SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU: TRIAL TERM: PART 24

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ADIS ALVAREZ MIRANDA,

Plaintiff,

Index No. 610566/21

-against-

DENNIS M. CURRY, TOWN OF HEMPSTEAD,

Defendants.

TRIAL

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Nassau Supreme Court
Mineola, New York 11501
May 13, 2024

B E F O R E: THE HONORABLE DAWN JIMENEZ,
Justice of the Supreme Court, and the Jury

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

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JENNIFER SAMPUGNARO, RPR
OFFICIAL COURT REPORTER

JS

COURT OFFICER: Jury entering.

(Whereupon, the jury entered the courtroom.)

THE COURT: Good morning everyone. Hope everyone had a good weekend. And for the mothers I hope you had a good Mother's Day.

We are on defendant's case.

Mr. Sokoloff, your next witness.

MR. SOKOLOFF: The defendants call Leonard Freifelder, Ph.D.

L E O N A R D F R E I F E L D E R, Ph.D., called as a witness on behalf of the Defendant, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

THE CLERK: Please have a seat and give your name and office address to the court reporter, please.

THE WITNESS: Leonard, L-E-O-N-A-R-D, Freifelder, F-R-E-I-F-E-L-D-E-R, 300 East 56th Street, Apartment 4D, New York, New York 10022.

THE COURT: Good morning.

THE WITNESS: Good morning, your Honor.

THE COURT: Mr. Sokoloff, whenever you are ready.

DIRECT EXAMINATION

BY MR. SOKOLOFF:

Q Good morning, Dr. Freifelder.

What is your educational background?

A I have an undergraduate degree in actuary science from the Wharton School of Business at the University of Pennsylvania, and I have a masters and a Ph.D. degree in operations research also from the University of Pennsylvania.

Q Can you explain to the jury what an actuary does?

A An actuary is the individual who does all of the economic calculations that insurance companies need to do to run their business. The actuary's job first and foremost is to take data that the insurance company collects when they pay claims and use that data to project what the cost of selling a particular type of policy will be. Then based on estimates of what it will cost the insurance company, what the insurance cost will be, the actuary then determines what price to charge for the policy to allow the insurance company to cover its cost, cover its expenses, operating expenses and make a profit.

The unique aspect of the insurance business is that it basically is the only business in which you have to price your product before you know what the cost of production is.

In other words, if you are producing a car you know kind of the steps that it will take to produce the car. You know what you pay your workers, you know what you pay for materials and so you can more or less determine what it's supposed to cost you to produce each car and then you add money for marketing and profit.

In the insurance industry you have to forecast those costs in advance and those forecasts may in some cases turn out to be incorrect. So it's a more complicated problem.

Q Now, you mentioned Masters degree in Ph.D. from the University of Pennsylvania in operations research.

Can you explain to us what operations research is?

A Operations research is a field of applied economics that uses standard economic principles and things that we call mathematical models.

The mathematical models are one or more sets of equations that are used to describe the phenomenon that you're studying.

Then you use those equations along with data or estimates and you use it to solve the problem you're trying to solve.

So the example that I use because it's familiar with most people is for the last thirty years or so the airlines have used what now are called variable pricing models or dynamic pricing models, okay. And what happens is if you're going to fly a plane from New York to Los Angeles, essentially the cost of flying the plane from one location to the other is a fixed cost. It's essentially a fixed cost.

So the goal for the airlines is to maximize the revenue on the flight. Now, maximizing the revenue doesn't necessarily mean that they have to fill all the seats although

they would like to do that, but what happens is at a particular point in time they price the seats in a certain way depending on how many seats there are, what they expect demand for the seats to be, how many cancellations they think are going to occur and then they sell the seats.

As time goes on that price may be adjusted up or down depending upon how many seats have been sold, how many more seats they think. And that uses a technique, an operations research technique called dynamic programming which allows you to take estimates for demand of the product and determine what's the best price to use.

Now, what we've seen in the last ten or fifteen years is that everybody does this now. The Mets do it, the Yankees do it, the Knicks do it. If you go to a Knick's game when LeBron James is in town those seats cost more than if it's the Washington Wizards because they expect more demand for the seats. They know they can get the same number of seats for a bigger price. The Mets do it, hotels do it.

All of it uses operations research tools and essentially the concept of maximizing profits or maximizing revenues or minimizing cost, all of which are standard microeconomic principles.

Q Is it outside of your expertise to answer why the Mets don't have better hitters?

A Yes, I think so.

Q In order to get a Ph.D. in operations research, did you have to write a dissertation?

A I did.

Q Can you explain to the jury what a dissertation is?

A A dissertation is actually a research paper. So what happens is the doctoral candidate, he or she first takes a set of courses. When you get to the end of your coursework the last step is writing a dissertation and having the dissertation accepted.

The first step is you work with your advisor and you propose a subject for research. Now, that research subject could be that you're going to prove some theory. So it's like geometry, you know, prove that all angles add up to 180 degrees or it could be empirical research where you are going to study something, collect data and then you're going to prove or disprove certain theory about the data.

So at the proposal stage you write a description of your research project, what you intend to do, why it's a contribution to knowledge in the field. And then you defend the proposal in front of a jury of peers which would be professors from your department, professors from your school, professors possibly from somewhere else in your university, maybe other universities.

Those individuals read the dissertation and then ask you questions. It actually kind of looks like a senate

confirmation hearing, okay. They ask you questions, you answer questions and then the members of the committee decide whether or not they believe you can complete this research, whether this research will be a contribution to knowledge. And if the answers to both those questions are yes, you're allowed to go out and do the research.

You then go out and do the research, you write up the results of the research and then you defend your dissertation. That's your dissertation. It's the paper that you produce that describes what you did, why you did it and how it's a contribution to knowledge.

Again, you get questioned by a jury of peers over the dissertation and the results thereof and, again, if the committee decides that you have completed the work successfully and that it is a contribution to knowledge in the field they approve the dissertation, you get your Ph.D. degree.

Q Do you belong to any professional groups?

A I do.

Q What groups?

A I'm a member of the National Association of Forensic Economists and I'm an Associate of the Society of Actuaries.

Q How did you become a member of these groups?

A The National Forensic Association of Forensic Economists you pay the dues, anybody can join that group and get copies of their journal which I will be talking about a

little later. But for the Society of Actuaries you have to take and pass a series of examinations. I did that a long time ago, about fifty years ago.

The first exam is calculus. The second exam is statistics. The third exam was numerical analysis, operations research, risk theory. The fourth exam is life contingency. And the last exam, the fifth exam which is the associate is five, was demography, population statistics, graduation and mortality tables.

Q So you mentioned numerical analysis as one of the topics that you were tested on. What is that?

A So numerical analysis has to do with types -- certain types of analyses of how you analyze data.

So I mentioned again a moment ago graduation. Graduation is a tool that actuaries use to smooth the data that they use in the tables, the life tables that they use to price the policies.

The generally accepted theory of mortality is that mortality rates increase from about age ten or eleven on.

In the first years of life mortality rates don't necessarily go down or up, okay. They move around, they're a little more random. But after ten or eleven years-old the generally accepted theory of mortality is that your probability of dying increases by a small amount each additional year you live.

What happens when you collect data because the data is actually a sample, okay, it's a hundred thousand people or fifty thousand people. You may in the data find that a person's mortality rate at age 50 seems to be higher than their mortality rate at age 60, and that's just essentially an anomaly of the data.

The graduation techniques is a form of numerical analysis that's used to smooth the data into the generally accepted theory of mortality.

Q And you also talked about being tested in life contingencies. What is that?

A Life contingencies describes the formulas, the approaches, the models that actuaries use to estimate mortality rates within a population of people that they use to estimate if you're selling a life insurance policy, how many people will die each year that the policy is in effect.

Now, the work of an actuary is largely statistical in nature. However, the actuaries over the years have developed their own statistical models that are different from the statistical models that people who are known as statisticians use. They have slightly different models. And that's the way the insurance -- so the life contingencies exam covers how the actuaries actually do these calculations that determine mortality rates and -- that use the mortality rates to determine what the insurance company is going to pay on a life

insurance policy or a pension plan.

Q Finally, you mentioned demography. What is demography?

A Demography is the study of population statistics.

So demography, the most common example would be life expectancy is a demographic analysis of how long people live based on their age, their sex, other characteristics. But there's other types of demographic tables.

I'll be talking about tables having to do with how long people would work or tables that talk about when people would retire. These are also demographic issues for which there are tables that forensic economists like myself use in their work.

Q Can you tell us what your work history was?

A Yes. So for the first ten years or so of my career I was a university professor first at Temple University in Philadelphia, then at the University of Connecticut and finally at Baruch College, part of the city university system.

In 19 -- I'm not going to remember exactly now. Then when I was at Baruch I was doing consulting work for the New Jersey Department of Insurance and I -- the Department of Insurance eventually made me an offer of full-time employment which I accepted.

So I worked at the Department of Insurance for three or four years as a special deputy commissioner. My job was to

do economic and statistical analyses forecasting work for the substandard automobile insurance market which at least at that time was popularly known as the assigned risk plan.

When I was at the New Jersey Department of Insurance the market had failed and the most people in New Jersey got their automobile insurance essentially through the state. It's a little more complicated than that, but the state was running the auto market.

While I was there there were initiatives that involved returning the market to the private sector which in fact happened. And so as I said, what I did was various types of statistical analyses so as to bring the revenues and the expenses of the system into balance.

Then I went to work for a company called Warner Insurance Services that did, was a third party administrator of automobile policies in New Jersey. And I also did quantitative analyses as to their book of business and how it was performing and things like that.

When I left Warner Insurance I went to work for a company called the Center for Forensic Economic Studies, and that company was headquartered Philadelphia. They did economic analyses and statistical analyses for matters that were in litigation. They were retained by both plaintiffs and defendants.

I worked for them until early '97 when I started my

own company Freifelder and Associates Consulting, Inc.

Q As a professor, did you teach any of the subjects or techniques that you did in performing your work in this case.

A Yes. So as you can tell everything I have done in my career for forty-five years, fifty years has been quantitative in nature, some sort of quantitative analysis, economic, statistical, whatever.

So when I was teaching courses in risk and insurance, things like, how do you use a person's earnings and use that to estimate how much insurance someone would need or how do you determine in some admittedly simplified way if you sell some sort of policy, what is it going to cost. How do you forecast losses.

So all of the things that I am going to be talking about today were used in some direct or indirect way as part of my teaching.

Q What does Freifelder and Associates do, your current firm that you started?

A So, Freifelder and Associates currently does almost exclusively economic analyses for matters -- for personal injury or wrongful death matters for both plaintiffs and defendants.

I estimate what a person who has been injured or who has died, what they would have earned, what their fringe benefits might be worth if they had any, what the cost of

future care to treat injuries would be.

Historically I have done also economic analysis in employment discrimination cases, in business commercial settings, lost profits analyses. I've also done some statistical analyses and some actuary science work, but I haven't done that work for statistical work or actuary science for many years.

So basically the focus now is economic analyses for plaintiffs and defendants in personal injury and wrongful death matters.

Q And about how many cases have you worked on since you formed your company?

A 3,700.

Q And is there a breakdown that you have between work that you've done for plaintiffs and work that you've done for defendants?

A So over my entire career the entire 3,700 cases its about 53 percent of the time I was retained by the plaintiff and 47 percent of the time I was retained by the defendant.

However, since 2020, since the beginning of the pandemic basically 30 percent or so, 25 or 30 percent of the time I am retained by the plaintiff, and 70 to 75 percent of the time I am retained by the defendant.

Q Are you getting paid to testify in court today?

A Yes, my appearance fee for coming to testify is

$4,000.

Q And you did an analysis and report in this case?

A I did.

Q And how much have you been paid for that?

A $5,600.

Q In order to perform the work that you did and write the report that you wrote, can you tell us what you looked at?

A Yes. So I looked at the Bills of Particulars in this case. I looked at the economic report of Dr. Liken and Dr. Dwyer, both of their reports. I reviewed Ms. Miranda's W2 statements. I reviewed Dr. Carfi's lifecare plan report. I also read and brought with me certain pages from Ms. Miranda's examination before trial testimony of December of 2021. I think that's all that I had.

And then more recently I reviewed the trial testimony transcript of Ms. Miranda, Dr. Carfi and Dr. Dwyer. And I have some pages from each of their testimony with me.

Q Now, did you see that Dr. Dwyer revised her report right before trial and updated her numbers?

A Yes.

Q And did you do the same?

A I did.

Q And so the numbers that you're going to testify to today based on your analysis, they're current as of when?

MR. THOMAS: Objection, your Honor.

I have never seen any updates.

THE COURT: You never received any updates?

MR. THOMAS: No.

THE COURT: From this witness?

MR. THOMAS: No.

MR. SOKOLOFF: I could send it to you.

MR. THOMAS: Thank you.

MR. SOKOLOFF: I just got it myself.

THE COURT: When, this morning?

MR. SOKOLOFF: Yes.

MR. THOMAS: Judge --

THE COURT: When you got it, that's when you should have exchanged it.

Do you have a hard copy that you can give to Mr. Thomas right now?

MR. THOMAS: Judge, I still object. Him handing me this in the middle of his witness' testimony gives me zero opportunity to prepare.

Q Dr. Freifelder, did you use the same analysis?

A I'm sorry?

Q In updating your report, did you use the same analysis that you used in the earlier report?

A Well, the same type of analysis. The data, some of the data that's used is different. Dr. Dwyer's updated report also contains -- from May 1st also contains data that was not

in her original report. And in fact her testimony which whenever it was, last week --

MR. THOMAS: Objection, your Honor.

Giving a speech here about Dr. Dwyer's testimony.

THE COURT: I'm going to sustain the objection and I am not going to allow the updated report unless and until you exchange it with Mr. Thomas and he has a moment to review it.

Do you want to take a five-minute break or a ten-minute break?

MR. THOMAS: Yes, Judge, I would like to take a look at this.

THE COURT: Okay, we will take a ten-minute break.

COURT OFFICER: Jury exiting.

(Whereupon, the jury exited the courtroom.)

MR. THOMAS: I would like to make a record so if we could ask the witness to step outside.

(Whereupon, the witness exited the courtroom.)

MR. THOMAS: Your Honor, in anticipation of the trial Plaintiff's economist Dr. Debra Dwyer generated a report, February 9th, 2022 in this matter. In anticipation of the fact that we were coming to trial now in May of 2024, I asked her to do an updated evaluation

based on more current numbers which she did, and I provided to counsel before we started the trial.

It was with enough opportunity for them to review it and to go over it. I would have expected that counsel would have done the same being that they hired their expert Dr. Freifelder on October 20th, 2022.

Dr. Freifelder is now on the witness stand and I am learning for the very first time that he's amended or modified his numbers, and I am handed now in the middle of his testimony during trial what appears to be an updated economic loss earning and social security benefit report of the plaintiff.

As I said, I haven't really had the opportunity to look at it, but this is highly prejudicial to the plaintiff to be able to prepare for a cross-examination of their economist witness if he's made any changes or modifications to his report and his numbers. It doesn't give me a lot of time.

I'm not here to waste the Court's time. Time is of the essence with regard to this matter, especially in light of the fact that one of the jurors has already indicated to us that by Thursday she is no longer going to be able to join us. I am not looking to waste the Court's time or to delay any further than we have to. I would ask that the Court not accept this updated report from this

expert at this time.

If there's any modification that needs to be done based on the fact that we are now in May of 2024, it should be done based on his existing report, not to hand me a new set of numbers and let him explain whys it's different from his original report as opposed to giving me this report now and asking me to accept these calculations. I want to go over these with my expert. I don't have the ability to even do that.

THE COURT: I will give you the ability to do that.

MR. THOMAS: I don't even if my expert is available to do that right now. For all I know she is engaged on another matter and won't be able to do that on the fly. Of course I will go out and give her a call. Had he emailed these to me I could have forwarded them to her.

Judge, I don't want to say this was done on purpose but it's very poor planning on the part of the defense to modify their economic numbers and hand them to me while their witness is on the witness stand and deprive me, seriously prejudice the plaintiff an opportunity to evaluate and analyze these updated figures with my own expert.

THE COURT: Can we go out of record for a

moment.

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

THE COURT: Back on the record.

MR. SOKOLOFF: First of all, I got an updated report the day before the trial started. Yes, it was before, I acknowledge that, but --

THE COURT: You just told me you got it this morning.

MR. SOKOLOFF: No, no, no, I got their updated report.

MR. THOMAS: Plaintiff's updated report before the start of trial so that he could evaluate and go over it with his expert.

THE COURT: Okay.

MR. SOKOLOFF: I got it right before the start of the trial. If counsel looked at the numbers he would actually see that Dr. Freifelder has revised upward his loss. So if he wants to strike this and go back to the original report, his numbers will come down. So I don't know how it's prejudicial to him if his lost -- if the losses go up.

MR. THOMAS: Judge, part of my cross-examination was that he didn't do an updated evaluation based on current figures. I mean his numbers are a year and-a-half

old and that was part of my cross-examination. So for counsel to say his numbers went up and that I should -- that should be a reason for me not to object?

I still don't have the opportunity to review them with my expert to highlight the changes so that I can prepare for this cross-examination. I went to law school, I am not an economist. I need the benefit of an expert to do this analysis and evaluation. So in light of that I still feel we are highly prejudiced.

If counsel wants to use his old report and have his expert modify it here based on the old report as opposed to this new report and it comes out to the same numbers, so be it. But to hand me a new modified sheet right now without the benefit puts me at a tremendous disadvantage.

THE COURT: Can your expert do that, just update exactly what he did before as opposed to handing over a whole new report?

MR. SOKOLOFF: Yes, I think so.

THE COURT: Why don't you compromise and do that. I mean I will give you a few minutes.

MR. THOMAS: I object to this going into evidence. Like he said --

THE COURT: And also to speak to your expert themselves about it. You can have all the time you want.

I mean I'm not going to worry so much about losing a juror on Thursday. We are already two weeks into this. We have invested our time. We have alternates. That's what the alternates are for.

The fact that we might lose somebody on Thursday isn't really a concern to me and shouldn't be a concern to you. But I will give you the time right now to review what you need to review and to speak to your economist no matter how long it takes.

MR. THOMAS: Shouldn't be but a few minutes. Let me see if I can get her.

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

MR. THOMAS: Your Honor, thank you for the time to see if I could reach my expert. I have called her office, I called her cell phone, I wasn't able to reach her at all.

Just on my perusal on this updated summary table there appear to be some changes in either the percentages that are being used because the original numbers are all the same in terms of estimated lost earning, work expenses, net earnings, those initial numbers seem to be the same, but the resulting numbers have changed, so therefore that tells me they've used a different percentage or a different growth rate to get different

numbers.

As well there is also an additional section that talks about future economic lost periods, earnings 14.54 years and social security retirement benefits, 17.35 years which was not included in his original report.

So in effect, not only does it seem to have used different growth rates or different percentages in doing the analysis. They have also added different years for those areas, earnings and social security retirement benefits.

Be that as it may, if counsel lays the proper foundation and has the doctor explain why there's a difference that might go a long way in helping to at least explain for the jury why there is a change, but it doesn't in any way minimize the prejudice to the plaintiff in not being able to go over these numbers with my economist so that I can prepare for his cross-examination. So my objection still stands.

THE COURT: Point taken.

Can you do that, what Mr. Thomas suggested, lay your proper foundation?

MR. SOKOLOFF: I could try.

COURT OFFICER: Jury entering.

(Whereupon, the jury entered the courtroom.)

THE COURT: Everyone can have a seat. Thank

you.

Mr. Sokoloff, you can continue.

BY MR. SOKOLOFF:

Q Dr. Freifelder, you wrote an initial report in this case on October 20th, 2022, correct?

A Yes, that is correct.

Q And did you update that report in order for today's trial testimony?

A Yes, I did.

Q Can you tell us why you did that?

A Because when Dr. Dwyer updated her report May 1st of 2024 she included additional earnings information, earnings, growth rates which I incorporated into my calculations from 2022 data that was not available in 2022. It's the earnings growth rate for -- 2022 growth rate and the 2023 growth rate.

She also -- there's changes to the lifecare plan because Dr. Carfi took certain things that he had recommended in 2022 out of the lifecare plan when he testified in this case earlier in the trial. And so she incorporated -- Dr. Dwyer incorporated that information as did I.

Q Other than updating and bringing current the growth rate and subtracting the expenses that Dr. Carfi took out of his report, did you make any other changes to your report?

A No, other than updating what was considered to be past loss of earnings and future loss of your earnings,

bringing them to current date as opposed to bringing them to 2022 dates.

Q Did you change the methodology of your report, how you went about coming up with the numbers that you did?

A No, I did not.

Q Now, did you look at the report of Dr. Dwyer in terms of her estimation of lost income?

A Yes.

MR. SOKOLOFF: I would like to put Dr. Carfi's visual demonstrative aid on the screen.

MR. THOMAS: You said Dr. Carfi.

MR. SOKOLOFF: I mean Dr. Dwyer.

Q Is this the chart by Dr. Dwyer that you looked at?

A In her most recent report, yes.

Q Did you find any errors --

MR. THOMAS: Objection.

THE COURT: Sustained.

Rephrase.

Q Do you have an opinion to a reasonable degree of economic certainty about the validity of Dr. Dwyer's numbers?

MR. THOMAS: Same objection.

Validity.

THE COURT: Can you find another word, please.

Rephrase your question.

Q Did you analyze economic losses based upon an

assumption that the plaintiff in this case could never work a day in her life again?

MR. THOMAS: Objection.

Leading, Judge.

THE COURT: Rephrase.

Q Did you make an estimate of lost earnings in this case?

A Yes, I did.

Q And did you make any assumptions about -- before you came to coming up with lost earnings?

A Yes, I made --

Q What assumption or assumptions did you make before you came up with lost earnings?

A So in order to do a loss of earnings calculation there are a number of assumptions that have to be made by the forensic economist.

You have to estimate the person's earning capacity which is what was the person capable of earning at the time they were injured.

You have to make -- there is a determination or an estimate as to whether the person is capable of earning anything subsequent to the injury, possibly a lesser amount subsequent to the injury.

There's assumptions about how long someone would work or, I'm sorry, about when someone would retire, when this

individual would retire. And whether the individual would retire -- sorry, whether the individual would work for a hundred percent or less than a hundred percent of the period from the date of loss to the date of retirement. There's also assumptions that have to be made about work expenses.

So there's more or less a half dozen different assumptions that an economist has to take to do this type of calculation.

Q And did you make an assumption in calculating lost earnings what a retirement date for Ms. Alvarez Miranda would be in the event she was not able to work at all until then?

A Yes, age 64.33. I assume she would have retired at age 64.33 in 2038.

Q And why did you assume that her retirement date would be 64.33 years of age rather than the age 67 that Dr. Dwyer used?

A Because there are statistics and in the Journal of Forensic Economic Studies there's an article called average years or data, final separation from the work force. There's extensive tables in that article which I have with me which indicate how -- when men and women of different ages with different levels of education are expected to retire, their average or their median dates of retirement.

This is data, in my opinion, that should be used to determine the retirement age of an individual or that I use

frequently to determine the retirement age of an individual.

I'm not saying that people don't retire at 67 sometimes. They're social security full retirement age like Dr. Dwyer has assumed, but you can also retire at age 62 with a reduced social security benefit which people do as well.

Not knowing, without other information that might be relevant to the determination of Ms. Miranda's retirement age, in my opinion the most reasonable estimate, the most reasonable way to determine the date of her retirement is to rely on the statistics of what a 46 year-old woman with a high school degree, how long that the members of that cohort of people work which is 17.73 more years or to age 64.33.

Q And if you assume that she was able to work at her earnings capacity at the time of the accident, would there be any lost income loss?

A You mean subsequent to when she stopped working in 2021?

Q Yes.

A Correct, if Ms. Miranda's earnings capacity subsequent to the September 17th date in 2021 remained $27,601 a year then she would have no economic loss because her earnings capacity prior to the accident and her earnings capacity subsequent to the accident would be the same.

You have to keep -- understand that the claim here is for loss of earnings capacity. So if Ms. Miranda was capable

of earning $27,601 a year subsequent to September, mid September of 2021, then her loss of earnings capacity is zero even though she didn't work after that date.

Q And you talked about expenses that go along with earnings.

Can you explain what you meant by that?

A Well, everybody has to get to work so they take the bus, the train, they drive. When people are at work they buy food. They pay for the food. There could be other expenses that you have depending on the type of job for clothing, for other things. Union dues, Ms. Miranda didn't have union dues. I am just giving you an example of what is a work expense.

Work expenses are not part of the economic loss calculation because if you're not working you're not incurring those expenses and you don't lose them.

So if you earn, just to use an example, $100 but you spent $6 to earn the hundred, you really only lost $94. And there should be a reduction for work expenses which Dr. Dwyer did not make.

Q And did you make a deduction for the work expenses?

A I did.

Q And how did you come up with it and what did you use?

A I used generally accepted data from the consumer expenditure survey as to what a woman who makes between $25,000 and $30,000 a year would spend on food, clothing,

transportation.

I've also included the amounts that would have been deducted from her earnings to fund the social security benefit, fund the social security system to pay for the social security benefits that Dr. Dwyer says Ms. Miranda has lost.

Q And where did you use the numbers -- where did you get the numbers that you came up with to deduct these expenses?

A There is a study of the U.S. Department of Labor, Bureau of labor Statistics called the Consumer Expenditure Survey. They publish these two-year tables basically every year. And I use the 2019/2020 table, table 4013 for consumer units of single females of income before taxes for 2019 and 2020.

That document, that survey the Department of Labor breaks down income for a single-female household by what the women spend on food, clothing, rent, et cetera.

So basically to do these calculations I assume that half of the food consumed outside the home was a work expense, half of her -- of the transportation cost were work expenses. Half of clothing and shoes, et cetera were work expenses.

Q On top of -- withdrawn.

Besides assuming that Ms. Alvarez Miranda could not work at all until age 67, did you assume, assuming she couldn't work at all that she would have worked continuously until age 67?

A So first of all I want to make one thing clear. I didn't assume whether she could work or not. I used an assumption that she couldn't work.

So I estimated her post-earnings -- post-accident earning capacity as zero. That's a question for another type of expert, a vocational person. It's not my field. So I used the assumption of zero because I had no information that she was able to work.

Regarding her working a hundred percent of the time to age 64, no, I did not assume she would work a hundred percent of the time because there is another study from the Journal of Forensic Economics which estimates the work life, the number of years individuals of given age with a given level of education are expected to work.

What that study told me was that 46.6 year-old women with high school degrees are expected to work roughly fourteen more years before they exit the work force for the final time which in my analysis was at 64.33. So she was going to work roughly fourteen of the 17.73 years, so I made a deduction of 20 percent, 22 percent for the period of time that the studies, the statistical studies tell me that a woman like Ms. Miranda is not likely to be working.

Q And so taking into account the estimate that she would work until 64.3 years of age, taking into account that there would be the work expenses that you mentioned and taking

into account that she would not work continuously until retirement age, did you come up with a conclusion assuming she couldn't work of what her lost income would be?

A Yes.

Q And before you tell us your number, can you tell us what Dr. Dwyer's number is?

A So Dr. Dwyer's number was a past lost of $29,763 and a future loss of $1,005,049.

Q And how about you, what do you come up with?

A My past loss is $59,475 and my future loss is $456,871 for the 14.54 years that would remain in Ms. Miranda's work life from May 16th of this year to age 64.33 in the year 2038.

Q Did you calculate lost social security benefits?

A I did.

Q And is that based again on the assumption that she could not work until retirement?

A Correct, it's based on an analysis of what Ms. Miranda has earned in the past plus what she would have earned from 2021 through 2024, and how much that income stream would have produced in social security retirement benefits less what she earned in the past. Plus what she earned in 2021 until she stopped working and what that income stream would have produced as social security retirement benefits at 64.33.

The difference between the two sets of benefits

becomes her lose, and that becomes the basis for projecting her loss of social security retirement benefits.

Q Did you have a methodology for computing assumed loss of social security retirement benefits?

A Yes.

Q And what methodology did you use?

A So if you go on the website www.ssa.gov, and anybody can do this, social security has a benefit calculator, quick benefit calculator.

If you input data into that quick benefit calculator as to what the individual earned, the calculator will tell you what their social security benefit will be at certain ages. You can specify the ages or you can use the default assumption which would do a calculation to age 62, age 67 and age 70.

And so I input the data that I had for Ms. Miranda's earnings. So I had her W2s for 2018, '19, '20 and '21. I had my estimates of what she would have earned in '22, '23 and '24.

I made some assumptions about what she earned from 2011 to 2017 because Ms. Miranda testified at her EBT that she came to the United States in 2010, late 2010, so I assume she had no earnings, social security earnings prior to 2011.

Now, that turns out to be important. And so I estimated her earnings history from 2011 through 2024, both pre-accident and post-accident and the difference. I then grossed up the difference to $2,038 when she would retire.

Q And you looked at Dr. Dwyer's estimate of social security loss?

A Well, I looked at the estimate that was in her report and I read her testimony about that subject at trial here.

Q And after reading her trial testimony did you have an understanding of how she came up with the numbers?

A No.

Q Why not?

A Well, because she testified that she used the calculator, but she didn't testify as to what she did with the calculator. And, for example, I didn't know if in using the calculator Dr. Dwyer --

MR. THOMAS: Objection, your Honor.

He doesn't know. How can he testify if he doesn't know?

MR. SOKOLOFF: Wait, he can't interrupt the guy. He's explaining.

THE COURT: I'm going to overrule.

Go ahead.

A There is no way of telling from Dr. Dwyer's testimony if she attributed wages to Ms. Miranda prior to 2011. If she did --

THE COURT: I don't need to know if she did. That's the reason why you don't know. You've answered the question.

Next question.

Q So for social security, loss do you recall what number for social security loss Dr. Dwyer came up with?

A Yes, Dr. Dwyer's number was $223,504.

Q And using the methodology that you used, what did you come up with for future social security loss?

A $133,594.

Q So your lost income number is about half of what Dr. Dwyer came up with?

A Yes.

Q And your social security loss is about half of what Dr. Dwyer came up with?

A Better way to say it it's about $90,000 less than what Dr. Dwyer came up with, yes.

Q And did you use -- withdrawn.

Do you stand by your numbers to a reasonable degree of economic certainty?

A Yes, I do.

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

Stand by.

THE COURT: I'm going to let it stand. I will overrule the objection.

The answer was what?

THE WITNESS: Yes, my answers are to a

reasonable degree of economic certainty.

THE COURT: Thank you.

Q Finally, did you look through -- withdrawn.

Did you make calculations for future medical care for Ms. Alvarez Miranda based upon the assumptions in Dr. Carfi's report?

A I did.

Q And what did you do?

A Well, I took the information from Dr. Carfi's 2022 lifecare plan report and I took out the certain costs, I think there were three, two prescription drugs that Ms. Miranda no longer takes and a raised toilet seat that Dr. Carfi acknowledged she no longer needs.

Then I projected making appropriate growth rates for physician services, physical therapy, medication, et cetera, what these, what the future care costs would be. And I came up with a number which is more or less similar to Dr. Dwyer's number.

In other words, my growth rates are lower than Dr. Dwyer's, but they don't have a huge impact on the results. My growth rates are based on the subcomponent of the consumer price index that is tracked by the U.S. Department of Labor, Bureau of Labor Statistics.

Dr. Dwyer, it is a little unclear what she did. Although she testified about Physician Services that she used

growth rates for Physician Services for dentist, for eye care providers, et cetera. I'm not sure why that -- how that information is relevant when we're talking about what the cost of a visit to a physician, a doctor would be.

MR. THOMAS: Objection.

Move to strike, Judge.

THE COURT: The objection is sustained and the part of the answer that is not responsive is stricken.

Next question.

Q Included in your analysis of future healthcare costs is physical therapy, correct?

A Yes.

Q And how many times a week, physical therapy, did you assume that the plaintiff would have physical therapy?

A Whatever Dr. Carfi said she would have. I believe it was twice a week for life.

Q If you assume that Ms. Alvarez Miranda instead of going to physical therapy twice a week for the rest of her life would go once a week for the rest of her life, how would that change your number?

A Well, basically all you have to do is take whatever the estimate was at twice a week, in my case it was $727,392 and if she's only going once a week you divide it by two. Because the calculation involves a cost growing at a certain rate for roughly 32 years, the end of Ms. Miranda's life. And

if she only goes once a week, well then she's only getting half as much treatment, the cost would be $363,000. You can do that for any other frequency you wanted to use.

Q If you assumed that Ms. Alvarez Miranda didn't need any physical therapy for the rest of her life, what does that do to your calculation about physical therapy?

MR. THOMAS: Objection.

THE COURT: I'm going to overrule.

A Well, if she doesn't need physical therapy at all than the future cost of physical therapy would be zero.

All of the future cost numbers because this is Dr. Carfi's area of expertise, not mine, all of his recommendations, cost estimates, frequencies, I accept them as accurate for the purpose of my analysis because it's his field of expertise, not mine. But it is based on the assumption that Ms. Miranda will get this treatment. If she doesn't get a certain type of treatment there is no loss.

Q Did you assume a certain cost for future surgery or surgeries by Ms. Alvarez Miranda?

A Well, Dr. Carfi in his report indicated I believe it was a cervical surgery the cost of which he estimated was $103,700. There's no time associated with that surgery so you treat it as a current cost which I did and, again, I'm not questioning the need for the surgery or Dr. Carfi's cost estimates, that is outside my area of expertise.

MR. SOKOLOFF: Just one second.

Q If you compare your total economic loss to Dr. Dwyer's total economic loss, what's the difference?

MR. THOMAS: Objection, Judge.

We don't know what his total economic loss is.

Q Do you want to tell us what your assumed economic loss is?

A For everything?

Q For everything.

A If I may have a second, your Honor.

THE COURT: Go ahead.

A My total for both lost income, social security benefits and future care costs is $1,558,754.

Q And how does that compare to Dr. Dwyer's?

A Dr. Dwyer's number I have actually in a report is $1,972,000, but I think she actually testified to $2,075,792 because there's the second surgery.

Q And your total, again, assumes that she can't work, correct?

A Correct.

Q Assumes that she will need physical therapy for the rest of her life twice a week, right?

A Yes.

Q If you take away the work component, what does your number become, your total number?

MR. THOMAS: Objection.

Total number of what?

MR. SOKOLOFF: Total number of economic losses.

A If you take away the earnings claim?

Q Yes.

A $908,813 for future care costs.

Q If you take away the future work -- future lost income and you also take away the physical therapy, what is your total estimate for future economic losses?

MR. THOMAS: Objection, your Honor.

Why are we taking away anything? I don't understand. That doesn't make sense.

MR. SOKOLOFF: It makes sense to me.

THE COURT: Part of their defense is that she doesn't need certain things that plaintiff is claiming.

MR. THOMAS: If we can have it properly delineated if there is a future or past claim.

THE COURT: Okay, fair enough.

MR. SOKOLOFF: We will satisfy counsel.

Q If you take away the assumption that she couldn't work in the future, if we take away the assumption that she needed physical therapy two times a week for the rest of her life, what is your total economic loss?

A The future economic loss for future care costs for the 31.88 years remaining in Ms. Miranda's life is $181,421.

There's no loss of earnings past or future, there's no future social security benefit loss. And the future care cost loss for 31.8 years is only $181,421.

MR. SOKOLOFF: Nothing further. Thank you.

THE COURT: Thank you.

Cross?

MR. THOMAS: Yes.

CROSS-EXAMINATION

BY MR. THOMAS:

Q Dr. Freifelder, my name is Peter Thomas and I am the attorney for the plaintiff in this case.

We've never met, correct?

A I believe that is correct.

Q We have never spoken, correct?

A If we've never met we've never spoken.

Q Well, so if you speak to somebody on the phone that counts as if you've met them in person?

A Well, you didn't ask me if I met you in person, you said we never met.

Q I asked you if we ever met, meaning if we ever met in person or if we ever spoken on the phone?

A We haven't spoken. We don't have to argue over that.

Q So, Doctor, you are a retained expert for the defense, correct?

A Yes.

Q Your job is to help the defense in giving as low a number for the economics as possible, correct?

A No.

Q Well, Doctor, your retention in this case was meant to challenge Dr. Dwyer's assumptions and figures and conclusions, correct?

A To analyze them, yes.

Q Well, more than analyze them. You didn't do the same analysis that Dr. Dwyer did, correct?

A Correct.

Q So then your numbers are not going to be the same, correct?

A Correct.

Q And you knew that you were retained by the defense in this case, correct?

A Yes.

Q And you've done work for Sokoloff, Stern in the past?

A I have.

Q And you've done analysis for them as a defense, as part of a defense case, correct?

A Yes.

Q You've never worked for them as a plaintiff, correct?

A No, I believe I've only worked for them once or twice, but that's correct.

Q But, again, they are a defense firm, correct, as far

as you know?

A As far as I know, yes.

Q And you made more money preparing your reports than you do testifying in court, correct?

A Yes, because I only testify in court in some of the cases.

Q Doctor, you have been through this before, correct, cross-examination in court?

A Yes.

Q And this is the point where I get to ask you questions, and I am going to ask if you can follow a simple instruction.

If I ask you a yes or no question can you limit your response to yes or no or I cannot answer that with a yes or no?

A When you tell me to answer it yes or no I will do so.

Q Well, assume that if my question is a yes or no question, can you limit your response to yes or no?

If I want an explanation or a description I will ask you. Is that okay?

A Fine.

Q Thank you.

You talked a lot in the beginning of your testimony about the insurance industry, correct?

A Yes.

Q And that your job is to help insurance industries

with risk assessment and anticipated costs and what payouts would be and what they should charge for insurance rates to sort of make sure they make money, correct?

A That's not my testimony.

Q Isn't that part of what you do as an actuary for insurance companies?

A Is that a yes or no question, counselor?

Q It is a yes or no if you can answer it yes or no.

A That's what actuaries do. I haven't worked as an actuary.

Q You said --

MR. SOKOLOFF: Objection.

It's an argument.

THE COURT: I haven't heard the question yet.

Hold off on the objection.

What's the question?

Q You gave a lot of information about the insurance business, do you remember that?

A I do.

Q You talked about risk assessments for the insurance benefits, do you remember that?

A I do.

Q And is that some of the work that you were involved in during the course of your career?

A Yes, technically, at some point in my career, yes.

Q Let's get this out up front.

How much do you understand the total economic loss that Dr. Debra Dwyer, the economist who testified on behalf of the plaintiff in this case, what was her total amount for economic loss, both medicals and wages?

A I understood it to be about $2 million.

Q And your total amount for economic loss is?

A I think I said $1.5 million.

Q So you're offering this jury testimony today that the difference between the plaintiff's economic expert and your opinion is about $500,000 less than what Dr. Dwyer's numbers came up with, correct?

A Correct.

Q That's in an effort to give the defense a discount in economic loss of almost a half a million dollars, correct?

MR. SOKOLOFF: Objection.

THE COURT: Sustained.

Rephrase.

Q You understand that if Dr. Dwyer's numbers are over 2 million and your number is at a million five, that it's about a $500,000 difference in favor of the defense?

Would you agree with that?

A Yes.

Q And one of the ways you get a discounted number from Dr. Dwyer is by using different ages for retirement, correct?

A Correct.
Q She used 67 as the age of retirement, you used 64, correct?
A Correct.
Q That would be decreased income, decreased social security benefits, correct?
A Yes.
Q That gives the defense a discount in the area of lost income, correct?
A Yes.
Q You used a different growth rate than Dr. Dwyer, correct?
A As to what?
Q As to -- did you use a different growth rate in any of the areas of the analysis that you did?
A In the future care costs.
Q So future care cost you had a lower growth rate?
A Lower growth rates, they're multiple, but, yes.
Q A lower growth rate would mean a lower number at the end for future healthcare costs, correct?
A Correct.
Q That would also give the defense a discount in future healthcare costs because you are using a lower growth rate, correct?
A Correct.

Q You also used a different life expectancy?
A Marginally different, yes.
Q But a lower life expectancy?
A Yes. A month or two, yes.
Q And, again, every assumption that you make, every value that you use that's at a lower value, a lower percentage is going to result in a lower total economic loss that you can offer to this jury, correct?
A Correct.
Q Do you believe -- this is a yes or no question.
Do you believe that Dr. Debra Dwyer's analysis and calculations, computations were conservative?
A No.
Q You thought she was excessive?
A Yes.
Q What area do you believe she was excessive?
A In estimating when Ms. Miranda would retire. In failing to account for work expenses. In assuming that Ms. Miranda would have worked a hundred percent of the time, never be unemployed, never be out of the workforce for any other reason. So those are some examples.
Q Did you read that portion of her testimony that says she's enjoyed working?
A Yes.
Q Did you read that portion of the testimony that she

took a reduction in pay so that she could spend more time with her children who were young?

A Yes.

Q Do you understand that or did you take into consideration that when her children get older, college-age, she might go back to work at higher pay?

Did you take that into consideration?

A It's taken into consideration in the statistics I rely on.

Q My question is, did you take that into consideration that she intentionally and purposefully took a reduction in pay so she could spend more time with her children; a job that didn't allow for overtime and had a schedule that allowed her to spend more time with her children, yes or no?

A Could I hear that question again?

Q Sure. Did you take into consideration that she voluntarily took a reduction in pay and a job that didn't allow for overtime, and had set hours allowing her more time to spend with her children?

Did you take that into consideration; yes or no?

A Yes.

Q And by doing that did you also anticipate that when her children got older she could go back to a higher rate of pay had she not been injured?

A No.

Q Did you learn what type of work she was doing before the accident happened?

A Yes.

Q What did you understand that she was doing?

A She was an assistant, medical assistant in a doctor's office.

Q Do you know if she wore medical scrubs or lab coat or anything like that?

A I do not.

Q If you found out that she had a uniform at work which was scrubs or a lab coat, that would do away with your reduction for clothing for work; isn't that true?

A Only if her employer paid for that.

Q I want you to assume that her employer who is a medical office has their staff in scrubs or lab coats and they provided them to their employees. You wear whatever your street clothes are and you come to work and put on a lab coat provided by the employer. That would then affect your overall numbers because you took a discount every week, every month, every year for clothing, correct?

A It might, yes.

Q And assuming she didn't have to spend money on clothing because she's got this uniform, this lab coat, how much higher would those numbers be?

A One percent.

Q One percent of two million is?
A No, no.
Q No, no what?
A That's wrong.
Q Oh, one percent of 1.5 million, that's your number?
A One percent of $516,000 would be $5,000.
Q So, again, that consideration, Dr. Dwyer didn't make that consideration, correct?
A Correct, she ignored work expenses.
Q You say ignored, how do you know she ignored it?
A Because she doesn't make a deduction for it and there are other reports of hers that I've reviewed where she does.

MR. THOMAS: Objection.

Move to strike.

MR. SOKOLOFF: Wait, your Honor, can he answer?

THE COURT: Hang on.

MR. THOMAS: Move to strike about any other reports.

THE COURT: I know people feel uncomfortable with silence which means I'm thinking.

Okay, the objection is sustained. The last part is stricken.

I am not concerned about her other reports. I am concerned about the report in this case as is the jury.

MR. THOMAS: Thank you, Judge.

Q You also took a 22 percent reduction in her work capability, correct?

A Yes.

Q Dr. Dwyer didn't do that, correct?

A Correct.

Q Why did you take a 22 percent reduction in her work ability?

A Because the generally accepted work life statistics indicate that a woman like Ms. Miranda would only be expected to work fourteen -- roughly fourteen years of her 17.73 year work life or the period from the date of loss to the end of her -- to the date of retirement.

Therefore, she wouldn't be working for one reason or another for 22 percent of that period. That's what the statistics tell me.

Q You understand that you had the opportunity to have detailed information about this person, not giving a lecture about statistics throughout the country, but for this person.

You understand that?

A No, I don't understand your question.

Q You had information specifically as to Adis Alvarez Miranda, correct?

A Yes.

Q You had specific knowledge and information about how old she was, where she came from, what her work history was,

the children that she has, where she lives?

You had all that information, correct?

A Correct.

Q And when you're doing your statistical analysis you generally don't have that information about one individual, correct?

A No.

Q So do you know what country she's originally from?

A I forget, no.

Q Do you know what continent she is originally from?

A No.

Q If I told you she is originally from Columbia in South America, do you know anything about the work ethic of Columbian women?

MR. SOKOLOFF: Objection.

THE COURT: Sustained. It's sustained.

Q If you didn't take that 22 percent reduction, the number would be higher?

A Correct.

Q The overall economic would be higher, correct?

A Correct.

Q So, again, that 22 percent reduction translates to a discount for the defense, correct?

A Correct.

Q Dr. Dwyer's number was 29,763 and your number was

59,475. Why was your number higher than Dr. Dwyer's when it came to that figure?

MR. SOKOLOFF: Objection.

Number for what?

MR. THOMAS: I'm going to ask him --

A I have no idea what you are talking about.

THE COURT: Rephrase your question.

Q Your past lost earnings was $59,475, correct?

A Correct.

Q And Dr. Dwyer's past lost earnings was $29,763.

A Correct, yes.

Q Why is your number different than hers?

A I can't answer specifically to her number, but my number is the earnings that she lost for the years 2021, 2022, 2023 and 2024 through May 15th.

Q Through May 15th which would be today? No, sorry, two days from now?

A Two days from now, right, correct.

Q Dr. Dwyer's future lost earnings was $1,005,049 and your future lost earnings was $456,871, correct?

A Correct.

Q Less than half -- your number is less than half of what Dr. Dwyer's number is for future lost earnings?

A Correct.

Q Once again you understand that Dr. Dyer has her

retiring at age 67?

A Yes.

Q Doesn't mean she is going to retire at age 67 if she was able to work, correct?

A Correct.

Q She can continue working until age 75, correct?

A Correct.

Q Age 85, correct?

A Possibly.

Q Why is your social security loss $90,000 less, social security benefit loss $90,000 less than Dr. Dwyer?

A Is that a yes or no question?

Q It's not. That was not a yes or no question.

A So because if -- well, first of all, it assumes that Dr. Dwyer's number is accurate. But her -- Dr. Dwyer's estimate is based on Ms. Alvarez Miranda working until 67. Age 67 is the full social security retirement age in which you get a hundred percent of your accrued benefit.

If you retire earlier than 67, while you collect benefits for a longer period of time, you collect a reduced benefit. It's about 20 percent, 15, 20 percent reduction. If you retire at 64 and change as opposed to waiting until 67.

Q So that assumption, once again, gives them a $90,000 reduction in that area of social security retirement income to benefit the defense, correct?

A It gets a lower number, yes, I agree.

Q Physical therapy. Counsel kept saying what if she didn't do physical therapy. Do you remember him saying that?

MR. SOKOLOFF: Objection.

I didn't say she didn't do.

THE COURT: He did not say that.

That's sustained.

Q Physical therapy, this was a big cut in the overall number, correct?

A Yes.

Q You understand why she's not doing physical therapy now?

A No.

Q Did you read that portion of her testimony that says she can't afford it? Did you read that?

MR. SOKOLOFF: Objection.

THE COURT: Did you read her testimony?

THE WITNESS: Yes.

THE COURT: Did you read that portion of that testimony?

THE WITNESS: I don't recall her saying that, but it's possible that would be a reason.

Q Well, Doctor, you've done this for plaintiffs, correct?

A Yes.

Q You've done this for defense, correct?
A Yes.
Q You understand a lot of times when you're at this stage of the case before there is a determination by the jury, it is not uncommon for plaintiffs to say I can't afford that kind of treatment, I don't have the money to do that therapy?
You're familiar with that, correct?
A Yes.
Q And that's not uncommon in someone in the plaintiff's situation?
MR. SOKOLOFF: Objection.
THE COURT: Sustained.
Q Based on your knowledge and experience?
MR. SOKOLOFF: Objection.
THE COURT: Sustained.
Q You said you used Dr. Carfi's numbers, correct?
A Correct.
Q Dr. Carfi prepared a lifecare plan for the plaintiff in this case, correct?
A Yes.
Q Are you aware whether he used New York numbers or North Carolina numbers?
A He said that he used North Carolina numbers.
Q Did you use New York numbers or North Carolina numbers?

A I used his numbers.

Q My question is, do you in your analysis use North Carolina numbers or New York numbers?

A I used his numbers.

Q Sir, why does it say in your report if Dr. Carfi used New York data to determine current costs and future care, I reserve the right to adjust my future care estimates to North Carolina dollars.

Why did you put that in your report?

A Because his report from 2022 did not specify that his numbers were New York or North Carolina numbers, that's all.

Q So, again, if when you did your original evaluation you didn't know if they were New York numbers or North Carolina numbers, when did you learn for the first time that they were North Carolina numbers?

A When Dr. Carfi testified in this case.

Q So then my question to you, when you prepared your original report if you say that you reserve the right to adjust your future cost estimates to North Carolina dollars than you didn't consider North Carolina dollars in your original report, correct?

A No, that's not true. I used Dr. Carfi's numbers. Dr. Carfi has now said his numbers are North Carolina numbers so the numbers I used in my original report were North Carolina numbers.

Q Question, yes or no, did you use North Carolina growth rates or percentages or any assumptions based on North Carolina figures; yes or no?

A Yes.

Q Which figures?

A The cost figures from Dr. Carfi's report.

Q Aside from Dr. Carfi's report, did you yourself do any analysis or investigation based on North Carolina numbers; yes or no?

A No.

Q You only considered one future surgery at $103,700?

A Yes.

Q As you are sitting here now, are you aware that there's actually two future surgical procedures that have been recommended by Dr. Macagno the treating physician?

MR. SOKOLOFF: Objection.

THE COURT: Overruled.

A I saw testimony to that fact, yes.

Q How come you didn't include that additional surgery in your overall economic figures?

A Because it doesn't appear that there was any cost estimate associated with a second surgery.

Q You saw Dr. Macagno's report?

A I did not.

Q Counsel didn't show you Dr. Macagno's report?

A No.

Q His narrative report, you never saw that?

THE COURT: Asked and answered.

MR. THOMAS: I want to make sure we are clear which report it was.

Q It was his narrative report that had the numbers --

MR. SOKOLOFF: Objection.

Q -- for future surgery. Did you see that?

A No, I did not see his report.

Q If you were to learn now that Dr. Macagno --

MR. THOMAS: Your Honor, I am talking from Plaintiff's Exhibit 31 in evidence, Dr. Macagno's file.

Q That in his narrative report he indicated regarding the lumbar spine, future spine surgery is anticipated. The present surgeon and assistant fee is $50,000 for surgery. This is the total of the surgeon and assistant surgeon. This does not include hospital and/or anesthesia.

You've read that?

A No, I did not read the report.

Q Well, Doctor, you said that you amended your numbers as of two days from now, correct?

A Yes.

Q And in amending your numbers don't you think it's important that you amend your numbers based on all the information that's been provided even during the course of this

trial?

A Yes.

Q So if you've only considered the cervical spine which Dr. Macagno also said was anticipated at $50,000 just for the surgeons and then another $53,700 for hospitalization, anesthesia, that's Dr. Carfi's, part of Dr. Carfi's lifecare plan, correct?

A Dr. Carfi says that the cervical would be $103,700, he doesn't break it down into individual components.

Q Well, as you are sitting here now, if I am reading to you that Dr. Macagno says 50,000 just for the surgeon and assistant surgeon and Dr. Carfi says the total cost is $103,700, again, that would be about another $53,700 for the hospitalization, anesthesia and any other related costs, correct?

MR. SOKOLOFF: Objection.

THE COURT: Overruled.

A Yes, the difference between 103,700 and 50,000 is 53,700, I agree with that.

Q I wasn't great in math, but that one I could figure out pretty good.

A Understood.

Q You have now shortchanged the plaintiff another $103,700 by not considering the lumbar spine surgery that Dr. Macagno has said is anticipated?

MR. SOKOLOFF: Objection.

THE COURT: Sustained.

Rephrase.

Q You are now discounting in your overall economic figures $103,700 for an anticipated lumbar spine surgery in the future, correct?

A If there's testimony to that specific cost and that that surgery is necessary, yes.

Q And, again, if Dr. Macagno's report and his testimony to this jury in this case is that she is anticipated to have two future surgeries, you would have not taken into consideration at least one of the surgeries that had been suggested and anticipated by her treating physicians, correct?

A Yes.

Q That would once again give the defense another discount of $103,700 of anticipated future cost of surgery that you didn't offer to this jury today, correct?

A No. You're double counting.

Q You only considered one future surgery at $103,700, correct?

A Correct.

Q You didn't consider the second surgery for the same $103,700, correct?

A Correct.

Q Now that you know that Dr. Macagno has testified and

his reports indicate that it is anticipated she would have a second surgery, do you want to add $103,700 to your overall economic estimate?

MR. SOKOLOFF: Objection.

Misrepresentation of what Dr. Macagno testified to.

THE COURT: I'm going to overrule.

You can answer.

Q It's a yes or no question, do you want to add it to your overall economic figure; yes or no?

A Yes.

Q So now the number that you gave which was a $500,000 difference, when you consider the cost of anticipated future surgery that number is now going to be only a $400,000 difference, is that fair to say?

A Fair to say.

Q The whole dispute between you and Dr. Dwyer comes down to about total economic cost of about $400,000 over the course of the plaintiff's life for lost wages and future medical costs, correct?

A Correct.

MR. THOMAS: Thank you.

I have nothing further, Judge.

THE COURT: Redirect.

REDIRECT EXAMINATION

Q Let's go to Dr. Dwyer's report, the plaintiff's expert. Take a look at her table. One time cost --

MR. THOMAS: Objection, your Honor.

He's not using the updated report which is in evidence. Again, your Honor, Plaintiff's Exhibit 30 in evidence, use this.

Q Did Dr. Dwyer produce a report to your knowledge that showed one surgery?

A Yes, May the 1st.

Q May the first of what year?

A 2024.

Q So on May the first of 2024, the plaintiff's economic expert in her calculation calculated one time cost for one surgery, right?

MR. THOMAS: Objection, your Honor.

Completely misleading. This document is in evidence.

THE COURT: You can do that on recross.

MR. THOMAS: Very good.

Your Honor, can we take this document down because this is not what is in evidence?

MR. SOKOLOFF: It's what I was given.

THE COURT: It's down. It was not put in evidence. You were given both reports so please don't do that.

Q And counsel asked you about the statistics, about people of Ms. Alvarez Miranda's age, how many years they would work until retirement. Do you recall that?

A Yes.

Q Is there anything that you know -- withdrawn.

Those statistics cover what kind of people?

A Well, they cover all 46 year-old, 46, 47 year-old women with a high school degree.

Q As far as you know do those statistics cover people from Columbia?

A Well, they're U.S. statistics, but obviously some people who are U.S. citizens were originally citizens of other countries.

Q Do those statistics also cover people who were born but are now in South America and who are now U.S. citizens?

A Yes.

Q Do those statistics cover people who have a great desire to work, great ambition?

A Yes.

Q And do those statistics cover people who would rather not work?

A Yes.

Q They cover all kinds of people?

A These are averages, that's what economists work on. It's like using life expectancy. When I tell you that Ms.

Alvarez' life expectancy is to 81.7 or 81.9 nine, I'm not telling you that's the day she's going to die.

In other words, to do these calculations, to do the types of calculations that I do and Dr. Dwyer does we have to use averages, okay.

The question that's really being asked here is if you're --

MR. THOMAS: Objection.

MR. SOKOLOFF: Can he not be interrupted?

THE COURT: He's answered the question. The question that is really being asked here is not proper. That's stricken.

Q Is there anything that you learned about Ms. Alvarez Miranda from counsel's questions about her that takes her out of the statistics about future work life?

MR. THOMAS: Objection.

Not my job to teach him. Objection, Judge.

MR. SOKOLOFF: It's a question.

THE COURT: Rephrase your question.

Q If you assume that Ms. Alvarez Miranda came from Columbia and is now a U.S. citizen, does that change your estimate based upon the statistics of how many years she would work until retirement?

A No, it does not.

Q If you assume that she was a very hard worker, would

that change your estimation of how many years based on the statistics she would work?

A No, that's what -- the statistics are there for that purpose, to allow me or any forensic economist to make the estimates we have to make.

Q And are those statistics based in part on the economic cycles?

A Well, the statistics on work life are from a study that was published in 2019, so it's prior to the pandemic. For example, if you think that the pandemic would change people's work incentives.

Q Sometimes people want to work fervently, they want to work and sometimes the economy doesn't allow them to work, fair?

MR. THOMAS: Objection.

THE COURT: Sustained.

Q The record of Dr. Macagno that counsel read to you and asked you to assume about future surgery or surgeries, that didn't tell you anything about when those surgeries would be, right?

MR. THOMAS: Objection.

Leading. Who's testifying here?

THE COURT: It is leading. Rephrase and just be careful about the leading.

Q Did what counsel read to you from Dr. Macagno's

report say anything about when the surgery would be?

MR. THOMAS: Once again, also leading.

MR. SOKOLOFF: It's yes or no, I'm not giving him the answer.

MR. THOMAS: A yes or no question is still a leading question.

THE COURT: It can still be a leading question.

It's leading. I'm going to overrule. Let's just finish with this.

A No, it did not.

Q In order to estimate a cost of some medical procedure that might happen in the future, what information -- withdrawn.

What do you need to know about that future event to help you cost it?

MR. THOMAS: Same objection.

THE COURT: Rephrase your question.

Q If you were given the assignment to come up with a cost of a future medical event at some time in the future, what information, if any, would you want to know?

A Well, if you want to come up with an actual cost you would want to know when in the future that procedure is going to occur. Is it going to occur in five years, is it going to occur in fifteen years, et cetera?

Now, when there's testimony about a future procedure, but no timeframe is put on it, the standard and generally

accepted approach is just to use the current cost of the procedure, the $103,000.

Q Did you see anything in Dr. Dwyer's report before the start of this trial that indicated a calculation for two future surgeries?

MR. THOMAS: Objection.

Asked and answered. We've already done this, Judge.

MR. SOKOLOFF: It's my last question.

THE COURT: Okay, I will hold you to that and then I will overrule the objection. You can have it.

A No, I did not.

MR. SOKOLOFF: Nothing further.

RECROSS-EXAMINATION

BY MR. THOMAS:

Q Doctor, you're aware that the evidence in this case is what the jury gets to consider, correct?

A Correct.

Q You are aware that Plaintiff's Exhibit 30 in evidence is Dr. Dwyer's yearly breakdown of future healthcare costs, correct?

A I don't know that.

Q You haven't seen this? Let me show this to you.

MR. THOMAS: Can we show this to the witness?

COURT OFFICER: Plaintiff's Exhibit 30.

Q That was quick. You're good with the numbers, right?

A I'm sorry, what's the question, counsel?

Q Is that the first time you're seeing this?

A Yes.

Q Your attorney, the attorney who hired you, didn't show you this chart before you took the witness stand?

A No.

Q And had you seen it you would have amended your report and your ultimate conclusions?

A I might have. I mean I'm aware, I read Dr. Dwyer's testimony. She testified to the $1,033,220 figure. She testified to two surgeries at $103,700 per surgery. I'm aware of all that, yes.

Q Counsel just asked you if you don't know when an event is going to occur, how do you estimate what the cost of that event is going to be when it finally occurs, correct?

A Correct.

Q Are you aware that Dr. Macagno has testified and the plaintiff has testified and his reports indicate future surgery ten to twelve years from now?

Are you aware of that?

A No.

Q Is this the first time that you are hearing what?

A Yes.

Q If you knew that then that cost would likely be

higher ten to twelve years from now for these surgeries, correct?

A Certainly, yes.

Q By just using the current value of $103,700 for each surgery, both the cervical and lumbar, that would be conservative knowing now that the estimation is ten to twelve years from now is typically when a future surgery of these kind, of this kind occurs?

MR. SOKOLOFF: Objection.

A Well, but that's what Dr. Dwyer --

THE COURT: Wait, there's an objection.

What is your objection?

MR. SOKOLOFF: He is stating facts in the question that aren't accurate.

THE COURT: I'm overruling.

MR. THOMAS: Thank you.

A Yes, Dr. Dwyer did the same thing that I did.

Q My question to you right now, please listen. If you don't understand tell me you don't understand.

The $103,700 for each surgery is a conservative approach to identifying what that value, what that cost is because you're not projecting it ten to twelve years in the future, correct?

A If you projected these surgeries ten to twelve years in the future the numbers would be higher, yes.

Q That's what I am asking.

So instead of the $207,000 for both surgeries combined it would likely be what ten years from now?

A $300,000 total.

Q So another $100,000 added to the cost of future surgery. And if you did that then the difference between you and Dr. Dwyer would still be $400,000?

A Yes.

MR. THOMAS: Thank you. I have nothing further, Judge.

If we can make sure he doesn't walk away with that exhibit.

THE COURT: You are excused. Thank you.

THE WITNESS: Thank you, your Honor.

THE COURT: Mr. Sokoloff, do you have any readings or anything like that that you would like to do or you have your other witness coming this afternoon?

MR. SOKOLOFF: I am expecting the next witness at 12:15.

THE COURT: Okay, so we can take a 15-minute break?

MR. SOKOLOFF: We can, yes.

THE COURT: Why don't we take a 15-minute break.

COURT OFFICER: Jury exiting.

(Whereupon, the jury exited the courtroom.)

MR. SOKOLOFF: Judge, I have an issue that I need to bring up.

THE COURT: Okay.

MR. SOKOLOFF: The plaintiff sent me an updated economic report from Dr. Dwyer dated May 1st, 2024. That updated report attached tables and the table that I was given is the one that I put up that shows a one time surgery of $103,700. That's what they gave me before the trial, right on the eve of trial.

Now I learn that there's a document that's in evidence that has a different calculation that doubles the number of surgeries. This was not provided to me before the trial.

Can we mark this as a court exhibit?

THE COURT: Mr. Sokoloff, the document that is in evidence was put into evidence. You guys marked evidence without my interference. You did it on your own. You can't now complain because of the things that your expert said on cross-examination.

MR. SOKOLOFF: I would like to have an explanation for how what was put into evidence, and we are trying to work cooperatively, how it was put into evidence differs from what I was given before the trial, not months ago.

THE COURT: I didn't rule that into evidence.

You guys consented to that being in evidence. So that's a conversation that maybe you should have with Mr. Thomas, but this is not something that the Court over anyone's objection made a ruling on.

You consented to that document being into evidence, having the report that you had which was exchanged with you on what, May 1st of this year?

MR. THOMAS: Before the trial started.

THE COURT: Before the trial started.

MR. SOKOLOFF: So the report that I had did not have that.

MR. THOMAS: Judge, the testimony from Dr. Dwyer was clear, that she updated her report including the additional surgery that was mentioned in Dr. Macagno's records and that counsel has had.

Counsel has had Dr. Macagno's report and his narrative. It was served with a 3101(d). It specifically says two surgeries, one for the cervical spine and one for the lumbar spine. Both at a cost of $50,000 for surgeons that doesn't include hospitalization, anesthesia and other costs and expenses.

So based on that, Dr. Dwyer wrote her chart with that one additional surgery. That was her testimony.

Original I had only one. There is now information that she's going to need two surgeries so I

added that to my chart. That was up on the screen for the Court, for the jury, for counsel. This was then admitted into evidence without objection.

So because counsel now says that before the trial started he got an exchange that only indicated one surgery, there's been a foundation laid for the fact that there were two surgeries that were likely or anticipated.

That's why Dr. Dwyer's numbers are exactly the same as what counsel has except the addition of that one anticipated future lumbar spine surgery which makes that number $103,700 higher than it was before the testimony. Again, this is a document already in evidence.

THE COURT: So, Mr. Sokoloff, that's your explanation. There were two reports and you apparently got both reports.

MR. THOMAS: Yes.

MR. SOKOLOFF: No. What I got right before trial by email is an updated report of Dr. Dwyer, May 1st, 2024. And when counsel says I'm putting in the updated report I did not notice that they updated it even further during the trial.

THE COURT: But that's on you then because then you subsequently consented to a document being in evidence.

MR. SOKOLOFF: It's pretty --

THE COURT: Listen, I am just saying.

MR. SOKOLOFF: Well, I am making a record that --

THE COURT: I know you are making a record and I am letting you make the record, but if that was a problem or a mistake, that was on your misunderstanding or misapprehension of something.

MR. THOMAS: Judge, it's not even a misunderstanding. This was the testimony of Dr. Dwyer. If she used the same chart from May 1st she would have handwritten in the additional surgical cost and would have done that in the chart.

I asked her to prepare the updated chart before she came to court, and it was explained why there was two surgeries listed on that -- on her chart which is Plaintiff's Exhibit 30 in evidence.

Plaintiff's Exhibit 30 in evidence specifically indicates a section for surgeries. And in the section for surgeries it says, times two and the number $103,700 appears twice. So the total for the future surgeries would be $207,400 on the document admitted into evidence, shown to the jury -- shown to counsel before it was admitted into evidence.

I don't believe there is a reason here to give any instruction, any curative instruction to the jury in

any way. The proper foundation was laid.

THE COURT: Well, I wasn't asked to do that, but I have no intentions of doing that.

MR. SOKOLOFF: Well, this was sprung in the middle of a trial a new --

THE COURT: Mr. Sokoloff, this is not a tit for tat because of what happened this morning with the report, the amended report of your witness, so please don't make it into that because that is what it seems like to me.

MR. SOKOLOFF: No, it's not. I went to put up an exhibit that I thought was the exhibit because that's what they gave me. Here is her updated report. So she updated it even further in the middle of the trial.

THE COURT: On a document that you consented to into evidence. You consented to it. Maybe you should have looked at it more closely or compared it to the other documents that you had.

MR. SOKOLOFF: I know for next time.

THE COURT: There you go.

(Whereupon, a recess was held.)

COURT OFFICER: Jury entering.

(Whereupon, the jury entered the courtroom.)

THE COURT: Mr. Sokoloff, your next witness.

MR. SOKOLOFF: Yes, the defendants call Dr. Marc Chernoff.

M A R C C H E R N O F F, M. D., called as a witness on behalf of the Defendant, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

THE CLERK: Please give your name and address to the court reporter.

THE WITNESS: Marc, M-A-R-C, Chernoff C-H-E-R-N-O-F-F, 2500 Nesconset Highway, Building 9, Stony Brook, New York 11790.

THE COURT: Thank you. Good afternoon.

THE WITNESS: Good afternoon.

THE COURT: Mr. Sokoloff.

DIRECT EXAMINATION

BY MR. SOKOLOFF:

Q Dr. Chernoff, what do you do for a living?

A So, I'm on orthopedic spine surgeon.

Q Can you tell us your educational background?

A Grew up in Long Island, Bellmore. Went to City University of New York which is a seven year BSMD accelerated program. I graduated summa cum laude from City College in 1991.

Then went on to complete my medical training receiving an M.D. degree in 1993 from State University of New York at Stony Brook. I was admitted to AOA, Alpha Mega Alpha Honor Society in my junior year.

In Stony Brook I stayed for quite a long time. I did my orthopedic residency there which is a five-year residency. I graduated in 1998. Then went on for further training.

I was the Harvard spine fellow in Boston, Massachusetts. Then came back to Long Island where my wife and I are from. I joined my brother in practice who is also an orthopedic spine surgeon. Has been in practice, my brother and myself, for 25 years since 1999.

Q You see patients?

A Yes. So we see patients, clinical patients, do surgeries, cervical, cervical, thoracic, lumbar spine, trauma and non-trauma. Affiliated with multiple hospitals in Long Island and Manhattan.

Q What hospitals on Long Island and Manhattan?

A In Manhattan we are at Lenox Hill Hospital. In Long Island in Nassau, well, we are in Huntington Hospital, St. Charles, St. Catherine's, Mather as part of the North Shore system, North Shore Manhasset. So we are affiliated with multiple hospitals for spine surgery.

Q And how long have you been -- how long have you been seeing patients?

A So I mean training finished in 1999, so for 25 years I've been in active practice.

Q And do you have any awards and honors?

A So graduating college summa cum laude. I was a

valedictorian candidate of City College. As I mentioned the honor society in medical school.

In clinical practice there is not really many awards that you get, but -- and obviously I am board certified. Part of that is you take part one of your boards that you take after training.

Once you pass that, which I passed that obviously, you take part two which is an oral exam. That you actually can't take until your in clinical practice for two years. I finished in '99 so I took my board certification in 2001 which was two years, the earliest time that you could take it.

Then you are re-certified every ten years. I was re-certified in orthopedic surgery in 2011, then 2021 and that lasts until '31 until you have to take another exam.

Q What is board certification?

A Board certification is kind of what I discussed. It is basically taking a written exam, submitting, doing an oral examine initially and then re-certifying every ten years both doing CMEs, which is continuing medical education every year. You need a certain amount of that.

You have to submit a case log to the board where they go over your cases that you've done, your operative cases. Any complications that you have had they might look at, and the re-certifying with the exam every ten years.

Q Have you authored any publications?

A No, sir, I am mostly in clinical practice. So in residency I think I helped out in some publications, but mostly I am involved in clinical practice and treating patients.

Q Do you do as part of your practice cervical fusion surgery?

A Yes.

Q And do you do lumbar fusion surgery?

A Yes, I do.

Q And do you evaluate patients for whether they need such surgery?

A Yes, for 25 years.

Q How many surgeries do you do a year, roughly?

A You know, it changes. I think it's a little less after Covid. But I would say anywhere from 50 to 80 surgeries a year.

Q And are you getting paid for your testimony today?

A Yes.

Q How much?

A It's $9,000 for today and there is also pretrial discussions and meeting with you and going over the records which was an additional $9,000.

MR. THOMAS: I'm sorry, I didn't hear that.

THE WITNESS: $9,000 and $9,000.

Q You reviewed medical records in this case?

A Yes, that's correct.

Q And can you tell us generally what medical records you reviewed?

A Sure. So these were records that were supplied to me and I have them here. They're things that are -- they are all in the report. Basically hospital records, emergency department records after the accident on March 4th, 2021, treatment records. Records from Dr. Gregorace, one of her treating physicians. Records from Dr. Macagno, physical therapy records, chiropractic records, various MRI studies, both the reports and MRIs of the cervical and lumbar spine, as well I believe the post-operative X-rays, intraoperative fluoroscopy films.

So there were multiple records that I reviewed, as well as examining the patient. The claimant was examined on May 26th, 2022.

Q Where did you examine the patient?

A That was in my Woodbury office.

MR. THOMAS: Objection.

It's not a patient.

THE COURT: Rephrase.

Q Where did you examine the plaintiff?

A So let me just make sure.

Yes, she was examined in my Woodbury office, 800 Woodbury Road.

Q Did anybody come with her to the examination and sit

there when you examined her?

A Yes, I have listed if anybody comes with her I note it, and that is Gene Duenas, her attorney and I think he gave me a card.

Q And how many MRI films of Ms. Alvarez Miranda's cervical spine did you see that were taken before she had cervical surgery?

A I believe there was one cervical MRI and one lumbar MRI that I reviewed, and those were performed April of 2021.

Yes, April 21 of 2021.

Q And was there any indication in the MRI records that you reviewed that there was -- that the plaintiff had been involved in a motor vehicle accident?

MR. THOMAS: Objection.

Leading.

THE COURT: Sustained.

Rephrase.

Q Was there anything in the records of the MRI facility, Carle Place MRI that told you anything about the plaintiff leading up to the examination?

A Yes.

Q And what is that?

A Well, so there's clinical history on the MRI reports. Obviously this was a car accident so this would have been under No-Fault. So the MRI facilities would be billing No-Fault so

they would have been aware of that.

The other thing is the reading radiologist Ronald Wagner, he read the cervical MRIs, he read the lumbar MRIs. The clinical history, for instance, on the lumbar MRI says the patient complains of sharp pain down the back, but the same radiologist also read an MRI of the brain on the same day and in that clinical history notes MVA.

Q MVA?

A MVA standing for motor vehicle accident.

Q And as part of your work in this case did you review and evaluate the MRIs from April of 2021?

A Yes. So I have those listed in my report and I have the films here today as well.

Those were reviewed when I initially reviewed, when I evaluated the patient back in May of 2022.

MR. SOKOLOFF: Your Honor, with the Court's permission, the witness has brought those films and I would like to have him discuss them by putting them on the screen as we did with the other witnesses.

MR. THOMAS: If these are the Stand-Up MRIs.

MR. SOKOLOFF: Yes.

MR. THOMAS: Then I have no objection. They're already in evidence and they have been used.

THE COURT: Go ahead. You stay step down.

A I can do the anatomy first before I do that if it

helps.

THE COURT: Mr. Sokoloff, however you want to present your case.

Q While the machine is booting up, can you explain to the jurors about the anatomy that is involved in this case?

A Sure. So the cervical spine basically has --

MR. THOMAS: Can I move my position?

THE COURT: You may.

A The cervical spine basically has vertebral bodies and disks. The disks I liken them to kind of jelly doughnuts where there are cushions in between the vertebral bodies. So this is C2, C3, C4, C5, C6, C7. There are seven vertebral bodies and there are disks in between.

In back of the disks and vertebral bodies is the spinal cord. And then at each level there is a nerve root that comes out. And so for instance if a disk or a spur were to pinch the nerve root, that would give you symptoms or can give you symptoms, but it would be in a particular nerve root distribution. You might get sensory changes or motor changes such as weakness.

So for instance at C5-6 that innovates your wrist extensors and other muscle groups. At C4-5 it innovates your deltoids. So there are different muscles that are innovated depending on the particular level. That's kind of what we look for when we examine patients.

What's not shown on the model is there are ligaments. There's strong ligaments, the anterior posterior cruciate eight, so different ligaments. The anterior longitudinal ligament, sorry. The posterior longitudinal ligament interspinous ligaments. And there are ligaments and then muscles that are also around the spine that help support that.

And the same is true for the lower back. The lower back has vertebral bodies. It has disks that are kind of like jelly doughnuts. The inside of the disks are a little harder, they're not really like a liquid. It is not really like a jelly, it is more like described as a crabmeat consistency. And there are nerve roots at each level just like the cervical pine.

There is no spinal cord in the lower back. The spinal cord ends at L1.

So you have all the nerve roots that run down. And then at each level a nerve root leaves and if something pinches on that nerve root it might give you pain or weakness or numbness in a particular distribution.

And then kind of discussing MRI studies and what they are and, you know, what we see on MRIs. So MRI is basically a magnetic resonance imaging. What that is is waves and they're not radiation they are more like radio waves or magnetic resonance. And what they do is they give you a picture that is generated through a computer, and you can actually see the

structure of the spine, disk herniations. You can actually often see the particular nerve roots in the spine and whether anything is compressing the spine.

So over here I have just some demonstrations just kind of anatomy-wise. This is just patients -- this is just anatomy so I can show what things look like on an MRI.

MR. THOMAS: Objection, your Honor.

Again, if this is for demonstrative purposes I want to make sure that it's clear that this is not the plaintiff.

THE WITNESS: Not the plaintiff, this one, and then I am going to show the plaintiff's films.

THE COURT: Do we need this in order to go straight to the plaintiff's films or can we use what we have been using, our Dr. Bones and all that?

MR. SOKOLOFF: But we are going to be looking at MRIs.

MR. THOMAS: We are looking at somebody else's MRI and that's what I'm objecting to.

MR. SOKOLOFF: It's for demonstrative purposes.

MR. THOMAS: It's still someone else's MRI.

MR. SOKOLOFF: And that's someone else's spine.

MR. THOMAS: No, it's not. This is a model of a spine. I can explain that to you later.

THE COURT: I am going to allow for

demonstrative purposes only. This is not plaintiff's spine.

THE WITNESS: That's correct.

A So, here you have an MRI. You have the vertebral bodies. You have the disks in between the vertebral bodies. And then you can see like this one has a herniation where the disk is pushed out.

What we're going to do is I am going to come over here. Then these are axial sections. So an axial --

MR. THOMAS: Again, objection, Judge.

I have to object to him using somebody's else's MRIs. We don't know the age of this person. We don't know prior congenital defects. This is -- I argue is totally inappropriate.

THE COURT: It's for demonstrative purposes only.

MR. THOMAS: Again, without the understanding as to is this a 12 year-old or is this a 70 year-old?

MR. SOKOLOFF: That's what cross-examination -- it's only for demonstrative purposes.

THE COURT: Let's stop. We are going to go to lunch in a second if the two of you didn't stop the bickering.

MR. THOMAS: I object to the use of these MRIs even for demonstrative purposes.

THE COURT: It's overruled.

A This is a cross-section. So you see the spinal cord and then this fluid around the spinal cord. In this case just to show you what something looks like, this is a disk herniation that is pushed out and that's touching into the spinal cord.

We are going to come over here. Lower back, same type of thing. You have fluid around the nerve roots. Obviously this one is abnormal. You see the disk herniation that is extruded out, that's called a herniated disk.

Same thing, if you correlate that with an axial image you see this is disk, right, and then this is the nerves. These little dots are the nerves. And then you actually can see the disk herniation that's extruded out.

I am going to go right to the plaintiff's films which is here. This is the cervical spine of the plaintiff. You see the Stand-Up MRI ordered by Joseph Gregorace and you see the plaintiff's name up here and the date of the MRI.

What you see here is these are the vertebral bodies and these are the disks that are in between them. The disks are relatively thickened, thick disks. There is not one that's collapsed.

What you can do here is that orange line is where the axial sections are cut through. So you can then cut through each of the disks. So we start at C2-3, you have the spinal

cord. You have a ring of fluid which is the cerebral spinal fluid and you have the disk.

What you see here is the spinal cord. There is nothing extruded into the spinal cord. This is C2-3. The neural foramen which is the room for the nerves to leave. You see that each level the nerves leave. And there is a nice big space at C2-3 here and here, and here and here for the nerve to leave.

Then this is slicing down the spine. What happens here is you see the spinal cord and you see the room for the nerves to leave, and this is nice and open. This is also C2-3.

Then as you come down here this is C3-4. This is the next level. Spinal cord. Room for the nerves to leave, big open area. That's the neural foramen, it's called that this is patent, this is widely open. None of the nerves are being compressed here.

Then as you come down, this is C4-5, same type of thing. Spinal cord is here. The disk is here. The room for the nerves are here. There's no extruded or herniated disk that is pushing into the spinal cord and nerves.

Then you are going to keep coming down. So this is the next level. So, again this is two, three, four, five, six. 5-6 you see the spinal cord. You see the nerves coming out. Because sometimes disks can herniate out into the center, but they can also herniate out into the foramen and actually pinch

the nerve out here and can cause a lot of pain and weakness.

Here you see the neuro foramen patent, nice opening for the nerves to leave. Then coming down to the last level which is C6-7, again this is the disk. This is the spinal cord. This is this little bone in the back, these are called facet joints. In between you have the neural foramen. And, again, none of the disk material is extruded into the neural foramen, and there is no neural impingement on this.

I'm going to go to the lumbar MRIs. These are done on the same day, also on April 22nd. It's always good to kind of compare the axial images and the sagittal images.

So axial images is like slicing like a loaf of bread which is the ones on your right and that's these. To know where we are slicing there is a cross-section. Here you can see that this is being sliced through and this is five, four, three, two, one. This is the 1-2 disk.

You see that L1-2, L2-3, L-3 disks their height is wide. There is like a little line here in the center which is the nucleus. And then the -- there is a whitening of the disk. What shows up on MRI is white is the water content on these images. So you can see that they're well hydrated disks.

L4-5 and L5-S1, even though the height is still good, it's darkened. That's called disk desiccation, degenerative disk disease or black disk disease. And that means that the disk is dehydrated, that some of the water content has

dissipated from it. We often see that as people get older. There's a phenomenon where the disks basically lose their water content.

These are the axial sections which is slicing like a loaf of bread. Again, L1-2, this is normal. This is the normal view. The little dots are the nerves. This is actually the ending of the spinal cord here. You can see it right here. And then the nerves leave through these canals, it's called neural foramen.

Then we are going to go to L2-3. Also similar appearance. Opening in the center for the canal. No stenosis, no narrowing. And the room for the nerves so nice and wide.

Same thing at L3-4. At L3-4 you see these foramen are wide. There is a little bit of facet arthritis which are these little joints in the back. I will show you that on the model. You can start to see some arthritis in the facet joints at L3-4. Again, she's in her 40s, this is kind of an age-appropriate MRI.

Then at L4-5 you can actually see a lot more disease in the facets. So these facets are much bigger. They go from here to here. They're enlarged. You can see this one is also very enlarged. That's called facet hypertrophic arthropathy which is basically an arthritis that affects the facet joints.

The center looks pretty good. There is room for the nerve to leave on the left side. The room on the right side is

little bit narrowed. And that's narrowed because this facet is so enlarged.

And then whether you called this a bulge or whether you call this a -- I would call it a shallow disk herniation, but that's kind of in the eye of the beholder whether something is a bulge or a shallow disk, but not a big focal disk. But you can see that the joint is so enlarged that it's cutting off the room for the nerve to leave on the right side. And this joint here from here to here is actually much larger than this joint.

Then we come down to the L5-S1 area and same type of thing. You see kind of the bulging of the disk. The joints are somewhat arthritic. There is a little bit of narrowing here for the nerves to leave, and that is secondary to the bulging of the disk as well as the facet joints that are very large.

Again, you see on the left side it goes from here to here, but on the right side it goes from here all the way down to here, so that is a very enlarged facet joint.

The facet joints what they are, like I said the structure of the disk you have the jelly doughnut is in the center, but then you also have these joints in the back and these are called the facet joints. But what happens is if you get arthritis in these facet joints they enlarge, they thicken and the ligaments thicken around them.

Right in front of these facet joints is the nerve root, so that can also pinch the nerve just from the arthritis. That's basically what I wanted to show.

Q You mentioned facet arthritis and then facet hypertrophic arthropathy.

What is arthritis?

A Arthritis is more of a laymen's term. When we say that something is arthritic, the knee is arthritic, but part of that is there is fluid that accumulates sometimes in your knee and the bones get spurs and they enlarge.

Hypertrophic arthropathy, arthropathy is really arthritis in the joint. Hypertrophic means that it is enlarged, that there are spurs and the joint actually enlarges.

If you look at people that have arthritis in their knuckle, their knuckle looks bigger and that's because of the spurs that form. Same thing in the spine. When the arthritis sets in in the facet joints they actually enlarge and they get bigger.

Q What causes facet hypertrophic arthropathy?

A That is a degenerative condition, wear and tear over years on the spine. So it doesn't have to be a particular injury. Often it can be a hereditary factor.

We find that they have done twin studies and one twin does a desk job and one twin does heavy work and their MRIs often look the same after 20 years. So there is a big

hereditary component. That is why we often ask people if you have a family history of arthritis or back or neck pain.

Q You use the term a focal disk or a focal herniation. What do you mean by focal?

A Sure. So, you can have a disk bulge. A disk bulge is basically a symmetric kind of bulging of the disk. You can even have a focal bulge where it kind of bulges out in a certain area.

Then there are focal disk herniations. So a disk that is extruded out. I showed you that on the earlier MRIs where there is a disk that is pushed out, pushing into the nerve causing neural impingement.

That is something we might either treat conservatively. So not all disk herniations require surgery. In my practice I believe about 90 percent of disk herniations are treated conservatively. We operate on about five to ten percent disk herniations.

You might if conservative treatment fails, go in and remove the part of the disk that's herniated out for a disk and that's called a diskectomy. Different from a fusion, but, yes.

Q From your examination of the plaintiffs MRI, did you see any cause for surgery here in either the cervical spine or the lumbar spine?

A So when you look at MRIs you have to correlate it to the patient of course as well. You can't base recommendations

just solely on one nor the other.

When you look at someone that has neck pain, but you look at their cervical MRIs and you don't see any nerve compression. So you see some degenerative changes. I would describe it as some diffused degenerative changes. Mostly of three of the disks, C4-5, C5-6, C6-7 showed some arthritis.

There was not a focal disk herniation. There wasn't nerve impingement. And given what the MRIs look like and if someone had neck pain, but not a specific nerve root radiculopathy that correlated with the MRI. So there is no nerve compression. So in that case I would have not offered surgery for that particular patient.

Q Did you see any nerve compression on the MRIs?

A No, not on the MRIs that I showed you on the cervical spine. In the lower back there was some narrowing of the neural foramen at L4-5 on the right side. Both sides were really more on the right and a little bit on both sides at L5-S1. But that's from the facet arthritis, the degeneration.

Normally if you do MRIs on everybody over the age of 40 you are going to see degenerative changes. It's an age-appropriate MRI and, you know, we don't operate on everybody that has like some narrowing of the foramen. So I would not have done a laminectomy or a fusion for the MRIs that I saw.

Q Why not?

A Well, number one it's a surgical intervention, right, so we kind of correlate. So if someone has herniated disks in the neck and it's pinching the C6 nerve root and they have weakness and numbness and I can say, oh look there is something on the MRI that's causing your symptoms, I want the surgery to be successful. I want people to get helped by the surgery.

Again, you have to correlate the MRIs and the patient's symptoms. So I often say if someone has like a headache and you do an MRI of the brain, but, you know, you see a brain tumor, well that's something that you can operate on and help the patient. Doesn't mean that's from an accident just because you see it on the MRIs.

If someone has headaches and they have the symptoms, but the MRIs of the brain are normal, you're not going to operate on them just because they have pain. You want to correlate their symptoms with the MRI findings.

On these MRIs I didn't see severe compression or disk herniations that would help the claimant get better after the surgery.

THE COURT: We need to stop. It's one o'clock so we are going to break for lunch. We will be back at 2:15.

Please don't discuss any of the testimony you have heard amongst yourselves or with anyone else. Enjoy your lunch.

COURT OFFICER: Jury exiting.

(Whereupon, the jury exited the courtroom.)

THE COURT: Please don't discuss your testimony with anyone. Thank you.

Enjoy your lunch.

MR. THOMAS: Can I make a record real quick?

THE COURT: Sure.

MR. THOMAS: Once the doctor leaves.

(Whereupon, the witness exited the courtroom.)

THE COURT: Go ahead.

MR. THOMAS: Your Honor, Dr. Chernoff just showed this jury what he said was demonstrative MRIs of someone else with no other information as to what conditions this person had.

The image that he said this is an obvious herniated disk is something that we can all see looks like something that's not consistent with the rest of the MRI film. And then he is putting up the plaintiff's MRI and going to say that there is no herniated disk.

It is highly prejudicial to the plaintiff to give the impression to this jury that a herniated disk looks like what he is showing in his demonstrative MRI film of someone else.

THE COURT: That demonstrative was only to show the anatomy of what the spine looks like on an MRI when it

was normal and when it's herniated, that's it. It's the same exact thing when you use your, as you call him, Mr. Bones. That is a demonstrative, but it's modeled after somebody's spine. It's not just put together mishap.

MR. THOMAS: I would have no objection if his demonstrative was to show what a normal spine looks like. But since he pointed out on the MRI that he produced which we don't know who this person is, how old they were.

THE COURT: You don't need to know that. It's a demonstrative. He is just showing what these things look like on an MRI. How they demonstrate on an MRI, that's it. And I made it very clear to the jury and so did Mr. Sokoloff that this was not the plaintiff's MRI.

MR. THOMAS: Again, Judge, I feel that by pointing out to the jury this is an obvious herniation and that is not what the plaintiff's MRI looks like, the impression is that a herniation has to look like what he pointed out on his demonstrative, and that's not true.

THE COURT: Okay, so noted.

MR. THOMAS: Thank you.

THE COURT: You're welcome.

MR. SOKOLOFF: 2:15?

THE COURT: 2:15.

(Whereupon, there was a luncheon recess.)

AFTERNOON SESSION

COURT OFFICER: Jury entering.

(Whereupon, the jury entered the courtroom.)

THE COURT: Everyone can have a seat. I hope you enjoyed your lunch.

Mr. Sokoloff, you can continue with your direct examination.

DIRECT EXAMINATION (Cont'd)

BY MR. SOKOLOFF:

Q Dr. Chernoff, on page 506 of the trial transcript of this case, Dr. Macagno was asked this question and gave this answer.

"QUESTION: What alternatives of treatment did you discuss with her during her first appointment with you?

"ANSWER: I discussed that because one of the alternatives is surgery, I said before multiple times I never said the surgery is emergency or necessary. She had the option to keep doing conservative treatment. It's going to be activity modifications, physical therapy, medications, injections or surgery." Closed quote.

Do you believe that that testimony is accurate, that the surgeries that Ms. Alvarez Miranda had in this case were not emergency or necessary?

MR. THOMAS: Objection.

Leading.

THE COURT: Sustained.

Rephrase.

Q From your review of the medical records and the films in this case, would you say that the surgery that Ms. Alvarez Miranda had was emergency?

MR. THOMAS: Same objection.

Leading.

THE COURT: Try to phrase it without leading.

Q How would you describe the necessity or urgency of the surgeries that Ms. Alvarez Miranda had in this case?

A I would say that it was an elective surgery. That it's -- I would agree that it's not emergent or medically necessary surgery that you had to undergo, and that's kind of the definition of an elective procedure. The patient would choose to undergo that procedure.

Myself as a surgeon I would not have recommended that surgery for that -- for this claim.

Q Are you talking about both the cervical and the lumbar or just one of them?

MR. THOMAS: Leading, Judge.

Who's testifying here?

THE COURT: Just rephrase.

Q Which surgery or surgeries are you talking about?

A So first the cervical surgery, there was no disk

herniations. There was no foraminal compression of the nerves. That's not something that I would have recommended surgery to address someone's neck pain given those MRI studies.

The lumbar MRI there was what's called disk desiccation or degenerative changes. There was enlarged facet joints. That's something that you can operate on, but that would be due to the arthritic condition of the spine. I don't believe that takes a long time to develop and that was not causally related by the accident that had occurred six weeks prior to the lumbar MRIs being obtained.

Q How long does it take to develop the arthritis and the condition that you just described.

A When I showed you the films the facet joints were enlarged. It takes time to enlarge. The ligaments get calcified and thickened. That is not a process that occurs in weeks, that takes years.

Q Did you see any signs of trauma on her spine?

A So when we look at trauma we say -- now, unless you had an MRI a day before the accident, a day after the accident, it's very hard to date the MRI findings.

When we look at trauma we say are there fractures, is their bony edema present. Is there ligaments interspinous ligament edema. Is there annular tears.

None of those findings were present that would say, yes, this is absolutely something that happened acutely. And

in fact the arthritic conditions that I described is something that would not have happened acutely.

Q You said edema, you didn't see edema. What is edema?

A Edema is swelling. So if you have like a bone contusion the -- you get bleeding into the bone and that shows up on MRI. If you have a fracture you would see that on the MRI. I didn't think there was a focal disk herniation, certainly not in the cervical spine.

The lumbar spine I thought there was a very shallow disk at the L4-5 area as well as bulging and facet arthropathy, but I did not see an acute finding that would have warranted the surgery as a result of the accident that would have -- that had occurred.

Q And you mentioned, did you say an annular tear?

A Yes. So annular tears there are annular tears, there are annular fissures. There sometime is a bright signal seen in the outer aspect of the disk that was not present on this case.

Q Do you see and treat patients who've had trauma in their back?

A Yes, routinely.

Q Did you see any signs that any of the plaintiff's nerves were being compressed?

MR. THOMAS: Objection.

Leading.

THE COURT: Rephrase.

Q Can you describe what you saw, if anything, with regard to neuro compression?

A So, in the cervical spine I did not see any evidence for neural compression. The nerve canals for the nerves called the foramen were widely patent. There was no compression. There was no cervical stenosis pressure on the spinal code.

The lumbar spine because of the facet hypertrophy, that can narrow where the nerves leave. That's at the L4-5 and L5-S1 area. There was not like a focal disk herniation that was something acute that pushed into the nerves.

Now, you know, from the records the claimant said she had pain. She presented with pain in her neck and back. That's consistent with a sprain. So I think she had some injury. I think she had a cervical or lumbar sprain as a result of the accident or at least she presented with pain, but I didn't see evidence that the MRI showed a structural change as a result of the accident.

Q What is a sprain?

A A sprain like for the neck, it's commonly called like a whiplash, right. So you can -- it can be immediate, it can be delayed. You can either go forwards or back. There's ligaments, there's muscles and that can give you pain. Just like you sprain your ankle and you -- it can swell up or you can tear some of the ligaments.

Q How long can pain from a sprain last?

A That's variable. You know, a lot of sprains will improve with time. A lot of times we say, you know, within six months or so, but pain is very subjective and people can complain of pain for a while afterwards. But you have to take that complaints of pain and correlate that to the imaging if you're recommending surgery.

Q Do sprains heal?

A They often do, yes.

Q And what were the chances that the plaintiff's symptoms would have improved without surgery?

MR. THOMAS: Objection.

THE COURT: Sustained.

Q Have you concluded that the plaintiff would have no improvement in her symptoms if she didn't have surgery?

MR. THOMAS: Objection.

THE COURT: Sustained.

MR. SOKOLOFF: Is it the form?

MR. THOMAS: Yes.

THE COURT: It's the form.

Q Do you have an opinion on the prognosis of the plaintiff's symptoms without surgery?

A Yes. I think that's very hard sometimes to talk about prognosis because it is a little bit of future telling, right. There are people that have pain that get better with

time. In this case I would have given it more time because I didn't see nerve compression. There wasn't any urgency to go in and operate on someone with the findings that they had on these MRIs.

As far as whether her pain would have gotten better without surgery, it's hard to say. I mean even with surgery when I saw her she still had pain. So that's something that is hard to answer.

Q Does the fact that she told you that she had pain after the surgery have any bearing on whether the surgery was needed?

MR. THOMAS: Objection.

Leading, once again.

THE COURT: Sustained.

Q Is there any relationship between the fact that the plaintiff complained of pain after the surgery and the need for surgery?

A Yes. So I would say that people that have pain after surgery, I mean as a surgeon you would like your surgery to be helpful.

So if you take someone who is working as a medical assistant, do surgery on them and then afterwards they are not working I wouldn't feel good about myself. You want to have people be more functional.

I think that the fact that she had persistent pain,

either the surgery didn't really work the way that it was intended or the levels that were fused really wasn't causing her some of her symptoms because she still had pain even after the fusion.

A fusion is meant to solidify those levels. What's thought is there's micro motion that occurs in the spine and if we eliminate that micro motion, that's a called a fusion, that that's supposed to help the pain.

So if someone has persistent pain afterwards, well either the surgery didn't work or she is having pain from muscles and ligaments and not from the operative levels.

Q Now, you examined her, correct?

A Yes.

Q And you took range of motion readings from her?

A Yes, I did.

Q And are your range of motion testing that you do, is that subjective? In other words, is it up to the plaintiff or is that something that you can measure without the plaintiff?

A So range of motion testing is just that, you are asking -- it is subjective. It has an objective component, but it is subjective. You're asking someone to bend forward. You're asking someone to bend backwards, side to side, bend your neck forwards.

So some of that we're not forcibly manipulating their neck to see how far they can go, right. So that is subjective

in that at a certain point if the claimant stops and says this is all I can bend, that's what we record.

Now, also, she had a fusion surgery and that does limit your motion. So some of that is going to be limited, we expect that. But it is a subjective finding as well.

Q There was testimony and evidence put into this case by the plaintiff's side that Ms. Alvarez Miranda needs to see a rehabilitation specialist twice a year for the rest of her life.

Do you agree with that?

MR. THOMAS: Objection.

Beyond the scope, your Honor.

MR. SOKOLOFF: What scope? This is my scope.

MR. THOMAS: Beyond the exchange of this expert's 3101(d).

MR. SOKOLOFF: This is evidence that came up.

THE COURT: Is it within his 3101(d).? He can only testify within the four corners of his 3101(d).

MR. THOMAS: No, it's not.

Q Did Ms. Alvarez Miranda need to see an orthopedist once a year for the rest of her life?

MR. THOMAS: Same objection.

THE COURT: Sustained.

Q Does Ms. Alvarez Miranda need physical therapy for the rest of her life?

MR. THOMAS: Same objection.

THE COURT: If it's outside the corners of the 3101(d) he can't testify to it. So show me where it is in there and then you can have it.

Q When Ms. Alvarez Miranda saw you, what medication did she tell you she was taking?

A I'm just going to check. I believe she said Tylenol and some Oxycodone.

She takes Tylenol or Oxycodone as needed which she currently takes a half a pill once or twice a week. So essentially Tylenol and a minimal amount of Oxycodone.

Q Does that tell you anything about her pain at the time that she saw you?

A Well, yes, in that people that, let's say, are taking extensive amounts of narcotics would have less functional ability and have more pain. But, you know, to her credit, a lot of times people don't like taking medications and we always advise people to take as little of narcotic medications as possible.

Q Did you in this case find any medical necessity or causality to the surgery in this case as related to a claim car accident?

MR. THOMAS: Objection.

Leading.

THE COURT: Sustained.

Rephrase.

Q Do you have an opinion on whether Ms. Alvarez Miranda needed the surgery to her cervical spine in this case?

A Yes, I do.

Q And what is your opinion?

A In this case I would not have recommended surgery. There was not any neural compression. Certainly not any evidence on the MRIs that there was a structural damage or trauma from the accident of record. I would not have recommended surgery. I don't believe it was medically necessary.

Q And do you have an opinion on whether the surgery that was performed was related to the car accident in this case?

A Yes.

Q What's your opinion?

A Well, you know, surgery can always be an option. You can operate on any level of the spine, but I do not believe that it was causally related to a traumatically induced injury from the car accident.

Q And do you have an opinion on whether the lumbar surgery that was performed on Ms. Alvarez Miranda in this case was medically necessary?

A Yes.

Q What's your opinion?

A So I think when you talk about medical necessity and causality, it was not medically necessary or causally related to the accident, right.

Now, did she have some arthritis in the lower back? Yes, she had some arthritis. The facet joints were arthritic. Can you operate on arthritis? You can, but it's not something, that arthritis was not caused by the accident. I don't believe that the surgery was a result of the accident.

MR. SOKOLOFF: Just one second.

Nothing further. Thank you.

THE COURT: Cross?

MR. THOMAS: Yes, please.

CROSS-EXAMINATION

BY MR. THOMAS:

Q Good afternoon, Doctor.

A Good afternoon.

Q Doctor, you are no stranger to the courtroom; isn't that true?

A Depends on what you mean by stranger. I've been in practice for 25 years. I've been in courtrooms I would say about twelve to fifteen times over 25 years. I don't routinely testify.

Q You don't routinely testify, but you routinely do defendant medical examinations for defense firms, correct?

A Yes, as part of our practice we operate on patients

and we do defense medical exams, yes.

Q Doctor, you're familiar with this stage of the questioning, correct? It's called cross-examination.

A Yes.

Q And you know that in cross-examination I the attorney for the plaintiff get to cross-examine you about the things you've said to this point.

You understand that?

A Yes.

Q I am going to ask if you can follow a simple instruction. If I ask you a question that you can respond with a yes or no answer I will ask that you limit your response to yes or no or I can't answer that with a yes or no.

Is that okay?

A Understood.

Q If I want you to explain or describe I will ask you to do so.

Is that clear?

A Yes.

Q Now, Doctor, what you're doing here is a medical legal review, correct?

A Yes.

Q And as a medical legal review, my client is not your patient, correct?

A That's correct.

Q And you've been retained by the law firm of Sokoloff, Stern to do a medical legal review on the plaintiff in this case, correct?

A To evaluate the records, yes, and see the claimant. So, yes, all of that.

Q You keep calling her a claimant. Why are you calling her a claimant?

A Well, when we called her a patient earlier you told me that I shouldn't say that, right. So it's a claimant or a plaintiff, right.

Q So why don't you call her the plaintiff? Why are you calling her the claimant?

MR. SOKOLOFF: Objection.

THE COURT: I think there's just the confusion as whether someone is a plaintiff or whether someone is a claimant in a case or someone is a defendant or a respondent.

In this level of cases we call them plaintiffs.

THE WITNESS: Okay.

Q But you call her claimant because she is making a claim in this case and this firm has hired you to challenge the claim that she's making in this case, true?

A Well, now I am going to say plaintiff, but in my report I said claimant, and that's to differentiate that there is not a doctor patient relationship. That I'm evaluating her.

And we let them know that this is for an evaluation and not for treatment.

Q So your opinions are completely useless from the point of view of treatment for Adis Alvarez Miranda, true?

MR. SOKOLOFF: Objection.

THE COURT: Rephrase.

Q The plaintiff Adis Alvarez Miranda cannot rely on your opinions for treatment because you're not her treating doctor, true?

A No. And in fact --

Q Doctor, it was a yes or no question.

A Well, I would have to explain it.

Q If I want you to explain I will ask you to explain, okay.

Tell the jury how many times you actually saw her.

A So I saw her that one time and that was on May 26th of 2022. Then reviewed the records and issued the report.

Q And in that one time that you saw her, how much time did you actually spend in her presence?

A That's not something that I typically record, but it's a pretty thorough exam. We do an evaluation. It could last from 20 minutes to 40 minutes. It's not specifically recorded. The attorney that was present might have recorded that, but I didn't.

Q Doctor, again, if you don't understand my question

let me know. I didn't ask what we did, I asked what you did.

My question is and I will say it again, how much time did you Dr. Marc Chernoff spend in the presence of the plaintiff doing your medical examination?

MR. SOKOLOFF: Objection.

Asked and answered.

THE COURT: I'm going to overrule.

Do you know how much you spent?

THE WITNESS: So it's not recorded.

Typically --

MR. THOMAS: I don't want to know typically.

THE COURT: So you don't know?

THE WITNESS: It's not recorded.

THE COURT: So you don't know?

THE WITNESS: No, I did not record it.

Q More or less than ten minutes?

A Definitely more.

Q More or less than 20 minutes?

A I would say as I said before, anywhere from 20 to 45 minutes, but I did not record it.

Q Doctor, 20 to 45 minutes would be the entire examination from the time that the plaintiff/claimant, depending on which way you want to describe her, came to your office to the time that your examination was done, correct?

A Yes, so it would include --

Q The answer is yes.

Doctor, please if you can limit your responses to yes or no this will go a lot faster.

A Understood.

Q So before you actually came into the room where she was you did a video interview with her, correct?

A So during Covid --

Q How about if you can just answer my question.

Did you do a video examination of her or video conference with her before you physically came into the room?

A No.

Q It was during Covid that you examined her?

A Yes.

Q And during Covid protocol you try and spend as little time as possible face-to-face, correct?

A Correct.

Q And so was there a video conference at all before you physically came into the room to do an examination on her?

A No.

Q Who did the video conference?

MR. SOKOLOFF: Objection.

THE COURT: Sustained.

Q Was there a video conference at all done before you physically came in to do an evaluation on the plaintiff?

A No, but if I can explain it will go quicker.

Q Before you came in to actually see the plaintiff you had documents that you reviewed, correct?

A Yes.

Q And those documents were provided to you by counsel, correct?

A They were provided by I think what's called D&D Associates, but probably from counsel, yes.

Q Let's talk about that. D&D associates is a third-party company that puts doctors like you in touch with law firms like Sokoloff, Stern so that they can do examinations on plaintiffs that make claims in lawsuits, true?

A So I would say that D&D --

Q How about yes or no?

THE COURT: Or you can't answer that.

A I can't answer what D&D is thinking.

Q I didn't ask you what D&D is thinking.

You know D&D as a company that you subscribe to, correct? You're on their list?

A We're on their list, that's correct.

Q D&D is a company that puts lawyers and doctors in touch with each other, correct?

A I think D&D hires me and they are working for the attorney's office, yes.

Q So this attorney hires D&D and they look on the roster. Your name is on the roster and they're able to link up

you, an orthopedic spine surgeon, with this law firm so that this law firm can have you conduct an examination on the plaintiff, the party who brought the lawsuit, true?

MR. SOKOLOFF: Objection.

THE COURT: Overruled.

Is that accurate or you don't know or it's not accurate?

THE WITNESS: In essence. Attorneys don't have a roster of spine surgeons offhand, right. So I've never met him before. I'm sure he received my name through an outside company.

Q Doctor, your name is on D&D's roster making yourself well-known that you are available to do defense medical examinations for litigation like this, true?

MR. SOKOLOFF: Objection.

THE COURT: Overruled.

Is that true?

THE WITNESS: I don't know if it's on a roster, but they do hire me and I do do independent medical examinations as I do surgery. So, yes.

Q Doctor, you said independent medical examinations, is that what you said?

A I think that's what the title of the report is. My --

Q Doctor, again, it's a yes or no question.

Did you just tell this jury it's an independent medical examination that you are doing?

A Yes, some people would call it a defense medical, but some people --

Q Once again, Doctor, if you could just stop at a yes or no I would really appreciate that.

A Yes, I did say that.

Q How many other companies are you involved with that help link up law firms with doctors like you other than D&D?

MR. SOKOLOFF: Objection.

THE COURT: I'm going to overrule.

Are there other agencies?

THE WITNESS: Yes, I'm sure there are other agencies. How many? It's like how many insurances do you belong to. There are definitely companies that will call and ask us to do these exams. I don't know how many that would be.

Q Doctor, it's no secret that you make your services available through this third-party company to do examinations for the defense on -- in litigation like this, correct?

MR. SOKOLOFF: Objection.

A Yes, I think it's necessary. I think everybody should do that.

THE COURT: Just yes or no.

You got your answer. Can we move on now? You

made your point.

MR. THOMAS: Yes.

Q How much money do you make doing these defense medical examinations in the last ten years?

A Again, that's an explanation, right? So I would say before Covid it was a little different. Probably before Covid it was about five to seven percent of our practice. After Covid it's probably about ten to fifteen percent of our practice. But over 85 percent of our practice is from operating.

Q Is from what?

A Operating, surgery, seeing patients.

Q Doctor, you make a distinction between practicing medicine for your patients and what you do, and the medical legal review and the analysis that you do and coming to court to testify on cases involving injured parties who are not your patient, correct?

A Do I make a distinction, yes?

Q And you want to be full, fair and accurate when you make your opinions in front of a jury like this, don't you?

A That's correct.

Q And every time you get an assignment on behalf of a defense firm to do an evaluation you charge $9,000 to do a review?

A No.

Q Why do you --
A Depends on how much the review is.
Q Once again, you said no and I will accept that as your answer and now comes the next question.
What information were you provided in this case before you did your report that enabled you to charge $9,000 just to do an evaluation?
A So, the $9,000 is for the testimony here, right. The $9,000 was not for the report.
Q Doctor, if I heard you correctly earlier you said you get $9,000 for your testimony and then you charge another $9,000 to do a review and evaluation.
The way I total it that's $18,000 that you have been paid to date for the work that you've done on this case. Is that true?
A No.
Q So you were mistaken or I'm mistaken?
MR. SOKOLOFF: Objection.
THE COURT: I'm going to overrule.
Were you mistaken?
THE WITNESS: No.
Q So you charge $9,000 to come to court here to give your testimony?
A Yes.
Q And you also got $9,000 to review all these records

and examine the plaintiff. Where am I missing? Where is my math wrong?

A Okay, so there's $9,000 for testimony, $9,000 for pre-conference with the attorneys, going over the records because obviously this report was from 2022.

There's a separate charge back in 2022 for examining the patient.

Q Great. So you've made more than $18,000 in this matter, haven't you?

A Yes.

Q How much did you get to do the review of records and the examination of the plaintiff before you charged them $9,000 to meet with them in preparation for your testimony where you would then charge another $9,000 to take --

A That is what I wanted to be clear.

So back in 2022 it was $7,850 for the review of the records. A lot less than the $50,000 that people charge for surgery, but, yes.

MR. THOMAS: Your Honor, move to strike that portion which is not responsive.

THE COURT: It's stricken. Let's move on, please.

Q So if my math is correct over $25,000 you've collected from this defense firm with your involvement in this case, correct?

A That's correct.

Q As I was saying, in order to render opinions you want to be full, fair and accurate in your overall assessment, evaluation and conclusions before you open your mouth to this jury in this case, correct?

A That's correct.

Q Now, Doctor, you have a format that you use when you write your reports, correct?

A I wouldn't call it a format. I dictate it and I typically dictate past medical history, that type of thing. It's not a form -- a format per se. I'm a creature of habit, so.

Q You don't like the word format. How about structure. Is there a structure?

MR. SOKOLOFF: Objection to the commentary.

THE COURT: I will sustain the objection. It's stricken.

Q Is there a structure that you use in writing your reports?

A There is a structure that I use to writing any reports, even patients, right, history.

Q No, no, Doctor, this is not your patient, correct?

A Yes, but there is a structure that I use to writing any report or medical record, yes.

Q My question is, is there a structure that you use in

writing your reports when you do these defendant medical examinations; yes or no?

A Yes.

Q And that structure typically starts with the name of the law firm that retained your services, correct?

A Well, the report is addressed, yes.

Q But the report is not addressed to D&D, the company, the third-party company that put you in touch with Sokoloff, Stern, correct?

A Correct. The bill was addressed to D&D. The second page is --

Q Doctor, why don't we look at your report that you generated in this case for Adis Alvarez Miranda.

Do you have that in front of you?

A Yes.

Q It's dated May 26th, 2022, correct?

A Correct.

Q It's addressed to Sokoloff Stern, correct?

A No, the first page is a bill letter that is addressed to D&D. The second page is the report letter that's addressed to Sokoloff, Stern.

Q Doctor, you understand that counsel exchanged your report in discovery, you understand that?

A I would assume.

Q And what we got is the first page that has New York

Orthopedic Spine Associates, Ira J. Chernoff, M.D. and Marc Chernoff, M.D. with a Woodbury address.

A Yes, that's the first page of the report probably.

Q And Ira J. Chernoff is your older brother?

A He is.

Q And so you and your brother are in practice together?

A Yes, for 25 years.

Q I have a twin brother so I know what it is to have -- my brother is also a lawyer.

MR. SOKOLOFF: I don't have a brother.

THE WITNESS: He is an older brother, I have to listen to him.

Q Your older brother got you involved in doing these medical legal reviews, correct? He was doing them before you?

A Yes, he's 12 years older than me so I joined him in practice and we both do it, yes.

Q When you joined him in practice your brother was already doing these medical legal reviews, correct? Just yes or no?

A I believe so, yes.

Q Again, on the heading on your report it has the name of the plaintiff, correct?

A Yes.

Q It has a D&d associates account number, correct?

A Yes.

Q And date of accident?
A Yes. Claimed date.
Q You learned that she was 47 years-old at the time, correct?
A Yes.
Q At the time of what, the accident or the time you did your examination?
A It says she is a 47 year-old right-hand dominant female. This is the time that I'm examining her.
Q May 26th, 2022?
A That's correct.
Q She told you how the accident happened?
A Yes.
Q You learned that she was impacted on the passenger side of her vehicle by a dump truck?
MR. SOKOLOFF: Your Honor, I thought this document isn't in evidence.
MR. THOMAS: It's not.
THE COURT: Then don't read from it.
MR. THOMAS: I'm not reading from it, I'm paraphrasing.
Q I just asked you did she inform you that she was hit by a dump truck on the passenger side of her car; just yes or no?
A I have motor vehicle accident passenger side impact

collision.

Q When she came to see you she was ambulating with assistance, correct?

A Yes, she was using a cane after her surgery.

Q Which surgery was that that she saw you, after she saw you? I should say which surgery did she have before she saw you?

A She had both the cervical and the lumbar surgery that was performed before I saw her.

Q Again, just let me cover this.

The structure that you use in your report is you take a history, correct?

A Yes.

Q Then you ask about past medical history, correct?

A Yes.

Q And you learned there was no past medical history, correct?

A That's correct.

Q No prior accidents, no prior injuries, no prior diagnostic testing, no prior litigation, correct?

A That's correct, that's what she told me.

Q And then you took -- your next section deals with surgical history, and you learned she had a cervical spine surgery and lumbar spine surgery, correct?

A Correct.

Q Next section deals with allergies, correct?
A Correct.
MR. SOKOLOFF: Objection.
We are talking about the report that is not in evidence?
MR. THOMAS: Yeah, we're talking about the structure.
THE COURT: We're talking about the structure.
Q The next section deals with medications?
A That's correct, what she takes.
Q The next section deals with employment history, correct?
A Correct.
Q At the time you saw her you learned that she had been out of work, correct?
A Yes. Since her surgery, yes.
Q The next section deals with social history, correct?
A Yes.
Q Smoking, drinking, drugging, things like that?
A Yes.
Q You learned no smoking, no drinking, no drugs, correct?
A I don't think I asked her about drugs, but it says no smoking and does not drink and she's married.
Q You asked about prior injuries, correct? That's the

next section?

A Yes.

Q You learned there were no prior injuries?

A That's what she told me.

Q Your next section deals with prior treatment, correct?

A Yes.

Q And you learned there was no prior treatment, correct?

A That's correct.

Q Your next section deals with subsequent injuries, correct?

A Yes.

Q You learned that after this accident she didn't reinjure her neck or her back or any of the other body parts that she's claiming were injured in this accident, correct?

A Yes, that's what the plaintiff told me.

Q The next section deals with physical examination, correct?

A Yes.

Q You did a physical examination of her on that May 26th, 2022 visit, correct?

A That's correct.

Q You found that she had a 12-centimeter lumbar scar on her back, correct?

A That's correct.
Q That's the scar that is the residual effect of the surgical procedure that Dr. Macagno performed on her lumbar spine, correct?
A That's correct.
Q You said it was 12 centimeters?
A Yes.
Q In inches, for those of us who are not good in metrics, how long is 12 centimeters in inches?
A So, 2.54 centimeters is an inch, so a little less than 6 inches, right.
Q So a six-inch residual scar on her back?
A A little less, yes.
Q Did you also find that she had a residual scar on her neck?
A Yes.
Q How long is that?
A That was noted to be four centimeters.
Q Which would be just under two inches?
A Under two inches.
Q And that scar on her neck is in the crease of her neck, correct?
A Yes. It's often planned that way.
Q That's by design, correct?
A Yes.

Q It's best to try and hide that scar as much as possible by putting it in a natural crease in the neck?

A It's more cosmetic when you do that, yes.

Q Now, the examination of both her neck and her back you found restrictions and limitations in the range of motion of her neck and back, correct?

A Yes, there was a decrease in the range of motion from normal.

Q Let's talk about the back first.

In her lumbar spine you found her flexion which is bending forward, correct?

A Yes.

Q Bending forward she can only do 30 degrees when 90 degrees is normal, correct?

A That's correct. As I noted that is subjective, but yes, that's what we found.

Q Doctor, once again, a simple yes or no --

A Well, it has to qualify, but, yes.

Q If she can only bend it 30 degrees flexion instead of 90 degrees, that's a 60 degree loss of range of motion in lumbar flexion, correct?

THE COURT: Just yes or no.

THE WITNESS: That I can't answer yes or no. I would have to qualify it.

Q You also tested her extension, correct? Extension

would be leaning backwards?

A Yes.

Q You found only five degrees in her extension when 30 degrees is normal, correct?

A That's correct, she bent back at 5 degrees.

Q Doctor, again, if you can just limit your response to yes or no. If I want you to explain I will ask you. And as you're familiar, counsel here will have a chance to get up and ask you any other questions if he wants to develop the issue.

For my purposes, please, if you can limit your responses as I requested, okay?

A Sure.

Q Five degree extension instead of normal 30 degrees, that is a 25 degree loss of range of motion in that modality, meaning lumbar extension, correct?

A No, I wouldn't call it a loss of range of motion. I would say that --

Q You said no, that's your answer.

A No, no.

Q She also had a decrease sensation to touch, correct; yes or no?

A Yes, to light touch, correct.

Q And with regard to her neck, the cervical spine, you found that she only had a 40 degree range of motion in ability to flex her cervical spine when 60 degrees is normal, correct?

A That's correct. That's what is written.

Q That is a loss of range of motion in cervical flexion, correct; yes or no?

A Yes.

Q And cervical extension, leaning back, 15 degrees when 30 degrees is normal, that's also a significant loss of range of motion and function, correct?

A I don't know if it's a loss of function in range of motion. I don't know if I can answer that yes or no.

I think it's what is documented. She bent backwards 15 degrees.

Q You don't think that any of these reductions in range of motion are significant, is that your testimony?

A Well, because it's subjective as well.

Q Yes or no? Is that your testimony that even though she's got limited range of motion in these modalities, meaning flexion, extension, rotation, those loss of range of motions are not significant?

A I would not say it's not significant, but it's expected with the surgery that she had.

Q Then you agree that if you have, for example, a 30 degree range of motion in lumbar flexion when 90 degrees is normal, that is a significant loss of range of motion, 90 degrees -- I'm sorry, 30 degrees versus 90 degrees; yes or no?

A That can't be answered in yes or no. If I can explain.

Q When we say significant, Doctor, we mean significant to her, correct?

MR. SOKOLOFF: Objection.

THE COURT: What's the objection?

MR. SOKOLOFF: When he says when we say. I don't know who he is talking about.

THE COURT: Refine your question.

Q When your report indicates that there is a 30 degree lumbar flexion rather than the normal 90 degree lumbar flexion, in order -- when I ask you if it's significant, I am asking you if it's significant to the person that you're testing, in this case the plaintiff, correct?

MR. SOKOLOFF: Objection.

So he's asking the doctor to get into her mind.

MR. THOMAS: No, I'm not.

THE COURT: He is asking if it's significant in her situation. But yes, you can rephrase it. Go ahead.

Q Do you know what it means to have a significant loss of range of motion in lumbar and cervical modalities, movement?

A I would call it as degrees. I don't know what significant might mean.

Q So if she can only bend 30 degrees instead of 90 degrees, you are telling us that that's not a significant

loss in range of motion?

A It's subjective, right. She is bending forward and I am asking her to bend forward.

Q How about yes or no? You can say yes, it's significant or no, it's not significant.

A That's something that I would have to explain.

Q With regard to lateral bending, do you know what lateral bending is?

A Yes, I have it in my report, so, yes.

Q Tell the jury, what is lateral bending?

A So part of the exam we ask her to bend forward, that's flexion. Lateral bending we ask her to bend to the side. You're tipping to one side, you're tipping to the other side. You are examining the pain and the motion, but that is also subjective. That's what that is, it's lateral bending.

Q I didn't ask you if it was subjective or objective. Bending to the side with regard to lumbar spine and bending your head from ear to shoulder, ear to shoulder in your cervical spine, that's lateral bending, right?

A That's what the test is, correct.

Q And you also found in your examination, loss of range of motion in lateral bending in both the cervical and the lumbar spine, true?

A Yes.

Q And the next section after physical examination says

medical record review, correct?

A That's correct.

Q The very first thing that you wrote in your report about a medical record review is a verified Bill of Particulars; isn't that true?

A That's correct.

Q Now, you know, doctor, that a verified Bill of Particulars is not a medical record? You know that, correct?

A Yes, but it lists her injuries.

Q Doctor, once again, real simple instruction. If you can just limit your responses to yes or no.

So even though you know that a verified Bill of Particulars is a legal document, you still included it as the very first thing that you reviewed in your medical record review, true?

A Well, maybe it shouldn't have been entitled medical review, but it is true.

Q Doctor, I can only go on the report that you generated and that you signed.

MR. SOKOLOFF: Objection.

THE COURT: He answered it. He said it's true. Let's move on.

Q Continuing in your section on medical record review, you looked at, for example, the notes from Timothy Groth, correct?

A Yes.
Q And who was Dr. Timothy Groth, G-R-O-T-H?
A He is a pain management anesthesiologist.
Q And you learned as well that she recounted to Dr. Groth that she was involved in an accident and developed pain and was getting treatment from him, correct?
A It says sideswipe by a truck on the passenger side.
THE COURT: Don't read from the document, please. It's not in evidence.
Q Just answer my question.
THE COURT: You can look at it to refresh your recollection. Then just turn it over and then you can testify.
A In his note I have it is noted that it was a sideswipe by a truck on the passenger side.
Q That wasn't the answer to my question.
A Can you repeat the question?
Q Sure.
You read Dr. Groth's notes that indicated she was involved in a motor vehicle accident and then developed a pain complex after the motor vehicle accident for which he was treating her, correct?
A I wouldn't use the word pain complex. It is noted that she had pain afterwards, yes.
Q You are aware that Dr. Groth and every other doctor

who treated her indicates in all the records that you reviewed no prior pain complaints, no prior accident, no prior neck or back issues.

Are you aware of that?

A Yes.

Q Dr. Groth gave her therapy, correct?

Yes or no?

A From the note that I see, I see injections. Don't know -- which bullet are you looking at? I don't know if he was the one who ordered the therapy or something else, but she did receive therapy.

Q You know as you are sitting here that she received therapy, correct?

A Yes.

Q And she received pain medication, correct?

A Yes.

Q And antiinflammatory medication, correct?

A Yes, I believe so.

Q And injections, correct?

A Yes.

Q And that's all part of conservative therapy, correct?

A Yes, it can be.

Q You learned that she had injections by a Dr. Cruz, correct?

A Lisanne Cruz, yes. I think they're in Groth's

office, but, yes.

Q You also learned by looking at the initial hospital records from Nassau University Medical Center that she claims she was involved in an accident, and that she had complaints in her neck, her back, her head, her shoulder, correct?

A I believe so, yes.

Q You also reviewed the records from Sports Medicine Spine Rehab of Hempstead, correct?

A Yes. That's the next bullet, yes.

Q Then you listed all the dates of treatment that she had there, correct?

A That's correct.

Q As well she indicated she was involved in a motor vehicle accident and then had neck and back pain after the accident, correct?

A Yes.

Q You learned that she also treated with a Dr. Joseph Gregorace, G-R-E-G-O-R-A-C-E, correct?

A Yes.

Q And Dr. Gregorace rendered a diagnosis, correct?

A I don't know. I would have to look at his note, but, yes, I believe typically if someone sees a doctor they give a diagnosis.

Q Not typically, Doctor.

Look at the bottom of page five of ten of your

report.

MR. SOKOLOFF: Objection.

We are having him testify from his report? I thought again it's not in evidence.

THE COURT: It is not in evidence and you can't read from it. He can look at it to refresh his recollection.

Q Look at it to refresh your recollection, the last sentence on page five of ten of your report.

Does that refresh your recollection?

A Yes, it refreshes my recollection.

Q So you understand he rendered a diagnosis as well of neck and back complaints causally related to the accident, correct?

A He might have, but I don't have that, that it's causally related. I would have to look at his report, but he might have.

Q You understand that it was Dr. Gregorace who referred her to Dr. Macagno the spine surgeon? Are you aware of that?

A I believe he did, yes.

Q And that's appropriate for a doctor like Dr. Gregorace to refer his patient to a spine surgeon when conservative treatment is not helping? Would you agree?

Yes or no?

A That's hard for me to get into Dr. Gregorace's mind.

I couldn't answer that yes or no.

Q Let's just talk about in general.

When conservative treatment fails, injections don't work and the pain is getting worse, then that person becomes a surgical candidate; true or false?

A False. Have to look at the MRIs.

Q You understand that Dr. Macagno consulted with the plaintiff about doing surgery?

A Yes.

Q Did you read Dr. Macagno's trial testimony in this case?

A Yes.

Q And did you read that portion where he said that based on his total evaluation that she was a candidate for spine surgery?

A That's what he felt.

Q I'm sorry?

A That's what he felt, yes, I read that.

Q And you disagree with Dr. Macagno, correct?

A I do.

Q Now, Doctor, you understand Dr. Macagno was her treating spine surgeon?

You understand that?

A Yes.

Q Who saw her multiple times before the surgery and

since the surgery?

You understand that?

A Yes.

Q You who saw her one time in the life of this case for less than 30 minutes, you're in a better position? Are you telling this jury that you're in a better position to render an opinion about whether she needed spinal surgery than Dr. Macagno? Just yes or no?

A I wouldn't say better. I have my opinion and he has his.

Q You didn't operate on the plaintiff, correct?

A No, I would not have.

Q And you didn't even know what her condition was before this accident, correct?

A Well, I did from the notes that I reviewed, right.

Q Doctor, once again, you never examined or evaluated her before the surgeries, correct?

A Correct.

Q You also had the benefit of Stand-Up MRI reports, correct?

A Reports and films, yes.

Q Do you understand that the Stand-Up MRI of Carle Place performed cervical MRIs on April 22nd, 2021?

Do you understand that?

A Let me just make sure the date is right.

What was the date that you said?

Q April 22nd, 2021.

A Yes.

Q And you understand that the radiologist at Stand-Up MRI rendered an impression after the MRI was done finding that there was a C4-5 broad central left paracentral disk herniation, correct?

A Yes.

Q And you also learned that there was a C6-7 subligamentous disk herniation, correct?

A That's what the report says, yes.

Q So the radiologist at Stand-Up MRI found herniated disks in her neck after the April 22nd, 2021 MRI, true?

A That's what the report says.

Q Just so we're clear, the report from Stand-Up MRI taken April 22nd, 2021 of the plaintiff's cervical spine, correct?

A Correct, but I don't agree with it.

Q Correct?

A Correct.

Q Doctor, once again, no buts, please.

A Correct.

Q And with regards to her lumbar spine, that's her low back, Stand-Up MRI of Carle Place also did an examine that same day, correct?

A Yes, they also did the brain. They did three MRIs, yes.

Q Right now I just want to focus on the neck and the back, okay?

A Both done the same day, yes.

Q You learned from reviewing the report from the radiologist who took the films or interpreted the films at Stand-Up MRI that there was a finding of an L4-5 broad disk herniation and an L5-S1 broad disk herniation, correct?

A Yes. I noted that in my report, yes.

Q So the radiologist from Stand-Up MRI found both herniations in her neck and herniations in her back, true?

A Yes.

Q You also reviewed photographs of the damage to the vehicle in this case, correct?

A I did.

Q Does that matter to you in rendering your opinion what the damage to the vehicle was; yes or no?

A Does it matter to me. yes.

Q Why? Tell the jury why it matters to you when you're rendering your opinion to see the damage to the vehicle?

A Sure. So my feeling is the more information you have the better, right.

If you have severe damage to a car let's say, that's different than if there is a scratch, right. So it's more to

determine etiology of the complaints and the diagnosis. So I think it's important to review pictures.

Q So, Doctor, you're telling this jury that the damage to the person is a direct relation to the damage to the vehicle? Is that what you're telling this jury; yes or no?

A Not a direct, but it's related, yes.

Q Doctor, you said you've been doing this 25 years, correct?

A That's correct.

Q Have you ever been involved in seeing someone who was injured in a motor vehicle accident where there was little damage to the vehicle; yes or no?

A Yes, there could be.

Q Have you ever been involved in treating somebody who was in a motor vehicle accident where the car was visibly destroyed, but they had no broken bones, no bleeding, sprains and strains; yes or no?

A Yes.

Q So then there is no hard fast rule that the damage to the vehicle is a direct relation to the damage to the person inside, true?

A I would say there is a relationship. It's a probability.

Q You're not saying she wasn't hurt in this accident, are you, Doctor?

A No. She had pain, I believe that.
Q Listen to my question.
You're not saying she wasn't hurt in this accident; true or false?
MR. SOKOLOFF: Objection.
Asked and answered.
MR. THOMAS: He didn't answer it, Judge.
MR. SOKOLOFF: Yes, he did.
THE COURT: Overruled.
Is that true or false?
THE WITNESS: True, I'm not saying that.
MR. THOMAS: Okay, thank you.
MR. SOKOLOFF: Can we not have commentary on the answer?
THE COURT: Okay, there will be no commentary.
Next question.
MR. THOMAS: It goes both ways, Judge.
THE COURT: It goes both ways. It does go both ways, you're absolutely correct.
MR. SOKOLOFF: I never thank the witness for an answer.
THE COURT: Let's move on. We're almost there.
Q Dr. Macagno's report, you reviewed his report, correct?
A I did, a few of his reports, yes.

Q And you reviewed his trial testimony, correct?
A I did.
Q And you read that part of Dr. Macagno's testimony where he said he performed surgery on the plaintiff, correct?
A Yes.
Q And he performed surgery not to eliminate her pain, but to make sure that her function wasn't more damaged or more deteriorated.
Did you read that; yes or no?
A It sounds about right. It's paraphrasing.
Q Doctor, if you said you read his trial testimony --
A I did, but it was long.
Q It's as long as it is.
My question is, did you read it?
A I did read it.
Q You read every word of it or you skimmed it?
A I read every word.
Q You read that portion of his testimony where he said because of her weakness in grip and tingling and numbness, that she was a candidate for this surgery and that the surgery actually helped to reduce some of her symptoms.
Did you read that; yes or no?
A Again, I'm not going to -- I would like to have the testimony in front of me, but it sounds paraphrase, yes.
Q Are you guessing?

A No, it sounds -- it was a long transcript, right. I am not going to be able to repeat it word-for-word. I know that he testified that he did the surgery and sounds what you said is about right.

Q His testimony started on page 434 of the trial transcript and ended on page 574 of the transcript.

A Right, over a hundred pages.

Q That's 40 (sic) pages.

Are you saying to this jury that 40 (sic) pages of trial testimony --

A I am not going to be able to repeat that word-for-word.

Q Just let me finish my question.

A Sure.

Q Twenty-five lines per page double spaced was too long for you to read and remember, is that what you're telling this jury?

THE COURT: Sustained.

Let's move on. Next question. Get to another subject.

MR. THOMAS: Thank you.

THE COURT: Good.

Thank you.

MR. THOMAS: Thank you.

Q And you read Dr. Macagno's operative reports,

correct?

A I did. I have them here.

Q And you understood the surgery that he performed, correct?

A Both surgeries, the cervical and the lumbar, yes.

Q And you understand that she did get some relief from those surgeries, correct?

A I -- maybe some relief from pain, but she stopped working so I don't know if it helped.

Q You don't know if Dr. Macagno or the plaintiff testified that she got some relief?

A It's noted that she got some relief.

Q She had tingling and numbness from her neck down to her fingers, and then after the surgery it was mainly down to her shoulders.

Did you read that?

MR. SOKOLOFF: Objection.

THE COURT: I'm going to overrule.

Did you read that?

THE WITNESS: It sounds paraphrase, but, yes.

Q And then after your review of all of the records that were provided to you by counsel, your next section of your report deals with diagnostic impressions, correct?

A Yes.

Q And your diagnostic impression was sprains and

strains, correct?

A Well, I list sprains, yes.

Q I'm sorry?

A I list five diagnoses. Some were sprains and also that she had surgery in her neck for a fusion C4 to C6. And the fifth diagnosis that she had surgery for a laminectomy, pedicle screw instrumented fusion with interbody cages L4-5 and L5-S1 is the fifth diagnosis.

Q During the course of your testimony today did I hear you say that she had age-appropriate changes visualized on her MRIs? Did you say that?

A I think that was in Dr. Macagno's transcripts.

Q My question was, did you say to this jury that you saw age-appropriate changes on the MRI; yes or no?

A Yes.

Q And did you read the testimony of Dr. Jessica Berkowitz, the defense radiology expert?

Did you read that testimony?

A Yes, I did.

Q Did you read that testimony where she says she doesn't believe in saying age-appropriate when you are talking about an MRI?

Did you read that?

A I'm testifying from my experience not hers.

Q So you disagree with her that it's okay to say that

something is age-appropriate when you are looking at an MRI? Just yes or no?

A I think you can use those terms.

Q Your last section of your report deals with your opinions and your conclusions, right?

A That's correct.

Q Now, Doctor, you would agree that the time that you spent preparing this report was time spent focusing on the complaints, symptoms and medical treatment of this plaintiff Adis Alvarez Miranda, correct?

A And the extent of medical records.

Q And all the world of information that was provided to you correct?

A Yes.

Q Your opinions and conclusions were based solely on the review of all the information that you were provided about this plaintiff, correct?

A And taking the history and talking to her and examining the MRI films and the reports and everything else, yes.

Q Doctor, you didn't cut and paste your opinions like the same opinions on every report that you do for a defense firm, do you; yes or no?

A So nothing is cut and pasted, but I often use terminology that might be similar. So if I decide if something

is medically necessary, I use the term medically necessary. But nothing is cut and pasted.

Q In this case you rendered an opinion and you said it when counsel was asking that you found no medical necessity for the spinal surgeries in this case.

Is that what you said?

A Yes.

Q You said that the surgery was unrelated to this accident.

Is that what you said?

A That's correct. And I am often asked about that on various cases, yes.

Q And you say the same thing in every one of your reports; isn't that true?

MR. SOKOLOFF: Objection.

THE COURT: Sustained.

Q Well, Doctor, do you remember the case of Stella Logiudice-Lello. Logiudice, L-O-G-I-U-D-I-C-E, hyphen, L-E-L-L-O, versus June Jungha, J-U-N-G-H-A, Park.

Do you remember that case?

A Do I remember it? The name sounds familiar. If you show me the reports I can refresh my memory.

Q You wrote a report in that case that was in Suffolk County. Do you remember that. David Sobel was the attorney of record for the defense in this case.

Does that refresh your recollection?

A No. What is the date of that report?

Q March 21st, 2022.

A It's a couple years ago, no, I don't remember that.

Q And that case you were asked to do like you were asked to do here, a defendant's medical exam. And in that case it was a 57 year-old right-hand dominant female who injured her neck and back and her shoulders in a motor vehicle accident.

Does that refresh your recollection?

MR. SOKOLOFF: Objection.

THE COURT: Overruled.

This is proper.

A From 2022 it doesn't refresh my recollection, but it sounds like a report that I wrote.

Q Again, in that report you took past medical history and you found that there was no prior injuries, accidents or diagnostic testing to those parts of the body.

Does that refresh your recollection?

A From 2022 it doesn't refresh my recollection, but I will be happy to look at it.

Q And your diagnostic impression was also sprains, cervical sprains, lumbar sprains like you said here, correct?

MR. SOKOLOFF: Objection.

THE COURT: Overruled.

Q Correct?

A I don't know if it's correct, I would have to look at the reports.

THE COURT: Do you want to show him the report?

MR. THOMAS: Sure.

A It's from 2022, I don't recall this.

THE COURT: We assume, Mr. Thomas, that you have several of these?

MR. THOMAS: I do. One, two, three, four, five six, seven.

I don't have to go through all seven, Judge.

THE COURT: Good, please don't.

A Just to refresh my memory, I'm looking and there's two motor vehicle accidents.

Q Don't read from it. Just take a look at it and then give it back to me because I have some questions for you.

A Yes, I'm more familiar with this.

Q May I have it back, please.

After looking at this report does that refresh your recollection that you were the defense expert in this case?

A Yes.

Q And, again, your opinion was that it was cervical sprains, correct?

A Well, I also thought that she had --

Q How about yes or no?

A No. She had rheumatoid arthritis, she had a prior

accident in 2018. So it is a much more complicated case.

Q And this was somebody who had a decompressive laminectomy in the cervical spine and a posterior cervical fusion in the neck, correct; yes or no?

A Yes, with the caveat that she had prior accidents and prior conditions.

Q And your finding like you're finding in this case is that the surgery was, as you said, unrelated to the complaints from that accident, true?

A In that case I thought it was from the --

Q How about you just answer my question.

THE COURT: Just yes or no.

Q That was your finding, that the surgery was unrelated to the injuries from the accident?

A The accident in '19 or the accident in '18? There's two accidents there.

Q Yes or no, was that your finding that it was unrelated to the accident of 2019, the case that you were involved in where you were hired as the --

A Unrelated to 2019, yes, I didn't think that surgery was related. I thought it had to do with the prior accidents and prior conditions.

Q You do concede that surgery can be related to signs and symptoms and complaints from somebody being involved in a motor vehicle accident, correct?

A It can, sure.

Q But you just didn't believe it was from this accident, correct?

A That's correct.

THE COURT: When you say this accident, which accident are you referring to?

MR. THOMAS: The 2019 accident that we were talking about in this report.

A That report also talks about 2018 accident, it talks about rheumatoid arthritis, that is she on methotrexate. So there's other factors that go into doing surgery on people, not just one incident --

Q How about Edgar Gitiva, G-I-T-I-V-A, versus Shells Only of Suffolk, August 20th of 2021.

Do you remember that case?

A 2021 is three years ago, no, no.

Q A 48 year-old male who presented with leg pain, back pain as a result of falling 16 feet from a platform.

Do you remember that?

A Again, I would request to look at that just so that I can refresh my recollection, otherwise you are going to read the whole thing.

Q He was a construction worker that fell and injured himself.

Do you remember that?

A Again, if I could look at the report.

THE COURT: Why don't we show him the report so he can refresh his recollection and then you can ask him questions with regard to it.

Q Does that refresh your recollection after having reviewed the report?

A Yes. The 2021 report, yes.

Q Yes, your affirmation in this report, correct?

A Yes.

Q This was a sworn document by you, correct?

A Correct.

Q So, again, does that refresh your recollection after reading this?

A Yes.

Q And this is someone who had surgery to his lumbar spine after falling from a height, correct?

A Yes.

MR. SOKOLOFF: Can I just ask, is there a copy of this report for me?

MR. THOMAS: This is cross-examination.

MR. SOKOLOFF: If it's being shown to the witness I have a right to see what's being shown.

MR. THOMAS: I will give you -- here it is. Here is the citation. Do you want the citation?

MR. SOKOLOFF: No, I want what the witness

looked at.

MR. THOMAS: Judge, I'm not going to give him my cross-examination material. He didn't give me his.

MR. SOKOLOFF: It's not fair. If a witness is being shown something.

THE COURT: He is being shown something to refresh his recollection. It's his own report.

MR. SOKOLOFF: And I have a right to see it.

THE COURT: You were objecting -- just show it to him quickly. You were objecting because the facts were being --

MR. THOMAS: Recited.

THE COURT: Recited, thank you. I had a mental block there for a minute.

The facts were being recited back to your client so you wanted him to be shown it, so he was shown the --

MR. SOKOLOFF: I didn't ask that he be shown it.

MR. THOMAS: He asked to see it.

THE COURT: The witnessed asked to see it. So it was shown to him to refresh his recollection. This one was shown to him to refresh his recollection also. It is being shown to you right now. It is not anything that's being moved into evidence. It is just something that is being used on cross-examination. That's it.

MR. SOKOLOFF: Judge, I don't have a problem

with the witness seeing it. He can be shown anything in the world to refresh his recollection. I just have a right to see what he's been shown.

THE COURT: So now you were shown.

MR. THOMAS: Fine, you saw it.

THE COURT: There are five more there.

MR. SOKOLOFF: If he is going to use them and show them I would like to see it. It's only fair.

MR. THOMAS: I would like him to show me his cross-examination materials before I have an opportunity to question, but the reality is I don't have to show him my cross-examination. This is public record.

He could have done the same search on this expert that I did and found the same information that I did.

May I continue?

THE COURT: Can you move on.

MR. THOMAS: Yes, please.

Q Again, after looking at this report does this refresh your recollection that your findings were that someone who had surgery as a result of falling off a ladder, you found was that the surgery was unrelated to the accident.

Is that what you found?

A I did in that he broke his nose when he fell and he didn't have spine complaints until three months later.

Q Why don't you just stick to my question.

A Because every patient is different. There are patients that I find was related to an accident.

Q This is not your patient either, correct?

A That's correct.

Q When you were asked to do this defendant medical examination and you were provided with this history and you learned that he fell off a ladder and he had spine surgery, your ultimate conclusion was that the lumbar spine surgery was unrelated to the accident; yes or no?

A I did not believe in that case that it was. There are other cases that I do.

Q Again, you wrote in this affirmation, the sworn statement from you that there was no doctor patient relationship exists or is implied, correct?

A That's a statement, yes, that is on every medical exam.

Q And the reason that it's important that you put on every one of your independent medical exams that there is no doctor patient relationship is so that you cannot be sued by giving medical advice to someone who is not your patient and affects the course of their treatment negatively; true or false?

A No, that's false. It's required by law to put it on and to inform the patient that you are not a treating

physician.

Q So, Doctor --

A It's not to not get sued.

Q If you're not a treating physician than your opinions are useless to the person that you are evaluating; true or false?

MR. SOKOLOFF: Objection.

That was asked and answered about an hour ago.

THE COURT: I'm going to overrule.

You can answer.

A I think it's very useful to the Court to determine, otherwise you would never have a doctor -- you would only have treating physicians, right. You would only have people that saw the patients before.

MR. THOMAS: Your Honor, if we could direct the witness to answer my question and not give speeches to say what he wants to say.

THE COURT: Do you want the question read back?

MR. THOMAS: Please.

THE COURT: You can read it back, Jennifer.

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

A I think they're useful opinions.

Q Doctor, Adis Alvarez Miranda never consulted with you for diagnosis and treatment, correct?

A Correct.
Q And she couldn't consult with you for diagnosis and treatment based on the opinions that you rendered in your report, correct?
MR. SOKOLOFF: Objection.
Q Yes or no?
THE COURT: Read that question back to me.
(Whereupon, the requested testimony was read back by the court reporter.)
THE COURT: I'm going to sustain the objection. Rephrase the question.
Q Your opinion in this case was rendered for this proceeding, this court proceeding, correct; yes or no?
A Well, no, I didn't know there would be a court proceeding, but it was rendered in a legal case. At the time in 2022 --
Q Do you make a distinction between a court proceeding and a legal case?
A In 2022 I didn't know it would ever go to court.
Q And when the cases that you give opinions on that say all these injuries are unrelated to the accident and then you come to court, you have to explain to a jury like this why you rendered these kind of opinions; isn't that true?
A And sometimes when I say that --
Q How about you just answer my question.

You have to explain why you render these opinions that no injuries, no complaints are ever related to the accident for which that person is on trial?

MR. SOKOLOFF: Objection.

A But many of the reports say there was --

THE COURT: Wait, there is an objection. Don't answer until I rule on the objection.

MR. SOKOLOFF: He never said that he never finds a relationship between an accident and surgery, but that was what was put into the question.

THE COURT: Rephrase.

Can we move on because I think you made your point.

MR. THOMAS: Thank you.

I will breeze through this, Judge.

Q Do you remember the case of John Nico, N-I-C-O, against M.B. Marangiello, M-A-R-A-N-G-I-E-L-L-O, June 1st, 2021 where you were hired by the law firm of Brand, Glick & Brand to render an opinion about a 32 year-old who was also involved in an accident and had surgical procedure performed.

Does that name sound familiar to you?

A From years ago it's not something that I would have easily recognized. Again, I would ask to look at the report.

Q Again, your opinion was that the lumbar diskectomy was not medically necessary and not causally related.

Does that refresh your recollection?

A It doesn't refresh my recollection. If you showed me the reports I can say whether he had prior injuries, whether he had --

THE COURT: He is not going to do that so let's move on.

A It doesn't refresh my recollection.

Q Case of Jacqueline Richards versus Chana Ivry. Chana, C-H-A-N-A. Last name, I-V-R-Y. March 4th, 2021. That's actually the date of this accident, March 4th, 2021. Where you rendered an independent medical exam for the law offices of Andrea Sawyers.

Do you remember that?

A It's three years ago, no, I don't remember.

Q You have done work for Andrea Sawyers office, correct?

A I have done work for many offices. It's not someone that I know personally.

Q In this case you render an opinion that the surgery was entirely unrelated to the accident even before you had the benefit of seeing the MRI films.

Do you remember that?

A Again, it's a case by case basis. I would have to look at it and I would have to tell you why.

Q And then you wrote an addendum after the MRI films

were provided where you said, even though I didn't see the MRI films initially, now that I have seen them my opinion hasn't changed.

You said that, correct?

A I can say that. Do you have any reports that I say that it's for because they exist.

Q Doctor, once again, you rendered an opinion that it wasn't related even before you saw the MRI films, correct?

A In the selected cases that you have there, yes.

Q How many written affirmations, reports for defendants have you done in the last fifteen years?

A Over 25 years I have been in practice. I have probably over ten thousand patients, and there are many independent medical exam reports that I have.

Q Doctor, I didn't ask you a questions about your patients.

A I couldn't give you a number.

Q More or less than a hundred?

A Ten to fifteen percent of my practice at this point is doing independent medical examinations. Previously it was probably five to seven.

So if we say ten percent then I have seen over -- probably about 20,000 patients at this point. Ten percent is 2,000.

Q Please don't mislead this jury. My question is very

clear. I didn't ask about your patients. I asked about defendant medical evaluations where you are a consulting retained expert for the defense.

A And in order to figure that out I would have to say that if I see 20,000 patients over 25-year period and ten percent are IMEs, it's about 2,000.

Q And you write reports on every single one, correct?

A Yes. And some of them I find that something is causally related and some of them I don't.

Q Can you off the top of your head right now tell me one report where you were asked to do a medical examination for the defense where you said the injuries that are being complained of are direct cause and relation to the accident they were involved in?

Can you give me the name because I will look it up right now.

MR. SOKOLOFF: Objection.

THE COURT: Overruled.

Can you name one?

THE WITNESS: I don't know the name, but I can tell you that recently there was a patient that had a car accident, had a femur fracture, injured their spine and it was a major accident. I thought it was related. Usually I recommend that they settle the case.

Q Again --

THE COURT: Next question.

Q Just speed through this.

Remember the name Gary Novins where you were retained by the law firm of Barrett, B-A-R-R-E-T-T, Lazar, L-A-Z-A-R, October 2nd, 2020? You did an independent medical examination.

Do you remember that?

A From 2020, no.

Q A 53 year-old male involved in a motor vehicle accident, had also no history of prior complaints. You rendered opinions that the conditions were entirely unrelated to the accident and that his surgery lacked medical necessity because it was unrelated to the accident.

Do you remember that; yes or no?

A I don't remember it, but, again, every case is different. It's a very litigious society.

THE COURT: You answered the question. You don't remember it.

Move on.

Q These were the same words that you used in this case, unrelated, lacked medical necessity, correct?

A That's correct, those are my words.

Q How about this case, February 19th, 2020, the case of Joseph Loring, L-O-R-I-N-G, where Picciano & Scahill, P-I-C-C-I-A-N-O. And Scahill, S-C-A-H-I-L-L. They were the firm that you were working for.

Do you remember that?

A What year was this?

Q February 19th, 2020.

A I'm not going to remember specific patients or plaintiffs from 2020.

Q Dr. Macagno was the surgeon who performed surgery on Joseph Loring and you were asked to come in and render an opinion about the surgery that Dr. Macagno performed?

A That doesn't surprise me.

Q Does that refresh your recollection?

A It doesn't from 2020. Dr. Macagno does a lot of surgeries.

Q You found, again, it was unrelated to the accident and that the surgery, the anterior cervical diskectomy and fusion, the same cervical surgery that the plaintiff in this case had, was unrelated to the accident.

Does that refresh your recollection?

A He does 300 surgeries a year, some of them are going to be related and some of them aren't. It doesn't --

THE COURT: Does it refresh your recollection?

THE WITNESS: No, it does not refresh my recollection.

THE COURT: He answered, move on.

Q James Skeldon, S-K-E-L-D-O-N, August of 2020 -- August 28, 2020. Again, a 31 year-old male involved in an

accident with no prior history which you said the surgery that he had was not causally related or medically necessary.

Do you remember that?

A From 2020?

THE COURT: Just yes or no.

THE WITNESS: No.

Q Or the case of Jerry Harvey, again, December 21st, 2017 who had an anterior cervical diskectomy and fusion with no prior history you said was also unrelated to the accident?

A Is that also Macagno?

MR. SOKOLOFF: Are these questions or is he just reading?

Q Do you remember that?

A Who was the surgeon? And what year was it from?

THE COURT: What year and who was the surgeon?

Q December 21st, 2017, 42 year-old male involved in an accident who had an anterior cervical diskectomy and fusion surgery.

THE COURT: And he asked who was the surgeon?

MR. THOMAS: And I will tell you.

Q Operative report from Vladimir Dadeshev, D-A-D-E-S-H-E-V.

A So from 2017 I don't remember that case.

Q But, again, the same structure in all your reports, correct?

MR. SOKOLOFF: Objection.

Asked and answered.

THE COURT: Sustained.

Q And, again, in this report you render an opinion without even seeing the MRIs and you said everything was unrelated to the accident, correct?

A I can't say it's correct because I don't have the reports in front of me.

Q Does that refresh your recollection?

A It does not.

Q And finally John J. Picciano and Jennifer Picciano against Sean Buscher, B-U-S-C-H-E-R, and DeThomas and Son Concrete Corp. January 19th, 2017 where John Picciano was a 52 year-old male complaining of neck and back pain from the accident. Underwent a two-level disk replacement performed by a Dr. Goldstein with no prior medical history. You said the surgery was unrelated to the motor vehicle accident.

Does that refresh your recollection; yes or no?

A No, not from 2017.

Q Doctor, have you ever been sued in court?

A Yes.

Q And you've been sued in your capacity as a medical doctor, correct?

A Yes, but I have no judgments or cases against me.

THE COURT: It's just yes or no.

Mr. Sokoloff is going to have an opportunity to question you. I know it's hard, but just yes or no.

THE WITNESS: Yes.

Q You were sued by Alisha Davis, A-L-I-S-H-A, Davis. You and your brother -- and who's Ira J. -- sorry Ira J. Chernoff is your brother, correct?

A Yes.

Q New York Orthopedic Spinal Associates, that's your company?

A Yes.

Q Do you remember her, Alisha Davis?

A Yes.

Q That was in Suffolk County, correct?

A Yes.

Q You were also sued in the case of Andrew Price and Eugene Price as executors of the estate of Jean price, correct?

A Yes.

Q These were lawsuits that were brought against you because of alleged malpractice on your part, right?

MR. SOKOLOFF: Objection.

THE COURT: Overruled.

Q Correct?

A They were brought about --

Q Allegations of malpractice, correct?

A Liability, yes.

Q Now, I don't want you to think that I didn't find a case where you actually said surgery was necessary from the accident.

A It should be out there.

Q There was one.

A There's more than one.

Q Do you remember the case of Robert Litras, L-I-T-R-A-S, versus the Long Island Rail Road?

Do you remember that?

A If you give me a year.

Q Actually, it was a while ago. It was 2002.

Do you remember that?

A I don't remember 2002.

Q You were the treating surgeon in that case, correct?

A I don't remember the case.

Q And you were called to the witness stand to testify, and you also wrote an affirmation about whether the surgery that you were requesting was medically necessary and causally related to the accident.

Do you remember that?

A Not from 2002.

Q Let me show you this then.

MR. SOKOLOFF: Can I see what the witness is being shown?

MR. THOMAS: I am not offering it into evidence,

Judge.

THE COURT: I understand that, but just as a courtesy.

MR. THOMAS: As a courtesy.

THE COURT: Thank you. I appreciate it.

Mr. Sokoloff says thank you too.

Q Is that your signature on the bottom of that affirmation, Doctor?

A Yes.

Q You can hold onto that.

A Sure.

Q This was one of your patients, correct?

A Yes, as I have many patients.

Q Robert Litras was one of your patients, correct?

A It appears so in 2005.

Q And you diagnosed him to have herniated disks in his cervical spine, correct?

A For that individual yes.

Q And you diagnosed him to have herniated disks in his lumbar spine, correct?

A Yes.

Q And you requested authorization for a diskectomy and fusion surgery, correct?

A That's correct.

Q And you opine within a reasonable degree of medical

certainty that the accident of May 17th, 2001 was the cause of his disk herniations in his lumbar spine and the need for fusion surgery, correct?

A That's correct.

Q And it was your opinion that conservative treatment failed and that he, that's Mr. Litras, would like to proceed with surgery, correct?

A Yes.

Q Because you don't decide whether somebody should have surgery, that person decides whether they should have surgery?

A No, it's a recommendation. You have to recommend it. I don't leave the patient to decide whether they should have surgery.

Q Doctor, once again if you could just limit your response.

A That's not correct, no.

Q Is that what is says?

MR. SOKOLOFF: Wait, are we reading through a document not in evidence?

MR. THOMAS: No, I'm summarizing the document, Judge. It's his affirmation.

THE COURT: What was the last question?

Can I have Jen read back the last question or do you want to rephrase your last question?

MR. THOMAS: I will rephrase it, Judge.

Q And because you were his treating orthopedic surgeon you wanted to perform surgery on him because conservative treatment failed and surgery was the last option, true?

A In conjunction with the MRIs that showed pathology, yes.

Q Did I hear you correct on direct examination that you saw a shallow disk herniation at the L4-5 level on the plaintiff in this case? Just yes or no?

A Yes.

Q Now, you would agree that you did see a herniation no matter how shallow you claim it is on that MRI; true or false?

A Yes, I thought there was a shallow disk.

Q Are you aware that Dr. Jessica Berkowitz the radiologist retained by the defendant testified from the very seat where you are saying that she saw no evidence of an MRI? Are you aware of that?

THE COURT: No evidence of an MRI?

Q No evidence of a herniation on MRI.

A She said there was a bulge, shallow disk and bulges are similar.

Q Doctor, Doctor, once again, if you can limit your answers to my question.

A I am aware of that, yes.

Q So you would disagree with the retained radiological expert, you do see evidence of a herniation in the lumbar

spine, correct?

A Again, that is something that I would have to explain because you have a shallow disk herniation or a bulge, similar.

Q You called it a shallow disk herniation, true?

A I did, true.

Q And so because you called it a shallow disk herniation it's still a disk herniation, true?

A Yes.

Q And so if you found a disk herniation on this lumbar MRI and Dr. Berkowitz said emphatically no evidence of a herniation on the MRI, one of you is wrong? Would you agree with that?

MR. SOKOLOFF: Objection.

A That's not true because you are describing a picture, so there is no focal disk herniation, there is no nerve compression.

Q Doctor, do you know what a clinical presentation is?

A In what context now?

Q You're a medical doctor, you don't know what clinical presentation means?

MR. SOKOLOFF: Objection.

THE COURT: I sustain the objection to the commentary. I assume that's what you were objecting to.

MR. SOKOLOFF: That was it, yes.

Q Do you know what clinical presentation is?

A I assume you mean how the patient presents to a clinician? Clinical presentation, that is not something that I use in my vocabulary.

THE COURT: So your answer would be?

THE WITNESS: No.

THE COURT: Good. Thank you.

Q So when somebody presents to you, you are a spine surgeon. When somebody presents to you and says, I never had any complaints in my neck and my back. I was involved in an accident and now I have pain in my neck and my back. Without the benefit of any diagnostic tests, that's a clinical presentation, correct?

A Yes.

Q And so you understand that the plaintiff in this case presented with a pain syndrome or complaints of pain --

A Complaints.

Q -- immediately after a motor vehicle for which she never had complaints of pain in those body parts before this accident, correct?

A I understand that's the history that she gave, yes.

Q So based on the history, based on the MRI that indicates at least from the radiologist at Stand-Up MRI who interpreted those films that there were herniations in both her neck and her back, and the overall complaints of her saying that she had tingling and numbness town her arm and tingling

and numbness down her leg, wouldn't that be consistent with the kind of complaints and the objective testing of the MRI which shows some accident related symptoms from the accident of March 4th, 2021; yes or no?

A That's a long question.

Q How about a short answer?

THE COURT: Do you want it read back?

THE WITNESS: Yes.

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

A I don't think I can answer that in a yes or no. It's a lot in that question.

Q Too much for you?

MR. SOKOLOFF: Objection.

THE COURT: Sustained.

Q Doctor, you understand that Dr. Macagno her treating spine surgeon evaluated all the records, including examination of the plaintiff before he suggested and recommended spinal procedures to her?

Do you understand that?

A I don't think he evaluated all the records. I think I had a lot of records that he didn't have. He wouldn't have had the emergency department records. There were records that you don't have as treating physician.

Q Doctor, you weren't in the plaintiff's spine, were

you?

A No.

Q You know what direct visualization is?

A Yes, but I also know what MRIs --

Q How about you just limit your responses.

A Yes.

Q You would agree that Dr. Macagno was the only one who had direct visualization during these surgical procedures where he had his eyes on her spine during operation, correct?

A At the time of his surgery, yes.

Q And you read his operative reports, correct?

A Yes.

Q And you found there were disk fragments that he removed, and that he had to put spacers into her spine to keep them stable, correct?

A Yes, the spacers from the center of the disk he removed, yes.

Q And that he put screws and rods in to help stabilize the spine, correct?

A That's what he did. I would not have done that.

Q Doctor, once again.

So he's in the best position to say what was going on in those portions of her spine, not the MRIs, correct?

A No, that's not correct.

Q Doctor, do you treat MRI films or do you treat

complaints of pain to a person?

Just answer my question.

A I will. You have to treat both. You can't take someone that has pain, that has normal MRIs or near normal MRIs, that has bulges or subligamentous disk herniations or shallow disk herniations and do aggressive surgery on them if it's not indicated.

Q Doctor, please listen to my question very carefully.

You know a record is being made of this testimony, correct?

A Yes.

MR. SOKOLOFF: Objection.

THE COURT: Overruled.

Q You rendered an opinion to this jury that Dr. Macagno did unnecessary surgery, is that what you said?

A That's not correct. I said that it was not medically necessary or causally related to the accident.

Q Doctor, do you know --

A You can do surgery for pain --

THE COURT: Doctor, there is no question before you.

How much more do we have?

MR. THOMAS: Just a few minutes.

Q Do you know what the office of medical misconduct is; yes or no?

A I am a reviewer for the office of professional misconduct, so I work for them.

THE COURT: So that would be a?

THE WITNESS: That would be a yes.

THE COURT: Thank you.

Q If all these reports where you said medically unnecessary, unrelated, did you ever report -- listen to my question.

Did you ever report Dr. Macagno or any of the other spine surgeons who performed surgery on injured people as a result of accidents, and said they had performed unnecessary surgery, not medically necessary, unrelated to the accident, things like that; yes or no?

MR. SOKOLOFF: Objection.

THE COURT: Overruled.

A You can't answer that in a yes or no because I didn't say that. I said it was medically unnecessary to the injury that occurred, not that the surgery itself. You can do surgery.

If someone decides to have surgery and wants the surgery you can do it, but it may not be related to a specific accident.

Q Doctor, are you telling this jury that it's just a coincidence that the plaintiff in this case spontaneously developed pain complaint in her neck and her back because of --

listen to my question, because of some pre-existing condition that was not related to this accident; yes or no?

A I'm not saying that. I think the pain was related to the accident, but I don't think the MRIs showed structural changes from the accident.

Q Doctor, do you know what the Hippocratic Oath is?

A Yes. I believe we recited a version of that with Maimonides Oath in medical school.

Q The Hippocratic Oath is what doctors take and it says, first do no harm, correct; yes or no?

A We don't recite the Hippocratic Oath anymore because it has abortion in it, so --

MR. THOMAS: Your Honor, if we can direct the witness to answer my question.

THE COURT: Yes, please, without the commentary.

A The Hippocratic Oath is an oath that physicians take to not to do any harm, I would agree with that.

Q And you take the Hippocratic Oath not to do harm to your patients, correct?

A Again, I never took the Hippocratic, it's a different oath.

Q So, because you didn't take the Hippocratic Oath, then you're not bound by it, right?

A It's a different oath.

THE COURT: Are we done? Are we done?

A They don't use that anymore. They don't use the Hippocratic oath anymore because of the abortion issue.

THE COURT: No commentary. There is no question before you.

MR. THOMAS: Judge, I did have one other thing that I wanted to cover.

Q You understand that even after surgery the plaintiff still has pain?

You understand that?

A I read that, yes, and she told me that.

Q And you understand that no surgery is a hundred percent when it comes to spinal surgery?

You understand that?

A Some surgeries relieve pain a hundred percent, some do not.

Q And you understand in this case -- well, did you ever say that 65 percent of surgeries are successful where there's no pain or discomfort after the surgery?

Did you ever say that?

A It would depend on what surgery and what circumstance.

Q The Robert Litras case where you were the treating orthopedic surgeon. You testified in court in that case.

A Depends on whether the patient had a fusion, whether they had a diskectomy. Diskectomy is 90 percent successful,

fusion surgeries are often not as successful.

Q And you understand that the pain complaints that the plaintiff has in this case are permanent now at this point, correct? Yes or no?

A I don't know if they're permanent. She has pain complaints and it's been a couple years from the accident. I don't know if they're permanent forever in the future. I hope not.

Q Can you tell this jury, can she wake up miraculously in let's say a year or two from now and have no signs or symptoms?

A I believe she takes Tylenol which people have pain in their back and --

Q How about you answer my question.

A It's hard to know.

Q Because you don't have a crystal ball, correct?

A That's correct.

Q And some people after having the surgery will never be able to go back to work, correct?

A Depends on what they do for a living, but, yeah.

Q And you know what adjacent segment syndrome is?

A Yes.

Q The plaintiff in this case has to be worried about adjacent segment syndrome because of the surgery she had in this case, correct?

MR. SOKOLOFF: Objection, your Honor. I was precluded from going into this because it's not in the report, so now he gets to go into it?

MR. THOMAS: I didn't preclude him from going into that.

MR. SOKOLOFF: The Judge did.

THE COURT: I did not. I don't remember that.

I shouldn't say I did not. I don't remember that.

MR. SOKOLOFF: So it was about the need for future surgeries.

THE COURT: I don't remember that because we have been talking about a need for two future surgeries.

MR. THOMAS: Judge, you're right, you're always right.

THE COURT: No, I'm not, believe me. I know there are plenty of people in my life who will tell me that I'm not always right.

Q Again, adjacent segment --

THE COURT: Can we wrap this up because we are coming to the end of the day and we are not bringing this doctor back.

MR. THOMAS: Judge, I get it. Like I said, I don't want to be cut short. I have a couple of other things I want to do, but I will get right to it.

Q Adjacent segment syndrome, you're familiar with that term?

A Yes.

Q Where the level above the surgery and the level below the surgery will wear out sooner because those disks are fused together, correct?

THE COURT: Now I remember this.

A It can.

Q You understand Dr. Macagno has rendered an opinion to this jury that she will be a candidate for anticipated future surgery both in her neck and her back?

A I understand that that's what he said.

Q What does it cost in today's dollars to do a cervical fusion like she had?

MR. SOKOLOFF: Objection.

THE COURT: What's the objection?

MR. SOKOLOFF: I wasn't allowed to go into this.

THE COURT: Is that going to be your objection all the time because I don't think that's a legal objection.

MR. THOMAS: It's not.

MR. SOKOLOFF: It's not in his report.

MR. THOMAS: It's testimony of this case.

THE COURT: Is it beyond the 3101(d), is that what you mean?

MR. SOKOLOFF: Yes.

MR. THOMAS: It's cross-examination, Judge. I am asking because there's been testimony about the cost of surgery.

This is a spine surgeon, I want to ask him what he charges.

THE COURT: Well, then ask him that.

Q What do you charge for a cervical fusion, Doctor?

A It would depend on was there a No-Fault rate, a commercial rate. I think No-Fault rates are probably $10,000, something like that.

Q What do you charge for spine surgery regardless of whatever rates? What is the going rate for physicians?

A It depends what's done. It mean it could range from $10,000 to $50,000 or $100,000.

Q Doctor --

THE COURT: He answered the question.

Q You know the procedures that were done to the plaintiff in this case. How much do you charge to do those surgeries?

MR. SOKOLOFF: Objection.

We are not talking about the past surgeries, we are talking about future surgeries.

MR. THOMAS: No, we are talking about the past surgeries.

Q You know it was done, correct? You know the neck fusion surgery she had, you know the back surgery she had, correct?

A Yes.

Q What do you charge for those procedures today?

MR. SOKOLOFF: Objection.

Relevance.

THE COURT: Sustained.

Let's move on. Are we done?

MR. THOMAS: No, Judge. I'm sorry.

THE COURT: There's only so much time in a day. Are we bringing the doctor back?

MR. THOMAS: I understand.

Q Doctor, your job as a spine surgeon is to try and save as much of the quality of life of the person as you can, correct?

A Yes, that's one of the jobs. And do appropriate surgery, yes.

Q I'm sorry?

A And do appropriate surgery, yes.

Q What do you mean by quality of life? What do you mean by quality of life?

A I think quality of life is a lot, right? It's pain, it's function, it's ability to do things, enjoy life.

Q When you performed the spine surgery on Robert Litras

you did that to improve his quality of life, correct?

A Well, in all surgeries that I perform I try to help people, but sometimes I recommend not to have surgery to try to help people too. There's conservative treatment.

Q In the case of Robert Litras --

MR. THOMAS: Your Honor, I have a copy for the Court if they want.

THE COURT: I don't need it.

Q In the case of Robert Litras which was in Federal Court.

A That's 2001?

Q That was -- this was actually filed in 2005, but the -- I'm sorry, 2002.

A Okay.

Q You testified on page 164 of the trial transcript, you were asked this question and gave this answer. Page 164, line 12.

"QUESTION: And what is meant by quality of life?

"ANSWER: Basically depends on your symptoms. If someone is able to not have pain and be asymptomatic with the condition, we generally tell them not to have surgery. Quality of life is really if it interferes with work, with their recreation, with their life, depending on their pain level.

We try to have people decide on the scale of one to ten where the pain is and whether they have more good days than

bad days or more bad days than good days. So people who have more bad days we recommend surgery for.

"QUESTION: So good days versus bad days, bad days would be that Mr. Litras was in so much pain he couldn't go to work?

"ANSWER: Yes, or he worked with severe pain."

Do you remember being asked those questions and giving those answers?

A Yes, but this plaintiff was --

THE COURT: You answered the question. You said yes.

Q So quality of life is very important when you perform these surgeries to try and maintain a degree of quality of life pain free and still have function in their limbs, correct?

A Quality of life is important, surgery or not surgery, both.

Q Do you know the quality of life of the plaintiff as you sit here today?

A As I sit here today I last saw her in 2022. I do know that she was working before and now can't work after the surgery.

Q And as a spine surgeon, what does that say to you about her quality of life?

A Well, she's taking Tylenol -- I wouldn't testify to her quality of life. I think --

Q You can't offer testimony?

A No, because I last saw her in 2022, right.

Q So, again, sitting here in May of 2024 after having seen her for less than an hour, you're in a better position to say what her overall condition is than the treating physicians who have treated her all throughout?

MR. SOKOLOFF: Objection.

This was gone over, asked and answered.

THE COURT: Sustained.

MR. THOMAS: And this is it, Judge, last thing.

Q And in that same trial of Robert Litras, do you remember being asked this question and giving this answer?

Page 160, line 2.

"QUESTION: There is disk replacement surgery?

"ANSWER: But at this point since it's been years and he has pain and he wants to proceed with surgery, it is medically necessary."

Do you remember giving that answer during that trial?

A In 2002 I don't remember that. Sounds like something I would say.

Q So if somebody is suffering with pain for a period of time and is a surgical candidate then it's medically necessary, correct. Yes or no?

A Surgery can be medically necessary or it may not be. It can be medically necessary, but doesn't have to be due to a

specific injury. It's very case dependent.

Q Doctor --

MR. THOMAS: This is the last question, Judge.

Q Doctor, can you point to this jury anywhere in the world of information that you have, that the need for surgery was based on something other than the injuries from this accident? Just yes or no?

A Can't answer that yes or no.

MR. THOMAS: No more questions, Judge.

THE COURT: That's it. We have redirect and recross. I am giving each of you 15 minutes. I am splitting the time because at some point I have to let the jury and my staff go, and I don't want to become afoul of any union rules, okay.

It doesn't mean you have to take 15 minutes each. I am splitting the time evenly.

Go ahead, Mr. Sokoloff.

REDIRECT EXAMINATION

BY MR. SOKOLOFF:

Q Have you done work as an expert for plaintiffs?

A Yes.

Q Do you remember Mr. Thomas asking you questions about other cases?

A Yes.

Q And in other cases you found that surgery wasn't

medically necessary?

A Yes, in some.

Q Are there medical doctors who see patients who in your experience surgeons who perform surgery that isn't medically necessary?

MR. THOMAS: Objection, your Honor.

THE COURT: Sustained.

We are talking about this surgeon in this case.

MR. SOKOLOFF: I am talking about the other reports that he wrote. He was questioned extensively about it. I don't know why I can't go into whether there are surgeons that do surgery that isn't needed.

THE COURT: You can't. I am sustaining the objection.

Next question.

Q One of the reports that Mr. Thomas asked you about was surgery that was performed by the same Dr. Macagno who performed surgery in this case, correct?

A Correct.

Q And in that case you also found that Dr. Macagno performed surgery that wasn't medically necessary?

MR. THOMAS: Objection.

MR. SOKOLOFF: This follows up from exactly what he was questioned about.

MR. THOMAS: It's form of the question.

THE COURT: It's form of the question.

Just rephrase your question.

Q Did you find in one or more previous cases that Dr. Angel Macagno who testified in this case, that in other cases he performed surgery that wasn't medically necessary?

MR. THOMAS: Objection.

Once again, to the form of the question.

Here, do you want to see the report?

THE COURT: There's the report. You can make your question specific to that report. Go ahead.

Q In the case of Joseph Loring -- withdrawn.

MR. SOKOLOFF: Can I show the doctor the report?

THE COURT: You can show him the report. You can use anything to refresh his recollection.

A Okay.

Q And in that case who was the surgeon?

A That I believe was Dr. Macagno.

Q And in that case you found that Dr. Macagno performed surgery that was not medically necessary or medically indicated?

A What I found was that the surgery that was performed was performed for a degenerative condition to the cervical spine, and that that degenerative condition was unrelated to the accident of record. I didn't think that the surgery was related to the accident.

Q Now, have there been other cases besides the one that you have in front of you and this case where you opined upon surgery that was done by Dr. Angel Macagno?

A Yes, he does a lot of surgeries.

Q And you've given opinions on other cases about whether he did surgery that you as a treating physician would not have done?

A I think it depends on the case. So there are surgeries that he's done that I would have done, and there are surgeries that he's done that I would not have.

In this case I think that the surgery that was done, I don't believe it was related to the accident. I didn't see any traumatic injuries.

There were no large disk herniations. There was some diffused degenerative changes in the cervical spine. There were enlarged facet joints. There were degenerative changes in the lumbar spine.

Is that something you can operate on? Yes, you can operate on that, but I don't think the accident caused any structural problems in the neck or back. It certainly didn't cause the hypertrophy of the facets, the shallow disk herniations.

There was no focal disk herniations. There was no nerve compression in the cervical spine. I would not have offered this plaintiff surgery in this case.

Q Now, you came up before the jury and showed us the MRIs of the plaintiff's spine and cervical, correct?

A Yes, and the pictures are worth a thousand words, right. You can read reports and somebody can say it's a bulge and somebody can say there is a subligamentous disk or broad disk or shallow disk, but you have to see if the disk is causing symptoms, whether it's pushing on a nerve root, whether it's causing the patient problems.

Q So what you know about the development of the spine, the MRI that was shown was April 22nd, 2021, correct?

A Correct.

Q And the car accident was March 4th, 2021?

A Approximately six weeks prior.

Q Is it your expectation that what was seen on the MRI on April 22nd would have appeared on --

THE COURT: Go ahead, finish your question.

Q On an MRI the day before the car accident?

MR. THOMAS: Objection.

Speculative.

THE COURT: Can you read me back the question?

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

THE COURT: I'm going to overrule. I'm going to let him answer it.

MR. THOMAS: Really?

THE COURT: Yeah, really.

MR. THOMAS: Sorry, Judge.

A So if you do MRIs on everybody, prior to accidents you are going to see some degenerative changes. And the degenerative changes that I saw were age-related. They weren't something that was from a specific trauma that I saw. There was not a big extruded disk herniation.

So I believe that an MRI done before, although we didn't have one, would have appeared similar.

MR. THOMAS: Objection.

Move to strike what would have been since we don't have it.

THE COURT: Overruled. Let's go.

Q Have you -- you realize that your testimony about what you saw and showed us on the MRI differs from the report of Stand-Up MRI of Carle Place?

A Yes, slightly.

Q Do you have any vision problems?

A No.

Q And have you given opinions in other cases where your opinion of what you saw on an MRI differed from an opinion by Stand-Up MRI of Carle Place?

MR. THOMAS: Objection.

THE COURT: Overruled.

Yes or no?

THE WITNESS: Yes.

Q About how many times have you differed with the reports of Stand-Up MRI of Carle Place?

A Well, as a spine surgeon I read all films, so I don't like to rely on reports because it's a picture and often any MRI center you're going to have variances in what they're reading and what we're looking for.

I am not looking for so much as the words in the MRI. Like they didn't say there's an extruded disk herniation or there's an impingement, severe impingement of a nerve. That's not what they're saying even in their reports. Whether something is a bulge, whether it's a shallow disk herniation, that's pretty similar.

Q You testified that there are times when you see patients with pain and you don't recommend surgery?

A Yes.

Q Can you explain why you wouldn't recommend surgery to somebody coming to you with pain?

A Sure. So you want to be able to help people, right. So if someone has pain but it doesn't correlate with the MRIs, someone comes in and says, well I have back pain and the MRIs don't show impingement of a certain nerve. They have symptoms going down their arm, but there's nothing for me to decompress because there's not a focal disk pinching the nerve. Then I'm not going to recommend surgery just based on pain.

So we operate on people. We operate on their complaints. But we have to correlate them to the MRI findings.

Q Now, in one of the cases that counsel questioned you about, that was where you had recommended and performed surgery, is that right?

A Yes.

Q Now, in that case before you performed surgery do you recall how long the patient did conservative treatment before you decided that surgery was necessary?

A So I think the case that he brought up was 2001 and I don't recall, but typically I see patients many times prior to recommending surgery.

We want to see, make sure that all conservative treatment is not helpful. And, again, that it correlates with the imaging studies. But it would be very rare, let's say, for me to recommend surgery after seeing someone once. It would be over weeks or months unless there is something so egregious on the films that the patient needs emergent surgery. But, you know, as testified Dr. Macagno did not think it was emergent. You know, it's an option, but I would not have recommended it in this patient.

Q Do you know whether or not Ms. Alvarez Miranda today can work or not work?

MR. THOMAS: Objection.

THE COURT: Sustained.

Q Counsel asked you questions and you talked about work with regard to Ms. Alvarez Miranda, right?

A Yes.

Q Can you testify to a reasonable degree of medical certainty that she cannot work to date?

MR. THOMAS: Same objection.

THE COURT: Sustained.

Q Can you testify within a reasonable degree of medical certainty that Ms. Alvarez Miranda will not -- withdrawn.

Can you testify within a reasonable degree of medical certainty that Ms. Alvarez Miranda will have pain for the rest of her life?

A I would not testify to that.

Q Why can't you testify to that, that she will have pain for the rest of her life?

A Well, it's kind of hypothetical. You have someone who is taking some Tylenol. She's not taking as I understand narcotic medications. I mean everybody has aches and pains. Everybody has pains for the rest of their life because you have aches and pains, you have good days and bad days.

So it's difficult to give an answer to that because you don't know the future, and I don't know how much pain she's in.

Q Now, in terms of restricted range of motion, is there -- withdrawn.

When somebody has cervical spine fusion like the plaintiff in this case had, is there a standard amount of restricted range of motion that you typically see following that surgery?

A Yes.

Q And can you tell us for each of the directions of movement what you would expect to see?

A Sure. So in a two-level surgical surgery which this plaintiff had, most of your motion comes from your occiput and C1, your head and C1, and C1 and C2. So fifty percent of your flexion extension, fifty percent of your rotation comes from those two upper levels. Each level after that is approximately ten percent.

So in a two-level fusion you would expect approximately a 20 percent restricted motion because the surgeon is fusing those disks. So once those are fused you are going to eliminate the motion of those disks.

Q So the standard limitation is 20 percent in each direction?

MR. THOMAS: Objection to the word standard.

Q Is that what you would expect medically?

THE COURT: Rephrase your question.

Q Is that what you would expect medically?

A So expected lack of range of motion for a two-level fusion, yeah I would say ten percent per level, about 20

percent.

Q And then is the same true for the lumbar surgery?

A Lumbar most of your motion comes from your hips. So when you say bend forward a lot of it comes from your hips. That's what I was kind of getting at. When you ask someone to bend forward, they bend forward 30 degrees, a lot of that is restricted by pain. So that is a not a permanent restriction in your motion.

She did have a two-level fusion. She's going to have some restriction obviously in her lumbar spine. But some of the values that are noted here is what she can do comfortably. It's not a passive range of motion. There's a subjective component.

Q Did you note based upon your examination of her with the subjective component of movement, did you note a greater reduction in range of motion after the surgery for Ms. Alvarez Miranda than you typically do when you perform these surgeries?

MR. THOMAS: Objection to what's typical. He didn't see her before.

THE COURT: Just rephrase your question.

Is this going to be the last question?

MR. SOKOLOFF: I hope so.

THE COURT: Okay, good. Just rephrase.

Q Can you characterize the reduction that you noted in range of motion for Ms. Alvarez Miranda after her surgeries

versus what you normally see when you perform surgeries at the cervical and lumbar levels, please?

A Sure. So her cervical flexion was noted to be 50 degrees which actually close to what I would expect, right. Normal is 60.

Extension is 20 which is somewhat restricted. Normal is 30, right. So 20 percent is about 6 degrees restricted. That would mean 24, hers was 20. Also, not too bad.

The lumbar spine, however, her flexion -- I'm reading from a different report. Hold on. Take this away.

I am going to go back. I was reading from the wrong report because that's what was before me.

THE COURT: So we are striking that testimony.

A Cervical flexion was 40 degrees, normal was 60. Again, that's a 20 degree restriction. I would expect maybe 12 degrees, but, you know, people have pain so there is some restriction in that. It's a little less than what I would expect, but it's not too bad.

Extension is 15 degrees in the neck with normal being 30. That is about a 50 degree restriction, but I would expect more in the range of 20 percent.

Lateral bending is 60 degrees, that's a 20 degree restriction. I think that's close to what that should be after a two-level fusion.

The problem with the lumbar spine is I asked her to

bend forward and it's 30 degrees. People should be able to bend forward a lot more than 30 degrees. But remember, I am asking her to do this and it's subjective, and she's stopping at a certain point. So if she bends forward 30 degrees, but then you are sitting at 90 degrees, a lot of your motion comes from your hips. She does have a restriction in her motion.

Lumbar extension was five degrees. I would expect someone even with a two-level fusion to be able to bend backwards more than five degrees. But, you know, she -- it's a subjective test.

Q And when you were asking her to do these things and you asked her to move and she stopped at a certain point, was her lawyer in the room?

A Yes.

THE COURT: No further questions?

MR. SOKOLOFF: No.

THE COURT: Thank you very much. Thank you for staying to the time.

RECROSS EXAMINATION

BY MR. THOMAS:

Q Doctor, did you write anywhere in your report that you believe that the plaintiff was exaggerating or lying or somehow not being honest with you during the course of your examination; yes or no?

A No.

Q So you understand when you as a doctor are asking somebody to move and they're doing what you ask and it creates pain, they stop when they feel pain, correct?

A Yes.

Q And you actually tell them in your examination, I don't want to hurt you, correct?

A I usually don't use those words, but I don't want to hurt people, sure. That's why it's an active test, right.

Q When you do these evaluations you expect them to stop when they experience pain, correct?

A And they often do, but that's not a full and accurate picture of her.

Q Once again, Doctor, you understand this phase, right?

A Okay.

Q So in a nutshell the plaintiff has a permanent restriction and limitation in range of motion with regard to her neck and her back, true?

A Yes, due to the surgery. I have to say it.

Q We are almost at the end here, Doctor. Again, a simple yes or no would suffice.

Counsel asked you about Stand-Up MRI and how your opinions differ from the radiologists who interpreted the films at Stand-Up MRI.

Do you remember that?

A Yes, because you are describing a picture.

Q Doctor, come on, we are almost there.
A Well, that is not a yes or no.
Q Your opinions differ from the radiologists at Stand-Up MRI, correct?
A Mildly differ.
Q You're not a radiologist, correct?
A No, I am an orthopedic spine surgeon.
Q As an orthopedic spine surgeon you typically look at MRI films, correct?
A Every patient, not typically.
Q But you are not a trained radiologist like the radiologist who interpreted the films at Stand-Up MRI, true?
A Not a radiologist, but I am trained at reading MRIs, so that's not true.
Q Doctor, between your knowledge and experience and the radiologists who interpreted the films at Stand-Up MRI, they have more knowledge and experience as certified, board certified radiologists than you as a board certified orthopedic surgeon, true?
A I absolutely would disagree with that.
Q You said a picture is worth a thousand words, is that what you said?
A Yes, that's why I showed the films.
Q So then you make your opinions on MRI films, you don't listen to the complaints of the person who is telling you

that they have pain, correct?

A No.

Q So the person's complaints are important, aren't they?

A They are both important.

Q Which is more important, Doctor?

MR. SOKOLOFF: Objection.

THE COURT: Overruled.

Is there one more important than the other?

THE WITNESS: No, you have to correlate it. If someone has pain, yeah, that's important. But if the MRI studies are normal, well that's important too. They are both important.

Q Doctor, let me pose this question to you.

Somebody comes to you and says, I was in an accident and I have pain. You look at their MRIs and your opinion is they're relatively normal. Do you send them away or do you try and find out what is causing their pain? Which one is it?

A You try to find it out and you try to treat it, but it's not necessarily treated with surgery. Not every pain complaint is treated with surgery.

Q Doctor, I didn't ask you that question.

You understand that her treating physicians were doing everything that they could to try and alleviate her complaints of pain, of weakness, of numbness, of loss of

strength?

Do you understand that?

MR. SOKOLOFF: Objection.

THE COURT: I'm going to overrule.

A One would hope, but there's secondary gain too.

Q Doctor, please don't mention secondary gain if you don't have any evidence to support secondary gain.

MR. SOKOLOFF: Judge, what is this?

MR. THOMAS: Your Honor, he's volunteering.

THE COURT: Please stop.

Yes or no or I can't --

MR. THOMAS: Move to strike, your Honor.

THE COURT: It's stricken.

Yes, no or I can't answer the question. That's the only answers you have.

THE WITNESS: What was the question again?

MR. THOMAS: Can we have the question read back?

THE COURT: Yes.

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

A My hope would be that they would.

Q Doctor, when counsel asked you, you said that you don't believe the accident caused any injuries to the structures in her neck or back?

MR. SOKOLOFF: Objection.

This is beyond the scope.

MR. THOMAS: This is what he just said in redirect.

THE COURT: I am going to overrule.

Q Did you say that.

A Yes.

Q You know what the longitudinal ligament is, correct?

A Yes.

Q When you first were giving the anatomy lesson to the jury you mentioned anterior cruciate ligament, but you misspoke, correct?

A Anterior longitude ligament, yes.

That's correct, I misspoke.

Q Right, you misspoke because --

A But I caught myself right away.

Q I'm sorry?

A I caught myself right away.

Q I know, but you said cruciate ligament which is in the knee, correct?

A I did.

Q There is a big difference between the ligaments in the knee and the ligaments in the spine, correct?

A A little Biden moment, yes.

Q You know what hyperextension or hyperflexion is of the spine?

A Yes.

Q Hyperextension or a hyperflexion of the spine can cause a tear in that longitudinal ligament, correct?

A It can, but it wasn't present in this case. Hypothetically.

Q We have another minute or two, if I con just get a yes or no?

A Hypothetically, yes.

Q Actually, medically that's supported that when you hyperextend or hyperflex your neck or your back you can tear that ligament and the disk material can then move from its position because the ligament that holds it in place is now torn, true?

A It can, but that wasn't on these MRIs.

Q Doctor, almost.

A Hypothetical.

Q I have faith in you, we can do this. Two more questions.

You said that the surgery is solely due to degenerative conditions. Is that what you said in this case; yes or no?

A I wouldn't say solely.

Q So then the accident did have some affect on the injuries that he was claiming in this case, true?

A No, I wouldn't say it was from the accident.

Q So you're telling this jury this accident had no affect on her, period end of story?

MR. SOKOLOFF: Objection.

THE COURT: Asked and answered.

MR. THOMAS: It's my last question, if I could just get an answer, Judge, I will just sit down.

THE COURT: Asked and asked.

I am sustaining the objection, it was asked and answered. What was I saying, asked and asked? It's been asked and answered.

Q Finally, you said that you would have not offered surgery to the plaintiff in this case, is that what you said; yes or no?

A At the juncture that she had the surgery and on the MRI findings that I saw I would not have recommended surgery for her.

Q So you would let her suffer rather than offer her the surgical option; true or false?

A She was working. I mean no, I wouldn't let her suffer, I would give her alternatives.

Q Surgery was the only alternative available at the time?

A I think it's an aggressive alternative.

Q If we both talk over each other nothing is going to show up on the record.

MR. THOMAS: If we can have my last question read back and then I am going to sit down, Judge.

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

A I would not let her suffer, I would give her alternative treatments.

THE COURT: Thank you. You are excused.

Does the defense have anything else?

MR. SOKOLOFF: We do and it's a motion outside of the presence of the jury.

THE COURT: No, I understand that, but anything else to present or do you rest?

Does defense rest?

MR. SOKOLOFF: Judge, can we be heard at sidebar?

THE COURT: Sure.

(Whereupon, a discussion was held off the record, at sidebar between the Court and counsel.)

THE COURT: Mr. Sokoloff?

MR. SOKOLOFF: I am happy to report the defense rests.

THE COURT: Thank you.

Now, members of the jury, you've heard all the evidence and the testimony, but you still do not have the case, so please one more day. Do not speak amongst

yourselves and do not speak to anyone else about any of the testimony that you've heard in this trial.

Tomorrow morning I have to do the instructions, we call it a PJI conference. I have to do a conference with the attorneys about the law that I am going to charge to you, and then we are going to have closing arguments.

After closing arguments I am going to read the jury instructions to you and then at that point which probably will be around lunchtime or so, that's when you will get the case for deliberations. But until I tell you you have the case for deliberations, please, you cannot speak to anyone about this case.

Get home safely. Tomorrow morning we will be here at 9:30, but they don't have to be here at 9:30. So please report at 10:00 and get home safely. Enjoy your evening. Thank you.

COURT OFFICER: Jury exiting.

(Whereupon, the jury exited the courtroom.)

THE COURT: That's it for this evening.

MR. THOMAS: Unless you want to hear the motions?

THE COURT: Tomorrow morning we will do that first thing.

(Whereupon, the trial was adjourned until May 14, 2024.)

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