pages that I have tabbed, Plaintiff's Exhibit 2. Doctor, could you tell us what these documents are, the jury?

A These are Elmhurst Hospital Center, and it is the ambulatory care service progress notes. These are the notes from the neurosurgical clinic at Elmhurst Hospital Center.

Q Can you go to the first visit. What's that date?

A The first visit appears to be November 22nd of 2005.

Q And did you have an opportunity to review those clinic notes this afternoon?

A Yes.

Q After reviewing all the notes, did you see any type of evidence, if at all, regarding radicular pain?

A Yes.

Q Can you explain what that is again?

A That's pain that goes down your leg. It's leg pain as opposed to back pain.

Q And what is radicular pain evidence of, if anything?

A Nerve root pressure and nerve root irritation or sciatica.

Q What, if anything, can cause that type of sciatica?

A Pressure on the nerve and irritation on the sciatic nerve will lead to pain in the nerve.

Q And, Doctor, could you tell us what the date of the entries are for those entries that indicate sciatica and read exactly what it says?

A I'm just going through the handwriting on the notes. The first most legible one is from August 22nd of 2006 and it indicates right lower extremity radiating pain.

Q Doctor, do you have an opinion as to what was causing that pain at that time?

MR. DERRICO: Objection.

THE COURT: And what's the basis of the objection?

MR. DERRICO: Foundation.

MR. NOMBERG: I'm asking what his opinion was.

THE COURT: I'm going to allow his opinion. Overruled.

Q You may answer, Doctor.

A Yes.

Q What is that opinion?

A Disk herniation with nerve root impingement.

Q Is that pain that Mr. Janda was -- that was noted n that visit consistent with a disk herniation?

MR. DERRICO: Objection. Same thing.

THE COURT: You want to approach for a minute.

(Whereupon, an off-the-record sidebar discussion was held.)

THE COURT: Are you withdrawing your objection?

MR. DERRICO: I withdraw that.

MR. NOMBERG: Do we have an answer to that question? I don't think so. If the court reporter will be so fine as to repeat it.

THE COURT: I'm going to ask her.

(Whereupon, the requested portion of the record was read back.)

THE COURT: You may answer.

A Yes.

Q And, Doctor, do you see any other entries?

A Yes, there's one from April 10th of 2007.

Q And could you tell us what that entry states that is of relevance?

A It says lumbaljia.

Q And what does that mean?

A Lumbaljia is an older medical term that refers to

low back pain with nerve root irritation.

MR. DERRICO: May I approach the witness just so he could point that out?

THE COURT: Thank you.

Q Doctor, do you have an opinion as to whether or not Mr. Janda sustained any type of lumbar injury to his lower back as a result of this fall?

A Yes.

Q What is that opinion, Doctor?

A That he has sustained a disk herniation to the lumbar spine at the L-5/S-1 segment.

Q Do you have an opinion as to whether or not the surgeries that you have -- the surgery that you discussed regarding the lumbar spine is necessary -- reasonably necessary as a result of the plaintiff's accident?

A Yes.

Q What is that opinion?

A That it is necessary as a result of the accident.

Q And, Doctor, do you have an opinion as to whether or not the patient's complaints regarding his thoracic region are causally re light today Mr. Janda's accident?

A Yes.

Q What is that opinion?

A That the thoracic complaints are causally related to the accident.

Q Doctor, do you have an opinion as to whether or not the surgery that you've discussed regarding the thoracic region are medically necessary as a result of the fall involving plaintiff's accident?

A Yes.

Q What is that opinion?

A That the surgical procedures are medically necessary as a result of the fall.

Q Doctor, do you have an opinion as to whether right now Mr. Janda has any type of a disability?

A Yes.

MR. DERRICO: Objection.

THE COURT: What's the objection?

MR. DERRICO: Not contained in the report.

THE COURT: Sustained.

(Whereupon, Senior Court Reporter Nora Campisi transcribed the following:)

THE COURT: Sustained.

MR. NOMBERG: Your Honor, it is in the reports, with all due respect.

THE WITNESS: I don't have the report in front of me.

THE COURT: Step up. (Off-the-record discussion at side bar between counsel and the Court)

THE COURT: Defendant is overruled. You may answer the question.

MR. NOMBERG: May ask it over again?

THE COURT: Yes.

Q Doctor, do you have an opinion to a regular degree of medical certainty whether or not Mr. Janda has a medical disability?

A Yes.

Q And what is that opinion?

A That Mr. Janda is medically disabled.

Q Okay, and could you tell the jury what that means?

A That means that he is unable to perform any type of employment, or gainful employment.

Q And Doctor, I want you to assume that --

MR. DERRICO: Objection.

THE COURT: Sustained.

MR. DERRICO: Move to strike.

THE COURT: I will strike the last part of the doctor's answer with respect to any gainful employment, as it is just too broad, counsel.

MR. NOMBERG: I will ask further.

Q Do you have an opinion as to whether or not Mr. Janda could return to the work force?

MR. DERRICO: Objection.

THE COURT: You want to know which work force?

MR. DERRICO: Selling pencils, I don't know what are we talking about here.

THE COURT: Thank you.

Q Doctor, in the treatment of your patients over the last 10 years, have you ever given opinions as to whether or not a person is medically able to return to work?

MR. DERRICO: Objection, relevancy. We are not talking about his other patients, we are talking about Mr. Janda.

MR. NOMBERG: I am establishing a foundation.

THE COURT: I am -- overruled. I am going to allow him to establish a foundation as to how he is going to answer the question.

Q You may answer?

A Yes.

Q Okay, and have you been doing that over the last 10 years?

A Yes.

Q What is the purpose of why you do that?

A We do that in order to, so that people that are reading our notes can make a determination as to whether or not a particular patient can go back to work.

Q And is that something that you are medically trained to give an opinion upon?

A Yes.

Q Okay, and in this specific case regarding Mr. Janda, do you have an opinion as to whether or not you have the necessary qualifications to opine about Mr. Janda's ability to return to the work force?

MR. DERRICO: Objection.

THE COURT: I think that the objection is that you need to be more specific.

Q Okay, do you have an opinion as to whether Mr. Janda is able to return to the construction field?

A Yes.

Q And what is that opinion?

A He --

MR. DERRICO: Please note my objection.

THE COURT: Your objection is noted for the

record, and at this time it is overruled.

MR. DERRICO: Thank you.

Not for overruling it, but acknowledging my --

THE COURT: Yes.

Q What is that opinion?

A That he cannot return to labor construction.

Q And why is that?

A He has an thoracolumbar fracture at the T12 segments, with mechanical axial back pain, as well as a lumbar disc herniation with sciatica.

Q And do you have an opinion -- withdrawn.

Do you have an opinion as to whether Mr. Janda has any type of limitations presently regarding his ability to sit, stand, walk?

A Yes.

Q What is that opinion?

MR. DERRICO: Objection.

THE COURT: Overruled.

Q You may answer?

A Sitting and standing are limited to 40-minute intervals with frequent breaks in between, the requirement for positional changes, with sitting and standing, and walking is a, limited to six blocks, five to six blocks at a time.

Q And what about lifting?
A No lifting greater than 15 pounds.
Q What about bending?
A No bending at the waist.
Q And why do you have this opinion or these opinions?
A The bending at the waist increases stress on the fracture site and the fracture area, as well as stress on the disc and on the nerve.
Q Doctor, do you have an opinion on what --
THE COURT: This is your last question, so make it good.
Q Do you have an opinion as to whether or not -- well withdrawn.
What, if any -- is your opinion as to whether or not Mr. Janda can return to work for an eight-hour day?
MR. DERRICO: Objection.
I mean as with what? I mean it goes beyond the scope of anything that is in any report.
THE COURT: I will sustain it. I will sustain the objection, counsel.
MR. NOMBERG: Do I get to make it up then, Judge?
THE COURT: Just if you have one, you have one. Let's go.

Q Do you have an opinion as to whether or not Mr. Janda is capable of working any job that requires an 8-hour workday?

MR. DERRICO: Objection.

THE COURT: It is the same question.

MR. NOMBERG: Well, I am saying any job, so that covers all the jobs that he is referring to. It is, the issue is whether or not he can work an 8-hour workday, not whether it is this job or that job, your Honor, based upon the limitations that he has just described.

MR. DERRICO: Once again, your Honor, it is not contained in any report; disclosure.

THE COURT: I am going to sustain the objection.

Q Could you tell us what are the reasonable costs if any, for the future surgeries that you have already discussed?

MR. DERRICO: Objection, your Honor, this is too speculative, and not contained in any of the reports.

MR. NOMBERG: Your Honor, it is not speculative if you don't even give him a chance to say what his answer is, because it may not be speculative, that is his conclusion. The doctor does surgery how

many times a day; I think he knows what the cost is for the surgery. And the fact that it is not exchanged, it doesn't have to be in a report about what the costs are.

THE COURT: Let's limit the argument, all right, I am going to allow it in. The exception is noted for the record.

Q Doctor, do you need to hear the question?

A Yes, thank you.

MR. DERRICO: Could we just approach for a second please, please?

THE COURT: Yes.

(Off-the-record discussion at side bar between counsel and the Court.

THE COURT: Your exception is noted for the record.

Read the last question.

(Whereupon, the record was read)

A Yes. A lumbar laminectomy at L5-S1 with a decompression of the nerves, and a partial discectomy, with surgery, anesthesia, monitoring, and in hospital stay, are $15,000. The reconstructive procedure of the thoracic area with the surgery, the implants, the monitoring, the anesthesia, and the hospital stay, are $125,000.

MR. NOMBERG: Thank you, Doctor.

THE COURT: Thank you very much, counselor. Any cross-examination?

MR. DERRICO: You want me to start now, or take a break, what do you want to do?

THE COURT: If you need a break we can take one.

MR. DERRICO: We will take 5 minutes, just a five-minute break?

THE COURT: Five-minute break, thank you, very much.

(The jury leaves the courtroom at this time)

(Whereupon, the witness stepped down)

MR. DERRICO: I am going to run to the bathroom, but he just testified to $140,000 with a with the special damages, which plaintiff's counsel never gave us. This has been from day one, a trial by ambush by plaintiff's counsel, by telling us he doesn't have to give us this, he doesn't have to give us that, we didn't have to ask for that. The record is replete with it. That is all I care about. I want everything on the record. I think it is outrageous that this Court permitted that testimony, and didn't strike it. I knew he was going to do exactly that. That is all I want to put on the record, I am done, I

am running to the men's room.

MR. NOMBERG: With all due respect, I would like to respond.

THE COURT: Before you run, the Court may make an error, but in terms of calling it outrageous, I have an issue with that, and we will try to work this out.

He is going to do his cross-examination. I don't want to hear anything else, any more about this from you at this point in time.

MR. NOMBERG: All I want to say, your Honor, is I would like it -- it is 4:00 o'clock.

THE COURT: It is 4:05.

Can you just go to the restroom; thank you.

(Whereupon, a recess was taken at this time).

(The witness resumes the witness stand at this time)

(The jury enters the courtroom at this time)

THE COURT: Thank you very much. Mr. Derrico.

MR. DERRICO: Thank you.

CROSS-EXAMINATION

BY MR. DERRICO:

Q Good afternoon, Dr. Merola?

A Good afternoon.
Q We have never met before, have we?
A Correct, that is right.
Q Other than earlier today, correct?
A Yes.
Q All right, I will try to do this as quick as possible so we can get going. How much are you being paid to be here today?
A $750 an hour.
Q Okay, and is that portal to portal?
A Yes.
Q Okay, so when you left the office or left -- what time did you leave the office?
A 12:00 o'clock.
Q 12:00 o'clock, okay, so it is 10 after 4, so 2,800 so far, 3,000 so far?
A Yes.
Q Okay, that will bill Mr. Nomberg until you actually get back home or back to the office, correct?
A Correct.
Q So how far do you live from here?
A Manhattan, I will be going back to Manhattan.
Q It will take you about an hour to get there?
A As fast as the F train can go, yes.
Q So approximately like $6,000, probably for today,

fair estimate?

A Perhaps, yes.

Q How much did you charge him to prepare those reports; anything?

A No, I didn't prepare any reports.

Q Okay, I am sorry, those -- were there any charges for the narrative reports regarding your visits with Mr. Janda?

A Those were standard office visits.

Q Okay, and have you met with Mr. Nomberg?

A Yes.

Q And did you meet in the office, his office, where did you meet?

A We met here today.

Q This morning?

A Yes.

Q You went over some things with him?

A Yes.

Q He showed you some records?

A Yes.

Q Have you ever testified for him before?

A Yes.

Q How many times?

A Once.

Q And how long ago was that?

A I think that was about a year-and-a-half ago.
Q And now you have got three offices, right, Brooklyn, Manhattan and Queens?
A Brooklyn, Manhattan and Queens, correct.
Q And you do surgery 3 days a week?
A Correct.
Q And how many patients are you currently treating?
A You mean my log of patients that I have?
Q Yeah?
A It is in the thousands.
Q Okay, so, how much did you earn last year testifying?
A I only testify about 4 or 5 times per year.
Q That is it?
A Yes.
Q Not more than that?
A Not usually more than that, no.
Q Well, I mean when was the last time you testified?
A The last time I was in Court.
Q When was the last time you were in Court?
A It was last year, I don't remember the month that it was though.
Q You testified for that firm Sachs & Sachs a lot?
A I have testified for Sachs & Sachs, yes.

Q And okay, now, you would agree with me as a Doctor, you want an accurate history, right, for your client, prior medical history?

A A pertinent history is appropriate and desired, yes.

Q And that would include obtaining copies of all prior records for accidents that you are treating him or her for, yes or no?

A It depends on the situation, and it depends on the particular problem that I am treating.

Q Okay, you saw Mr. Janda for the first time September 2008, right?

A Correct.

Q When you see him for the first time, you didn't have the Elmhurst Hospital records, did you?

A I had the diagnostic imaging studies that he brought in to me.

Q Did you have his in hospital records?

A No.

Q All you have were copies of the films, or copies of the reports?

A I had his x-rays, his CT scan, and an MRI.

Q Now, he brought those to you, right?

A That's correct, yes.

Q Mr. Janda brought them to you?

A Yes.

Q But you didn't have Dr. Nagendra's records, did you?

A No.

Q That is the guy who had been treating him since November of 2005?

A That is it pain management doctor, yes.

Q Did you ever call Nagendra?

A No.

Q To this day you have never spoken to Nagendra about Mr. Janda, have you?

A Correct.

Q And I know you looked at the out patient records from Elmhurst Hospital today, outside in the hallway, but you never saw those before, did you?

A Correct.

Q Okay, now, when he came to see you the first time he had a translator, right?

A Yes, there was a translator.

Q But that person was from your office?

A It may very well have been, we have Polish translators in the office in Queens, yes.

Q But you are not certain who it was?

A No, but I did indicate that I had -- I did see him with the Polish translator.

Q Who referred Janda to you?

A He came in on his own.

Q Just kind of a miracle, just showed up?

MR. NOMBERG: Objection.

A No. I am a very well-known surgeon --

THE COURT: One second, objection sustained to the characterization. You can answer.

Q Just a fluke that he happened to show up? I'll withdraw the question.

THE COURT: Thank you.

Q So you are doing surgery like 3 days a week, right, and does that mean you are in the hospital pretty much morning to afternoon or --

A It depends on the, it depends on the day. Tuesdays are, I am usually in the hospital all day; Tuesday, Wednesday afternoon, all day Thursday.

Q And then you see patients, do you go to the Brooklyn office, one day the Manhattan office, another day the Queens office, another day?

A I have an office rotation, that is correct, yes.

Q And how many days a week do you work?

A Five days a week in office hours and surgery, and then I make rounds on the weekends.

Q When you say rounds, you go to visit patients at the hospital?

A That's correct.

Q That means You are not visiting, having patients come into your office?

A Not unless there is some extenuating circumstances on the weekends.

Q Now, patient records from Elmhurst, we agree that you never saw those, did you?

A I saw them today.

Q For the first time?

A Yes.

Q And give me a second here, Doctor.

Doctor, when you looked at the records from the in-patient records today, did you happen to note there was a neuro consultation done on October 6, 2006, did you see that?

A No, but I can look at it for you.

Q Okay, well, Doctor, just saving time, if I told you that the -- actually I will find the neuro consult, you want to take a look at that, Doctor, real quick, and tell me if you can find the neuro consult from 10/6/05?

THE COURT: You said, so the record is clear, you initially said '06, you mean --

MR. DERRICO: I am sorry, I meant '05.

THE COURT: Thank you.

Did you find it, Doctor?

THE WITNESS: Is it in the progress records, or is there separate consultation form.

Q It is a follow-up form, it is in the progress?

A Okay, because I see 10/7/05 neurosurgery in the progress note.

Q Can you take a look at that?

MR. DERRICO: May I approach the witness?

THE COURT: Yes.

Q Well, Doctor, would it surprise you to learn that there is actually the -- well, actually the 10/6 neuro consult and the 10/7 neuro consult 2005 says there is actually no cord compression, do you see that, Doctor?

A Yes.

Q It say no cord compression?

A Yes.

Q Now, in order to have symptoms, right, because there is a sheath that goes around the spinal cord, correct?

A Yes.

Q And what they call that, doctor?

A That is the thecal sac or the dura.

Q That is kind of like a protective covering, isn't it?

A Correct.

Q Kind of like on a telephone cord where the wires

run up there, and you have that tan covering, correct?

A Yes.

Q That goes over it. And the wires, so-to-speak, the nerve endings, right, in order for there to be symptoms of pain or neurological deficit, they have to be compressed or impinged upon, correct?

A The wires are separate from the cord.

Q The wires run up through the cord, right?

A No, it depends on where -- we are getting in some anatomy now, but I don't want to confuse that and/or use the incorrect terminology.

Q There is no cord compression in the 10/7/05 neurological consult, right?

A Yes, it says that.

Q Okay, and what does that mean, tell the ladies and gentlemen what that means, there is no cord compression, according to that note?

A It means that the spinal cord is not compressed.

Q Not being touched?

A The cord, correct, is not being compressed.

Q Now, in the, there is a note, do you see the records?

MR. DERRICO: May I approach the witness?

THE COURT: Yes.

Q With my notes, with my copy of this, just for

the -- we will go through mine, okay.

THE COURT: If you want to join him, counsel, you can.

MR. NOMBERG: Not necessary.

Q Now, Doctor, let's look here, now this is the Jamaica Hospital records, right?

THE COURT: For the record, it is the Elmhurst Hospital records.

MR. DERRICO: Elmhurst, I keep saying Jamaica, I am sorry.

THE COURT: Quite all right.

Q That is the admission 10/6/05?

A Yes.

Q And here at 1655, that is military time like 3:55, right, I think, right?

A 13 is one, 14, 15, so it is three something.

Q Something like that, we agree right? So it says he is in mild distress, right, mild distress?

A Yes.

Q It says here, has a zero with a line through it, right, it says TLR thoracic lumbar spine, right?

A Yes.

Q Okay, has a little tenderness there, right, zero thoracic lumbar spine tenderness, right?

A Yes.

Q He has no tenderness right here, right?
A That is what that says.
Q That is the date of the accident?
A Correct.
Q Okay, now, here 10/6, same date of the accident, it says when they are talking about the pain, right, it says one to three slight pain, that is what it says, right, we agree on that, one to three, slight pain?
A Yes.
Q Right, okay, now, oh, let's go to this one, the other -- the musculoskeletal system, the bones?
A And the muscles.
Q And the muscles, okay. When we have, let's say, I have an impingement on my shoulder, I can't really lift it up this high, so I have a limited range of motion because of an injury, right?
A Yes.
Q But I can rotate it this like, and my good arm, I will use my good arm, go like this, that is a full range of motion, right?
A On your left shoulder, yes.
Q On my left shoulder. If they were to say I had a full range of motion on my musculoskeletal system, that means I can do all of this, right, full range of motion, I move my back and my neck and my legs, right?

A That is a very generalized statement to make, and we wouldn't make that kind of statement. That is way too general.

Q Well, let's -- what does it say here in the record, musculoskeletal system, range of motion, it says moves all extremities freely, and they check that, right, and then it says full, means full range of motion, right, no weakness, right, no stiffness, right, there is nothing going on there, right, that is what it says, right, we agree on that?

A Under that section, yes.

Q Okay, when they come in with a back injury or neck injury, they are going to do a whole battery of tests on you, correct, yes or no?

A They should.

Q They should, okay.

Now, this is from 10/7/05, an assessment, you see the assessment, they are assessing his abilities, right, okay?

A Yes.

Q Activities of daily living, October 7th, right, dressing, I am sorry, let's start with ambulation, walking, right, what does it say?

A It actually says --

Q Upon admission we are talking about, he is

admitted on the 6th, right, and we are talking about a note from the 7th, right?

A No, but it says prior to admission, if you notice that says prior to admission.

Q You are right, 100 percent right on that, okay. Got me on that one, didn't you?

A Sorry.

Q Okay, okay, this is from 10/7/05, right, it is a progress note, progress note I read that one, right?

A Yes.

Q What does that say, no complaints of pain, no signs of pain, slept well?

A Yes.

Q Okay, now, here we go, another one, this is 10/7/05, MRI shows T12 edema, edema is swelling, right?

A Yes.

Q We expect that if you have a T12 fracture, we expect you have some swelling; it says no cord compression, right?

A Yes.

Q No post element fracture, what is that?

A No posterior element fracture.

Q Let's go to the next day, 10/8, progress notes nurse progress notes, A and O times 3, which means alert and oriented times 3?

A Yes.

Q Person, place, time, right?

A Yes.

Q Now, no complaints of pain offered at this time, right, he is not making any complaints of pain; okay.

Let's go to 10/10, nurse's note, there is a little circle with a zero slash, that means no complaints pain or other discomfort noted, patient resting quietly in bed, right?

A Yes.

Q Here it says on 10/12, able to provide self-care, right?

A Yes.

Q Oh, here we go, this is a neuro, this is the one I was looking for before, this is the neuro surgical consult, right?

A Yes.

Q That is from October 6, 10:30 p.m. so that is about six or seven hours after the accident, T12 fracture without cord involvement, no neuro deficits?

A Correct.

Q That is what it says right there?

A Yes.

Q The day of the accident, now this is the discharge summary we were talking about before, remember?

Okay, now, Doctor, it says here, and that is about 5 days after he was admitted right, they are looking at the patient discharge status, okay, ambulation, independent with minimal assistance, bathing, the same thing, dressing, able to do that, grooming, right, he can do that?

A Yes.

Q All these things, he can feed himself, go to the bathroom himself, no problem, stair climbing, cooking, communication, he can do all those things, and they basically discharged him that day, right?

A Yes.

Q Now, what I want to talk about at this point, Doctor, is the Elmhurst Hospital out-patient records, that we briefly discussed before, and once again, we agree that you never bothered to get these at any point in time prior to today, and looked at it for the first time out in the hallway with plaintiff's counsel before testifying before this jury, correct?

A Yes, I saw them today.

MR. DERRICO: Okay, so, may I approach the witness?

THE COURT: Yes, please.

Q Once again, we will, just use my notes, okay, so, let's jump, we already talked about the November 22, 2005

entry, so let's jump over to the January 24, 2006, okay.

Now, it notes that HE last visited on November 22, 2005, but it indicates smokes between ten and 15 cigarettes a day, and he drinks every day, drinks beer every day, right. Now you would agree with me, Doctor, you are a doctor 13 years, you have been doing this, surgeries and stuff?

A Yes.

Q Smoking inhibits healing, doesn't it?

MR. NOMBERG: Objection, your Honor, no disclosure on that.

THE COURT: Sustained.

MR. DERRICO: Can we have a side bar?

THE COURT: Yes.

(Off-the-record discussion at side bar between counsel and the Court)

THE COURT: The objection is overruled, you may answer the question.

Q So we agree that smoking and drinking inhibits healing, especially with fractures; correct?

A Smoking may inhibit the healing process.

Q Okay, now, let's look and see here, it says with a zero with a line going through it again, no motor sensory deficits, correct?

A Yes.

Q And what is that word right there next to it, zero?

A I got to be honest with you, I can't read it.

Q Me neither. So we will move on. It does say here he is neurologically stable, right?

A Yes.

Q Patient feels better, says that right there, 1/24/06, right, not taking any medications, does it say that?

A That says something about 4 weeks, I think.

Q No, it has a line through it a zero medications?

A I can't read that one, I am sorry.

Q Let's move on to the next.

This is March 30th, 2006, no weakness, right?

A Yes.

Q Okay, now, this is interesting. It has, it says a little circle with a line going through it and a triangle. I have learned that means change, right, so it says no change in angulation of T12, right?

A Yes.

Q So that means the T12 fracture that occurred, there has been no change in it, it is stable, it has remained the same?

A It hasn't angulated further, correct.

Q Neurologically stable, right, yes, is that a yes

or no?

A Yes.

Q No change, there is a triangle again, right, no change in last CT, and what does that say, do you know?

A I can't.

Q Okay, that is all right, it is a tough one?

A I can't make out that word.

Q There is no change since the last CAT scan?

A Correct.

Q Here's May 23, 2006, he is here for a follow up again, right, denies weakness, denies paresthesias, right, tell us what paresthesias is, what we commonly refer to as pins and needles?

A Altered sensation, yes.

Q Altered sensation. You fall asleep on your arm and you wake up and all of a sudden it hurts like pins and needles, right here they are saying there is no paresthesias?

A Yes.

Q This is -- what does that say right there, no longer wearing the brace?

A Yes.

Q Right, that is on May 23, 2006, no change in the angulation again, T12, right?

A Yes.

Q You have to speak up a little louder?
A Yes.
Q August 22, 2000, five months later?
THE COURT: 2,006.
Q 2006 I am sorry, I was going back in time. Motor 5-5, right, motor strength?
A Yeah, but it doesn't tell you where it is.
Q No sensory deficits?
A Also it doesn't tell you where it is.
Q But if it was a sensory deficit anywhere, they would say there is a sensory deficit here or there, yes or no?
A They should, but they are not telling us where there is or is not.
Q But they are not saying there is any, I mean it doesn't say there are any, does it, there?
A But it is a lack of information because it doesn't tell you there is or is not in any particular place, so it doesn't give me any information.
Q Well, it says S slash PT 12?
A Status post T12.
Q No change?
A No, it doesn't -- I am sorry status post means he has had a T12 fracture.
Q Neuro stable, right?

A Yes.

Q Now, let's see here, this is September 22, 2000, (sic) neuro stable, right?

A Yes.

Q Ambulating?

A Yes.

Q No sensory deficit, not wearing the brace again, right, still not wearing the brace?

A Correct.

Q This is 2007, January 30, 2007, patient ambulating well?

A Yes.

Q Indicates no gait issues, right, gait, walking right, no problems walking, no palpable deformity, right?

A Yes.

Q Palpating is when they touch him, right, they palpate, check, palpate the spine?

A Yes.

Q You like that.

Neuro intact?

A Yes.

Q Neurologically he is intact. 4/10/07, no gait issues, right, no problem with the walking?

A Hang on a second, no gait.

Q Instabilities?

A I can't make that out.

Q It doesn't indicate, there is any problem with the walking?

A It doesn't tell us anything about his gait.

Q Okay, what does that say right up there, it is a circle with a line through it, it says no pain, doesn't it?

A Yes.

Q 4/10/07, no pain, he is not in any pain. What is that, no complaints?

A Hang on a second, it says no --

Q I can't make out that word either?

A It almost looks like shoulder.

Q No shoulder, all right, let's move on.

Here is 1/8, '08, January 8, '08, pain zero, he is not in any pain in January 2008, right? Again it says motor sensory, doesn't really say, it just says zero, but okay, no gross interval change?

A Yes.

Q Okay, that is the spacing between the discs right?

A The -- well, it says T12.

Q T12, so there is no change there, pretty much the same, okay, 5/13/08, feels better, 5-5 strength, sensory intact, normal flexation, normal flex, right, normal

flexation?

A No, normal reflexion.

Q Normal reflex?

A Yes.

Q He has normal reflexes?

A Yes.

Q They did a CT to check for the alignment?

A Yes.

Q You didn't have that records?

A No.

Q Never bothered to get them?

THE COURT: Do you want an answer to that question?

Q You never bothered to get them, did you, Doctor?

A I did not obtain those records, correct.

Q Now, let's talk next about the diagnostic tests; you have talked about some of them?

MR. DERRICO: And may I approach the witness?

THE COURT: Yes.

Q Okay, now, did you review all of the films from Elmhurst Hospital?

A I reviewed the films he brought to me which were the x-rays, his CAT scan, and the MRI.

Q Okay, and you then, this is in September,

correct, September 2008?

A Correct.

Q Now, did you -- let's go through these?

MR. DERRICO: Can we just approach for one quick second, your Honor, one second? I am moving along as quick as I can.

THE COURT: Yes.

(Whereupon, there was an off-the-record discussion at side bar between counsel and the Court)

Q All right, did you look at the CT scan of the lumbar spine December 29, 2005?

A That is the Elmhurst Hospital CT scan?

Q Yes?

A Yes.

Q And we agree that according to that --

MR. DERRICO: If I might approach?

THE COURT: Yes.

MR. DERRICO: Thank you.

MR. NOMBERG: All right.

MR. DERRICO: I am not looking at that, I am looking at my notes.

Q All right, so, here this is an impression, right, that is after the radiologist reads it, they tell you what they see and then they give you their impression, their findings, right?

A That is the radiologist writing that report.

Q So they talk about the old burst compression fracture involving the T12, right?

A Yes.

Q Now, they say there is no change in the amount of retropulsion in the T12 vertebrae, right?

A Yes.

Q Retropulsion, we know is when it pushes back, right?

A Yes.

Q So, they are comparing this in December 29, 2005 they are comparing this study to the prior study, which is done in October 6, 2005?

A Yes.

Q Four months ago, and they are saying looks the same, no change?

A Yes.

Q Now, they say there is no change in the amount of the narrowing of the canal, spinal canal?

A Yes.

Q That is the same as the study 4 months ago, and there is no evidence of paravertebral soft tissue swelling, that means the swelling has gone done, right, the edema that was there, no longer there?

A It means that the swelling from the acute

fracture is subsiding.

Q Okay, and there is no evidence of herniated or bulging intervertebral disc; correct?

A Yes.

Q There is no, right?

A On the CAT scan.

Q According to this?

A According to the report.

Q And there is no other abnormalities located in the spinal canal, right, this is taken how many months after the accident, 2 months after the accident?

A Correct.

Q That is compared with the one that was done right at, I mean the day of the accident, right?

A Yes.

Q So it looks the same.

Then we go to February 2, 2006, no subluxation or posterior bulging into the spinal canal. Now, subluxation we agree, is like basically it is a fancy term for meaning movement, right, the bones move?

A Alignment.

Q Alignment, okay. So when we talk about a disc, that is the disc, I mean that is the vertebrae, and then there is the vertebrae, and that is the disc, right, that goes all the way down, right?

A Yes.

Q So we are talking about when there is no subluxation, that means this hasn't moved, right, there is no shifting of it, right?

A Subluxation means that they, the vertebral bodies line up on each other.

Q They are lining up, right, and here in February 2, 2006, this is, you know, what, 4 months after the accident, they are saying everything lines up, right, yes or no?

A That is what that report says.

Q That is what that report says?

A Yes.

Q Disc spaces are normal, right?

A It says.

Q Normal disc spaces?

A Normal disc spaces, yes.

Q And normal lordosis?

A Yes.

Q When we talk about lordosis, that is another fancy term for the way your spine curves, right?

A Lower back.

Q Lower back, it goes -- see if I can get it the right way. I am doing it backwards with my other hand, you come, and you come out, right, this would be your hips

here, right, and your little legs would go right there, right that is your, basically your spine. It is that right here, and it does a little curve, right?

A Yes.

Q We call that lordosis?

A No, we call that your spinal curve lordosis refers to the lower part of the back.

Q Right here?

A Where there is a reverse curve.

Q That is the reverse, it curves?

A Correct, there is an upper curvature in your upper back, and that is what we call a kifosis, and in the lower back there is a reverse curvature to balance the kifosis.

Q That is up here?

A And that is a lordosis, the reverse.

Q The lordosis here is -- it is normal?

A In the lumbar spine, correct.

Q That is where the L5-S1 is located?

A The L5-S1 is the junction between the lumbar spine and the sacrum.

Q Right down here?

A Yes.

Q And right there they are saying at that point in time 4 months after the accident looks normal, right?

A The lordosis is normal, yes.

Q And the sacrum, and sacroiliac joints are normal as well?

A Yes.

Q Now, going to 2/8/06, which is only a couple weeks later, talk about the old burst fracture without change in the amount of compression compared to the previous study on December 29th; correct?

A Yes.

Q Looks the same, it is not changing?

A The fracture, correct.

Q Okay, no change in the amount of retropulsion, right, staying the same; in fact, they say it is an unremarkable scan of the lumbosacral spine, right?

A That is what they say.

Q Unremarkable?

A Unremarkable, yes.

Q We go to 8/31/06, T1-T12 disc space narrowing, stable since 2/2/06, the spinal canal is not compromised; doesn't that say that?

A That is what that says, yes.

Q So there is nothing, there is nothing pressing upon the spinal cord at that point in time?

A That is what the report says.

Q Okay, all right.

Now we go to 2/8/07, okay, this is now, you know, a year and 18 months after the accident, approximately, okay, T12 unchanged in parens, from prior study, right?

A Yes.

Q Bony pedicles are preserved. Now, the bony pedicles are portions of the vertebrae itself, right?

A Yes.

Q Those are kind of like the wings of the vertebrae, so to speak?a

A They are columns that connect the vertebral body to what we call the posterior helmuts.

Q Preserved, right?

A Yes.

Q No areas of fracture or subluxation are noted, right?

A Yes.

Q This is 14 to 16 months after the accident, right, okay, so everything is still in alignment, we are doing okay, right, no significant interval change from the previous examination, right?

A That is what the report says, correct.

Q 3/12/07, without change in the amount of cord compression compared with the previous study of February 2006, February 28th?

A So this says there is cord compression, this is

contradicting its own report.

Q No, let's see let's move on here. Let's find the 2/28 --

MR. NOMBERG: May I have the date of that, please?

THE COURT: Yes, can we have the date again of that report that you are reading?

MR. DERRICO: That date is 3/12/07, okay.

Q Now here they say they are still no paravertebral soft tissue swelling, right?

A Yes.

Q No evidence of osteolytic or osteoblastic lesions?

A That means cancer.

Q Yes, okay, no evidence of herniated or bulging intervertebral discs?

A Correct.

Q No other abnormalities?

A That is what it says, yes.

Q Okay, let's go to 12/18/07, MRI thoracic, okay, there is no compression of the conus medullaris, or thoracic spinal cord, that is what it says, correct?

A Yes.

Q This is an MRI, an MRI is a better than a CT scan?

A It is different than a CT scan.
Q Is it better?
A No.
Q It is not?
A It is different.
Q So if a doctor testified on this stand that it is a better examination, you wouldn't agree with him on that?
A Depends upon what we are calling better, in what respect. Because MRIs and CAT scans look at different things in different ways. A CAT scan is an x-ray, so it looks at bone density. An MRI is a test that looks at soft tissue and water content, so there are differences.
Q Okay, but if someone said that an MRI is a better examination all around, you would disagree with that?
MR. NOMBERG: Asked and answered.
A I would have to ask that someone --
THE COURT: There is an objection. I will overrule the objection and allow him to answer.
Q You have to disagree with that?
A To -- I have to ask him what he means by better. I don't know what he is telling me by better. We need to specify in what respect we are talking about better.
Q I am going to ask him on Wednesday when he comes back on the stand?
MR. NOMBERG: Objection.

THE COURT: Sustained. You can strike that from the record.

Q Now, it says no compression, right, okay, it says no abnormal signal in the thoracic spinal cord; correct?

A Yes.

Q It is working as it should work, correct?

A Doesn't tell you whether or not it is working, it just tells you there is no abnormal signal in the cord.

Q No evidence of abnormal intensity signal -- I will read it again -- epidural or intradural, correct?

A Correct.

Q It appears normal, right?

A Yes.

Q Once again, here we go, no disc herniation, right?

A Yes.

Q No central spinal canal stenosis, or neuro foramen narrowing, right?

A Yes.

Q That is normal?

A According to the report, yes.

Q Thoracic spinal cord is normal in size and shape, normal again, right?

A Thoracic cord, yes.

Q Last one we are going to look at is June 17, '08,

thoracic, okay, let's see here, okay, they have no swelling, right, no paraspinal swelling, there is no evidence of herniated or bulging intervertebral discs, right?

A That is what that says, yes.

Q No other abnormalities are seen in the thoracic spinal canal, correct?

A Yes.

Q So, you didn't look at these?

A The reports?

Q Yes?

A No, I remember the films myself.

Q But when all of the films --

A I read those films that he brought to me, including the x-rays the CAT scan and the MRI.

Q Now, again, and then --

MR. DERRICO: I am almost done, your Honor.

THE COURT: Thank you.

Q I just want to look at your -- do you know the difference between the word may, and will?

A Yes.

Q Okay, so, may is not specific, is it something may happen, it may rain tomorrow, right?

A Yes.

Q We don't know if it is going to rain but it may?

Now if I say it will rain tomorrow, I am saying that it actually will rain tomorrow, right?

A Yes.

Q No doubt in my mind?

A Correct.

Q But if I say it may rain, I am leaving it open that it might happen, might not happen, right?

A Tomorrow.

Q Yes, right?

A Yes.

MR. DERRICO: Can I approach the witness?

THE COURT: Yes.

Q Now, Doctor, your last report dated January 5th, 2009, I want you to read the highlighted portion, start with the word I meaning you, right? And I will stop you at some point.

A "I have explained to Mr. Janda at length, and in detail that his pain may" --

Q Stop, may, right, not will, but may?

MR. NOMBERG: Objection, your Honor, he is allowed to at least finish the sentence. That is taking it out of context.

MR. DERRICO: I told him I was going to stop him mid sentence for this purpose.

THE COURT: You also allow him to finish the

sentence.

MR. DERRICO: Absolutely.

THE COURT: Thank you. Overruled.

Q Okay, so we are saying this pain may over time cause further -- may, right, you are saying it might, you are not saying it will, you are saying it might, right? Okay, go ahead continue on?

A Can I start over?

Q Sure, go ahead?

A "I have explained to Mr. Janda at length and in detail that this pain may over time cause further deterioration of his spinal column, alter sagittal balance and require corrective surgery up to and including anterior posterior reconstruction, particularly as he ages."

Q Go ahead?

A "Within a reasonable degree of medical certainty this may happen" --

Q May, again, right, you are not saying it will happen, you are saying it may happen?

MR. NOMBERG: Your Honor, again, I ask him to allow the witness to finish the sentence.

THE COURT: You are overruled. He is going to allow him to finish the sentence.

Q Now, finish that sentence for me?

A "Okay, within a reasonable degree of medical certainty this may happen in 15 years or so."

Q May, there is no guarantee, no, in that sentence? You do not say this will happen, do you say it may happen; am I right or wrong?

A I gave a reasonable degree of medical certainty.

Q But you say --

A I use the term may.

Q You use the term may, okay.

MR. DERRICO: One second.

(Pause in the proceedings)

MR. DERRICO: I have no further questions at this time.

THE COURT: Thank you very much.

Any redirect?

MR. NOMBERG: Yes, briefly, your Honor.

THE COURT: Good, thank you.

REDIRECT EXAMINATION

BY MR. NOMBERG:

Q Doctor, from the entries that defense counsel has been reading to you throughout, do any of those entries that he read change any of your prior answers regarding opinions regarding today's testimony?

A No, they do not.

Q Could you explain, why if at all --

MR. DERRICO: Objection, it is such a broad question.

THE COURT: You are overruled.

MR. DERRICO: Okay.

A First of all, the clinic notes that I read from, the neuro surgical clinic were different doctors on different days. It was never the same physician at any given time, so there was real, no continuity of care, that is No. 1. No. 2, we were reading radiology reports and we are relying on a radiologist who never has the opportunity to open up a patient and look inside them to see what he thinks about what a particular exam or an x-ray or an MRI looks like. And I reviewed the actual films themselves, and was able to make my own interpretation, and reading of those. And given the fact that Mr. Janda came to me because he was basically being ignored, or felt that he was being ignored --

MR. DERRICO: Objection to what Mr. Janda felt.

THE COURT: Sustained, stricken from the record, the jury is told not to consider it.

A Because Mr. Janda had progressive pain, those were clear indications that surgical intervention was necessary and required for the laminectomy.

Q And Doctor, what is the significance of that one

note that defense counsel read to you where it said "cord not compressed, if any?"

A The spinal cord is a portion of a central nervous system, or your brain. The spinal cord ends in a structure called the conus medullaris. The thoracic spine contains the spinal cord, the thoracal lumbar junction contains what is called the conus medullaris. And then it contains the nerve roots, also known as the cauda equina. That area where the fracture is does not contain any spinal cord per se, and that is why there is no spinal cord compression.

Q And, that note that defense counsel read to you 3/12/07 that mentioned cord compression; what was the significance of that, if any?

A 3/12/07, I am sorry, that was the note regarding --

Q The cord compression, that defense counsel -- where you stated to defense counsel, it does say cord compression?

A Correct, the note indicated that there was no progressive cord compression, which meant that the prior notes that said there was no cord compression had to say there was cord compression, because they were comparing it to something that they said wasn't there, so it was contradictory.

Q If I may, your Honor -- again, if defense counsel, to save time, to show you a selected portions of the clinic notes that were not read to you, if defense counsel wants to look over and the Court has no problem, I just want to show you a couple of entries real quick?

MR. DERRICO: Goes beyond the scope. He had the opportunity at direct examination.

MR. NOMBERG: Your Honor, he read over certain limited notes that, trying to insinuate things, and I want them to see the notes that show contrary to what he was asserting.

THE COURT: I think in the interest of justice, since you read the --

MR. DERRICO: But he did, your Honor, in his direct examination, he did read from those notes, and he did point out what he thought to be were significant entries, I pointed out other significant -- he can't now go back and point out other significant entries. It is going beyond the scope.

MR. NOMBERG: I did not -- it is redirect regarding what he brought out. I did not go into detail regarding every clinic note regarding the complaints of lower back pain, which defense counsel did. I want to show him the notes.

THE COURT: Well, there was nothing with

respect to lower back pain or any notes with respect to lower back pain in the clinic notes.

MR. NOMBERG: That is what he was -- that is exactly what he was trying to suggest, your Honor, and that is why I want to show, let him read this, your Honor.

MR. DERRICO: Your Honor, I didn't make that -- I read only what I thought were significant entries. He could have done this on direct. He should have done this on direct. The fact he didn't do it on direct, is not my fault. He doesn't get to do clean up after I do my cross-examination. The idea is he presents his evidence, then I get to cross-examine on it. He doesn't get to do everything he forgets to do after. That is not the way it works.

MR. NOMBERG: With all due respect --

THE COURT: Can we do a quick side bar?

(Whereupon, there was an off-the-record discussion at side bar between counsel and the Court)

THE COURT: Briefly, please. Are you withdrawing your objection?

MR. DERRICO: No, I am not.

THE COURT: You are overruled.

Q Let's start with going backwards, the one I think that is 1/8?

A January 8, 2008.

Q Okay, remember defense counsel read this to you where it says pain equals zero?

A Yes.

Q Could you read this part here?

A Okay, it says complains of back pain, right hip pain, intermittently.

Q And could you read the 5/13/08 entry that I have highlighted here has well?

A Pain to lower back.

Q And could you read the 10/9/07 entry that I have highlighted here?

A Intermittently low back pain and right knee pain.

Q And could you read the 9/26, I think that is '06, entry?

A Yes, still complains of low back pain, sometimes radiating to the right lower extremity.

Q Okay, and this entry here?

A With severe wedge compression.

Q What is that?

A That is the T12 fracture.

Q And could you read the 8/22/06 neurosurgery note right here?

A Complains of low back pain, sometimes radiating to the right lower extremity.

Q And how about the 5/23/06 entry?
A Positive low back pain.
Q And that is again a neuro surgery note?
A Yes.
Q 3/7/06?
A Mild low back pain.

MR. DERRICO: Your Honor, I object, this goes beyond what I did.

MR. NOMBERG: Your Honor, I finished with this.

Q And lastly, the that MRI film, of 2008, is there actually a report in there?
A Yes, there is.
Q Okay, and who is the radiologist for that, on that report?
A Karl L. Hussman, M.D.
Q Are any of the findings that you found on that film inconsistent with what that radiologist wrote?

MR. DERRICO: Objection, this goes beyond the scope.

THE COURT: It does go beyond the scope. The objection is sustained.

MR. NOMBERG: Your Honor, I ask that he be permitted to just read what it says because he has brought out numerous CAT scan films as to what they

say or do not say. So I would like to let them know what the actual radiologist in this case says, and it is in evidence, your Honor.

MR. DERRICO: I am going to object to that characterization, and can I just see what he is referring to, please?

THE COURT: Yeah, I will allow you to see what he is referring to but the characterization is you did, in fact, permit the radiology reports.

MR. DERRICO: In fact, I never asked anything about this report.

THE COURT: No, I know you didn't.

MR. DERRICO: He can't bring it up now. He should have done that before, never asked anything about that.

THE COURT: I have allowed a great deal of latitude.

MR. NOMBERG: Your Honor, it is my last question that brought out -- trying to show there is inconsistencies with his medical condition, so that contradicts that, Your Honor.

THE COURT: He is sustained. Your objection is noted for the record.

MR. NOMBERG: I have nothing further.

THE COURT: Thank you very much.

Anything further?

MR. DERRICO: Nothing.

THE COURT: Thank you very much.

At this point in time it is only five after five, sorry for the slight delay. I ask the Doctor to step down now, and we are going to recess for the day.

(Whereupon, the witness stepped down).

THE COURT: I want to thank you for your attentiveness throughout today, and again I am going to ask you not to even reflect upon it, what has occurred here. Certainly don't talk about it with anybody else, connected with this trial or not. We will see you tomorrow morning at 9:.30 thank you.

(The jury leaves the courtroom at this time)

THE COURT: Before we make it a rap, is there anything for the record? Okay, is there anything for the record?

MR. DERRICO: I am just going to renew my application that the testimony regarding the need for future surgery be stricken. I do not believe this doctor has indicated anything other than it was stable, he used the word "may" in a number of reports, it is pure speculation. I think that it should be stricken from the record.

THE COURT: Given the renewal, I will

reserve on the renewal of his application, in light of the complete testimony, and I will render a subsequent opinion, yes, decision.

MR. NOMBERG: May I place on the record real quick, my objection that I made regarding the preclusion of allowing the doctor to read the MRI film. My offer of proof, for the record, the doctor was going to say that had he been permitted to read that film, he would have seen there was a disc herniation in the 2005 MRI film of the lumbar spine taken at Elmhurst Hospital, and this Court precluded that, reading in the testimony, so I want to preserve my objection for the record, your Honor.

THE COURT: The report has to do with not an MRI film from Elmhurst Hospital, the report had to do with the Alpha 3T MRI.

MR. NOMBERG: Different objection, your Honor, I wasn't referring to the one just now. I was referring to earlier --

THE COURT: I missed that.

MR. NOMBERG: Your Honor, remember earlier you precluded on the side bar the doctor from reading the 2005 lumbar MRI that the doctor was going to testify.

MR. DERRICO: He is right, he is talking

about the October 6 --

MR. NOMBERG: October 6th or 7'05 MRI that your Honor precluded the doctor from testifying regarding reading it, and he would have read that it showed that the disc herniation at that time --

MR. DERRICO: Just for clarification purposes, I don't think the Court was precluding him from reading the report. I think the Court was precluding him from rendering an opinion in contradiction to what the report said. He was going to give his own opinion as to what the MRI showed.

THE COURT: That is quite different from what you just said. The report did not show a herniation. I precluded him from reading the MRI with respect to the, to the alleged, or the alleged herniation, because there has been nothing prior in anything that you submitted or he submitted, or any of your experts submitted with respect to the fact there was a herniation at that time. And that is why there was that preclusion. So you switched it. It wasn't about reading a report, it was about permitting this expert to read the MRI, to give his analysis of that MRI today, that was different from the report.

MR. NOMBERG: I thought I said that, your Honor, I didn't say reading the report.

THE COURT: No, you switched the whole thing.

MR. NOMBERG: Just now in my statement, your Honor, well, if you believe that I did --

THE COURT: In any event, you are renewing it and it is still as it is. Okay, thank you, preserved for the record. I want to thank the staff for staying late.

MR. DERRICO: I want to thank them as well.

(Whereupon, the Court recessed and case adjourned to February 10, 2009 at 9:30 a.m.)