SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY : CIVIL TERM : PART IA-10
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WILLIAM BURNS and KAREN BURNS,

Plaintiff(s), INDEX NO. 305430-2008

-against-

1 BRYANT PARK, LLC, DURST DEVELOPMENT LLC, TISHMAN CONSTRUCTION CORPORATION and REGIONAL SCAFFOLDING & HOISTING CO, INC.,

Defendant(s). Trial
----------x

June 9, 2016

851 Grand Concourse
Bronx, New York 10451

B E F O R E:

THE HONORABLE LIZBETH GONZALEZ,

JUSTICE.

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THE COURT OFFICER: All rise. Jurors entering.

(Whereupon, the jury enters the courtroom.)

THE COURT: Alternate number one is now Juror Number 4.

Jurors, we're going to review our schedule. So please take out your phones or your pads, whatever you have, on which you keep your calendars. If you need a piece of paper, we will gladly give it to you. Anybody need paper or a pen?

Today is Thursday, June 9. We're in session tomorrow, Friday, June 10. We are then in session three days in a row -- I have a changed my schedule -- Wednesday the 15th, Thursday the 16th, and that's it for that week.

THE JUROR: You said three days. You only gave us two.

THE COURT: I can't add either.

MR. McCRORIE: It's three days the week after.

THE COURT: Two days. Sorry. Two days next week: Wednesday the 15th, Thursday the 16th.

Then we go to the week of the 20th. We have the 21st, Tuesday; the 22nd, Wednesday, and the 23rd.

THE JUROR: I have an issue on the 22nd.

THE COURT: What's wrong with the 22nd?

THE JUROR: It's my daughter's graduation. I know she's in kindergarten, but my wife will kill me.

THE COURT: Is her graduation all day?

THE JUROR: No, it's in the morning. I believe it's around 10:00 A.M.

THE COURT: So, were your plans to go there and be done, or were your plans to have a family day?

THE JUROR: Yeah.

THE COURT: Which?

THE JUROR: To have a family day afterwards.

THE COURT: That's Wednesday the 22nd?

THE JUROR: Yes, ma'am.

THE COURT: Counsels, come up a second. Let's talk. We're going to talk in the robing room.

(Discussion off the record.)

THE COURT: Jurors, so this is what we're going to do. I understand that there's a graduation issue for the 23rd and a graduation issue for the 22nd, right? Juror Number 1 has a problem for the 22nd. Juror Number 4 has an issue, a graduation issue, for 23rd.

We're going to go ahead with the schedule that I set forth, including the 22nd and the 23rd. You never know what's going to happen at a trial. You never know if all the witnesses are going to go forward or not. We're just going to go through with that schedule as is.

So, do I need to repeat the schedule?

THE JUROR: Yes, please.

THE COURT: One more time. So, today is the 9th. We continue tomorrow, the 10th. We then go to the 15th and the 16th. We then go to the 21st, 22nd and the 23rd. On the 23rd I anticipate giving you the case for deliberations.

Now, I'd like you to be here tomorrow at 9:30 ready to start so that we can finish. We probably have at least two witnesses for tomorrow. We're trying to use the time as best as we can, and the attorneys have asked that we start earlier tomorrow because that will make a difference. Is that good? So, I essentially need you here around 9:15 so we can start at 9:30. All right?

THE JURORS: Yes.

THE COURT: Mr. McCrorie.

Let me change that. We had a witness on the stand. That person is going to continue his cross-examination tomorrow, right?

MR. KAMINSKY: My understanding is Dr. Merola will be here tomorrow.

MR. McCRORIE: Yes.

MR. KAMINSKY: And I have a stipulated to allow Mr. McCrorie to call another witness out of turn.

THE COURT: Excellent.

So, Mr. McCrorie, who are you calling as the plaintiffs' next witness.

MR. McCRORIE: Mr. Mandelbaum in the courtroom, Dr. Thomas' partner.

THE COURT: Thank you.

THE COURT OFFICER: Raise your right hand.

Do you affirm under penalties of perjury that the testimony you shall give will be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE COURT OFFICER: Doctor, please state your name and business address for the record.

THE COURT CLERK: Dr. Chaim Mandelbaum, 10 Union Square East, Suite 4K in Manhattan, New York, New York 10003.

THE COURT: Doctor, what's your area of specialty, please?

THE WITNESS: I am board certified in anesthesiology and pain medicine, and I'm practicing pain management.

THE COURT: Thank you.

Counsel, you may inquire.

MR. McCRORIE: Thank you, your Honor.

D R. C H A I M M A N D E L B A U M, having first affirmed, testified as follows:

DIRECT EXAMINATION

BY MR. McCRORIE:

Q Dr. Mandelbaum, when did you become licensed to practice medicine in the State of New York?

A My New York license was issued in 1993.

Q Can you please, directing your loud answers at the jury, could you please tell the jury, as succinctly as you can without leaving anything out, your educational background, work history, fellowship and any accolades you feel you'd like to share from your CV?

A Okay. I attended Yeshiva University for college. After graduating college, I went to Downstate, which is in Brooklyn, SUNY Health Science Center in Brooklyn, attended four years of medical school there.

Afterwards, I spent a year at Staten Island University Hospital doing internal medicine. And after that I did my residency in anesthesiology at Mount Sinai Medical Center, which is also in Manhattan on 98th Street towards Harlem. I did three years of anesthesiology there, afterwards doing a year of interventional pain medicine, also at Mount Sinai.

After finishing my anesthesiology, I took my board examinations in both anesthesiology and pain medicine.

After that I worked for a little over four years in New Jersey at Trinitas Hospital, which is in Elizabeth, New Jersey, practicing both anesthesiology as an attending and doing pain medicine.

Afterwards, I teamed up with Dr. Thomas and was working

with him doing pain management at, at that time it was Cabrini Medical Center, which subsequently closed, and then we moved over to Beth Israel where our practice right now is part of Beth Israel, recently taken over by Mount Sinai. So, there was a merger over there. And right now I'm practicing at Mount Sinai at their Beth Israel facility doing pain management.

I also have an affiliation at New York Methodist Hospital in Brooklyn where we have our other office in Park Slope, Brooklyn near the hospital.

Q Can you briefly just tell this jury when you use the term saying at Mount Sinai you did interventional pain management when you were talking about your training, what is interventional pain management?

A Well, part of pain management is dealing with chronic pain disorders. We use a wide variety of different modalities to help treat pain, including medication. In addition, there are certain procedures and interventions that could be very helpful for different disorders or different pain, especially with nerve-type pain, which could involve back pain, neck pain, headache.

I guess we can go more into details, but the interventional pain management aspect of it is quite different than the physical therapy, where they don't do as much as far as procedures goes.

Q Doctor, just for your examination to make it go

quicker, I would like you to not give the jury any anatomy -- assume they know the anatomy of the spine -- unless you're asked a specific question about anatomy. Okay?

A Yes.

Q And unless you're asked to define words, they've already been discussed with the jury.

So, are you board certified?

A Yes.

Q In what area are you board certified?

A I'm both board certified in anesthesiology and subspecialty board certified in interventional pain medicine.

Q Can you please describe your current practice? You told the jury there are two offices. What is the name of it, where is it located, etcetera?

A I'm part of a practice called Comprehensive Pain Management, which has two offices, one in New York City, which I told you about. It's affiliated with Mount Sinai. Our office is located in Union Square at the Phillips Ambulatory Care building. The second office is in Park Slope, Brooklyn, on Seventh Avenue near Methodist Hospital.

We see a wide variety of different pain management. We see a wide variety of patients, including some personal injury, including a lot of older patients, chronic back pain, a lot of headaches, migraines, chronic migraine-type headaches, neuropathic pain. We do see a large variety of different types

of pain disorders.

Q Does your practice accept work-related accidents and everything that comes along with that?

MR. KAMINSKY: Objection.

A Yes.

THE COURT: Wait. When there is an objection, you have to stop.

THE WITNESS: I'm sorry.

THE COURT: Sustained.

MR. KAMINSKY: Move to strike the answer.

THE COURT: Yes, let's strike that.

Q Have you ever testified in court before?

A Yes.

Q Can you tell the jury -- you told us how long you've been practicing, since the nineties.

How many times have you stepped in to court on behalf of a patient to testify?

A Once.

Q Do you know when that was?

A Approximately two -- a little over two years ago.

Q And was I the attorney and was Sacks and Sacks the law firm?

A Yes.

Q Representing a construction worker?

A Yes.

Q Was Mr. Kaminsky representing the construction company?
A Yes.
Q So, this is your second time ever in court?
A Yes.
Q Is your practice being paid for your time away from your practice?
A Yes.
Q At what rate are you being paid for today, including anything else that we did?
A At $500 an hour.
Q Can you tell the jury, approximately, how many patients your practice sees a month?
A We see close to 600 patients between the two offices.
Q Okay. And out of those 600, how many of them are work related or litigation related?
A Approximately 30 percent.
THE COURT: Counsel, is it two separate questions?
Q Well, how many of those patients are patients that have either a motor vehicle accident or work accident where there's also litigation?
A Approximately 30 percent. I don't know which ones are actually having litigation.
Q Does your office also accept all types of patients, like you said, chronic?
A Yes.

Q Can you just tell the jury, your partner, you told us his name, Dr. Thomas, what's his first name?

A My partner, who I've been with for almost the past 20 years, is Dr. Gary Thomas.

Q And not all of the details, but where is Dr. Thomas this week?

A Unfortunately, he had a medical emergency and --

MR. KAMINSKY: Objection.

THE COURT: It was explained to the jury before.

Q Is he in the practice this week, next month, whatever?

A No, he'll be out of the practice.

Q Hopefully for the short term?

A Correct.

Q In that interim, it's just you in the office?

A Yes.

Q Did you and I meet in preparation of your testimony here today?

A Yes.

Q And did you have any knowledge as to whether or not I met with Dr. Thomas at length prior to this medical emergency?

A Yes, you did.

Q Okay. So, just tell the jury when we met.

A We met this past Monday.

Q And not for the purposes of a visit, the record will show when you saw Mr. Burns, but did Mr. Burns also come, not to

sit in on the meeting, but did you also just see him to acquaint yourself with his case?

A Yes. I asked for Mr. Burns to come to the office informally just to reacquaint myself with the case while I was reviewing the chart.

Q Your chart is in evidence. I had it in my head, but I forgot. It's Plaintiffs' 11. You can read from it.

Can you tell the jury when Mr. Burns became a patient of the practice, Comprehensive Pain Management and Anesthesia Services, PC?

A Yes. The first time that he came to our office was October 19, 2010.

Q And on that date, was a history taken?

A Yes.

Q Can you please relay the basic history that was taken?

A I'm going to access that first note.

Q We're not going to do this for each note, just the beginning one and one or two others.

A On October 19, 2010, he was 52 years old at that time, and he came to our office stating or giving a history of being in, it was a construction site where there was an elevator outside the construction. As it was coming down, the last 15 feet the elevator --

MR. KAMINSKY: Objection, Judge.

THE COURT: Sustained.

MR. KAMINSKY: Move to strike.

THE COURT: Sustained.

Jurors, you will disregard the information about the distance.

Q Not the distance.

Did you know how the accident happened?

A Yes.

Q What other information did Mr. Burns give you in addition to how the accident happened, give your practice?

A That there was a free fall from the elevator.

Q Other information, other than about the accident. What were his symptoms?

MR. KAMINSKY: Judge.

A Yes.

MR. KAMINSKY: The witness knows better. I move to strike that.

MR. McCRORIE: Judge, it's in evidence.

THE COURT: Wait. Wait. Wait. Don't make comments.

Counsel, you know that what can come into evidence, as far as the history of the accident, is information that's relevant to diagnosis and treatment.

Doctor, I'm going to ask you to confine your language accordingly.

Jurors, what you will retain for this is simply

the fact that there was a construction accident involving an elevator, an elevator fall. End of story. Okay?

Q Was the mechanism of injury important to you in treating or formulating a treatment plan with regard to Mr. Burns or any other patient?

A Yes.

Q Without giving us details of what was relayed to you, can you tell the jury your understanding of the mechanism of injury, not how it happened, the mechanism of the injury?

A That there was an injury to --

MR. KAMINSKY: Judge, I'm going to object to this testimony from this witness.

THE COURT: Hold on.

Do you understand the difference between the two things that the question asks you?

THE WITNESS: Do you want to elaborate?

THE COURT: Yes. Why don't you decipher your question a little more simply, Counsel.

MR. McCRORIE: Yes, your Honor.

Q In terms of your treatment and your intended treatment of the patient, was it important for you to know the mechanism of his injury?

A Yes.

Q Is that important in all patients?

A Yes.

Q What was your understanding of the mechanism of the injury?

MR. KAMINSKY: Objection.

THE COURT: Sustained.

Let's move on, Counsel.

Q Can you tell the jury, make it a synopsis -- let's do this: On that day Mr. Burns filled out an assessment form, correct?

A Correct.

Q Can you go to that assessment form?

A Yes, I have it.

Q Can you please read to the jury what the problem that he was there to help him with?

THE COURT: You mean what he complained of?

Q What did he write down and what is the problem?

A He wrote down to the question of what problem he'd like me to address --

MR. KAMINSKY: Judge, I'm going to object to this.

THE COURT: We're talking about the symptoms, Counsel.

Come up.

(Discussion off the record.)

THE COURT: Doctor, after conferencing the matter with the attorneys up here, the question is what were the patient's complaints.

THE WITNESS: He had described constant back and neck pain.

Q And what are the words that were used to describe it?

MR. KAMINSKY: Objection to leading.

THE COURT: Counsel, are you asking him to read?

MR. McCRORIE: Read from a document in evidence, yes, I am, your Honor. It's the assessment form on the first day.

THE COURT: Okay. You may read.

A He wrote down "Constant back plus neck pain," and he described it as a dull ache, sharp, burning, tingling, gnawing, stabbing, cramping, nagging, stinging, pinching and shooting.

Q And the medications that he was on on the first visit prior to coming, what were those medications at that time?

A He was on ibuprofen.

Q Is there another name for that, too?

A Motrin.

Q And did you have the milligrams and how long he was taking them?

A He was taking 200-milligram tablets, three tablets approximately three to four times a day.

Q Can you go to the next page, and can you tell us the treatments and medications he has tried for his pain up until this time that he was seeing you?

A Yes. What he described was seeing a chiropractor and

undergoing chiropractic treatment, having physical therapy and massage therapy.

THE COURT: I'm sorry. Physical therapy and what?

THE WITNESS: Massage therapy.

THE COURT: Massage?

THE WITNESS: Yes.

A (Continuing) He did have surgery to both his neck and lower back. He did undergo an exercise program. He had use of a brace for his lower back. He had been taking hydrocodone, which is Vicodin tablets for pain. He was taking ibuprofen, as stated, and he had tried Percocet, which is oxycodone, for pain.

Q That was prior to coming to you?

A Correct.

Q Do you and Dr. Thomas share patients?

A Yes.

Q In reviewing this chart, did you see Mr. Burns on a number of times from that first visit in October 2010 up until the time you're testifying here today?

A Yes.

Q More than ten times?

A Yes.

Q Your office uses a pain scale, that speaks for itself, but it goes from one to ten?

A Yes.

Q Can you please tell the jury, if you can go to the

November 16, 2010 note, I would like you to discuss the types of pain management your office performed on Mr. Burns. Okay?

A Yes.

Q Tell me when you're there.

A Okay.

Q So, you're on that note?

A Yes, November 16, 2010.

Q In your treatment of Mr. Burns, did you have knowledge of his past medical history and past issues of back and neck?

A Yes.

Q Do you know how he was referred to your office?

A Yes. He was referred by Dr. Hausknecht.

Q Did you know that he was seeing other doctors in addition to Dr. Hausknecht?

A Yes.

Q What other doctors were you aware of?

A He had seen Dr. Merola, who is an orthopedic spine surgeon. He had seen -- prior to his surgery, I believe he saw another pain management doctor and was treated. And he had undergone physical therapy prior to coming to our office.

Q What, if any, knowledge did you have of something that your office also does, something called epidural injections?

A Yes. I'm familiar with it.

Q That he had it?

A He had it, and I believe it was Dr. Kaisman.

Q The jury knows the word "spasm," but can you tell the jury, in your notes it says "cervical trap," T-R-A-P, "spasm," what does that indicate or mean?

A That he has spasm along the cervical spine, which is the neck area, into the trapezius muscles, which are these bands of muscles coming from the neck into the shoulder area.

Q The plus sign with the words "facet pain," can you describe what the plus and the facet mean?

A There are, within the bony structures of the neck and the entire back, where one bone sits on the other bone, there is a joint. Those joints are called facet joints, and through that joint you're able to actually move your spine back and forth.

When there is either trauma or arthritis or some pathology to the facet joint, you can actually have pain with movement of those joints, like any arthritic-type pain in your hands or knees.

Q So, in your impression and plan, can you please define for the jury cervical facet syndrome?

A Cervical facet syndrome is pain from those facet joints, those joints in the neck, that are constant. It's pain with movement in different directions. You can have facet pain from either the right or the left side or both.

Associated with cervical facet pain is, at times, spasm along the cervical muscles. There could be radiating pain into the shoulder area, and it could be associated with headaches as

well.

Q I'm just taking that first one in the impression and plan, a separate one other than cervical facet syndrome.

Can you please define for the jury post cervical and lumbar fusion syndrome and radiculopathy?

You don't have to define the word "radiculopathy," but those words.

A Well, he is a patient who has had surgery to his neck, undergoing a fusion, as well as his lower back. Despite the surgery, which was successful, he still had pain from the neck going into his upper extremity, and he still had some back pain going into his lower extremity.

The ideology of pain is difficult to define, but in someone who has that chronic pain condition, it is called a postsurgical fusion type syndrome both in the neck and the lower back.

Q Just for clarification, I'm still reading the office visit of the first note, before we get to 11/16/10, on the Impression and Plan, what does "TPI" mean, "today," it says?

A "TPI" refers to trigger point injections.

Q Can you please tell the jury, does that mean he had one today if it says that?

A Yes.

Q Can you please define for the jury trigger point injection, and tell them what it is used for?

A As I described before, there is spasm along the cervical muscles next to the, they're called paraspinal muscles, which are next to the cervical spine, that go into the trapezius muscles, which go into the shoulder.

These muscles can be injected with a solution of local anesthetic. The medication is called bupivacaine.

Q Spell it or just say it slowly.

A Bupivacaine, B-U-P-I-V-A-C-A-I-N-E.

The idea is to inject multiple spots along those muscle spasms. The injection helps the muscles relax. It helps with pain.

Q In that impression and plan, when it says, "PT considering SCS/intrathecal pump," can you please tell the jury what was being considered at that time on the first visit with the patient?

A "PT" refers to physical therapy, which is a modality that should be used for --

Q When it says, "PT considering," is that patient considering? Just go to that.

Does "PT considering SCS/intrathecal pump" -- I can show it to you.

A Oh, I'm sorry. "Patient considering spinal cord stimulator and intrathecal pump."

Q "SCS" means what you just said?

A Spinal cord stimulator.

Q I understand it wasn't done, but can you tell the jury the difference between -- not in such detail, but you'll step down with the court's permission later -- a spinal cord stimulator and intrathecal pump?

A An intrathecal pump is a fairly large device that is a pump. It's the size of a hockey stick -- a hockey puck. Sorry. This device gets inserted in the stomach, in the lower part. Actually, it's a surgical incision. The device is placed there.

From that device, there's a little tube that goes into the spinal cord area where it sits in the spinal fluid, and that device can pump medication into the spinal fluid. Usually the medication is a narcotic type of medication. There could be a mixture of medications that go through that device.

And the whole idea is to administer a lower dose of medication that can effectively help with chronic pain. It's usually used for chronic back pain. It can be used for other pain disorders as well.

A spinal cord stimulator is another type of implantable device, so it is a surgical procedure where there is a wire that's placed within the epidural space in the back. The epidural space is a space outside the spinal cord, so it's in the spinal cord, but just outside of -- it's in a different space right outside the spinal cord. And those wires have these contacts or leads on there. Usually there are eight or sixteen contacts.

The wires get tunneled into a pocket where a small generator, it's almost like a pacemaker, that gets placed there. The patient has the ability to turn on the device. And what happens is he feels a sensation across the back and into the legs that will essentially cover up, or help diminish, a lot of the pain and symptoms that he has.

Q Again, just taking the first note so we can use what it means for any future notes, "F/U plus one month," what does that mean in the plan?

A Follow up in one month.

Q Could you please tell the jury, understanding you've told them what he was on when he came in, could you tell them what Topamax, Elavil and Fioricet are and what they were used for in this particular patient?

A Mr. Burns, in his complaints, had complaints of headaches, chronic headaches from his neck. Medication such as Topamax is used a lot for chronic headaches. It is an antiseizure type of medicine, and the whole idea is to subside nerve-like pain. So both may help his headaches and may help with his nerve pain from his back into his legs.

A medication like Fioricet is used for chronic headaches, and it is a pain type of medication used for chronic headache.

There was one other one you mentioned.

Q Elavil.

A Elavil is an antidepressant medication. It's also used for nerve type pain. Antidepressants have been shown to help with nerve disorders, and are routinely taken in the evening because they can be sedative.

Q I'll try to only hit one day on each different type of therapy regimen.

On November 16, 2010, approximately a month later, could you tell the jury, what, if any, injections you gave or your office gave to Mr. Burns?

A Yes. He had complaints of, one, chronic headaches from the back of his neck, and he had muscular spasm. So, during that office visit he had trigger point injections, which I described before, which are injections along the muscles along the neck area to help diminish spasm.

He also had something called a greater occipital nerve block. There are nerves that come out from the back of the upper part of the head that go over the head. It's called the occipital nerve. And you can actually inject medication, which is a local anesthetic, plus a steroid, along that nerve that can help subside chronic, pulsating occipital-type headaches.

Q At some point in this treatment of Mr. Burns, did your office notes change to a different system from the handwritten system to something else?

A Yes. Our office had converted to electronic medical records.

Q So at one point it becomes a typed computer record?
A Yes.
Q You've already described what a lot of the words mean, but can you tell the jury what "Scheduled CESI" means?
A CESI refers to say a cervical epidural steroid injection.
Q What does "I.V. sed" mean?
A With I.V. sedation. He gets a little anesthesia for the injection.
Q So, if we could just go to 12/4/2010.
Could you tell the jury what, if any, different injections, other than what you've already discussed, did you try in December of 2010?
A This was the 12/14/2010?
Q Yes, sir.
A He had undergone a cervical epidural steroid injection.
THE COURT: Excuse me. Are you saying that this happened on 12/14, or are you saying that this happened previously on 11/16.
THE WITNESS: No, on 12/14/2010.
THE COURT: Okay.
A He underwent a cervical epidural steroid injection, which is an injection in the neck area where a needle is inserted and directed just anterior, just before the spinal cord in the epidural space. Once in that space, an injection is made

with a steroid medication into that space.

Q In addition to that injection on that date, did he also undergo other injections? If you've already explained what they are, you can just say what was done.

Just looking at the operative note, what did he undergo?

A Yes. He also had, again, trigger point injections, which I explained before, into those cervical paraspinal muscles.

Q Can you tell the jury what this word means in some of the notes, torticollis, torticollis?

A Torticollis is a term used for severe muscle spasm of the neck area. It's usually constant. It diminishes range of motion of the neck area.

THE COURT: Can you spell that?

THE WITNESS: T-O-R-T-I-C-O-L-L-I-S.

THE COURT: Thank you.

A (Continuing) And, again, it's a more severe form of spasm that is constant, causes very diminished range of motion, can cause the head to tilt to one side.

Q I'd like you to make it simpler, too. I know it comes along with the note, referring to the procedure note of 12/28/10.

A 12/20/10?

Q 12/28/10.

A 12/28/10, sorry. Yes.
Q The procedure note.
A Yes, I have it.
Q Can you tell the jury what myofascial pain means?
A Myofascial pain refers, is another term for muscular spasm in the neck area.
Q Can you please tell the jury what, if any, different -- other than what had been tried to that point -- what if any different type of injection was done to Mr. Burns on that date?
A Well, as I described before, there are joints in the neck area. These joints are called facet joints, and those joints could actually be injected individually.
So, at that office visit he underwent a nerve block to those joints called a, it's a diagnostic facet or dorsal medial nerve, which is actually the little nerves that go to those joints. So, he had an injection done on the left side with numbing medication to see if that would help with the pain.
Q I'm just going to jump a little. We're going to try to move through it.
4/4/11 -- I think it's still on the handwritten -- procedure note signed by you.
A Yes.
Q Just because it's in there, on the intravenous drip, on your note, it's signed by you, what is all that other stuff, other than what you've already told the jury is injected,

vitamin C, B12, B complex, what is that?

A When someone has spasm and/or nerve pain, which Mr. Burns has, one of the modalities that can be helpful is intravenous infusion of different -- it's a cocktail of vitamins, including calcium, magnesium, the B vitamins, vitamin C, and an amino acid called glutathione, and the whole idea is to help subside some of the pain, as well as to help with nerve-type pain, which he was exhibiting into his lower extremity.

So, I.V. infusions we commonly use as an additive type of modality for these type of patients.

Q I'm going to skip over -- you've already gone over the types of injections -- to some other procedures.

Go to August 9, 2011, please. The one in evidence is in the same order. You could just tell me when you're there.

A Yes.

Q Okay. "B/L trap times six," what does that mean?

A Bilateral trapezius muscle. These were six injections done in the trapezius muscles, which are the muscles in the neck going into the shoulder. He had six of them.

Q And then what other injections on that date did he have, if you could read down the list.

A He also had bilateral lower back injections. He had bilateral cervical spine injections. And I'm having a difficult time reading.

Q Is that glute?

A Yes. The bilateral gluteal, which are the muscles in the lower back, he had five injections over there.

Q So, it's indicated there 14 injections were given on August 9, 2011, and that they were trigger points?

A Yes.

Q Can you please tell the jury what would be the expected relief for someone with Mr. Burns' condition on that date? What would be the expected relief after giving the 14 injections on August 9, 2011?

A I would expect it to help with spasm for one to two weeks after these muscular spasm injections.

Q What about his ability to move around and function better?

A Yes, because it helps diminish spasm and helps with pain. Because there is a numbing effect, he should have improvement of range of motion and ability to move.

Q Is there another type of injection that you've performed on him that lasts longer than the two expected weeks?

A Yes. So, trigger point injections are something that can be done very routinely, and we do it quite frequently on multiple office visits.

A longer lasting type of injection is actually Botox injections. The same Botox that is used cosmetically helps muscles diminish in spasm. It helps muscle to relax.

Botox can be injected in the neck area, and it's indicated, actually, for torticollis, which is that severe spasm. It can also be injected into the lower back area for spasm.

Q We'll get into the cost later, but which one is more expensive?

A Botox is quite more expensive.

Q 12/15 now. Can you go to December 15, 2011?

A Yes.

Q It indicates that he stopped using morphine at that time because it wasn't effective.

What was the purpose in administering morphine tablets to Mr. Burns at one point?

A The purpose of opiate medication in pain management is to help with diminishing pain and improving activities of daily living, range of motion, function.

At that office visit he had been on morphine and stopped it stating it was not effective.

Q What is the purpose, as a pain management physician, in monitoring and changing medications in a patient that you're treating?

A We always follow up with patients who are started on opiate medication. One, we have to monitor their use of the pain medication, so they routinely follow up definitely on a monthly basis.

In part of the monitoring program, we have to assess how the medication is working, is it helping with activities of daily living and are there side effects from the medication and how effective it is.

We also routinely do urine toxicology. And New York State how has a database that you can check to make sure they're not filling multiple prescriptions.

Q If you have that note open, what were the medications Mr. Burns had been taking as prescribed by your office on that date, December 15, 2011 office note?

A He was taking Percocet, which is another opiate medication, 10-milligram tablets as needed for pain. He was also taking Fioricet, which was used for headaches. He was still on the Topamax, which I described before, which is that antiseizure medication to diminish nerve-type pain, and he was taking amitriptyline, which is the antidepressant medication to help with pain and help him sleep.

Q On that date could you please tell the jury something you were seeking to do or trying to get permission to do? Radiofrequency facet ablation, what does that mean?

A As I described before, there are these joints in the neck area, and those joints can be injected with numbing medication, a local anesthetic, to see if it helps with pain.

Unfortunately, those type of injections don't necessarily last too long, so there is a procedure where you can

take a needle called a radiofrequency needle, and what that does is it delivers a very hot, the tip of the needle gets exceedingly hot, 80 degrees celsius, and you can actually burn the little nerve that goes to those little facet joints and that may offer much longer standing pain relief from those facet joints.

Q And has that been done to date? Despite the cost, have you done it?

A No.

Q On that date, you have the procedure codes and it says what was done, so it's a matter of record.

We're going to skip now. Just go to a note of 2/9/12.

A Yes.

Q You already told them SCS.

So, was Mr. Burns, at the time he was doing these injections and doing the medications that you were prescribing, was he, the whole time, considering the spinal cord stimulator?

A Yes.

Q We're going to now jump to July 2012. When you were giving injections to Mr. Burns, would your office, from time to time, indicate the type of relief he was getting from the injections?

A Yes.

Q On that date, regarding the cervical trigger points he received or had been receiving, what did he indicate about the

effect, if any, on the pain and spasm?

You're the person who wrote that.

A Yes. I mean, there was the diagnostic block, if you're referring to that, which he stated offered 80 percent reduction on the site of the injection.

Q Right above that for the other injections?

A He had the trigger point injections which were stated to help 75 percent decrease in the pain and spasm after the trigger point injection.

Q Can you discuss with the jury when spasm -- if it's such as the case that's indicated here, if in a case where the injection of trigger point or the Botox helps the spasm but then it comes back, can you explain to the jury why that happened in a case like Mr. Burns?

MR. KAMINSKY: Objection.

THE COURT: Sustained.

(Continued on the next page.)

THE COURT: Counsel, you are really leading your witness.

Jurors, you can disregard that question.

Counsel, rephrase please.

Q. What is the purpose of doing the injections during the treatment on a bimonthly or monthly basis, whenever you did them on this case?

A. As I stated before, it does help diminish spasm, diminish pain, improve range of motion of the neck area. These injections were done on him very routinely on almost every office visit. Again, the whole idea one, it helps --

THE COURT: Doctor, please listen to the question, which is different.

And let's not have questions that elicit duplicative testimony, counsel.

MR. McCRORIE: Yes, your Honor.

THE COURT: Would you like to repeat your question?

MR. McCRORIE: What I'll try to do is move on so we don't duplicate anything.

Q. Going to 5/13/2014, you can skip your records that are in evidence of the treatment between those dates and you can let me know when you are at May 13th, 2014.

THE COURT: We're going to take a break for a second. We'll take a restroom break.

THE COURT OFFICER: All rise. Jurors exiting.

(Whereupon, the jury exited the courtroom and the following occurred:)

THE COURT: Okay. Thank you. Do you want to use the restroom?

THE WITNESS: No, I'm fine. Thank you.

(Whereupon, a brief recess was taken.)

(After the recess the following occurred:)

THE COURT OFFICER: All rise. Jurors entering.

(Whereupon, the sworn jurors enter the courtroom and take their respective seats.)

THE COURT: Thank you. Everyone please be seated.

Let's continue, please.

Q. You don't have to describe anything about it, but what, if any, injection was given on that date?

THE COURT: On 5/13/2014?

MR. McCRORIE: Yes.

A. He had Botox injections, which I described before.

Q. Without telling us the number because it's a matter of record in there, on what frequency did Mr. Burns get injections in your office in one form or another from the time he started coming until today?

A. On roughly a monthly basis, he had injections.

Q. So could you please move to this year, 2016.

MR. McCRORIE: With the Court's permission for a few exhibits, I'm going to ask that Dr. Mandelbaum be able to come down.

THE COURT: You've already seen the exhibits, Mr. Kaminsky?

MR. KAMINSKY: I probably have.

MR. McCRORIE: The spinal cord stimulator.

THE COURT: You plan to put it on the easel, so you marked it for identification?

MR. McCRORIE: Previously, yes.

THE COURT: It's not in evidence; am I correct?

MR. McCRORIE: No, your Honor. The three of them will be in evidence. I can state what is in evidence when it goes up.

I asked with the Court's permission, would I be able to have Dr. Mandelbaum come down for purposes of explaining 2016 and the two procedures that were done.

THE COURT: So before we do that, with the last witness you had the last witness in part lecturing from the well without adding anything that he was pointing to or using. So we're not going to do that again, right?

MR. McCRORIE: No, I believe the last witness was discussing the anatomy, which was an exhibit, but I just want him to discuss what his office did in terms of the stimulator trial and the implantation.

THE COURT: Which exhibit are we starting with?

MR. McCRORIE: 20 for ID to be followed by 20A. And also for ID to be utilized, 29 for ID. And then I would just have the witness comment on three of the pieces that are already in evidence.

THE COURT: Three of what?

MR. McCRORIE: Three -- actually, I'll just have him do two.

MR. KAMINSKY: I may object to that.

MR. McCRORIE: 17D and C we would have him --

MR. KAMINSKY: When we get to that point.

MR. McCRORIE: Sure.

THE COURT: All right. So let's put the first one up on the easel and then we'll let the doctor come down.

Jurors, can you see clearly? Okay.

Also, remember that if you can't see you can stand or adjust your seat, but if you really can't see we will move the easel so that you have a clear view, okay? I'm going to go down.

You may go down.

MR. McCRORIE: If you could bring the operative report for the record.

(Whereupon, the witness leaves the witness stand.)

Q. Could you please describe for the jury, it's in evidence, the trial stimulator implanted?

THE COURT: Excuse me before you continue.

So jurors, I just had to move my seat down here because the light from the back was bothering me and we've had some issues with jurors being uncomfortable with the chandeliers. Are any of you having that problem with the chandeliers? Yes? Right? It's too bright.

Okay. We need to put this in a different location and the question is where.

MR. McCRORIE: Maybe if we put it there.

THE COURT: Jurors, perhaps we're going to put the easel over here away from the light. If the light will bother you, if it's bothering you already it will bother you more.

Okay, let's swap.

(Whereupon, there was a brief pause in the proceedings.)

THE COURT: All right, doctor.

Q. If you could just, please tell the jury, and using it, describe what is done or what was done to Mr. Burns on January 7th, 2016, and if you could explain the reason for a trial stimulator rather than just putting one in --

A. That day in the office --

Q. A little louder.

A. -- he underwent what they call a trial of the spinal cord stimulator leads. As I described before, the leads are inserted via a needle and this is again, the trial so it's done percutaneous. In other words, through the skin where a needle is inserted and you can see the needle over in this diagram.

So it's directed through the skin and it's directed into the epidural space which is a millimeter or two next to the spinal column spinal fluid, outside of that. And once in the space through the needle a little wire can be inserted and that wire is directed up within the epidural space. It goes all the way up into the thoracic area.

So the needle is put in the lower lumbar, the lower back, and then the wire is thread up into the thoracic area. Then the wire remains there coming out of the skin from the back and gets hooked up to a little box and the box can be reprogrammed and programmed so it causes a stimulation or electrical activity along the wire.

What the patient ends up feeling is a sensation, one, it's affecting the central nervous system which is the spinal cord and the patient will feel a sensation that hopefully, covers and helps with the areas of pain that he has, which in his case is the back and the lower legs.

Q. What is the purpose of a trial stimulator? What are you hoping to achieve with the trial?

A. The idea is to leave these leads that are coming out

of the skin for up to five days and it gives him a chance to see how much this helps with the pain. What we're looking for is at least 50 percent decrease in pain.

Q. Five-zero did you say?

A. Five-zero. 50 percent.

Q. Did the spinal cord stimulator provide 50 percent relief to Mr. Burns' lower back complaints?

A. Yes.

Q. Could you please take the next, Exhibit 3, of the procedure, 3/31/16, and the one underneath it. Just bring it up there, but put the one on the board now, 20A. The big one first.

THE COURT: We need you to stand on the other side because it's easier to see. Thank you.

Q. Doctor, please describe for the jury the procedure performed upon Mr. Burns on 3/31/16.

A. This is after the trial was done and he had significant relief, so the permanent spinal cord stimulator is then placed. The approach is very similar to the trial with the needle going into the epidural space, the lead placed up into the thoracic part of the spine. Then there is actually a surgical incision that is made, one in the middle of the back where the leads go in. So that lead has to be tacked down. It has to be sutured to the ligament lead.

Then that lead is tunneled to a pocket where another

incision is made. Usually, it's by the buttock area. And at this place the generator, which is this little battery, it's like a pacemaker, is placed and the lead is tunneled from the mid-line incision into that pocket where it's attached and placed in there and the incision is closed.

Q. You can just take the smaller exhibit now. Can you explain to the jury -- take that one down. I think you're holding up, look at the back, the number please, if you could tell us for the record, for ID.

A. 29.

Q. 29. If you could put 29 up and explain to the jury how it is that a spinal cord stimulator works to alleviate pain.

A. Well, the battery, which you see over here by the buttock area, is transmitting electrical activity to the lead. The top of the lead is usually the thoracic area and by giving electrical impulses over there, it effects the whole central nervous system. It effects the conduction of pain, both nerves into the brain, as well as the nerves that are now going down into the back, into the lower extremity.

Q. How does it effect that?

A. By -- there is an imprint of pain that happens when somebody has chronic pain and the whole idea is to stop that conduction. There's electrical activity normally in the body. That's how nerves actually work.

So you're overriding some of that electrical activity

with this spinal cord stimulator and changes what his perception is of pain. It changes what he feels. Especially, with nerve type pain it's very, very helpful.

Q. I'm going to have you do one exhibit, not two. 17D, it's already in evidence. Can you put that up for the jury.

What you just discussed, the leads go to the thoracic region. Can you tell the jury what is depicted in 17D?

A. Here you see --

THE COURT: Excuse me. Is this an x-ray?

THE WITNESS: Yes.

THE COURT: Thank you.

A. You can see part of -- this is the thoracic spine coming down to here. These are the ribs. This is the lumbar spine coming down to the sacral area where the hips are. This is his prior fusion with the hardware. This is the spinal cord stimulator generator that is implanted. It's actually underneath the skin.

From there you can actually see the wires coming in. These little dots are where it's sutured and the wires go all the way up. Actually, it goes up further into the thoracic epidural space.

Q. I'm going to have you sit down. Those are the only exhibits and I'll have you move everything back.

(Whereupon, the witness resumed the witness stand.)

Q. It's called a permanent spinal cord stimulator. How long when you put one into someone after the trial works, do you intend that spinal cord stimulator to be in their body?

A. It is called a permanent spinal cord stimulator. It has a battery that would need to be replaced. Typically, depending on usage, it's about seven to ten years and that would have to be replaced.

Q. In your preparation for today and your treatment of Mr. Burns, did you, in fact, review the medical records that are here in evidence, plaintiff's medical records of Dr. Hausknecht, Dr. Merola, Medcor, as well as the operative procedures performed upon him?

A. Yes.

Q. Did you, in fact, review the prior medical records?

A. Yes.

Q. That's in evidence as well.

If we could just go, skip all the way to the very last note and then we can -- 5/19/2016.

A. Yes.

Q. Okay. Can you please discuss in that last note before you came here to testify, with regard to the spinal cord stimulator permanent implant, which was the coverage, and what does that mean?

A. On that office visit he reported that he had good coverage of his pain into his legs.

THE COURT: Excuse me, Doctor. "Coverage" can mean many different things. Can you just say what "coverage" is?

THE WITNESS: Yes. I was describing that he stated that there was an 80 percent reduction in his symptoms into his lower extremity, which refers to the coverage into his lower extremity.

Q. Okay. If you could just finish that sentence. It says "although."

A. "Although he still has some chronic lower back pain." So it wasn't covering the lower back area, but it was actually getting reduction of pain into the legs.

Q. Into the radicular complaints?

A. That is the radicular component of the pain.

Q. Okay. And in Mr. Burns' case was Mr. Burns kept on medication after the implantation of the spinal cord stimulator?

A. Yes.

Q. Can you tell the jury the medications he's currently on. Medications he's currently on due to this, due to the injuries you were treating him for to the neck and the back?

A. Okay. Mr. Burns was currently taking at this last office visit, a muscle relaxant called Skelaxin, 800 milligrams he takes it three times a day. He was taking a narcotic medication one called Opana, it's extended release. Dose is three times a day because it's a long lasting medication at 40

milligrams. And for in-between as needed for pain, he was taking Oxycodone which is a Percocet like medication.

He was also taking Lunesta which is a pill used for sleep and he was also using testosterone which is a medication also used for to help with sexual dysfunction.

Q. And why were you guys prescribing for a while, testosterone?

A. Well, low testosterone levels are common in someone who has chronic pain in addition to side effects from pain medication, especially opiate medication. So it's not uncommon to have a low testosterone level which should be treated.

Q. On that date in May of 2016 what, if any, injection therapy was administered to Mr. Burns?

A. Again, he had trigger point injections done.

THE COURT: Counsel, you just said a date.

MR. McCRORIE: It is the last visit, May 19th, 2016.

THE COURT: That's the last visit before today?

MR. McCRORIE: Yes, your Honor.

THE COURT: And, I'm sorry, Doctor, would you mind repeating your testimony.

THE WITNESS: He had trigger point injections to his lower back muscles.

THE COURT: Thank you very much.

Q. Okay. Can you please just go over, since it's the

last visit, the physical examination and what, if any, positive medical findings you found or were found?

A. He, on that last office visit, had lower back spasm on the lower paraspinal muscle L3-S1, which is the lower back on both sides. He had pain to deep pressure, deep touch to those areas. He had pain with extension of his back. So standing up, right, if you were to bends backwards there is pain, as well as pain bending forwards.

He had positive what they call positive straight leg raises. That's when you're either sitting or lying down, when lifting the leg up, you produce a pain going into the lower extremity at both sides at approximately 30 degrees.

Q. So you're still -- stay within the lumbar. What does "gait" mean and the word after it?

A. Gait refers to the way he walks.

Q. So please --

A. And as stated, he had an antalgic gait. He has a little bit of a limb when he walks.

Q. Regarding range of motion, you talked about degrees and compared it to normal. Can you quantify it in any way or qualify what you wrote or what is written as to his range of motion in the lower back?

A. Okay. He had flexion of his lower back. That's bending forward up to 45 degrees. Normal would be in the range of 90 degrees. Extension on standing and bending backwards, he

had pain at 20 degrees.

THE COURT: I'm sorry, how many?

THE WITNESS: 20 degrees.

THE COURT: Thank you.

A. Normal is approximately 35 to 40 degrees.

He also, bending to the right and to the left, he had pain at approximately 20 degrees with normal being at 30 degrees.

Q. Are those medically significant ranges?

A. Yes, those are significantly diminished range of motion.

Q. Please do the cervical and then I think we can --

A. So along the cervical spine he had spasm along the cervical paraspinal muscle at C-3 through C-7 on sides. He had pain over the facet joints which are the joints along the paraspinal muscle as well, a little bit more on the left than the right. He had noted upper weakness of the left upper extremity versus the right. He had decreased sensation along certain areas along both hands or both arms and hands going down the nerve roots of C-6 and C-7. And that was what was significant at that office visit.

Q. Okay. At the end of the office visit it says to follow-up when?

A. Four weeks.

Q. Okay. So I'd like you to assume for the purposes of

these questions that in evidence are all of the medical records in this case, the ones you reviewed, in evidence, your own notes and your treatment that is contained in your own notes, okay? As well as the prior medical records, all right?

I'd like you to further assume Mr. Burns has testified as to his back and neck being asymptomatic at least since 2003 until the date of the elevator accident as described in your notes, okay? And I'd like you to assume that he's testified to the jury all about the symptomatic nature or asymptomatic nature of his priors from 1986. 1989 and 2003, okay?

A. Yes.

Q. Do you have an opinion with a reasonable degree of medical certainty as to the cause of the need for the spinal cord stimulator that your office put into Mr. Burns?

MR. KAMINSKY: Objection.

THE COURT: Step up, please.

(Whereupon, an off the record discussion took place at the bench among the assistant district attorney, the defense counsel and the Court.)

(Back in open court.)

THE COURT: Objection overruled.

Jurors, do you need to stand and stretch a minute all of you, or was the restroom break good enough? It was good enough. Okay. Good.

So you may answer that question. Do you recall

the question?

A. I recall, but if you don't mind repeating it.

THE COURT: Oh, it was a long question.

Q. Do you remember, the basis of having reviewed everything that you told the jury you reviewed, including his prior history --

A. Correct. So my opinion --

Q. -- the cause of the need to have the spinal cord stimulator?

A. In my opinion, it's within a reasonable degree of medical certainty that his accident caused exacerbation of his back pain resulting in an injury that subsequently he needed surgery both for his neck and lower back.

MR. KAMINSKY: Objection.

MR. McCRORIE: He's saying he needed it. He's not saying --

THE COURT: Wait.

So, Doctor, we need you to limit yourself to the question. The question had to do with the stimulator. So let's start again.

Q. The question is, assuming the asymptomatic nature, that he said now there are symptoms and he goes through the treatment, just what you guys did your office. So limit it to the cause of the need for the spinal cord stimulator.

A. So it is within a reasonable degree of medical

certainty --

MR. KAMINSKY: Just note my objection.

THE COURT: It's noted.

A. -- that the spinal cord stimulator was medically necessary because of his work related injury given all the information that he gave us, knowing that he had some preexisting back pain and was asymptomatic at the time of the injury and coming to our office and having continued pain and not responding well to his regular pain medication, the regimen that we gave him.

Q. With a reasonable degree of medical certainty with that same set of facts, do you have an opinion as to the cause of the need for the injections and prescription pain medication therapy?

A. Yes.

Q. Please tell the jury.

A. It's within --

MR. KAMINSKY: Same objection.

THE COURT: Overruled.

A. It's within a reasonable degree of medical certainty that he, because of his injuries, that he will need continued medication.

Q. I want first, the need for the injections you did for the neck and the back and the prescription medication for both the neck and the back pain.

A. That he again, needs those injections that were given to him for the neck and back, including the trigger point injections, the facet joint injections and the continued need for pain medication.

Q. Doctor, I know it's your second time testifying. I need your opinion as to the cause of the need for the injections that you did and the prescription pain medication for the neck and the back.

MR. KAMINSKY: Objection.

THE COURT: I'll allow it.

A. Prior, whenever I mentioned the cause of the accident I kept getting stopped, but --

Q. Listen, I know there's a lot of rules here, but if you can just give it to us for this question.

A. Given what I know of the incident and accident and the date of the accident on 5/20/2008, that that is within a reasonable degree of medical certainty the reason that he will continue to need injections and oral medication.

Q. Is that the same answer for the past up to today?

A. Yes.

Q. Why he needed it?

A. Yes.

Q. Okay. We're going to get to the future in just a second.

Do you have an opinion with a reasonable degree of

medical certainty as to whether a man with Mr. Burns' past medical history as it relates to the neck and the back, is more susceptible to become symptomatic after trauma?

MR. KAMINSKY: Objection.

THE COURT: Step up one second.

(Whereupon, an off the record discussion took place at the bench among the assistant district attorney, the defense counsel and the Court.)

(Back in open court.)

Q. Doctor, before we speak specifically about Mr. Burns, can someone with a herniation from say 1991 and 2003, can they be symptomatic and both asymptomatic at times?

A. Yes.

Q. Given Mr. Burns' particular history of a herniation to the neck in 1991 and a herniation to the low back in 2003, do you have an opinion as to, with a reasonable degree of medical certainty, as to whether or not someone with his medical condition is more susceptible to injuries in those areas due to a trauma?

MR. KAMINSKY: Judge --

THE COURT: Sustained.

Q. In the type of accident that he was in, do you have an opinion with a reasonable degree of medical certainty as to whether or not he's more susceptible to injury in those areas?

MR. KAMINSKY: Objection.

THE COURT: Sustained. Counsel, please refer to the discussion that we had up here and ask a general question first.

Q. Generally, is Mr. Burns --

THE COURT: No. No, just general.

Q. Take Mr. Burns out of it. Generally, is someone with previous herniations to either the neck or back that were symptomatic at one time and become asymptomatic, are they susceptible --

THE COURT: Can they be.

Q. I'm sorry. Can they be more susceptible to injuries in those areas?

A. Yes.

Q. Doctor, regarding your speciality and your speciality only, do you have an opinion with a reasonable degree of medical certainty as to whether after this trial into the future, whether or not Mr. Burns needs to continue to see a pain management physician?

A. Yes, it's within a reasonable degree of medical certainty that he will need to continue to see pain management.

Q. Can you please tell the jury first, your basis for that, and if the Court will permit, with what frequency?

THE COURT: Yes.

A. The basis is, one, he has a spinal court stimulator which quite frequently needs to be reprogrammed. The stimulator

is helping with some of his pain going into his lower extremity. He still has chronic lower back pain different again from the facet joint areas.

He also has chronic neck pain which remains. He will continue to need pain medication which he's taking now, the opiate medication. He will likely continue to need trigger point injections and may very well need another epidural injection or Botox injections as necessary in the future.

Q. I'm going to ask, too, for all of your opinions, understanding it's your second time testifying, all of your opinions whether I state so or not, need to be stated with a reasonable degree of medical certainty. If for whatever reason you couldn't, you need to just state so, okay?

A. Yes.

Q. Was your last answer within a reasonable degree of medical certainty?

A. Yes.

Q. Okay. What is the -- did you give us the frequency?

A. On a monthly basis.

Q. For what period of time into the future?

A. For the rest of his life.

Q. Can you please tell the jury, the current cost of a private pay visit to your office?

A. $200.

Q. Do you have an opinion with a reasonable degree of

medical certainty, you've already told the jury the spinal cord stimulator battery needs to be replaced and the leads and the time period. Will he, Mr. Burns, require a replacement of the spinal cord stimulator, both the battery and the leads into the future?

A. Yes, he will.

Q. Can you please tell the jury with a reasonable degree of medical certainty upon what frequency?

A. Upon seven to ten years.

Q. Can you please tell the jury, and I guess we'll do it exclusive of any of the other facility or anesthesia cost, what is the current cost to replace the spinal cord stimulator?

A. The generator and leads themselves are $35,000.

Q. And what would be the other costs?

A. There would be a surgical fee for the surgeon, an anesthesia fee and there will be a facility fee for wherever the procedure or operation is done.

Q. Do you have an opinion with a reasonable degree of medical certainty as to whether or not injection therapy into the future that you'd recommend for Mr. Burns given everything you know and treating him for five years?

A. It is within a degree of medical certainty that he will need injections in the future.

Q. Which are the injections -- first, what injections would he need with reasonable certainty?

A. He will need trigger point injections. He will need facet joint injections. He will need Botox injections for spasms. And radio frequency of the facet joints.

Q. I'm just going to do this, because trigger point and Botox, one lasts longer, one is less but you need to do it more. Let's go with Botox. With what frequency --

THE COURT: Excuse me. Can you give me one second?

MR. McCRORIE: Yes, your Honor.

(Whereupon, there was a brief pause in the proceedings.)

THE COURT: Let's continue, please.

Q. We were discussing the Botox. Understanding your testimony about how long that lasts as opposed to trigger point, do you have an opinion with a reasonable degree of medical certainty with what frequency into the future Mr. Burns will require Botox for the spasms?

A. Every three months.

Q. For what period of time into the future?

A. For the rest of his life.

Q. What is the current cost of the Botox and the dosage?

A. The current cost of a vial of Botox is $600. He would need two vials for each series of injections that he comes every three months.

Q. Do you have an opinion what other types of injections,

if any, would he require?

A. The trigger point injections which I stated, the facet joint --

THE COURT: I'm sorry, I did not get the dollar amount for the trigger point.

Q. You can give the dollar amount.

THE WITNESS: It's $300 for the trigger point injection, including office visit.

Q. With what frequency?

A. On a monthly basis.

Q. For what period of time?

A. For the rest of his life.

Q. But just understanding if he gets the Botox he wouldn't need the other one as well?

A. Correct.

THE COURT: I'm sorry?

MR. McCRORIE: One would wipe the other out, Judge.

THE COURT: So, Doctor, it's one or the other?

THE WITNESS: If he gets the Botox injections, he hopefully will not need the trigger point injections for that period of time.

THE COURT: Thank you.

Q. You talked before about facet injections, epidural. Can you please tell the jury with a reasonable degree of medical

certainty what, if any, other injections would he require?

A. We said the facet joint injection both for the neck and the lower back, twice per year. The occipital nerve block which he had done at least once per year. He will likely -- well, I think that's all the procedures.

Q. Let's just do this. Going back to the facet, you said twice a year both neck and back. Would you please tell the jury what is the cost -- are the injections the same cost for both neck and back?

A. Yes.

Q. Can you please tell the jury what the cost of a single injection would be twice a year?

A. The cost for the procedure is $1000, plus the cost of anesthesia which is also a $1000.

Q. Okay. And you said that would be for the neck and the back?

A. Correct.

Q. Only because it's --

THE COURT: I'm sorry. Clarification, please. $2000 includes the neck and the back?

THE WITNESS: No, for each one. Neck and back would not be done together. They would be done separately.

THE COURT: So $2000 is for the neck and $2000 is for the back?

THE WITNESS: Correct.

THE COURT: And that's two times a year?

THE WITNESS: Correct.

THE COURT: Two times a year for the neck and two times a year for the back?

THE WITNESS: Correct.

THE COURT: Okay. Thank you.

Q. If you could just put into the record the cost of the occipital nerve block. You said it was once a year.

A. It's $150.

Q. Are each of those for life?

A. Yes.

Q. With a reasonable degree of medical certainty -- we just have two more categories -- do you have an opinion as to whether or not Mr. Burns will require physical therapy into the future to his neck or to his back?

A. Yes, he will require physical therapy, episodic physical therapy for spasms three times per week for four weeks two to three times per year.

Q. What is the current cost of a physical therapy session?

A. It's $125.

Q. Per session?

A. Per session.

Q. Okay. With a reasonable degree of medical certainty, do you have an opinion as to going into the future, the

medication plan for Mr. Burns?

A. Yes. Mr. Burns will need to continue his opiate medication which is the Opana extended release which he is taking 60 milligrams three times a day. He will continue to need the break through pain medication, Oxycodone, 10 milligrams needed for in-between break through pain. He will continue to need a muscle relaxant, Skelaxin, 800 milligrams three times a day and he will continue to need the sleeping medication, the Lunesta, which is 3 milligrams at bedtime.

Q. Before we get into the cost of that, with the notes, physical therapy into the future, for what period of time into the future with a reasonable degree of medical certainty will Mr. Burns require three to four times a week for four weeks, two to three times a year?

A. For the rest of his life.

Q. Regarding the costs of medications, for what period of time would Mr. Burns require medication such as those at the cost you're about to give into the future?

A. For the rest of his life.

Q. Okay. The muscle relaxer, you said it's Skelaxin, but there is a bunch of different muscle relaxers.

A. Yes.

Q. What is the current cost of the 800 milligrams three times a day, what did you say the amount was?

A. It was 800 milligrams three times a day. Typically

used for spasms. So a ten day period is normal per month. The cost is $100 for that prescription.

Q. 100. You're giving a monthly cost, correct?

A. Correct.

Q. Into the future period of time?

A. Into the future.

Q. For life?

A. Yes.

Q. Is that for each of the medications so we don't to have ask the question each time?

A. Yes, it's for the rest of his life. Each medication, the cost is different.

Q. But the need for each of the medications?

A. Yes.

Q. Please tell the jury the current cost of 40 milligrams of Opana three times a day, the monthly cost?

A. The cost of Opana is $1400 per month.

Q. Please tell the jury whether or not there is a generic version of Opana?

A. There is not a generic version.

Q. Can you please tell the jury the dosage and the amount of tablets and the cost of Oxycodone?

A. Oxycodone ten milligrams which he takes up to eight a day, the cost is $70.

Q. $70 for the whole month?

A. Yes.

Q. Just the last three, the cost of the sleep medication you discussed, Lunesta, the 3 milligrams once a day. What did that cost?

A. $50.

THE COURT: $50 what?

THE WITNESS: Per month.

Q. Before I sit down, Mr. Acosta just told me, we spoke generally before about someone's susceptibility. You gave the answer as to generally if someone has a herniation. Knowing what you know about Mr. Burns that he had a herniation in 1991 to the neck and one in 2003 to the back that he claims was asymptomatic up until the accident, was Mr. Burns in his condition more susceptible to injury with a trauma?

MR. KAMINSKY: Objection.

THE COURT: I'll allow it.

A. Yes, he was.

Q. Was that opinion with a reasonable degree of medical certainty?

A. Yes, it is.

Q. Just give us the basis of it. That's my final question.

A. Someone who has a prior injury to their back sometime earlier in life, the back there is some degeneration. It's less stable and more prone for future injury.

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

THE COURT: Thank you.

Jurors, are we okay to continue?

Doctor, do you need a break?

THE WITNESS: No.

THE COURT: Okay. Stand and stretch jurors before we start the cross.

(Whereupon, there was a brief pause in the proceedings.)

THE COURT: Okay. Are we good? Yes? All right.

Cross. Mr. Kaminsky, you may cross-examine the witness.

MR. KAMINSKY: Judge, I will ask for an opportunity to review the doctor's file perhaps during the lunch break. I would ask for an opportunity to review the doctor's file during the lunch break so as not to take up time now.

THE COURT: That's fine.

(Continued on next page...)

CROSS-EXAMINATION

BY MR. KAMINSKY:

Q Doctor, nice to see you again.

A Likewise.

Q Is just so happens that the two times you testify in court, I get to cross-examine you both times.

And your partner, Dr. Thomas, were you aware that I cross-examined him as well? Is that a yes or you don't know?

A I don't know.

Q You're here because he's not available, correct?

A Correct.

Q Let's just go over a timeline, okay?

When this incident happens, Mr. Burns goes to his attorneys, okay, and they --

MR. McCRORIE: Objection.

THE COURT: You're not going to testify, right?

Q Are you aware that after going to the attorneys, he goes to Dr. Merola?

MR. McCRORIE: Objection.

MR. KAMINSKY: Subject to connection.

THE COURT: Sustained.

Q The doctors involved in this case, Dr. Merola, Dr. Hausknecht, yourself, Dr. Missun who is going to be the next witness, you've all worked with plaintiffs' attorneys before, correct?

MR. McCRORIE: Objection.

THE COURT: Sustained.

Q You've all been retained on cases on behalf of plaintiffs?

MR. McCRORIE: Objection. Retained. He is a treating.

THE COURT: Sustained. Come up.

Jurors, you're going to disregard all of that. Come up.

(Discussion off the record.)

Q Doctor, I need to back up.

Do you know who Dr. Merola is?

A Yes, I do.

Q You've worked with him on other cases, correct?

A Correct.

Q Do you know who Dr. Hausknecht is?

A Yes.

Q You've worked with him on other cases?

MR. McCRORIE: Objection to "work with him."

THE COURT: By "cases" you mean court cases?

MR. KAMINSKY: Yes.

THE COURT: Or medical?

MR. KAMINSKY: Court cases.

THE COURT: Or medical cases?

MR. KAMINSKY: Right now I'm going to ask about

court cases.

MR. McCRORIE: There's only been one.

THE COURT: I will allow it.

Q When I say "you," I mean you or your partner.

A He refers patients to us for medical treatment.

Q That's my point.

So, Dr. Merola you're familiar with, and Dr. Hausknecht you're familiar with; correct?

A Correct.

Q And then the next thing that happens is they send them to you, and you tell the jury all these things the plaintiff is going to need in the future and how much they cost?

MR. McCRORIE: Objection. Required.

THE COURT: Come back.

MR. KAMINSKY: I'll rephrase it, Judge.

THE COURT: I think so.

MR. KAMINSKY: Okay.

Q So, a patient sees, for instance, Dr. Merola, then sees Dr. Hausknecht. Dr. Hausknecht refers the patient to you, correct? Then --

THE COURT: Wait. Wait. Do you know this? Doctor, are you familiar with this?

Q Dr. Hausknecht?

A Yes.

THE COURT: You are familiar with this?

THE WITNESS: With Dr. Hausknecht and Dr. Merola.

THE COURT: No, with the referrals that he's talking about.

A We get referrals from Dr. Merola and Dr. Hausknecht.

Q That answers my question.

And then, as in the last case where I cross-examined you, one of the things you do is you come to court and you tell the jury what you believe a plaintiff will need in the future as far as medical care, correct? That's what you're doing in this case, correct?

THE COURT: That's a different question, Counsel.

MR. KAMINSKY: I'll make it simple.

Q That's what you've just told the jury, correct?

A Correct.

MR. McCRORIE: Objection. In addition to treatment.

THE COURT: Wait. Wait. Wait. You're not testifying from the counsel table.

And, just to be very clear, the witness has testified that this is his second case.

MR. KAMINSKY: Yes.

Q This is your personal second case, but not the second case of your office, true?

A True.

Q And then are you aware that the next thing that happens

is that an economist is going to testify and take those projections you've just told the jury and show us a chart with what those items will cost going out in the future; you're aware of that, true?

A True.

Q Let's start with some of the items that you told the jury that Mr. Burns will need in the future.

Once an economist projects their cost into the future, they add up to a lot of money, don't they?

MR. McCRORIE: Objection.

THE COURT: Sustained.

Q Have you conferred with the economist in this case?

A No.

Q So, let's say, for instance, physical therapy, you told the jury Mr. Burns is going to need it for how often?

A Three to four times per year.

Q For the rest of his life?

A Correct.

Q At $120 a session?

A It was -- actually, it was a correction. I said two to three times earlier, for up to four weeks at a time, three times a week and at $125 a session.

Q Let me see if I understand, because I'm confused.

In your opinion, what did you tell the jury how much physical therapy plaintiff is going to need at what cost for the

rest of his life?

MR. McCRORIE: Objection. He just asked and answered it.

MR. KAMINSKY: It was confusing.

A The plaintiff will need physical therapy two to three times per year at a session of four weeks at three times a week.

Q So, ten times a year for the rest of his life, twelve times a year for the rest of his life?

A If that's what the numbers come out to be, yes.

Q And so let's do it 12 times a year at $120 a session?

THE COURT: It was $125.

MR. KAMINSKY: $125, okay. $125.

Q $13,000 a year, correct?

A Correct.

MR. McCRORIE: It's 36 times a year.

MR. KAMINSKY: Thirty-six times a year?

MR. McCRORIE: Yes, three months.

Q So, tell the jury when is the last time Mr. Burns had physical therapy?

MR. McCRORIE: Objection. Can we approach, Judge?

THE COURT: If you know.

A I don't recall when the last time he had physical therapy.

Q Are you aware that Mr. Burns hasn't had physical therapy since 2010? Yes or no?

MR. McCRORIE: Objection.

Q Are you aware of it? Yes or no?

A No, I do not know.

Q So, he hasn't had physical therapy for six years, yet you're telling the jury that he will need tens of thousands of dollars of physical therapy for the rest of his life, true?

A True.

Q That's what you just told the jury?

A Yes.

Q Now, I'm not going to go over all the items that you testified to.

For instance, you say it's $200 per visit for him to see your office, correct?

A Correct.

Q How many times has he seen your office, approximately?

A On a monthly basis.

Q But you didn't charge him $200 a visit, did you?

A That is our office fee.

Q Yes or no? Has he paid $200 a visit or has --

MR. McCRORIE: Objection. He hasn't paid anything.

THE WITNESS: Correct.

THE COURT: Why are you testifying from the counsel table?

MR. McCRORIE: Objection, your Honor.

THE COURT: Excuse me. Come up.

(Discussion off the record.)

THE COURT: Counsel, do you want to withdraw the last question and start again?

MR. KAMINSKY: I'll ask it again.

Q For instance, when you said --

THE COURT: Counsel, you have to have a nexus. We just took a break of five minutes.

Q Doctor, I was asking you about how much visits to your office cost, and you said $200 a session.

Would you agree with me that you may charge -- your facility may charge different rates to different people depending upon different circumstances?

A No, I don't agree with that. Our charge for an office visit is $200.

Q Well, for instance, someone --

MR. KAMINSKY: I don't know how to say this, Judge.

THE COURT: Come on up. We'll work on the language.

(Discussion off the record.)

MR. KAMINSKY: Thank you, Judge. I'll rephrase the question.

Q Regardless of the charge, what your office may ultimately receive as payment could be different, correct?

A Depending on the insurance plan that the patient has, payment can be different.

Q Thank you.

I asked the question the wrong way. Thank you for explaining that to the jury.

So, just because you may charge $200 a visit, you may not actually receive $200 a visit in payment, depending upon the person's individual situation; correct?

A Depending on their insurance plan, it may vary, yes.

Q It could be lower, correct?

A It could be lower, sometimes higher.

Q If you get lucky, okay.

Now, as far as the medications that you prescribed, this goes for the rest of his life, you told us what you believe he needs on a daily basis, how many, what dosage, what the cost is for the rest of his life, correct?

A Correct.

Q Are you aware that, as far as the pain medication goes, are you aware that as far as the pain medication goes, Mr. Burns has testified that he tries not to even take the pain medication? Has that been told to you? Yes or no?

A I don't recall that he has stated that.

Q So if he doesn't take it, because he doesn't like to take it, nonetheless, you're saying he needs it in the dosages you've indicated for the rest of his life, true?

A He needs to take --

Q Whether he takes it or doesn't take it, you're prescribing it, correct?

A Correct.

Q And are you aware that there was even an instance where he went to the hospital because he was vomiting from taking all the medication?

MR. McCRORIE: Objection.

THE COURT: I'll allow it.

A Again, you're assuming that he went to the hospital because he took all his medication.

Q Actually, I'm not assuming --

MR. REIFF: Judge, can we approach on that?

THE COURT: Yes.

(Discussion off the record.)

Q Doctor, are you aware that pain medication can have an adverse effect on Mr. Burns?

A Yes.

Q Now, you've met with the attorneys before testifying, correct?

A Yes.

Q And are you aware that arguably the most important issue in this case is whether or not the plaintiff's surgeries, including to the neck and to the back, and the implantation of a spinal cord stimulator, has it been discussed with you that a

key issue in this case is whether or not those procedures were due to a work accident that happened in 2008?

MR. McCRORIE: Objection.

THE COURT: I'll allow it.

A I am aware that it is important.

Q You're aware of that. You've discussed that with the attorneys, true?

A Yes.

Q In fact, by coincidence, in the other case that I had the pleasure of cross-examining you, the key issue in that case was whether or not that plaintiff's injuries were caused by an accident, true?

A True.

Q Now, in that case, did you testify, under oath, that a critical issue in determining whether or not a person's injuries are caused by an accident or are pre-existing is whether or not that person had prior complaints of pain to that part of that person's body?

A Can you repeat that question? It was a little lengthy.

Q Yes.

THE COURT: It was what?

THE WITNESS: It was lengthy.

Q Before you give your answer, I want you to assume that I have a copy of your testimony. Okay?

In that case, just like in this case, the question was

whether or not a plaintiff's injuries were caused by an accident or whether they were caused by something else, true?

A True.

Q And in that case, did you testify --

MR. McCRORIE: Do you have the page number?

MR. KAMINSKY: Sure. Page 46 and Page 47.

Q In that case did you testify --

MR. McCRORIE: Could I see it, because it starts at 199.

Q In that case did you testify that your opinion that plaintiff's injuries were related to an accident was, in large part, because he never had any prior injuries or complaints of pain to that portion of his body?

MR. McCRORIE: Objection.

A Yes. I don't have an independent recollection of the transcript.

Q I don't expect you to have it memorized, but you acknowledge in that case that that patient, that plaintiff, never had prior neck or back pain, and that was very important to you, correct?

A Correct.

Q Now, in this case, yes or no, did Mr. Burns have prior complaints of pain to his neck?

A He has a history of prior complaints.

Q He does.

And in this case does Mr. Burns have a history of prior complaints of pain to his back?

A He has a history --

Q Just yes or no.

A Yes.

Q And in this case does he have a prior history of complaints of headache?

A Yes.

Q Now, you said you are familiar, because you've reviewed them, you are familiar with the nature and extent of Mr. Burns' past medical history, correct?

A With the chart that was available to me, yes.

Q Tell the jury, what is your understanding, tell the jury in as much detail as you can, what are Mr. Burns' history of complaints and treatment and care for his neck that predate this incident?

A He has a history of having neck pain much earlier than the accident. He was treated, which I don't have available how he was treated at that time, but he did have injections I'm aware of. I believe he had therapy. And his symptoms resolved.

Q When did they resolve?

A I don't have the timing of it, but as per the chart, the records that I have available, he was asymptomatic prior to the incident, this date of accident in 2008.

Q So now we've gone from someone who had no complaints of

pain in the other case, to someone in this case, you're saying you acknowledge did have complaints but was asymptomatic, correct?

A Correct.

Q And that's important to you that he was asymptomatic, correct?

A Correct.

Q When did Mr. Burns first start experiencing the pain in his neck, at what age?

A I don't recall.

Q At what years was he experiencing pain, what years was he asymptomatic, and what years did the pain come back before the accident?

MR. McCRORIE: Objection.

THE COURT: You've got to separate.

MR. KAMINSKY: Okay.

Q You don't recall how old he was when the pain first started, correct?

A Correct.

Q How long a period of time did he experience the original onset of pain to his neck?

A Again, I have old records --

Q Yes or no or tell us you don't know.

A I don't know.

Q How long a period of time did the pain stop before it

started again, if you know?

A I don't know.

Q And after the pain started again, how long a period of time did it stop before it started again?

A Again, I don't know the start and stop times.

Q You don't know the start and stop times?

A Correct.

Q You don't know if he had pain on and off for a year, you don't know if he had pain on and off for two years, you don't know if he had pain on and off for five years, correct?

A I don't know.

Q All you know is that what Mr. McCrorie told you is that he was asymptomatic from 2003 to 2008, true?

A That is true.

Q And that's important to you, true?

A That is the information that was given to me.

Q Well, what if I told you --

THE COURT: Hold on. Don't interrupt him.

What did you say, Doctor?

THE WITNESS: I said that was the information from the medical records that were given to me by Dr. Hausknecht, which was available, and Dr. Merola.

Q Well, what if I told you that in 2006 Mr. Burns went to a hospital in New Jersey complaining of pain to his back.

MR. McCRORIE: Objection. Objection. The

Hackensack record.

MR. KAMINSKY: I said hospital in Jersey.

MR. McCRORIE: He didn't go there complaining of anything but reactive airway.

Judge, can we approach on this?

THE COURT: Yes, you can.

(Discussion off the record.)

Q Are you aware that in 2006 he gave a complaint of back pain while he was in a hospital in New Jersey?

A No.

Q Now, by the way, just because someone does or does not go to a hospital, does that necessarily mean they are or are not having back pain?

A No.

Q So the mere fact that he was in the hospital in 2006 and at one point did give a complaint of back pain, you aren't aware of that, true?

A True.

Q And you've just acknowledged that just because someone doesn't go to a hospital doesn't mean they don't have back pain, correct?

A Correct.

Q So, for all you know, he could have been having back pain during the periods he did not go to a hospital, true?

A True.

THE COURT: Why don't we break here. It might be a good time.

Jurors, it's lunchtime. See you at 2:15.

THE COURT OFFICER: All rise. Jurors exiting.

THE COURT: Members of the jury, don't discuss the case.

(Whereupon, the jury exits the courtroom.)

THE COURT: Okay. I'll see you at 2:15.

Don't discuss the case because you're on the stand. All right, Doctor?

THE WITNESS: Yes.

MR. McCRORIE: And on the phone. Jurors could be around.

THE COURT: Yes.

(Whereupon, a luncheon recess was taken.)

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

THE COURT OFFICER: All rise. Jurors entering.

(Whereupon, the jury enters the courtroom.)

THE COURT: It's nice outside, right?

THE JUROR: Very nice.

THE COURT: Mr. Kaminsky, you may continue with the doctor's cross-examination.

MR. KAMINSKY: Judge, we would all like to continue the trial outside.

THE COURT: We'd probably be blown away, though.

CROSS-EXAMINATION

BY MR. KAMINSKY: (Continued)

Q Doctor, welcome back.

Doctor, you were kind enough to let me review your file during the lunch break.

THE COURT: I can hardly hear you.

MR. KAMINSKY: Sorry, Judge.

Q I reviewed your file and have given you everything back except one page.

This is a page of your handwritten notes, correct?

A Correct.

Q Is it fair for me to say these are notes you took while you had your meeting with the attorneys?

A These were notes -- no, that's not correct.

THE COURT: Counsel, how can he tell what you've got in your hands?

MR. KAMINSKY: I showed him.

Q You know what page I'm referring to?

A There was only one page, yes.

Q What is this page?

A This was a review of the chart as I was going over the past before I even met with the attorney.

Q Okay.

THE COURT: Did he cut you off, or were you finished answering?

THE WITNESS: I can further explain what is on the piece of paper.

Q Okay.

A (Continuing) I had reviewed the chart, some of the old medical records. I was reviewing the dates that the patient was seen by myself, which was 13 times in the office, and marked those down. I reviewed the chart work about what happened during the accident. I discussed the case with Dr. Thomas and came up with what typically is discussed during these trials, which are the cost of further treatment, and I jotted those down. And then I think that's most of what's on there.

Q Okay. Let me ask the question differently, okay?

Was this something that you prepared sort of in anticipation of testifying today?

A Yes. It's a synopsis so I can quickly reference dates of service.

Q I didn't ask the question properly. Thank you for clarifying it for us.

This is kind of like your cheat sheet, correct?

A It's easier to look at notes than the whole chart.

MR. McCRORIE: We're not admitting that.

THE COURT: Did you mumble something?

MR. McCRORIE: I said we're not admitting that into evidence. It's not part of the chart.

MR. KAMINSKY: Judge, I can absolutely put into

evidence the doctor's handwritten notes.

THE COURT: You haven't moved it.

MR. KAMINSKY: I'm asking that this be marked and received in evidence.

MR. McCRORIE: Objection. It's a summary of his notes in anticipation of testifying.

MR. KAMINSKY: Exactly.

THE COURT: It's not protected by any privilege.

MR. McCRORIE: I didn't say it is.

THE COURT: I can't hear you because you're sitting down.

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

THE COURT: I actually don't see a problem. Can I see them?

MR. McCRORIE: I'll withdraw it.

THE COURT: There's nothing that's extraneous to the case.

MR. McCRORIE: I'll withdraw it.

THE COURT: Do you want this marked and admitted?

MR. KAMINSKY: Defendants, yes.

THE COURT: D.

(Whereupon, Defendants' Exhibit Letter D, Dr. Mandelbaum's handwritten note, was received in evidence and marked.)

MR. KAMINSKY: If the court officer could show it

to the witness.

Thank you, Officer.

Q Doctor, in the top right-hand corner in relatively small print it says "500/hour"?

A Correct.

THE COURT: Counsel, I don't know why, but I'm really not hearing you clearly.

MR. KAMINSKY: I'll try harder, Judge. I'm sorry.

Q The 500 an hour that you wrote there, is that the agreed-upon rate that you were charging the attorneys?

A Yes. It was agreed upon actually prior to me, which was Dr. Thomas, but yes.

Q It was your colleague that agreed and that's the rate, correct?

A Correct.

Q Now, is that Dr. Thomas' handwriting or is that yours?

A It's my handwriting.

Q As I pointed out earlier, you understand what happens next, after you testify as to what you claim all the treatment is that Mr. Burns is going to need, how much it's going to cost, things like that, an economist comes in and makes projections to the jury, correct?

A Correct.

Q Now, you've told us the different medications. If you look at the medications that you wrote on your sheet, would you

agree with me that if you add them up, it comes to approximately $20,000 a year?

A I added it up, and it was $1,600.

THE COURT: $1,600?

Q Per month?

A Per month. I misheard you.

Q So, it's approximately $20,000 a year?

A Yes.

Q $20,000 a year for the rest of his life is a lot of money, true?

A True.

Q And so you'd agree with me that the more medications he needs and the more the medications cost, the more that's going to be asked to be awarded by the jury, true?

A True.

Q Same thing with physical therapy. The more physical therapy you say he needs, the more the physical therapy costs, the more that's going to be asked to be awarded by the jury, true?

A True.

Q Same thing with how often he needs to visit an orthopedic surgeon, how often he needs to visit a pain specialist such as yourself, the more visits and the more they cost, the more that's going to be asked to be awarded by the jury, correct?

A True.

Q Now, as far as the physical therapy, when you add up the number of times you say he needs it, when you multiply it for the rest of the years of his life, it comes to a lot of money, correct?

A Yes.

Q But you weren't aware that he hasn't even had any physical therapy since 2010, true?

A True.

Q And as far as all the medications go, you're not even aware that he's had adverse effects to them, true?

MR. McCRORIE: Objection.

Q To one of them?

A To his current regimen, he doesn't have adverse effects.

Q Well, are you aware, were you provided with a copy of Mr. Burns' trial testimony where he says that he doesn't even take the meds?

MR. McCRORIE: Objection.

THE COURT: Counsel, yes, sustained.

Q Are you aware, did you read Mr. Burns' testimony when he testified as to the actual amount of medications he's been taking as opposed to what you allege that he needs?

MR. McCRORIE: Objection.

THE COURT: Sustained.

Counsel, rephrase.

Q Do you know what Mr. Burns actually takes on a daily basis today? Yes or no?

A Yes.

Q If you add up all those medications and all those pills, it comes to a significant amount of money, correct?

MR. McCRORIE: Objection.

THE COURT: You already asked that.

Q Well, the next witness is going to come in, I'm referring to Plaintiffs' 30B which has been received in evidence, he's going to come in and make projections to the jury and say when they take your testimony as to what different physical therapy costs, what different visits to the doctor costs, what all the medications cost and you add inflation to that, he is going to come in and tell the jury that the total amount of everything he testified to is almost $2 million?

MR. McCRORIE: Objection, your Honor, for this witness.

Q Are you aware of that?

THE COURT: Excuse me. Come up.

(Discussion off the record.)

THE COURT: Counsel, are you withdrawing that question?

MR. KAMINSKY: I'll move on, Judge.

THE COURT: Thank you.

Q Now, would you agree with me, Doctor, that if the jury determines Mr. Burns doesn't need all that physical therapy, they can make adjustments to your testimony accordingly, true?

MR. McCRORIE: Objection. I'll stipulate to that.

MR. KAMINSKY: You stipulate to that?

MR. McCRORIE: Yes, of course.

MR. KAMINSKY: Thank you.

Can I get the same stipulation to the meds and the visits to the doctors.

MR. McCRORIE: Your Honor, it's the jury's determination.

THE COURT: Why doesn't someone articulate the stipulation, please.

Mr. McCrorie, do you wish to articulate?

MR. McCRORIE: Whatever the jury finds.

THE COURT: Stand up.

MR. McCRORIE: The jury can take off anything they determine he doesn't need from the care plan, as you know.

THE COURT: Did you all hear that?

THE JURORS: Yes.

Q In your records, you've tabbed certain things, correct?

A Yes.

Q You've tabbed items from Dr. Merola, correct?

A Yes.

Q You've tabbed items from Dr. Hausknecht, correct?

A Yes.
Q There is a stack of materials concerning the plaintiff's prior neck and back problems, correct?
A Correct.
Q Can you pull that out?
A I believe this is the one you're referring to.
Q It is.
Fair of me to say that there's nothing that's tabbed in there?
A Correct.
Q Now, as was your testimony in the last time we had the opportunity to meet, you acknowledged the importance of past medical history in determining whether something is caused by an accident or not, true?
A True.
Q And in that case, that person did not have a past medical history, true?
A True.
Q Which led you, in part, to conclude, in your opinion, that that person's injury was due to that person's accident, true?
A True.
Q Now, here --
THE COURT: Counsel, you're repeating testimony from this morning.

MR. KAMINSKY: I'm just trying to sum up from this morning and move on.

Q So, in this case we acknowledge, and you're holding it in your hand, that there is a past extensive history, correct?

A Correct.

Q In fact, if you would -- I'm going to read -- when did, to your knowledge, if you know, when did Mr. Burns first see a chiropractor for problems to his back?

A I don't recall the date.

Q Okay. Roughly 1986, correct?

A Okay.

MR. KAMINSKY: Okay, Counsel?

MR. McCRORIE: Yes.

THE COURT: You're stipulating to that, Mr. McCrorie?

MR. McCRORIE: Of course. They're in evidence, your Honor.

A Yes.

Q But if you look at that case history from the chiropractor dated July 1, 1986, this is part of Plaintiffs' 21 in evidence, one of the questions that Mr. Burns was asked was: "Have you ever had chiropractic care before?"

Do you know how he answered that question?

A No.

Q He answered the question yes.

THE COURT: Counsel, please. Is that a question for the witness or are you testifying?

MR. KAMINSKY: Both.

THE COURT: Well, you can't testify.

MR. KAMINSKY: I know. Okay.

THE COURT: You know, the two of you, the two of you.

MR. KAMINSKY: Come on, Judge. He's way worse.

THE COURT: You see me. I'm looking at you. You're not supposed to testify. You can read from a record, but then you have to identify it. You can't just say, oh, he said yes. This is not how it goes.

MR. KAMINSKY: Okay. I'm going to read it for the record.

Q The case history: July 1, 1986, and Mr. Burns was asked, "Have you ever had chiropractic care before?" And he wrote down "Yes."

So, would you agree with me that Mr. Burns was receiving chiropractic care before the records we have in this trial?

A It does not surprise me that he had chiropractic care prior to.

Q Okay. So, he has had back problems that go back to at least before July 1, 1986, true?

A True.

Q Now, what is the significance of back pain and pain and numbness going down to your legs with weakness? What is the significance of that to you, if any?

A That there is some back pathology disorder causing pain into the legs.

(Continued on the next page.)

Q. Okay. And that pain has to be of a certain seriousness enough nature to radiate down to your legs, correct?

A. Correct.

Q. There has to be something going on with the nerves and discs and things like that, correct?

A. Correct.

Q. Something that's at issue in this case, correct?

A. Correct.

Q. Okay. So -- oh, okay. In the office note from that day --

THE COURT: Whose office note?

MR. KAMINSKY: From July 1st of 1986.

THE COURT: The chiropractor's office notes.

MR. McCRORIE: Dr. Sylvester.

MR. KAMINSKY: Yes, Dr. Sylvester.

Q. July 1st, 1986, when he's complaining of pain to his back and neck, in addition to being asked if he's ever been to a chiropractor before, he's asked has this ever happened before and he says yes.

Now, he goes on to say that -- he has patient complains of low back pain and pain and numbness to his legs and weakness, sharp limp turning, constant dull ache, otherwise started two weeks ago. Had it previously six years ago.

So now we know that Mr. Burns has a history of radiating pain and pain in his neck and his back as far as back

as 1980, correct?

A. Correct.

Q. Okay. You didn't know that before just now, did you?

A. No. I --

Q. Did you know it before? Just now yes or no.

A. I know he has a history of ongoing back pain.

Q. Listen to my question. Did you know that the problem goes as far back as 1980?

A. No.

Q. When he was in his 20's. Did you know that?

A. No.

Q. Okay. So can we agree that this intermittent pain as has been described during this trial, goes back at least to 1980?

THE COURT: You already asked that, counsel.

MR. KAMINSKY: Withdrawn.

Q. So the period of radiating pain, there's a pattern, correct? There would be periods where --

THE COURT: Counsel, allow him to answer the question.

Q. Okay. Here's my question: Could you -- would you agree with me that going as far back as the 1980, Mr. Burns has had complaints of intermittent pain in his neck and his back often radiating to his legs causing numbness? True?

A. As far as the medical records that I reviewed, can I

quote?

Q. Yes or no or you can't answer?

THE COURT: Excuse me. Yes, no, or you can't answer with a yes or no.

THE WITNESS: Can't answer --

THE COURT: Or you can't answer, period.

THE WITNESS: No, I can't answer with a yes or no question.

Q. Okay, that's fine.

And are you aware that Mr. Burns had another lawsuit?

A. No.

MR. McCRORIE: Objection.

THE COURT: Sustained.

MR. KAMINSKY: It's been stipulated to, your Honor.

MR. McCRORIE: I know, but objection --

THE COURT: It's not a fair question to the witness.

Q. Do you know what the nature of the injuries were that Mr. Burns sustained in that lawsuit?

MR. McCRORIE: Objection.

THE COURT: Sustained. You can pose a hypothetical if you wish, but these are not fair questions.

MR. KAMINSKY: That's fine.

Q. I want you to assume that prior to this incident

Mr. Burns had an accident where he fell seven feet off a ladder and injured his back and his head. Were you aware of that?

MR. McCRORIE: Objection, your Honor, not just to the question. Can we just approach?

THE COURT: Okay. You asked two different questions in that.

MR. KAMINSKY: Okay. I'll rephrase.

MR. McCRORIE: Can we approach for one moment? It's just going to take a moment.

THE COURT: Yes.

(Whereupon, an off the record discussion took place at the bench among the assistant district attorney, the defense counsel and the Court.)

(Back in open court.)

THE COURT: Do you wish to withdraw your question?

MR. KAMINSKY: Yes.

Q. You're aware that -- are you aware, that Mr. Burns fell seven feet off a ladder and injured his back and his hip?

THE COURT: In what year, counsel?

MR. KAMINSKY: In 1989.

A. I am aware after reading one of the notes from what I recall.

Q. Do you know the extent of the force by which he hit his back when he fell off that ladder?

MR. McCRORIE: Objection, your Honor.

THE COURT: Sustained.

Q. Are you aware that following that accident he went to the emergency room?

A. No.

Q. Are you aware that following this incident he went back to work?

A. Yes.

Q. Okay. And are you aware that after that accident in 1989, he underwent a CAT scan in 1991? An MRI in 1991?

A. I know that he had a CAT scan or MRI in 1991.

Q. And are you aware that that MRI showed problems, herniated discs in the exact spot where he ultimately had surgery in 2000 --

MR. KAMINSKY: What was it '10, '11 in --

MR. McCRORIE: 9.

Q. 2009. Are you aware that it's the exact same spot?

A. I am now aware.

Q. You are now aware?

A. No. Yes, now that you pointed it out, it's the exact same spot. Again, I don't have the earlier MRI.

Q. You don't have the earlier MRI?

A. I have the report.

Q. Okay. So is it a coincidence that Mr. Burns had an MRI because of pain he was having in his neck in 1991 after he

fell seven feet off a ladder and landed on his head? Is it a coincidence that that MRI shows a disc herniation already existed in a relatively young man who continued to have bouts of intermittent pain over the years?

MR. McCRORIE: Objection to "coincidence," your Honor.

THE COURT: Sustained. Shorten your question, counsel.

Q. Yes or no, is it a coincidence that the CAT scan shows a herniated disc in 1991 at the exact level --

MR. McCRORIE: I object.

Q. -- in his spine where he had surgery?

MR. McCRORIE: I object to "coincidence" and it's an MRI.

THE COURT: Sustained. Let's not use the word "coincidence". Let's phrase it differently so the doctor can get the question.

MR. KAMINSKY: Sure.

Q. What is the level that the CAT scan -- that the MRI showed a herniation in his neck in 1991?

A. I will pull up the CAT scan.

MR. McCRORIE: It's an MRI.

THE COURT: Counsel, you're not supposed to be speaking from the counsel table. You can direct yourself to the Court, but not to the witness.

MR. McCRORIE: Can I just tell Mr. Kaminsky --

THE COURT: Yes, you can show him.

MR. KAMINSKY: It's in evidence. Can we just stipulate?

MR. McCRORIE: Yes. Sure.

Q. The parties stipulate so that makes it easier for you. The parties stipulate that it's the same level.

A. Yes.

Q. Now --

THE COURT: Excuse me.

So, jurors, you've been having "stipulate." You've been hearing that word. You understand it's agreed? The parties agreed that. The parties stipulate that. Therefore, it's not a fact at issue.

Q. Are you aware that Mr. Burns later on had an MRI -- had a CAT scan to his back?

A. I believe it was an MRI.

Q. Okay. He had an MRI to his back in 2002?

MR. McCRORIE: 3.

Q. 2003. Let's get it right. Sorry.

Have you reviewed either the films or the reports of the radiologist from those films?

MR. McCRORIE: Objection. A stipulation to the films doesn't exist.

MR. KAMINSKY: Okay. I'll reask the question.

Q. Have you reviewed the reports of the radiologist from those films?

A. Yes, I have the reports.

Q. And those films show a posterior disc herniation at L5-S1, correct?

A. Yes.

MR. KAMINSKY: Okay. And can we agree -- I'll ask for a stipulation. Can we agree that that's also the exact same part of the plaintiff, this time his back, not his neck, this time it's the same part of his back that surgery was ultimately performed on? Can we stipulate to that?

MR. McCRORIE: So stipulated, your Honor.

Q. Now, when you are trying to give us an opinion as to whether or not an accident caused an injury or whether the injury was due to something else, you want to know the past medical history, true?

A. True.

Q. Okay. And some of the things I just told you, you've told us you did not know, correct?

A. I did know the MRI findings.

THE COURT: You did?

THE WITNESS: I did know the MRI findings. I had those reports available.

Q. And you reviewed them?

A. Yes.

Q. And now I want to take -- by the way, as far as this incident is concerned, fair of me to say that not only are there a couple of things you need to know before you can give your opinion, you need to know his past medical history, true?

A. True.

Q. You need to know the nature of the incident itself. You told us that, true?

A. True.

Q. And I assume you would also want to know post-incident, correct?

A. True.

Q. Okay. So pre-incident we've established by stipulation what we've established. As far as the incident itself goes, there were about fifty people on that hoist, okay?

THE COURT: Did you say fifty or fifteen?

MR. KAMINSKY: Fifty. Five-zero.

MR. McCRORIE: 60 was the final.

Q. Okay. There were 60 people on that hoist. Just yes or no, did you ever see any statements or ever speak with any of the other people on that hoist to get their analysis of the nature of the incident?

A. No.

Q. Okay. Did you review the deposition testimony of any of the other witnesses in this case who gave their testimony as

to what happened?

A. No.

Q. Did you review the sworn testimony of any witnesses as to whether or not there was so much as even any damage to the hoist?

MR. McCRORIE: Objection.

THE COURT: That is sustained.

MR. KAMINSKY: To damage to the hoist?

THE COURT: Sustained. We're going far afield, counsel.

Q. Well, you need to know the nature of this incident, correct?

A. Correct.

Q. It has to be significant enough to cause injury because otherwise, jumping up and down you can herniate your back, correct?

MR. McCRORIE: Objection.

THE COURT: Let's rephrase, counselor.

Jurors, disregard that. Disregard that.

Q. The incident has to be of significant enough force to cause trauma, correct?

A. For this patient, yes.

Q. Well, for any patient who's claiming an injury, not just this one, true?

A. Everyone is different. Their pathology is different.

Q. Everyone is different. I understand.

MR. REIFF: Judge, can you please instruct counsel not to interrupt the witness as he's answering.

MR. KAMINSKY: Can only one attorney make an objection, please.

THE COURT: Yes. We shouldn't double team. You can pass your objection to him and he can pass it to him.

MR. KAMINSKY: And I will do my best not to interrupt, but I'm trying to get yes or no answers. That's why.

THE COURT: Some of them can't be answered with yes or no.

MR. KAMINSKY: Fair enough.

Q. These are yes or no questions concerning the nature of the impact, okay?

After this incident happened, did Mr. Burns go to the emergency room?

A. No.

THE COURT: Counsel, you already asked that.

Q. After the accident happened, he went to Medcor, correct?

A. Correct.

Q. And then he went back to work, true?

A. True.

Q. And then the next day he went back to work, true?

A. True.
Q. How long was it after the accident happened that Mr. Burns first went to go see Dr. Merola?
MR. McCRORIE: Objection.
Q. If you can tell me.
THE COURT: Can we have a stipulation as to that?
MR. McCRORIE: June 2008. June 9th.
THE COURT: 2008?
MR. McCRORIE: Yes.
THE COURT: That equals how many days?
MR. KAMINSKY: About close to three weeks.
THE COURT: Is that correct?
MR. McCRORIE: I can't do it either. So whatever May 20th to June 8 is -- June 9th. Three weeks. Yes.
A. I was aware it was a couple of weeks.
Q. Couple of weeks. Three weeks?
A. Yes, three weeks.
Q. Now -- so whatever happened that day wasn't enough to send him to a doctor for three weeks, true?
MR. McCRORIE: Objection.
THE COURT: Sustained.
Q. Okay. During those three weeks he went to work, did he not? Do you know?
A. He, as far as I know, he did go to work.
Q. And he continued to go to work for close to a year

after the incident, true?

A. Yes.

Q. Okay. Well, does that -- is that something you would want to know, or is that something that's irrelevant to you?

A. You said close to a year. I'm not sure of the exact date, but I'm aware he went to work.

Q. It's April of 2009. So it's close to a year, okay? Is that something that's of significance to you or it's irrelevant, one or the other?

A. It's significant enough that I'm aware he did.

Q. Okay. Thank you.

THE COURT: Counsel, don't cut him off. Let him talk.

MR. KAMINSKY: Okay.

MR. McCRORIE: Can we have the answer to the last question?

THE COURT: No, I'm going to let him say what he was going to finish with.

What were you going to say?

THE WITNESS: I was going to say I'm aware that he did return to work and he saw Dr. Merola three weeks after.

Q. Okay. And do you know if the plaintiff's work is physically demanding on him?

THE COURT: I can't hear you.

Q. Do you know if the plaintiff's work is physically demanding?

A. It is.

Q. What is the effect of the nature of the work Mr. Burns did, going back to when he first joined the union working upward of 2500 or 3000 hours a year? What is the effect of doing what he did on a person's neck and a person's back, if any, if you know?

A. He has a very physical job and it may have some effect on his neck and back.

Q. And, in fact, we know from the records that he did have these prior problems, true?

MR. McCRORIE: Objection.

THE COURT: Can you answer that question?

THE WITNESS: Yes.

A. He had problems and a history of problems, yes.

Q. What, if any, significance of Mr. Burns complaining of headaches for all those years --

MR. McCRORIE: Objection.

Q. -- intermittently?

THE COURT: Yes. Gentlemen, step up.

(Whereupon, an off the record discussion took place at the bench among the assistant district attorney, the defense counsel and the Court.)

(Back in open court.)

THE COURT: Okay. Let's rephrase.

MR. KAMINSKY: Okay.

Q. Doctor, in relation to -- let's try and see if we could either connect it or not connect it to problems with a neck, okay?

MR. KAMINSKY: I'm sorry, Judge.

Q. In relations to possible injuries to a person's neck, what significance, if any -- what significance is there of complaints intermittently of headaches?

A. There are a lot of causes of headaches. One of them has to be --

THE COURT: I'm sorry, there's a lot of what?

THE WITNESS: Causes of headaches.

A. There are many different types of headaches. One of them happens to be cervical genic.

THE COURT: Cervical who?

THE WITNESS: Genic, coming from the neck, versus a tension headache or migraine headache and there's a whole host of different types of headaches. A headache is really a separate assessment.

Q. Okay. When he had his accident when he fell off the ladder we know he went to the emergency room. Did you review or have access to those emergency room records to see the extent of his injuries?

A. No.

Q. Now, on this plan that you've prepared for Mr. Burns for the rest of his life, things that you say he will need --

THE COURT: Counsel, I don't know what exhibit you're referring to, but there's been no testimony about preparing a plan for anybody.

MR. KAMINSKY: Okay.

THE COURT: So if you could just ask a foundation question, it would be good.

Q. Of the items that you say that he needs that you've itemized for us, okay, are you aware that by far the most expensive item is the cost of the various medications?

A. Yes.

Q. Okay. Now, would you agree with me that -- just yes or no -- the goal of a spinal cord stimulator is to get that person off pain medication, yes or no?

A. It can't be answered with a yes or no answer.

Q. Then I'll see if I can change the question to get you to give me a yes or no answer.

Would you agree that the objective of a spinal cord stimulator is to lessen, if not have a person totally off pain medication, yes or no, or you can't answer still?

A. The answer is no.

Q. Okay. Would you agree that there are many studies, including governmental studies, that say that when a person has pain such as Mr. Burns, the goal should be to get them off pain

medication?

MR. McCRORIE: Objection.

Q. Would you agree with me?

THE COURT: I'm going to allow that.

A. I agree, with an explanation.

THE COURT: Hold on. Say it again.

THE WITNESS: I agree, with an explanation.

Q. Okay. Mr. McCrorie will certainly give you a chance to give an explanation, okay? I promise.

And would you also agree that being on an excessive amount of pain medication can be dangerous?

A. Yes.

Q. And would you also agree that one of the reasons the Center for Disease Control says not to prescribe the extensive medications you're prescribing --

MR. McCRORIE: Objection.

THE COURT: Sustained.

Q. Would you agree that the Center for Disease Control -- have you read any of their studies on opiates?

A. Yes.

Q. Okay. And can we agree that they recommend trying to reduce the person's dependency on opiates?

A. I agree, but it deserves an explanation.

Q. And it will get one, okay?

And have you read studies by the Mayo Clinic that talk

about the need to taper opioid therapy in non-cancer patients, yes or no?

A. It needs an explanation.

Q. I understand it needs an explanation, but the question is, are you familiar with that study?

MR. McCRORIE: Objection.

A. I'm familiar with the study, but it's not objectionable to this patient.

MR. McCRORIE: Objection.

Q. Okay. That will be your explanation.

THE COURT: I will allow you to pursue this matter on redirect, counsel.

Q. Are you familiar with the Center for Disease Control and Prevention -- well, first of all, are you familiar with the Center for Disease Control and Prevention?

A. Yes.

Q. Have you -- you probably have it in your office. If not, tell me. Do you have a copy of their guideline of prescribing opiates for chronic pain?

A. Yes.

Q. And I assume you abide by the guidelines and standards of the United States Department of Health, correct?

A. Correct.

Q. If we look at the prescriptions you're prescribing on a daily basis to Mr. Burns, can we agree that they are well in

excess of the recommendations of the C.D.C.?

MR. McCRORIE: Objection.

THE COURT: I will allow it, if you can answer it.

Q. Can you?

THE COURT: Excuse me. If you can answer with a yes or no or I can't answer that with a yes or no.

THE WITNESS: It can't be answered with a yes or no.

Q. Can this be answered with a yes or no: The more medications you prescribe, the higher the number is going to be on that chart?

MR. McCRORIE: Objection. Stipulated, but objection, asked and answered.

THE COURT: I think that was asked and answered, counsel.

MR. KAMINSKY: Okay.

Q. Now, given the -- let's first talk about the neck, okay? Given what we know about Mr. Burns' --

THE COURT: Excuse me.

Jurors, stand and stretch. Up. Up. I see everybody up.

(Whereupon, there was a brief pause in the proceedings.)

THE COURT: We're going to open the outside door

over here which helps improve air circulation and if worse comes to worse, we'll open this one. Now Kenny will watch and if it gets noisy in the hallway we'll close it, but usually, as soon as we open that door we have a great draft and that will keep you alert, okay? Otherwise, you'll be jumping up and down every few minutes. Okay? You're good? All right.

All right. You were about to ask a question.

MR. KAMINSKY: Yes, which I forgot.

THE COURT: It's okay.

MR. KAMINSKY: You know, Judge, and it was a good one. Hold on a second.

THE COURT: Would you please read that back.

(Whereupon, the testimony as requested was read by the court reporter.)

Q. All right. Doctor, I want you to take this incident out of the equation, okay? This incident never happened for purposes of this question, all right?

A. Which incident are you referring to?

Q. The incident that's the subject of this lawsuit. Take it out, okay?

THE COURT: You're talking about the accident?

MR. KAMINSKY: Yes.

Q. Given what we know about the plaintiff's neck, given that we know he complained of neck pain back in the 1980's,

given that we know that he had film studies done in 1981 that show herniations at the exact level where he had the surgery, given that we know that he went through bouts of intermittent neck pain over the years, okay? Can you say with certainty that if this accident never happened, Mr. Burns never would need to take a pain killer?

MR. McCRORIE: Objection.

THE COURT: I'll allow it if the doctor understands the question.

MR. McCRORIE: Objection to the certainty standard.

THE COURT: Do you understand the question?

THE WITNESS: I can repeat the question if you want.

THE COURT: No. It's a hypothetical.

Q. And it's yes or no.

A. It's difficult to answer a question like that.

Q. It's difficult to answer. Okay.

Now, I want you to consider what we know about the plaintiff's back. I want you to take this incident out of the equation as if this incident -- wait.

MR. KAMINSKY: Withdrawn. I'm not up to that.

Q. Take this incident out of the equation. I'm still focusing on the neck, okay? Given what we know about the plaintiff's prior intermittent complaints of pain to his neck,

including the findings of herniated discs at the levels where he ultimately had the surgery, add in all the years of physical labor that he did, add in the intermittent complaints of headaches, can you say with certainty --

MR. McCRORIE: Objection to that "certainty" again.

Q. Yes or no, that the plaintiff never would need physical therapy?

A. Difficult question to answer. You can't predict the future.

THE COURT: Excuse me. Come up.

(Whereupon, an off the record discussion took place at the bench among the assistant district attorney, the defense counsel and the Court.)

(Back in open court.)

Q. Doctor, I'm going to restate my question.

THE COURT: Yes. This has to be rephrased because only God knows things with certainty, so.

Q. All the questions I'm asking you, just like Mr. McCrorie asked you his questions, my questions are with a reasonable degree of medical certainty, not absolute one hundred percent certainty. Reasonable degree of medical certainty, okay?

So my question to you is, with a reasonable degree of medical certainty, take this incident from 2008 out of the

picture, okay? Given what we know of the plaintiff's intermittent problems with his neck, can you tell us, would the plaintiff's condition to his neck have continued to have gotten worse as he aged, yes, no or I can't answer that?

MR. McCRORIE: Objection.

THE COURT: I'll allow it.

A. Can't answer the question simply as yes or no.

Q. Okay. When a person has a herniated disc, isn't it true that that condition worsens over time?

A. He is --

Q. Yes or no?

A. It can.

Q. Okay. So in this case, we know that Mr. Burns had a herniated disc in his neck as a result of the films taken in 1991, true?

A. Yes.

Q. Is a person who does physical labor up to 2000 hours a year --

THE COURT: Up to what?

Q. Up to 2000, 2500 hours a year. One year 3000 hours. Is that person who also complains of intermittent pain to his neck, is that person likely to experience the deterioration in the condition of his neck as he ages, yes or no?

A. He is likely to have some degeneration, but not necessarily pain.

Q. Well, we know he had pain over the years, true?

A. But he was asymptomatic prior to the incident.

Q. Actually, you were told he was asymptomatic since 2003, but I've shown you that in 2006 he did complain of pain at a hospital and you've told us that just because someone doesn't go to the hospital, doesn't mean they're asymptomatic, true?

MR. McCRORIE: Objection.

THE COURT: Sustained.

MR. McCRORIE: Okay.

THE COURT: Jurors disregard.

Q. All right. Doctor, given everything you know about the plaintiff's -- I asked you if you had an opinion. Take this incident out of the equation and I asked you if you had an opinion with a reasonable degree of medical certainty whether or not Mr. Burns' neck would have continued to deteriorate anyway to the point where he would need painkillers and you said you can't answer that yes or no. I asked you the same question whether or not he would need physical therapy and you said you can't answer that yes or no.

As far as his neck is concerned, given what we know about his prior problems with his neck, given what we know about his intermittent complaints of his neck, given that we know the surgery was done at the exact same level where he had the complaints beginning twenty years earlier, can you give us an opinion with a reasonable degree of medical certainty, yes, no

or I can't answer that yes or no like you couldn't answer the other questions yes or no, do you have an opinion if Mr. Burns at some point would have been a candidate for surgery to his neck if you take this incident out of the equation?

MR. McCRORIE: Objection. He's not here for surgery to the neck. Spinal court stimulator and pain management.

MR. KAMINSKY: Wait a minute.

MR. McCRORIE: I object, your Honor.

THE COURT: Wait one second.

(Whereupon, there was a brief pause in the proceedings.)

THE COURT: Come up one minute, please.

(Whereupon, an off the record discussion took place at the bench among the assistant district attorney, the defense counsel and the Court.)

(Back in open court.)

THE COURT: Objection sustained.

Q. Okay. Doctor, I'm going to ask you about the spinal cord stimulator, all right? I want you to take this accident out of the equation, okay? I want you to assume that in 1986 Mr. Burns began treating for pain radiating down to his leg from his back. I want you to assume that at that time he told the treatment doctor --

MR. McCRORIE: Chiropractor.

MR. KAMINSKY: A chiropractor is a doctor. Let's give chiropractors credit.

MR. McCRORIE: Objection, your Honor. That's not a medical doctor.

Q. Doctor, is a chiropractor a doctor?

A. A doctor of chiropractic medicine.

Q. Thank you.

Is it proper to call him a doctor?

A. He's not a medical doctor.

Q. I didn't say he was.

THE COURT: We're not going to get into a back and forth between you. No arguments.

Q. The gentleman, the chiropractor that Mr. Burns went to see in 1986, we can agree he complained of pain radiating down to his legs often causing numbness, correct?

A. Yes.

Q. And he said that it began onset a few weeks earlier, correct?

A. Yes.

Q. Can we agree that he told that chiropractor that this isn't the first time that that happened; he had an incident like this six years earlier, 1980, okay?

A. Yes.

Q. So I want you to assume that as far as back as 1980 Mr. Burns was dealing with issues to his back that were serious

enough --

THE COURT: Counsel, why are we repeating this? We already did this.

MR. KAMINSKY: I'm going to ask his opinion.

THE COURT: Go do it. Go for it.

Q. Given everything that we know about his past medical history, including the herniated discs, including the fall from the ladder, including the intermittent complaints of pain to his back radiating down to his leg, can you say if that condition is something that is likely to deteriorate over time as he gets older?

MR. McCRORIE: Objection. Asked and answered.

THE COURT: Which condition?

MR. KAMINSKY: The back.

THE COURT: Are you asking if his back injuries were likely to deteriorate over time?

MR. KAMINSKY: Yes.

THE COURT: That simple?

MR. KAMINSKY: Yes. That's my question.

A. It can, yes.

Q. In fact, as a person ages it's common to, correct?

A. Yes.

Q. And that's called desiccation and degeneration, correct?

A. Yes.

Q. And in prior medical records you reviewed there were signs of desiccation and degeneration also as far as back as in the 1980's, true?

A. Yes.

Q. So that degeneration problem was going on for 25 years, 30 years, correct?

A. Yes.

Q. Okay. Given that we know that Mr. Burns had all prior issues with his back as has been described, given what we know about the CAT scan or the MRI films to his back which show the herniation, given what we know about the fall from the ladder, given what we know about the football coaching incident where he had a concussion and he hurt his back, given all the things we know about the complaints he made over time, can you say with a reasonable degree of medical certainty whether or not at some point in his life, taking this incident out of the equation completely, Mr. Burns may have been a candidate for a spinal cord stimulator implantation? Yes, no, or I can't answer that?

A. I can't answer that without --

Q. Okay. If you can't answer it, I accept that you can't answer it.

MR. McCRORIE: He said without an explanation.

THE WITNESS: I need an explanation.

THE COURT: Anything else, counselor?

MR. KAMINSKY: I'm thinking, Judge.

Q. Now, I asked you about different costs of different things as you -- withdrawn.

Now, I just want to go back since it's the biggest item on that chart. I want to go back to the medications. The chart that the next witness is going to use, Plaintiffs' 30B, we've agreed that the largest cost on there is the medications. Your own notes indicate that the plaintiff had an 80 percent improvement concerning his pain following that procedure, true?

THE COURT: Following what?

MR. KAMINSKY: The implantation of the spinal cord stimulator.

(Continued on next page...)

Q The implantation of the spinal cord stimulator.
A Part of his pain was relieved by 80 percent.
Q Now, I asked you about some of the studies of the CDC.
Does the CDC also say, as far as pain medications go, a person ultimately plateaus and at that point the goal is to reduce their taking of pain medications? Yes or no or you don't know?
A It deserves an explanation. Not every patient will plateau.
Q So now you're giving explanations without me asking. Okay.
A Sorry.
MR. McCRORIE: Objection.
THE COURT: No side arguments.
Q You also say that he needs further epidurals, correct?
A Yes.
Q Isn't it true --
THE COURT: You said what?
MR. KAMINSKY: He needs further epidurals.
MR. McCRORIE: Facets. Facets.
MR. KAMINSKY: Epidurals.
MR. McCRORIE: It's facets.
MR. KAMINSKY: Just facets?
MR. McCRORIE: Yes, that's all it is.
Q Let's explain what a trigger point injection is. A

trigger point injection, it's like a little pinch, correct?

A That's intramuscular injections with a one-and-a-half inch needle.

Q Yes. And they're injected one after the other. The whole process takes maybe 30 seconds, correct?

A No. It takes a little longer than 30 seconds, a few minutes.

Q Okay.

A It depends.

Q Not to make myself a witness in the case, but, okay, if you say so.

MR. McCRORIE: Objection.

THE COURT: I'm sorry. Come up here one minute.

(Discussion off the record.)

THE COURT: We're going to start over with those questions.

Are you okay, jurors? Do you need to walk around the hallways three times?

MR. KAMINSKY: I do, Judge. I need to walk around about four times.

THE COURT: I'm going to make all the lawyers walk around three times.

MR. McCRORIE: And do pushups.

THE COURT: All of them.

Let's start with that series of questions again.

MR. KAMINSKY: Okay.

THE COURT: Let's try not to repeat.

MR. KAMINSKY: Judge, if we can take a very short break, maybe I'll be done, if that's okay. I just want a couple of minutes to go over some notes.

THE COURT: Jurors, three laps.

THE COURT OFFICER: All rise. Jurors exiting.

(Whereupon, the jury exits the courtroom.)

(Whereupon, a recess was taken.)

THE COURT OFFICER: All rise. Jurors entering.

(Whereupon, the jury enters the courtroom.)

Q Actually, Doctor, I only have a few more, and I thank you for your patience.

Doctor, if we went through all of your --

THE COURT: Louder.

Q Doctor, if we went through all of your progress notes, and I'm not going to, but if we did, isn't it mentioned throughout your notes that Mr. Burns wants to stop using pain medications?

A Yes.

Q And isn't one of your goals, as his treating doctor, to help him achieve that objective?

A Yes.

MR. KAMINSKY: I have nothing further. Thank you again for your patience.

THE COURT: Thank you.

Any redirect?

MR. McCRORIE: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. McCRORIE:

Q First, Dr. Mandelbaum, did any of Mr. Kaminsky's questions change your opinion that this accident aggravated and activated pre-existing, asymptomatic conditions in his neck and his back?

A It has not.

MR. KAMINSKY: Objection.

THE COURT: I'll allow it.

A It has not changed my opinion.

Q I know it's your second time testifying --

THE COURT: Counsel, you have said that maybe five times.

Q Can you tell the jury, despite Mr. Burns wanting to get off the medication and not taking it before really getting to your practice, is a post laminectomy syndrome in the cervical and lumbar region a permanent syndrome?

A It is a permanent syndrome, yes.

Q Does everyone who has a back or neck surgery such as the one Mr. Burns had, do they all lead to post laminectomy syndrome?

A No.

Q Before you answered that you didn't know Mr. Burns had a negative reaction to one of the drugs.

I'd just like you to go to the note of 10/14/14?

THE COURT: 10/14?

MR. McCRORIE: October 14, 2014.

For speed, if the Court will permit.

THE COURT: You can show him the page.

Q In that note and other notes, Doctor, it says, "Hospitalized times four for vomiting episodes secondary to a Fentanyl patch, 2014."

Did you know during the treatment of Mr. Burns that he was hospitalized four times for vomiting with the Fentanyl patch?

A Yes.

Q Was the Fentanyl patch then dis -- was the use of it by your office with Mr. Burns discontinued in lieu of another drug?

A Correct. We changed the Fentanyl patch to another pain medication.

Q Going back in order from the beginning of the cross-examination that there has been no physical therapy for six years, if Mr. Burns were not within the system he's in where authorizations were required --

MR. KAMINSKY: No, no.

THE COURT: Yes. Sustained.

Q Do you stand by --

THE COURT: No, no. You have to rephrase.

MR. McCRORIE: Yes. Okay.

Q Forget anything I said before.

Do you stand by your opinion that physical therapy should be prescribed for Mr. Burns in his current condition to his neck and his back?

A Yes.

Q You were asked a lot of questions about the only other time you testified where Mr. Kaminsky was representing the construction company. He pointed out he had the very same claims that that 20-year-old who fell two stories --

MR. KAMINSKY: No, Judge. It's only relevant what the doctor testified to. I object.

THE COURT: Excuse me. Excuse me. The objection is sustained.

MR. KAMINSKY: Thank you.

THE COURT: No drama, please. Thank you.

Q Is every case, whether there's litigation or not, is every patient's case considered separate and apart from any other person's case?

A Yes, they are.

Q Was it important for you to know the fact that Mr. Burns had prior conditions so you knew how to treat it?

A Yes, it was important.

Q And in the court case, was it important for you to

know, to have his prior medical records and to learn that he was previously asymptomatic prior to this accident?

A Yes, that is important.

Q Okay. So, again, we knew that 1980, asymptomatic for six years, right?

THE COURT: Counsel, excuse me. Excuse me. Don't testify, and don't go outside the scope of the cross, please.

Q I'd like you to -- withdrawn.

You've testified to this, but Mr. Burns was being treated for the nerve pain, the radiating pain, correct, down the arms and the legs?

A In particular, for the spinal cord stimulator, that's what it's most helpful for.

Q I would like you to assume that his testimony was, on the stand, that since 2003 he has not ever had any --

MR. KAMINSKY: Objection.

THE COURT: Sustained. You're outside the scope of the cross.

MR. McCRORIE: Okay.

Q Remember, Mr. Kaminsky put a record into evidence, 39 pages, Defendants' C, of a Hackensack hospitalization for what the judge read, hyperactive airway disease, okay?

A Yes.

Q And during one exam it's mentioned about coughing and

back pain. Okay? Does that change -- it doesn't specify radiating or not. It's during a gastrointestinal exam.

MR. KAMINSKY: Objection to his testifying.

THE COURT: Sustained.

Jurors, you will disregard all of that question.

Q Does the fact that what Mr. Kaminsky read to you, one note of the word "back pain" with nothing qualifying it, does that change any of the opinions you gave as to the cause of the need for the spinal cord stimulator?

MR. KAMINSKY: Objection. He already said everything that I asked him doesn't change his opinion, so he's answered it already.

THE COURT: Rephrase.

Q Learning that while hospitalized in 2006 for an unrelated issue during one exam by a gastrointestinal --

THE COURT: There was no testimony, Counsel, that the note was from the gastro.

MR. McCRORIE: He put that page into evidence.

THE COURT: But there was no testimony as to that type of doctor. You are testifying.

MR. McCRORIE: Judge, I'm reading something that's in evidence.

THE COURT: It's not in evidence.

Is the note in evidence?

MR. KAMINSKY: I believe it is, judge.

THE COURT: The note is in evidence?

MR. KAMINSKY: I'm not sure exactly what we put in evidence.

MR. McCRORIE: It says C in evidence.

MR. KAMINSKY: Judge, I think it may be, so I'm okay if Mr. McCrorie reads it.

THE COURT: C is in evidence subject to redaction.

MR. McCRORIE: The only page I'm referring to is this, and I'd ask for the whole thing to be in evidence.

MR. KAMINSKY: I'm fine if you read what this is.

MR. McCRORIE: Judge, I can't say gastrointestinal?

THE COURT: You have to be quiet when you're talking yourselves. That's what talking yourselves means.

MR. McCRORIE: It's five after 4:00 and I have plenty to do. He's already answered that his opinion doesn't change.

THE COURT: He didn't answer anything. He didn't have a chance.

MR. McCRORIE: The first question I asked, I'll stay with that, Judge.

THE COURT: Jurors, you must disregard everything that was just said in the way of his question. All right? Thank you.

Q So, you've told this jury that Dr. Thomas is ill and

you took over the 600 patients, correct?

MR. KAMINSKY: Objection.

THE COURT: He didn't testify.

MR. McCRORIE: He did.

Q Can you tell the jury why you took notes, Defendants' D, after reviewing all of this last minute, having to come into court after reviewing his entire history?

MR. KAMINSKY: Objection.

Q Why did you take the notes in your review of the medical records?

MR. KAMINSKY: He told us already.

MR. McCRORIE: He called it a cheat sheet.

Q Can you tell us why you took those notes?

THE COURT: Would you come up here, please.

(Discussion off the record.)

Q Doctor, Plaintiffs' 21 in evidence, is that the same as the pack of paper you reviewed of the prior medical records?

A Yes.

Q What does "intermittent" mean, medically?

A It means that the pain comes and goes.

Q Can a chiropractor prescribe any medication?

A No.

Q And I'd like you to assume that Mr. Burns' testimony and the records reflect that up until the date of this accident he's never been on any pain medication for the neck or back

whatsoever, okay?

A Yes.

Q Mr. Kaminsky asked you if it was important to know whether or not someone went to an emergency room in the nature of the emergency room record, okay?

A Yes.

Q I would like you to assume that in the notes it's indicated that on March -- February 23, 1989, he had the accident. As Mr. Kaminsky pointed out, he went to the emergency room. He testified to the jury about that.

A Yes.

Q Can you go in that packet to the April 20, 1989 note of the neurologist, the medical doctor?

A Yes.

THE COURT: Excuse me. Are we talking about the latter half of that?

MR. McCRORIE: Yes, 1989, Plaintiffs' 21 in evidence, the medical records.

Q On the bottom of that note can you read to the jury just the last, second to last paragraph, and that sentence on the first one?

MR. KAMINSKY: I'm sorry. Where are we?

MR. McCRORIE: Plaintiffs' 21.

MR. KAMINSKY: I have it.

MR. McCRORIE: April 20.

THE COURT: Show him, Mr. McCrorie.

MR. KAMINSKY: Okay. Go ahead.

A "Because of the nature of the patients's complaints, the EMG nerve conduction study, nerve conduction testing were performed. A thorough evaluation of both lower extremities and the lumbar paraspinal muscles did not reveal any abnormality.

"My diagnosis would be that William Burns is suffering from posttraumatic lumbothoracic sprain and posttraumatic headache."

Q Continue reading that.

A "I am recommending that the patient use any over-the-counter medication conservatively for minor pains as they should occur but to continue in the future with chiropractic manipulation."

MR. KAMINSKY: Keep going.

MR. McCRORIE: You can keep going.

A "In the meantime, I am recommending, because of persistent foot numbness and no certain ideology, to get an MRI of the lumbosacral spine and the patient will return to my center two weeks after the MRI."

Q I would like you to assume after that, as the records indicate, not until 1991 did he treat again and he got an MRI of his neck.

You have that, right?

A Yes.

Q And then not again until 2002 with a chiropractor and 2003 with the epidurals, that you know of, okay?

A Yes.

Q That's the extent of what we know --

THE COURT: No, no. Where's the question?

Q Was it significant to you to know that he was or was not on any form of narcotic pain medication?

A Yes, it was significant to me, and as far as the neurologist, that he didn't have any significant findings on that neurological examination.

Q And in that note, does the doctor also indicate his complaints are intermittent, the numbness is intermittent?

A Yes.

Q You had Dr. Hausknecht's note, the referring doctor?

A Yes.

Q It's already been read, but in the very first note, his impression is aggravation of prior neck and back injuries and underlying degenerative joint disease.

THE COURT: What record are we speaking of?

MR. McCRORIE: The first note of Dr. Hausknecht, June 19, 2008, under the "Impression."

A Yes.

Q My question to you is: Did you know as early as when you first started treating the patient that the claim of Mr. Burns is that he --

MR. KAMINSKY: Objection. Objection.

Q Did you know that --

THE COURT: Excuse me. Sustained.

Jurors disregard.

Q In the notes that you had of Mr. Burns' prior -- you had his MRI from 1991 and his MRI from 2003, correct?

A Yes.

Q And you had his operative reports from Dr. Merola, correct?

A Yes.

Q So, did you know before coming here today that --

MR. KAMINSKY: Objection.

Q Did you know before coming here that his operation was at the same --

MR. KAMINSKY: Objection. Objection. It's already a leading question.

Q What information did you have --

THE COURT: Sustained.

Q What information did you have as to whether or not he was operated on levels that were previously herniated?

THE COURT: You have to wake up. Stand and stretch. Up. Up. Up. Not by yourself, everybody together.

(Brief pause in the proceedings.)

THE COURT: Do you have another question?

MR. McCRORIE: I don't think there was an objection to the last question.

MR. KAMINSKY: Can we have the last question read back?

THE COURT: Yes.

Can you read back the last question.

(Whereupon, the requested portion was read by the reporter.)

THE COURT: Can you answer that?

THE WITNESS: Yes.

A I was aware that he had surgery on those discs, that disc level that he had previously herniated.

(Continued on the next page.)

Q. I'd like you to assume that Dr. Merola showed the jury what he said was something that was now touching the cord.

MR. McCRORIE: Objection.

THE COURT: That's beyond the scope of cross.

Q. Mr. Kaminsky asked you if you had an opinion as to whether or not a herniation could progress over time, okay?

A. Yes.

Q. Can a herniation that's been there since 1991, if there's a trauma, move and get bigger?

MR. McCRORIE: Objection. Way beyond the scope.

THE COURT: Sustained. You have to rephrase that.

MR. McCRORIE: So withdrawn.

Q. The jury heard about the generation. Does everyone degenerate whether your disc is herniated or not?

A. Everyone degenerates from the time they're born until they die. If someone has a preexisting injury, another injury can -- by far there are more susceptible to reinjuring that spot. Especially if they're asymptomatic.

MR. KAMINSKY: Objection. Move to strike as unresponsive.

THE COURT: Yes, the first part stays in. Everyone degenerates as they get old.

Q. Mr. Kaminsky asked specifically about Mr. Burns if he had herniations at the 2 to 3, the 3,4, the 4,5, which we know

he had in 1991. We know that in 1991 there's no cord involvement.

MR. KAMINSKY: Objection.

THE COURT: Sustained.

MR. McCRORIE: We can't stipulate to that?

THE COURT: Counsel, you have to limit yourself to cross, the scope of cross.

Q. I would like you to assume that Dr. Merola testified that there was no cord involvement indicated on the 1991 MRI.

MR. KAMINSKY: Judge, I didn't say a word about that.

THE COURT: Sustained.

Q. Mr. Kaminsky asked you if the disc could progress and get worse without any trauma. Do you remember that?

A. Yes.

Q. If there is a trauma, could one or more of the discs get bigger, push further into the canal and touch the spinal cord from a trauma?

MR. KAMINSKY: Objection.

THE COURT: I will allow that.

A. Yes. It's more likely that it will happen in someone who has a preexisting condition.

Q. Okay. And so you were also asked about whether or not specifically you reviewed if there's statements from any of the 60 or so other people on the elevator. Okay?

A. Yes.

Q. Did you see how many people reported to Medcor with neck and back injuries after this accident?

MR. KAMINSKY: Objection.

THE COURT: Sustained. Do you have anything else?

MR. McCRORIE: Yes, your Honor.

Q. Does the level of impact in the mechanism of an injury, does someone's preexisting condition have something to do with how hard or soft it would have to be to reinjure a previously asymptomatic --

MR. KAMINSKY: Objection.

THE COURT: Sustained.

Q. -- herniated disc?

MR. KAMINSKY: Objection.

THE COURT: Sustained.

Q. While hospitalized, if bedridden, can coughing cause back pain, not radiating back pain?

A. Yes.

MR. KAMINSKY: Objection.

THE COURT: Sustained.

Disregard the question.

Counsel, I'm going to end your redirect if you don't stay within the scope of cross-examination if I have to tell you one more time.

MR. KAMINSKY: I'm done with it, your Honor.

THE COURT: You're done. Thank you very much.

Okay. Do you have any recross?

MR. KAMINSKY: Very briefly, yes.

THE COURT: You have about seven minutes to be brief. At most.

MR. KAMINSKY: Okay.

RECROSS EXAMINATION

BY MR. KAMINSKY:

Q. What is the difference between asymptomatic and residual symptomatology?

A. Asymptomatic means you have no symptoms. Residual symptomatology can refer to someone who has symptoms and still has symptoms maybe not as severe.

Q. Okay. So in other words, on June 19th, 2008, do you agree or disagree with the report prepared by your partner, Dr. Thomas, where he writes --

MR. McCRORIE: That's Dr. Hausknecht's report.

Q. Dr. Hausknecht's report. I stand corrected.

THE COURT: He stands corrected.

MR. McCRORIE: And it's beyond the scope, your Honor.

MR. KAMINSKY: Asystematic versus systematic is beyond the scope?

MR. McCRORIE: Yes. It was asked on direct and

then on cross.

Q. Do you agree or disagree with the report prepared by Dr. Hausknecht that Mr. Burns had residual symptomatology when he was examined in June of 2008 before, and he's referring to residual symptomatology before this incident happened?

MR. McCRORIE: Objection.

THE COURT: Isn't this beyond the scope of redirect?

Q. You just told Mr. McCrorie that the spinal cord stimulator is supposed to help with radiating pain, correct?

A. Yes.

MR. McCRORIE: Objection. I don't think I asked that.

MR. KAMINSKY: That's word for word.

Q. And can we agree --

THE COURT: Wait.

MR. McCRORIE: I didn't ask about --

THE COURT: Wait one second.

No, that wasn't part of redirect.

Q. Is the spinal cord stimulator supposed to help with radiating pain?

MR. McCRORIE: Objection.

THE COURT: Sustained. That was part of your cross-examination, but not part of redirect. This is why I take notes.

MR. KAMINSKY: Okay.

THE COURT: Any more questions?

MR. KAMINSKY: Yes.

Q. Counsel just read in his cross-examination a note from Dr. Hausknecht.

THE COURT: His redirect.

MR. KAMINSKY: In his redirect. I'm sorry.

Q. That said --

MR. McCRORIE: I believe I was objected to --

THE COURT: Excuse me. You have to be quiet.

MR. McCRORIE: Objection. I believe I was sustained and I wasn't allowed to read from it.

THE COURT: I don't know what he's even talking about, Counsel. Can I please hear the question.

MR. McCRORIE: Yes.

Q. Dr. Hausknecht wrote, and you were asked and you agreed, he had underlying joint disease. What is underlying joint disease?

A. I don't recall that being stated beforehand that I read from Dr. Hausknecht's -- that wasn't his statement that I read. That was the other neurologist.

Q. You were asked if discs can move. As a result of trauma, can a disc also move as a result of wear and tear?

MR. McCRORIE: Objection. Asked on his cross.

THE COURT: I will allow it in context.

A. Trauma --
Q. No. My question --
A. It deserves an explanation.
Q. Okay. My question, can a disc be affected by wear and tear?
A. Unlikely.
Q. Okay. So for instance --
A. I should say, correct, that it's unlikely to herniate from wear and tear unless there's a preexisting condition.
Q. I accept that it's unlikely to herniate as a result of wear and tear.

Can an already herniated disc worsen as a result of wear and tear?

MR. McCRORIE: Objection. Asked and answered on cross.

THE COURT: I'll allow it.

Q. Yes or no?
A. Yes.
Q. Okay. And for instance --

THE COURT: You've got two minutes to go.

MR. KAMINSKY: Okay.

Q. Would one example be where Mr. Burns --

THE COURT: Are you about to go beyond the scope of redirect?

MR. KAMINSKY: No.

THE COURT: I'm listening.

MR. KAMINSKY: I hope I'm not anyway. If I am I'm sure I'll be --

Q. Are you aware that there was an instance where he felt --

MR. McCRORIE: Objection.

Q. -- his back pop? I mean literally pop?

THE COURT: Sustained.

Jurors, disregard.

Are we done?

MR. KAMINSKY: We are done.

THE COURT: Thank you.

Any redirect?

MR. McCRORIE: No, your Honor.

THE COURT: Amen. Thank you. All right.

Doctor, you may step down from the witness stand. Thank you very much. Take your stuff with you, please.

(Whereupon, the witness was excused from the stand.)

THE COURT: All right. Now, jurors, tomorrow -- so we're done for today. Tomorrow please be here by 9:15 so we can start at 9:30. We are going to do two witnesses tomorrow and we need to utilize our time as best we can, so we'd like to start a little bit earlier. Is that good? Okay. Thank you. Be well. Good-bye.

THE COURT OFFICER: All rise. Jurors exiting.

(Whereupon, the jury exited the courtroom and the following occurred:)

MR. McCRORIE: I would like to make a record.

THE COURT: Go ahead.

MR. McCRORIE: The first record is defendant put into evidence, we objected because it wasn't in the packet of prior medical records, Defendant's C on 6/21/16, it's a 39 page record of a hyperactive airway disease hospitalization in 2006.

THE COURT: Yes, subject to redaction.

MR. McCRORIE: But, Judge, the subject to redaction was that the Plaintiff wants to redact. He wants to put in one page of 39 where the word back pain is mentioned. I wanted in context the whole hospitalization. It's in the middle of the record during a gastrointestinal examination.

THE COURT: 21 is in evidence subject to redaction which means that the whole thing is in evidence. I'm not redacting the whole thing. If there's certain things that are not pertinent, you guys can go over it and figure out what it is. For example, let's assume it had something that was acutely personal, that stuff doesn't have to go in there.

MR. McCRORIE: Understood.

THE COURT: You can work that out.

MR. McCRORIE: The next, your Honor, I wanted to make the record that we did -- I know what your Honor's ruling is -- move to preclude the biomechanical expert. The motion was made. I don't know if we have to officially do it as a court exhibit.

THE COURT: You requested that the biomechanical expert be precluded. I indicated that I would allow the biomechanical expert to testify and you can tear him apart during cross-examination.

MR. McCRORIE: Understood. I just wanted the motion marked a court exhibit as part of the record.

THE COURT: I don't know if we have the court exhibit down here.

Anything else?

MR. McCRORIE: Next, your Honor, with regard to the next witness that's about to come up, off the record when we were talking about Dr. Missun's testimony.

THE COURT: Are you asking to go off the record?

MR. McCRORIE: No. I'm sorry. Earlier in the day when we were in the back, Mr. Kaminsky was bringing up the Obama Care and said he would utilize that cross-examination with the economist. We have submitted that motion to preclude such testimony and evidence to your Honor. We would like you to consider it before tomorrow.

And we don't need to be heard on it, but we did serve everyone by e-mail so they can certainly bring in papers.

THE COURT: We don't have a hard copy?

MR. McCRORIE: Well, we only did it over lunch. So we didn't go back to an office. We went to Billy's, whatever that cafe is. We took it, as I said from another case. This has come up in all of the cases we had with Mr. Kaminsky.

THE COURT: So is your objection to using the term Obama Care or is it your objection to indicating or establishing for the record that medical costs can be reduced if, in fact, you have some type of health care.

MR. McCRORIE: That medical costs can be reduced if you have some kind of health care because that's a collateral source issue. The jury, just like they don't hear about social security disability or disability policies that a person holds, that would all be for a collateral source hearing, not for the economist to talk about what Obama Care would be or wouldn't be.

MR. KAMINSKY: Judge, I absolutely disagree with that. I think it is a very relevant issue in this case. The Affordable Care act is the law of the world. It's not something that is speculative, it's the law and my position is that instead of the jury being shown -- withdrawn.

My position is, the jury is going to be shown

projections from an economist that the Life Care Plan of all the medical needs, the medication, the physical therapy, the surgeries, all the things that they claim Mr. Burns will need as a result of this incident which we dispute obviously, but that's their claim. My position is that it would be a lot less expensive for us to simply purchase an insurance policy through a state or federally regulated institution.

THE COURT: Let me say this. There are many types of health insurance, some of them are quite limited in what they offer their beneficiaries and we can think of health care plans very easily that have high deductibles and minimal benefits, right?

We can also think of health plans that are expansive and I don't know that we can really --

MR. KAMINSKY: You see, and I agree with you, but the thing is --

THE COURT: -- can get into a hole. Let me think this out. I don't know that we can get into a hole with the jury as to what type of health plan might or might not be out there, how much they might cost or not cost as opposed to how much should be available to the plaintiff if, in fact, the jury decides to award him future medical expenses. I don't know how you parse that out for a jury.

MR. KAMINSKY: I believe that this witness who is

testifying tomorrow, is competent enough to help us with that information.

MR. McCRORIE: He couldn't tell you what particular health care plan would cover it. In fact, your Honor dealt with similar issues. We gave you the case from 2014, it was an actual collateral source. Your Honor, of course, knows more about it, but we served that decision as well. It's all for -- the jury gives the number. We can even agree if there is coverage.

THE COURT: Can you stipulate on this issue and this -- let's go off the record.

(The trial was adjourned to June 10, 2016, at 9:30 a.m.)

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