

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CIVIL TERM: PART 113

- - - - -X

ROBERTO ABREU PEREZ,

PLAINTIFF,

-against-

176 EAST 116 LLC, and LUXURY HOME
IMPROVEMENT CORP.,

DEFENDANTS.

-----X
176 EAST 116 LLC,

THIRD-PARTY PLAINTIFF,

-against-

178 JJH, Inc.,

THIRD-PARTY DEFENDANT.

- - - - -X

Supreme Court
360 Adams Street
Brooklyn, New York 11201
January 20, 2026

B E F O R E :

HONORABLE LISA LEWIS,
Justice of the Supreme Court

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

GORAYEB & ASSOCIATES, P.C.
Attorneys for the Plaintiff
100 William Street - Suite 1205
New York, New York 10038
BY: FRANK KELLY, ESQ.

(Appearances Continued on Next Page.)

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

2

LESTER, SCHWAB, KATZ & DWYER, LLP
Attorneys for the Defendant/Third-Party Plaintiff
176 EAST 116, LLC
100 Wall Street
New York, New York 10005
BY: MICHAEL FRITTOLA, ESQ.
BY: ALFREDO J. ALVARADO, ESQ.

6

7

8

SONG RAMIN, PLLC
Attorney for the Third-Party Defendant
178 JJH, Inc.
40-21 Bell Boulevard - 2nd Floor
Bayside, New York 11361
BY: FARZAD RAMIN, ESQ.

9

10

11

12

GALLO VITUCCI KLAR, LLP
APPELLATE COUNSEL TO LESTER SCHWAB,
KATZ & DWYER
One Bridge Street - Suite 140
New York, New York 11797

13

14

15

16

17

18

19

LAURA DELVAC
SENIOR COURT REPORTER

20

21

*

*

*

*

22

23

(Pause in the proceedings.)

24

25

COURT OFFICER: All rise, The Honorable Lisa Lewis
presiding, please be seated and come to order.

1 THE CLERK: Good morning this is Index Number
2 515104 of 2012 Roberto Abreu Perez versus 176 East 116th
3 Street, LLC.

4 Counsel please state, stand and state your
5 appearance please.

6 MR. KELLY: Frank Kelly for the Plaintiff.

7 MR. ALVARADO: Alfredo Alvarez, Lester, Schwab,
8 Katz & Dwyer for Defendant/Third-Party Defendant 176 East
9 116th Street, LLC.

10 MR. FRITTOLA: Good morning, your Honor, Michael
11 Frittola, Lester, Schwab, Katz & Dwyer, also for the
12 Defendant/Third-Party Plaintiff. 176 East 116th Street,
13 LLC.

14 MR. RAMIN: Good afternoon, your Honor, Farzad
15 Ramin, Song Ramin, PLLC for the Third-Party Defendant, 178
16 JJH.

17 MR. JOHNSON: C. Briggs Johnson, Gallo, Vitucci &
18 Klar, appellate counsel for Lester, Schwab, Katz & Dwyer.

19 MR. FRITTOLA: Very briefly, my partner Alfredo
20 Alvarado will handle the trial testimony of Dr. Kolb.

21 Is there any objection for me looking at the
22 evidence while he's doing that, just the New York Ortho?

23 THE COURT: That's fine.

24 We have two witnesses today, two doctors; correct?

25 MR. KELLY: Correct.

Dr. Kolb - Plaintiff - Direct

1 MR. FRITTOLA: Yes.

2 THE COURT: Dr. Kolb this morning and Dr. Kaplan
3 this afternoon.

4 MR. KELLY: That's correct, Judge.

5 If I may, an issue was brought to my attention, it
6 probably might be worthy of a sidebar for a minute, so we
7 don't do anything messy in front of the jury.

8 MR. ALVARADO: Can we go side bar, okay?

9 (Pause in the proceedings)

10 THE COURT: Counsel, do you have the documents you
11 want to review in front of you?

12 MR. FRITTOLA: Yes, so counsel knows I have
13 Plaintiff's Exhibit 16 and Plaintiff's Exhibit 11 here.

14 THE COURT: Okay.

15 (Pause in the proceedings.)

16 COURT OFFICER: All rise, jury entering.

17 (Whereupon, the jury entered the courtroom.)

18 THE COURT: Alright, everyone you can be seated.

19 All right, members of the jury, welcome back, we're
20 going to continue the trial today beginning with testimony.

21 Counsel you may call your first witness.

22 MR. KELLY: Thank you, your Honor. Plaintiff calls
23 Dr. Thomas Kolb to the stand.

24 (Whereupon, Dr. Thomas Kolb took the witness
25 stand.)

1 THE CLERK: Stand up and raise your right hand.
2 Please do you swear or affirm that the testimony you're
3 about to give the Court is the whole truth and nothing but
4 the truth?

5 THE WITNESS: I do.

6 THE CLERK: Please state your full name and address
7 for the Court Reporter?

8 THE WITNESS: Doctor Thomas Kolb, 37 West 34th
9 street, New York 10001.

10 DIRECT EXAMINATION BY

11 MR. KELLY:

12 THE COURT: Mr. Kelly keep your voice up speak into
13 the microphone. If you don't understand the question, just
14 ask for it to be repeated.

15 THE WITNESS: Yes, ma'am.

16 THE COURT: Thank you, you may inquire.

17 MR. KELLY: Thank you, your Honor.

18 DIRECT EXAMINATION BY

19 MR. KELLY:

20 Q Good morning, Dr. Kolb.

21 A Good afternoon.

22 Q Tell the jury kindly what is your profession?

23 A I'm a diagnostic radiologist.

24 Q Tell the jury a little bit about your professional
25 education?

1 A I went to college here at Queens College City of New
2 York, graduated in '79, went to medical school here in Brooklyn
3 Downstate Medical Center, graduated in 1983, I then did an
4 internship and residency in pediatrics in the Bronx at Albert
5 Einstein College of Medicine, Jacobi Medical and became board
6 certified as a pediatrician, then went back and did another four
7 years of training in radiology, diagnostic radiology, in
8 Manhattan, Washington Heights at Columbia-Presbyterian Medical
9 Center, and finished that program in 1990, and became board
10 certified in radiology, diagnostic radiology, and from 1990
11 until today, I have been practicing radiology.

12 Q Can you tell the jury, please, what does it mean to be
13 board certified in your profession?

14 A If means that you have to finish the number of years of
15 training, pediatrics it was three years, in radiology it was
16 four years, you have to finish those years. After that, you
17 take a written examination, if you pass that, you take an oral
18 examinations. If you pass that, you become a member of the
19 Board of Radiology or a board certified radiologist.

20 Q Are you licensed to practice medicine in the State of
21 New York?

22 A Yes.

23 Q Have you conducted any research or published in your
24 field?

25 A Yes.

1 Q Tell the jury a little bit about that?

2 A My practice is split into two parts, one part is CAT
3 scans, MRIs, X-rays, which we will see today, my other part of
4 the practice is breast cancer diagnosis, specializing in young
5 high risk women in diagnosed breast cancer, doing mammograms,
6 ultrasounds, MRI's and biopsies, and you asked me about
7 publications?

8 Q Yes.

9 A I published a large study on over 27,000 consecutive
10 women, also a prior study in over 17,000 consecutive women,
11 showing how often mammograms find and how often mammograms miss
12 breast cancer, and it's related to breast density, the denseness
13 of the breast.

14 So nowadays breast density is concept which many of us
15 have heard about, back when I did the research, it was something
16 that I had worked through and I had established the numbers of
17 how frequently women's breast are dense, how often cancers are
18 missed in dense breast, and most importantly what you can do.
19 You can do another test like an ultrasound at that time.

20 So over those 27,000 plus patients I published all of
21 the data for that and introduced screening breast ultrasound for
22 women who have dense breast, and that won the American Medical
23 Association Scientific Publication of the Year Award, so that
24 was there were a few publications, that was the largest one.

25 Q Do you engage in the private practice of radiology?

1 A I do.

2 Q And help the jury understand, what you do in your
3 radiology practice, doctor?

4 A Well, in general a physician refers a patient for a
5 problem, whatever the problem may be pain or dizziness or some
6 problem the patient is having for either an X-ray or a CAT scan
7 or MRI an ultrasound.

8 Radiologists do, in general, tests noninvasive, in
9 general, to look inside the body to see if there's a problem or
10 no problem.

11 Q What kind of films?

12 A X-rays, CAT scans, MRIs, ultrasounds.

13 Q Tell us a little bit about each of those, X-ray, CT
14 versus an MRI or something?

15 A So an X-ray uses X-ray energy, we've known about this
16 for over 100 years, oldest test, very good test to look at
17 difference between things are hard and soft. For example, a
18 bone is a very hard thing, but there's a lot of structures
19 around the bones, for example, in the back, there's discs,
20 there's muscle, arteries, veins, ligaments, a whole lot of
21 structures that are soft.

22 So if you just do an X-ray, you will see the bones,
23 because they're hard, you won't see all of the other soft
24 structures around it, so X-rays are really good if you're
25 looking for a fracture, because you're looking at a bone,

1 looking for a fracture.

2 If you're looking for a disc problem or looking for a
3 problem with a muscle or arteries or veins or ligament, X-ray is
4 not very good at that.

5 So CAT scans came along, CAT scan uses X-rays, but
6 instead of taking one picture of the whole back, let's say CAT
7 scans will take many, many, many thin pictures of the back, so
8 you can look at only a certain portion at a time, and that does
9 show you soft tissue in addition to the bone, so CAT scans are
10 major improvement meant on regular X-rays.

11 MRIs don't use X-rays at all, they use magnetic X-rays,
12 M for magnetic, and that looks at different parts, any part of
13 the body and exquisitely sensitive looking at those soft tissue
14 structures there in the brain or in the back looking at discs,
15 ligaments that may be torn or not torn.

16 So MRIs are a whole different it test, it's a large
17 machine you lie in, for, for a good amount of time and magnetic
18 waves are pulsed in, and the computer generates pictures, so
19 there are very different things.

20 Q With what frequency do you read or perform these
21 studies?

22 A Daily for the last 35 years.

23 Q In our case, Mr. Abreu Perez, was in a reasonable good
24 state of health without complaint, he suffered from diabetes and
25 hypertension.

1 When he was caused to fall due to an unsafe workplace
2 and fall from a height --

3 MR. ALVARADO: Note my objection.

4 THE COURT: Sustained.

5 MR. ALVARADO: I ask that the statement and
6 question be stricken from the record.

7 MR. KELLY: Your Honor --

8 THE COURT: Hold on, one moment, one moment, the
9 characterization of the workplace as unsafe is stricken from
10 the record.

11 Q Mr. Abreu Perez was in a state of reasonably good
12 health suffering only from diabetes and hypertension when he was
13 caused to fall from a workplace that did not conform to Labor
14 Law Section --

15 MR. ALVARADO: Objection, let me be very clear for
16 the record --

17 MR. KELLY: Not have a speaking objections.

18 MR. ALVARADO: They we'll go side bar.

19 THE COURT: We can go to the side.

20 (Whereupon, an off the record bench discussion was
21 held.)

22 (Pause in the proceedings.)

23 THE COURT: Counsel, rephrase your question.

24 The previous question is stricken from the record,
25 the jurors are instructed not to make any inference with

1 respect to the question, and remember the question together
2 with the answer constitute the evidence in this case, there
3 has been no evidence the question is stricken.

4 Counsel rephrase, please.

5 Q Doctor, I would like you to assume that Mr. Abreu Perez
6 was working without limitation in construction prior to the
7 happening of an accident where he fell from a height, and
8 suffered an injury, where he fractured ribs injured his neck and
9 injured his back.

10 Do you have experience in applying your professional
11 skill to problems of Mr. Abreu Perez's kind?

12 MR. ALVARADO: Note my objection.

13 A Yes.

14 THE COURT: Overruled.

15 A Yes.

16 Q Have you previously been qualified as an expert in New
17 York courts?

18 A Yes.

19 MR. KELLY: I offer Dr. Kolb as an expert in
20 radiology.

21 MR. ALVARADO: Objection.

22 THE COURT: Dr. Kolb is admitted as an expert in
23 radiology.

24 Q Doctor, did there come a time when you encountered
25 Mr. Abreu Perez?

1 A Yes.

2 Q And can you tell a little bit about that, you can refer
3 to your records, your records are here in court?

4 A He was sent to my office for an MRI of the
5 cervical spine, writes the neck, September 20, 2017, and he was
6 also sent to my office for an MRI of the lumbar spine, which is
7 the lower back on same date, September -- I'm sorry, July, not
8 the same date, different date, July 29, 2017.

9 Q Doctor, were you, was Mr. Abreu Perez referred to you
10 by physicians in addition to our office?

11 A Wait, the patient was referred to me by a physician
12 only.

13 Q Okay.

14 A I can only do examination like MRIs on patients who are
15 referred to me by physicians.

16 Q Okay.

17 Did there come a time when my office asked you to
18 review some studies and render reports?

19 A Yes.

20 Q Can you just tell us what material you reviewed, just
21 list it?

22 A I reviewed many X-rays, MRIs and CAT scans of the
23 lumbar spine, which is the lower back and I reviewed X-rays,
24 MRIs and CT scans of the cervical spine which is the neck.

25 Q And did you make certain findings after review of this

1 material?

2 A Yes.

3 Q During this examination, doctor, I'm going to ask you
4 for certain opinions, all of your opinions must be to a
5 reasonable degree of medical certainty, even if I don't say
6 those words; is that okay?

7 A Yes.

8 Q Doctor, we've developed some demonstrative aids for the
9 purpose of helping you teaching, explain your findings?

10 MR. ALVARADO: Note my objection to this leading
11 question, leading questions.

12 THE COURT: Sustained.

13 Q Would the demonstrative aids that you went over help
14 you to explain your testimony to the jury, doctor?

15 MR. ALVARADO: Note my objection to these leading
16 questions.

17 THE COURT: Overruled.

18 A Yes.

19 MR. KELLY: I'm going to ask that we get the
20 demonstrative aids, we can start off with the first one,
21 which is 19, I believe.

22 COURT OFFICER: (Displaying.)

23 MR. ALVARADO: Judge, if you don't mind if he does
24 that, can I stand over there?

25 THE COURT: That's fine.

1 MR. ALVARADO: I will be quiet over there.

2 Q Doctor, did you compare the demonstrative aids that
3 we've established to -- strike, did you compare the
4 demonstrative aids we developed to the original documents?

5 A Yes.

6 Q Are they fair and accurate representation of the
7 original documents?

8 A Yes.

9 Q Would they aid in conveying your testimony with respect
10 to radiology specialty to the jury so they understand?

11 A Yes.

12 Q Doctor, I'm going to ask you to kindly come down, and
13 tell the jury a little bit about your examination and the
14 findings.

15 (Whereupon, Dr. Kolb exited the witness stand.)

16 Q As an initial matter, if you kindly tell us a little
17 bit about the -- you want something else?

18 A We should bring the rest of those closer or we'll be
19 spending minutes going back and forth.

20 COURT OFFICER: (Hanging.)

21 A Okay, so we're looking just for anatomy now so we're
22 all on the same page, we're going to learn a little bit about
23 the neck and back. So this is an X-ray of the neck, you can see
24 the patient's head is here and the mouth is here, but this is
25 done in 2021, it's during the middle of the course of this

1 treatment, this is just to get on the same anatomy page and in
2 the neck, there are bones and each one of these squares is a
3 bone. We talked about X-ray shows the bones really well, so the
4 bones are here, and there are seven bones in the neck, and there
5 are five bones in the back.

6 The -- each one of these bones in the neck is called a
7 vertebra, and we label them with a number, so for example, this
8 is the third bone and the fourth bone and the fifth bone, so we
9 call them C3, because it's cervical spine third bone, and I
10 don't have a marker.

11 Q Right there.

12 A In fact, we do, so this is the third bone, I will mark
13 them two 3, 4, 5, 6 and 7.

14 Those are the seven bones of the neck, in between the
15 bones, there are, what we call discs, so you're able to move
16 your neck around, the bones are not connected to each other in
17 this part of the neck, but there are discs and the discs are
18 shock absorbers, when you jump up and down and move your neck
19 around, the bone doesn't touch the bone, because if bone touches
20 bone, that's a bad thing, very painful thing or it could be, may
21 not be, but could be.

22 So we're born with these discs, shock absorbers and the
23 discs have little jelly in the middle of them, almost like a
24 doughnut and in between these bones, as I told you on X-ray,
25 you're not going to see the discs, you just see spaces where the

1 discs are in between the bone.

2 If I would be talking to you about the disc between the
3 six and seventh bone, I will call that the C6-C7 disc, okay,
4 that's just a little bit of anatomy.

5 If we go to a different picture now, you'll see a very
6 different picture.

7 MR. ALVARADO: What is the exhibit, Judge?

8 THE COURT: What's the -- it's on the back upper
9 right.

10 A Number 20, MRI cervical spine September 20, 2017.

11 September 20, 2017, okay, so this now is an MRI, but
12 you still see these boxes there, this is by the way done four
13 years earlier, I just showed you the first one just to show you
14 an X-ray.

15 Now traveling back four years to September of 2017, I'm
16 going to label the discs again for their numbers, just like I
17 did the X-ray, those are the bones, the vertebrae, in between
18 the bones you can see these areas right there and those are the
19 discs, and those discs are held in place, very tightly by
20 ligaments when you move around, as I told you those discs are
21 like shock absorbers, why don't they just spurt out and move,
22 because they're held very tightly in place, and there are
23 ligaments, one is called the posterior longitudinal ligament,
24 you don't have to remember any of this medical jargon, but you
25 get the concept, but there's a ligament that goes around the

1 disc like that, like a circle, and that's called an annulus, and
2 that holds the disc in place, and a normal disc should go to the
3 margin of the bone and stop as they all do here, if you look
4 between 2 and 3 and 3 and 4, 4 and 5 and 5 and 6, but this one
5 here at C6-7, you see it's pushing out and you will see it's
6 pushing on this white stripe right here, you will see it better
7 on this picture, on this white stripe here.

8 This white stripe in front of this big gray stripe is
9 fluid, right around that fluid is gray stripe is the
10 spinal cord, and you're seeing the spinal cord in a patient, it
11 starts from the brain up here and goes all the way down to the
12 mid-back, and from the spinal cord, all of our nerves come out
13 of the spinal cord, and they go down our arms or fingers and
14 they go down our legs to our toes so we can move and we can
15 feel.

16 So here on this particular picture in the middle, this
17 disc here is pushing out on the thecal sac, that's the name of
18 the structure that contains this fluid, that's because there's a
19 tear of the annulus. What we can do with MRI which you can't do
20 a regular X-ray, we can look at a three-dimensionally, and
21 that's kind of what we're doing here.

22 We now tell the machine to take a picture a round, a
23 round picture and we will talk about in a second, right here
24 through the C6-7 disc and if we do that, we will see that the
25 disc material, which is right here, disc material is pushing

1 down on the spinal fluid, which you can faintly see the gray
2 circle here, which is the spinal cord.

3 Just so we all understand what we're talking about,
4 this is a long picture, where you see the patient's brain, and
5 down here are the feet, and this is a picture taken down here,
6 what this is like if you have a long French bread or long
7 Italian bread two ways, you can slice a loaf of bread, make one
8 long cut on a bread, open up and make a hero sandwich, then you
9 only have two pieces of bread, both very long, that's what we're
10 doing here, we're taking a piece, taking a picture through the
11 very middle on this particular scan of this patient and we're
12 seeing all the way from the top to the bottom, but we can cut
13 the bread a little way, we can make slices, and if you make many
14 slices of bread, you pull it out, it's not going to be look, it
15 will be round or square, depending on the bread, and this is
16 what is as called an axial picture and here we're not actually
17 cutting the patient, we're just taking pictures, we're slicing
18 right here through this disc level and then taking it out and
19 putting it down and looking at it.

20 On this picture, you can actually see instead of the
21 spinal cord being long, like you see in this top picture, the
22 spinal cord is round, that's how we took the picture, like a
23 slice of bread, not only that, you can also see going to the
24 right side of the patient here is what's called a neural
25 foramen, inside of it is the nerves this nerve comes off the

1 spinal cord, thin little gray structure here, and it goes to the
2 right side of the body, and depending on what levels it comes
3 out, goes around the way from the neck, all the way down to the
4 fingers, and this is, this goes to the right side of the body,
5 and it also goes to the left side of the body here, here a nerve
6 comes out of the left, and what you're seeing here is that this
7 foramen is slightly narrowed, because of this disc herniation
8 right here, which you couldn't see on this picture, just the
9 middle picture here.

10 So the findings on this picture are, a small
11 herniation, at C6-7, mildly impinging or pushing on the thecal
12 sac and narrowing the left sided neural foramen, that's the
13 findings on September 20, 2017.

14 Q Doctor, are those findings consistent with a history of
15 trauma?

16 A They can be.

17 One more point, the right side of the foramen is mildly
18 narrow as well, but not as much as the left, so the left side of
19 the foramen as you can see here is much thinner than the right,
20 both somewhat narrow, the left more than the right.

21 Q The findings on these MRIs, are they objective
22 findings, that is can they be manipulated or exaggerated?

23 A No, the images are what they are.

24 Q What's shown in Plaintiff's Exhibit 20, could those
25 findings be the competent producing causes of pain?

1 A It can be.

2 Q The condition shown in Plaintiff's Exhibit 20, that a
3 permanent condition?

4 A Yes.

5 Q And did those conditions heal without treatment?

6 A In general, no. Well, they can heal, medical
7 conditions, no, in general, they stay the way they are or
8 progress.

9 Q Okay.

10 A If they don't go back to the way they were.

11 Q When you say "progress," do you mean negatively?

12 A They could get better.

13 Q Could, alright.

14 Look at another exhibit.

15 THE COURT: Before you show that, what is the
16 number?

17 THE WITNESS: That's if for the neck.

18 Q So we want to look at that time, the lumbar spine?

19 A Yes, the patient had other imaging we can discuss.

20 Q Let's discuss that then, you want to talk about the
21 other imaging with respect to the neck, let's talk about it.
22 You can retain your seat if you're not going to use the
23 demonstrative aids.

24 (Whereupon, Dr. Kolb resumed the witness stand.)

25 MR. ALVARADO: Is it okay if I sit back?

Dr. Kolb - Plaintiff - Direct

1 THE COURT: For now.

2 MR. ALVARADO: For now.

3 Q Tell us what you reviewed with respect to the
4 cervical spine and what findings you made with respect to
5 Mr. Abreu Perez's cervical spine?

6 A Well, just in keeping with MRIs, now we're talking
7 about on February 3, 2022, patient had MRI of the
8 cervical spine, which showed that the disc herniation that we
9 talked about at C6-7 got a bit bigger.

10 MR. ALVARADO: Note my objection.

11 THE COURT: We can approach, doctor.

12 (Whereupon an off the record bench discussion was
13 held.)

14 (Pause in the proceedings.)

15 COURT OFFICER: All rise, jury exiting.

16 (Whereupon, the jury exited the courtroom.)

17 MR. ALVARADO: Judge if we're going to argue on the
18 record, I ask that the doctor step out.

19 THE COURT: Yes. Dr. Kolb, would you please just
20 wait in the hallway.

21 THE WITNESS: Yes.

22 (Whereupon, Dr. Kolb exited the witness stand and
23 the courtroom.)

24 THE COURT: Okay.

25 MR. ALVARADO: Your Honor, my objection is, for the

1 record, Mr. Kelly solicited or elicited from the doctor an
2 MRI dated February 3, 2022, that was not disclosed in his
3 3101 (d) response, and it was not disclosed in any of the
4 notices of medical exchanges for Dr. Kolb served by the
5 Gorayeb firm, I have them, I can show them, if he's now
6 going to talk to something that was never served on me,
7 that's prejudicial.

8 The other thing is he said he subpoenaed the
9 records here, but we also agreed to admit them in subject to
10 redaction of course, but again it's not there, it's not in
11 the notice of medical exchanges I will hand up to your
12 Honor, I will be happy to.

13 THE COURT: Okay.

14 MR. ALVARADO: If he's going outside of what he
15 served us, then I'm going to move to preclude that.

16 MR. KELLY: He testified he's a treating physician
17 and referred by other physicians, he's in the continuum of
18 care, not limited to the 3101 (d), that's a complete
19 misstatement of law and he knows it.

20 The fact of the matter is they were delivered
21 authorizations good through the end of the litigation, years
22 ago, they had all of the authorizations required, and I
23 presume they prosecuted, them got, Dr. Kolb records, and
24 Dr. Kolb records are here in court and marked in evidence
25 already.

1 MR. ALVARADO: Well, I guess that kind of goes
2 against what -- as attorneys do when you want to serve us
3 with notices of medical exchange and intentions, you make
4 sure you serve us with the right records, because what
5 happens is even though you serve us with an authorization,
6 they don't come to our office, or he doesn't disclose them,
7 and you'll see on cross, he's been working with these guys
8 for 30 years. So I don't know what's going on, I don't have
9 it, and I will move to preclude or object to any reference
10 to that MRI of the cervical spine dated February 3, 2022.

11 MR. KELLY: I can't image that the records don't go
12 to their office and they're using that as an excuse, I'm
13 sorry, the MRI of February 3, 2022.

14 MR. ALVARADO: Yes.

15 MR. KELLY: It's right here in the notice of
16 medical exchange, and there's an affidavit of service.

17 I will show it to the Court.

18 MR. ALVARADO: Okay, show it to the Court, the
19 affidavit is a couple of pages after the report.

20 THE COURT: Counsel, do you have the notice of
21 medical exchange?

22 MR. ALVARADO: What date, Judge?

23 THE COURT: It was served on June 1st, 2021, notice
24 of medical exchange.

25 MR. ALVARADO: Yes, do you want me to show you what

1 I have? I will walk this up to you, or I will give it to
2 the officer.

3 THE COURT: Well, this is actually --

4 MR. ALVARADO: I gave that back because it was the
5 film, the film was taken 2022.

6 THE COURT: February 3, 2022.

7 MR. ALVARADO: So why would he serve me in 2021?

8 THE COURT: Hold on, let me see something, there
9 are multiple.

10 MR. KELLY: Right.

11 THE COURT: There's a clip, there's multiple notice
12 of medical exchange, one moment, this one was actually
13 served, this one was served on January 20, 2023.

14 So, as I stated, Mr. Kelly handed me multiple
15 notices of medical exchange, and I have one served on
16 June 24, 2024, another one served, oh, this one is also
17 June, this is a duplicate, January 20, 2023, and it includes
18 a CT scan of the lumbar spine dated December 1, 2022, and
19 MRI of the lumbar spine dated February 3, 2022, and an MRI
20 of the cervical spine dated February 3, 2022, this
21 MRI report was dated, was served June 1, 2021, which I see
22 Mr. Alvarado, you have also provided a copy to the Court,
23 Mr. Alvarado.

24 This one served on, well, it's dated June 1, 2021,
25 served June 1, 2021, is also looks to be a duplicate,

1 Mr. Alvarado that you provided.

2 So, so I have some that are duplicates, but then
3 Mr. Kelly has provided more than what you have provided.

4 MR. KELLY: There are affidavits of service.

5 THE COURT: There are affidavits of service
6 attached, I'm not sure what happened because Mr. Alvarado,
7 you have only handed me three.

8 MR. ALVARADO: The other three I have here do not
9 refer to that MRI, I can give those to you too.

10 THE COURT: Let me see those.

11 MR. ALVARADO: I will hand them to the officer.

12 COURT OFFICER: (Hanging.)

13 THE COURT: This is a duplicate.

14 MR. KELLY: Your Honor, clearly they got it, if I
15 may, their expert's report talks about reviewing it, clearly
16 they got it, sent it to them.

17 THE COURT: Their expert report.

18 MR. KELLY: Page three, MRI of cervical spine Kolb
19 Radiology, 2/3/22, their own expert made a report on it,
20 Judge, I don't know why we're doing this.

21 THE COURT: Mr. Alvarado, do you see that?

22 MR. ALVARADO: Yeah, but if we get it on our own
23 and you don't serve it on me, we have a problem.

24 MR. KELLY: Judge, this is.

25 THE COURT: One moment.

1 MR. KELLY: There is an affidavit of service, their
2 expert reported on it, clearly they have it. I don't know
3 what kind -- I don't know what they're trying to do now, but
4 this is nonsense.

5 THE COURT: The question just becomes who got it,
6 did he, there's an affidavit of service.

7 MR. ALVARADO: If he served it, that's fine, Judge,
8 I don't have that exchange.

9 THE COURT: Okay.

10 MR. ALVARADO: I have to protect my file, and I
11 object, I don't have the exchange, I don't have the
12 exchange.

13 MR. KELLY: But their expert got it, clearly
14 there's no prejudice to them, I don't know what they're
15 talking about, they definitely got an authorization years
16 ago, good to the end of the litigation.

17 THE COURT: Okay. So I do have a notice of medical
18 exchange from Mr. Kelly that these documents and
19 specifically the ones that Defendant's Counsel did not
20 provide to the Court is the CT scan of lumbar spine dated
21 December 1st, 2022, and the MRI of the cervical and lumbar
22 spine both dated February 3rd of 2022.

23 All of the others look like they had been handed up
24 by Mr. Alvarado.

25 MR. ALVARADO: Okay.

1 THE COURT: From his records, I just want to double
2 check so we don't have to stop again.

3 (Pause in the proceedings.)

4 THE COURT: It looks like everything else is the
5 same.

6 MR. ALVARADO: I'm sorry, for the record, I just
7 remembered, Judge, the reason for Dr. Sherman, he didn't
8 serve those on me, we had to have my paralegal come to the
9 subpoenaed records rooms and obtain it, that's how we found
10 out about it, not because we got it from Mr. Kelly or his
11 firm.

12 THE COURT: Okay.

13 MR. ALVARADO: For the record, when I took over
14 this matter for trial, I think it was in July or August, we
15 had asked their firm serve me with any films that you have,
16 and, but my paralegal said they refused, so that's when we
17 said go down to subpoenaed records rooms with your laptop
18 that's how, I'm not going to consent to admissibility of
19 something that wasn't served to me. You have the affidavit
20 of service, I will let the judge rule.

21 MR. KELLY: You've already consented to the
22 evidence, it is in evidence, Dr. Sherman's report is
23 December 13th, don't contrive just a week before, this is
24 nonsense.

25 MR. ALVARADO: This kept going on during

1 jury selection, you seem to change your statements to me.
2 When you say something to me, I take you at your word, okay,
3 I said we will stipulate subject to redactions.

4 MR. KELLY: They're marked in evidence.

5 MR. ALVARADO: Yes, we're marked into evidence,
6 subject to redaction, I have been doing this for a long
7 time, but to sit here and contradict what you say, I will
8 put all of these lawyers on the stand, you do it all the
9 time.

10 THE COURT: These go back to Mr. Alvarado.

11 MR. ALVARADO: Thank you, Judge.

12 THE COURT: These go back to Mr. Kelly.

13 MR. KELLY: Are you keeping one?

14 THE COURT: No, this is the one that has the
15 affidavit of service.

16 MR. ALVARADO: I will see it, I will rule, I mean,
17 Judge, you will rule whatever you rule.

18 I'm sorry I raised my voice, Mr. Kelly, that's not
19 proper or professional either.

20 I will hand it back to Mr. Kelly.

21 THE COURT: The doctor will be allowed to testify
22 as to the findings of February 3, 2022.

23 MR. KELLY: Should I go get them?

24 THE COURT: Mr. Alvarado, are you ready?

25 MR. ALVARADO: I'm ready, Judge.

1 THE COURT: Alright, and just to, I just want to
2 ask a question, Dr. Kolb is testifying as the witness who
3 reviewed the films.

4 Is he the treating physician or --

5 MR. KELLY: I will clarify.

6 THE COURT: Because the notice just says he looked
7 at the film.

8 MR. ALVARADO: I am going to object.

9 MR. KELLY: Some of the reports are also to
10 Dr. Grimm, the referring physician.

11 MR. ALVARADO: And I'm going to object to any
12 questions as causation, that is definitely not in his 3101
13 (d), he didn't take a history from the Plaintiff other than
14 what you tell him here, Mr. Kelly, in court.

15 MR. KELLY: Once again, looking advisory ruling.

16 MR. ALVARADO: What advisory rulings? I'm telling
17 the Court I'm going to object, you start talking about
18 trauma, caused by trauma when he's not, when he doesn't have
19 that ability and he doesn't have the foundation for it.

20 THE COURT: Okay. Okay.

21 (Pause in the proceedings.)

22 THE COURT: Bring the witness in, and the jurors,
23 bring the witness in first and then we will bring the jurors
24 in.

25 (Whereupon, Dr. Kolb resumed the witness stand.)

1 COURT OFFICER: All rise, jury entering.

2 (Whereupon, the jury entered the courtroom.)

3 THE COURT: Alright everyone, you can be seated.

4 Members of the jury, as I've stated before,
5 sometimes the Court needs to do some housekeeping, there are
6 a lot of documents, we just want to make sure everything is
7 proper and everyone is on the same page.

8 Madam Reporter, please read back the last question.

9 (Whereupon, the last question was read back by the
10 Court Reporter.)

11 Q Doctor, the services you that provided with respect to
12 your radiological studies on Mr. Abreu Perez, were they at the
13 request of a physician?

14 A Yes.

15 Q And was that Dr. Weinstein and Dr. Grimm?

16 A Yes.

17 Q So doctor, are you in the continuum of care with
18 respect to Roberto Abreu Perez?

19 A Yes, you could say that, yes.

20 Q Would you say you're a treating physician in that
21 respect?

22 A Yes, you could say that, yes.

23 Q Tell us a little bit more that you reviewed and the
24 findings?

25 A I indicated there was an MRI in 2022 where the

1 herniation got bigger at C6-7, and I also reviewed a CT scan of
2 the cervical spine, CAT scan of the cervical spine in January of
3 2024, which also showed the herniation at C6-7, and there it had
4 hypertrophic changes which narrowed the neural foramen, we
5 talked about the hole where the nerves come out, which are
6 narrowed on both sides, from hypertrophic changes and then one
7 MRI of the cervical spine on January 15, 2024, which also showed
8 that the herniation at C6-7 which narrowed the sac, and the
9 neural foramen that we talked about was unchanged from 2022, s
10 that's what happened over a seven-year period.

11 Q What is the meaning for Roberto Abreu Perez, with
12 respect to the change in the herniation and the growth of
13 osteophytes and things like that?

14 A Once the ligament is torn or annulus is torn and the
15 herniations forms, that doesn't go back in, there's more stress
16 placed on that joint at C6-7, because it's not normal anymore,
17 so the patient can degenerate or have arthritis, at various
18 parts in their cervical spine, in general, after a disc
19 herniation, but in general as a, because the patient is, was
20 born in; 73, about 44 years old on the first imaging, and then
21 seven years later, about 51 years old, right, 51 years old, in
22 2024, so that's all happening.

23 Q Can you expect increasing complaints of pain with
24 respect to the worsening condition you see?

25 A It's possible.

1 Q And you've mention a degenerative condition, describe
2 for us what does that mean, degenerative condition?

3 A As we age or if there's trauma, certainly as we age, we
4 degenerate, we get arthritis, another way of saying arthritis
5 and there are kind of like three stages of arthritis in the
6 spine.

7 First thing that happens the disc dries out not as much
8 as a shock absorber as it used to be, when we jump up and down,
9 it doesn't quite spring back to the way it was.

10 The second thing that happens the disc height the
11 thickness of the disc goes down when the thickness of the disc
12 goes down.

13 The third thing that happens the bones get closer to
14 each other, the bones don't like that and the bones start
15 forming bone spurs or hypertrophic changes which is new bone
16 growth, which is a reaction to bones getting closer to each
17 other, and that happens either after a trauma or as a normal
18 aging process.

19 Q As we get older unfortunately can these degenerative
20 conditions be present in a patient without pain?

21 A Yes, sure, you can be degeneration in a body part
22 without having pain, yes.

23 Q Can a trauma precipitate or bring pain in an otherwise
24 dormant condition?

25 A A trauma can form a herniation and it can in some way

1 cause pressure on a nerve, so that you can feel, or can have
2 symptoms like pain sure, it's possible.

3 Q Did you review any other radiological studies with
4 respect to any other body parts for Mr. Abreu Perez?

5 A Just the X-rays of the neck, I reviewed as well, and
6 then in the back as well, there are CAT scans, X-rays and MRIs.

7 Q Okay. Would some of the demonstrative aids assist you
8 in conveying your testimony to the jury?

9 A Sure.

10 Q Would you kindly come down and take a look at some of
11 the lumbar.

12 THE COURT: Counsel, before you show them, say what
13 the Exhibit Number is, one moment, what is the number?

14 MR. KELLY: 21, Plaintiff's Exhibit 21.

15 THE COURT: Mr. Alvarado, do you want to move?

16 MR. ALVARADO: Yes, sorry, Judge, I was just trying
17 to get my --

18 (Pause in the proceedings.)

19 A So when we first look at 25.

20 Q Plaintiff's Exhibit 25?

21 A If we look at just 25 for a second, this is an
22 X-ray, just like I showed you an X-ray of the neck, this is an
23 X-ray of our back, and we all have the same anatomy, whether
24 we're tall/short, male/female, all the same which is five bones
25 in the lumbar spine, and I will number them, and after, and

1 they're all called L for lumbar spine, so this is L1, L2, then
2 the one after that is called S, S1 down here in the back and
3 that's the sacrum, so it's called S for sacrum, and that's the
4 first bone.

5 So again you see these bones very well, and you see
6 spaces really well, between them in between those spaces are the
7 discs, you're not going to see them on an X-ray. So if we jump
8 to the next one, which is number 21, which is MRI on July 29,
9 2017, again, you see these squares, which are the bones, which I
10 will number, same numbering, but now you see these discs really
11 nicely, these white areas between the bones, and those are the
12 discs, and again, the spinal cord that we saw before, the gray
13 stripe comes down actually and ends here at this level, and each
14 one of these little gray lines coming down are nerve roots and
15 those nerves will come out of the back and go down your legs,
16 one nerve to the left, one nerve to the right at each level.

17 So again, looking at what normal looks like, this disc
18 between the first bone and the second bone stops right here
19 between the bones and is normal, between 2 and 3 is normal,
20 between 3 and 4 is normal, but look what happens down here at
21 L5-1, you have this piece of disc pushing out and it's pushing
22 on the anterior epidural fat, there's a little bit of fat that
23 sits between this liquid, the spinal fluid and the disc and
24 pushing on the fat there, and this one here is pushing out but
25 not as much as 5-1, the disc at 4-5 is pushing out partially and

1 that's called a disc bulge.

2 So we're hear about bulges and herniations, a bulge is
3 a partial tear of the annulus, the ligament, where the piece of
4 disc material pushes out along with the annulus, because the
5 annulus is only partially torn.

6 A herniation, disc herniation is when the -- there's a
7 complete tear of the annulus and the disc pushes through like
8 that, so if you look at the patient from the side, and my
9 fingers are the bones, if there's a herniation, you'll see the
10 disc material protrude or push beyond the margin of the bone and
11 you will see that here and to a lesser degree here.

12 So on this MRI of 2017, there was a small disc
13 herniation at L5-S1 and a disc bulge and L4-5, impinging on or
14 pushing on the thecal sac, that's the major findings on this
15 MRI.

16 Q Are these objective findings as well, doctor?

17 A Yes.

18 Q Can the patient manipulate or exaggerate the images
19 shown?

20 A The patient cannot.

21 Q What's shown in this MRI of the lumbar spine July 29,
22 2017, is that consistent with trauma?

23 MR. ALVARADO: Objection.

24 A Oh --

25 THE COURT: Overruled.

1 A It can be.

2 Q Can these findings be the competent producing cause of
3 pain?

4 A They can be.

5 Q And the condition shown, is that permanent without
6 medical intervention?

7 A Yes.

8 Q And can it get worse?

9 A It can.

10 Q Doctor, can you get the next image.

11 THE COURT: One moment, what is the number?

12 MR. KELLY: He's bringing them all over.

13 THE WITNESS: It's Number 22.

14 A So here you can see nicely the disc herniation between
15 L5 and S1, right here all of this is fat, right behind the bone
16 and you see a piece of the disc pushing out and that's the disc
17 herniation, and you see here lesser disc pushing on the sac, so
18 that's a disc bulge.

19 Q Let me ask you, doctor, what is the significance of
20 that material pressing on the sac?

21 A It causes pressure.

22 Q And what does that mean for the patient?

23 A It could put pressure on a nerve root and cause the
24 patient's symptoms.

25 Q And would that --

1 MR. ALVARADO: Objection.

2 THE COURT: One moment.

3 Overruled, what is your question?

4 Q That's not your role, you're not a clinician; is that
5 correct?

6 A That is correct.

7 Q And so by a clinician, we would be talking about
8 somebody who to whom Mr. Abreu Perez makes complaints?

9 MR. ALVARADO: Note my objection.

10 THE COURT: Overruled.

11 MR. KELLY: His physician.

12 A Yes, that's true.

13 Q That's not what you do?

14 A That's not what I do.

15 Q You just take objective images; correct?

16 A Correct.

17 Q Tell us a little bit more what we see here?

18 A So I compared this from 2020 to the one earlier, from
19 2017, and there was no change in the three years, that's what we
20 see on this.

21 Then, we move over to Number 23, here you see similar
22 picture to what we saw earlier that was in the cervical now
23 looking at lumbar in the back, here is the disc herniation here
24 between 5 and S1, and the bulge between 4 and 5 and we took a
25 picture here, between 5 and 1 and put it out, just like we cut

1 that loaf of bread earlier, and you see that this here is at L4,
2 at L4-5 here is pushing out a little bit more, it's pushing on
3 the sac and turned from a disc bulge to a small herniation and
4 at L5-S1, it's still pushing on the fat just like it did
5 previously, without change, so that's move forward to 2022.

6 Q Okay, is there any degeneration that we see on this
7 page?

8 A The MRI you don't see much in the way of degeneration.

9 Q If there was degeneration of the lumbar spine, that can
10 exist without complaints of pain?

11 A It can could.

12 Q Can a trauma precipitates complaints of pain in a
13 latent condition like that?

14 A It can.

15 Q What else do we need to see?

16 A So we have one other thing. This is Number 24, and
17 this was done December 1, 2022, and this is a CAT scan, now you
18 see the difference between CAT scans and MRIs, you see the
19 bones, all five of the bones, I will number them again.

20 MR. ALVARADO: What number is this, doctor?

21 THE COURT: 24.

22 MR. ALVARADO: Thank you.

23 A So here you see the bones really well, and we know that
24 the discs are in between the bones and the CAT scans are better
25 than X-rays, you can actually see some of the disc material

1 here, and if we look between L5 and S1, you'll see a disc
2 herniation here pushing on the fat in front of the nerve roots
3 and the thecal sac, so it shows you on a CAT scan what we saw on
4 the MRI, it also shows you that this bone is a little bit
5 slipped back, L5, it doesn't lineup with S1 slipped back, so it
6 slipped back, a small amount, and it also shows you that there's
7 mild narrowing.

8 We talked about second phase of the degeneration, of
9 the spine, there's now narrowing of the back of the L5-S1 space,
10 and we also see here, these little pieces of bone in the front
11 of the spine, which are osteophytes or degenerative or
12 hypertrophic changes all the same there, you see that very
13 nicely on the CAT scan here.

14 On the CAT scan, the findings for the disc herniations
15 at L4-5 and L5-S1 with everything else that I just told you.

16 Q And again, with the CAT scan, may seem obvious the scan
17 much like the MRI that can't be manipulated; can it?

18 A Correct.

19 Q It's an objective finding that can't be exaggerated or
20 anything else?

21 A Correct.

22 Q The condition shown in 24, are they permanent without
23 medical intervention?

24 A Yes, what you're seeing on these pictures are
25 permanent.

1 Q And can those conditions be the competent producing
2 cause of pain?

3 A They can be.

4 Q Alright, doctor, do you see any other radiology?

5 A Well, one last X-ray, which is Number 26, so this is an
6 X-ray of the lumbar spine of the back done in March of 2023,
7 March 7, 2023, marking the numbers of the bones again, and in
8 this picture, it is different than the picture you saw earlier,
9 which was number 25, here it's one picture, there's the other
10 picture, 25 versus the one that's up now, which is 26, and you
11 see the difference is this white area here.

12 So a surgeon went in and fused this back, they put
13 screws on either side of the L5 vertebra, bone and positive side
14 the S1, they connected up the screws which is the rods, and now
15 the aim here is there shouldn't be motion between these two
16 levels, and the point here is to try to do something for the
17 patient, so that's what a fusion done by a surgeon looks like on
18 an X-ray.

19 Q Doctor you can retain your seat, thank you. You can
20 remove the blow up.

21 (Whereupon, Dr. Kolb resumed the witness stand.)

22 Q Doctor, if not sharing your knowledge today, what would
23 you be doing?

24 A Working.

25 Q As a radiologist?

1 A As a radiologist, yeah, I mean reading X-rays and MRIs.

2 Q Is your office charging a fee for your time away from
3 the practice?

4 A Yes.

5 Q Could you tell us what your fee is?

6 A \$20,000 and \$12,000.

7 Q Were you retained to do certain reports by my office in
8 this case?

9 A Yes.

10 Q And did you charge a fee for that?

11 A Yes.

12 Q Do you recall how much it was?

13 A For the MRIs, they're in here, but the MRIs if I
14 reviewed MRIs and CAT scans there were about 900, were for each
15 one, and the X-rays are about \$500.

16 Q And over the last 20 years or so, you and I have been
17 together on five or seven cases?

18 A Yes, some number like that.

19 Q And you've done some other work for my firm?

20 A Yes.

21 Q Just talking about just briefly, the disc bulge versus
22 a disc herniation, what does that mean in terms of radiological
23 parlance?

24 A A bulge is partial tear of the annulus that holds it in
25 place, and the herniation is a complete tear where the disc

1 material pushes out.

2 Q Both of them can cause pain by impinging on other
3 structures?

4 MR. ALVARADO: Objection.

5 THE COURT: Rephrase.

6 Q Can both of them cause pain by impinging on other
7 structures?

8 A They can.

9 MR. KELLY: Thank you, doctor, I have nothing
10 further.

11 THE COURT: Alright, we're going to take an a brief
12 break, go to the restroom and stretch, and then we will come
13 back in about five, ten minutes.

14 COURT OFFICER: All rise, jury exiting.

15 (Whereupon, the jury exited the courtroom.)

16 MR. ALVARADO: Can I take a look at the doctor's
17 file?

18 THE COURT: He's testifying, they are his records,
19 how much long do you needs?

20 MR. ALVARADO: 40, 45 minutes, will finish before
21 lunch.

22 (Whereupon, Dr. Kolb exited the witness stand.)

23 (Whereupon, a short break was taken.)

24 (Pause in the proceedings.)

25 MR. KELLY: Your Honor, on the record.

1 THE COURT: Yes.

2 MR. KELLY: Any objection is that I've just been
3 told minutes ago, there's some intention to use
4 demonstrative evidence by the defense in terms of
5 cross-examination.

6 My understanding of demonstrative evidence is that
7 has to be fair and accurate representation that helps
8 present the party's case, not subject to cross-examination,
9 that's *Hinlicky v. Dreyfuss*, 6 N.Y. 3D 636 2006, *People v.*
10 *Del Vermo*, another Court of Appeals case, I don't have the
11 cite for, to put these things up on the screens all around
12 the jury is solely designed for prejudicial purposes and not
13 to refresh the recollection or anything else.

14 THE COURT: Okay, counsel, you can show the witness
15 the document but not on the screen.

16 MR. KELLY: And is there anything else they intend
17 to show on the screen, Judge? I mean they just told me now.

18 MR. ALVARADO: Oh, my God, we're going to show his
19 MRI reports, you want to look at my notes, look at my notes,
20 I'm questioning about this case.

21 MR. KELLY: On this case.

22 MR. ALVARADO: On this case do you want me to refer
23 to another Roberto Abreu Perez, I will do it.

24 MR. KELLY: You're supposed to serve a notice of
25 intention to do it.

1 MR. ALVARADO: Notice of intention to cross-examine
2 his on his reports?

3 MR. KELLY: His exhibits, common on.

4 MR. ALVARADO: What exhibits? You marked them into
5 evidence, the blowups.

6 MR. KELLY: Counsel, you just told me two seconds
7 ago, you just said you're using as demonstrative evidence,
8 you're going to use demonstrative evidence.

9 THE COURT: That was something different.

10 MR. ALVARADO: That was the list of cases he was
11 retained, I don't have to give you notice of nothing.

12 MR. KELLY: I asked you anything else, and you said
13 it.

14 (Pause in the proceedings.)

15 CROSS EXAMINATION BY

16 MR. ALVARADO:

17 COURT OFFICER: All rise jury entering.

18 (Whereupon, the jury entered the courtroom.)

19 (Whereupon, Dr. Kolb resumed the witness stand.)

20 THE COURT: Alright, everyone you can have a seat.
21 Counsel, you may inquire.

22 MR. ALVARADO: Thank you, Judge, I appreciate it.

23 Q Dr. Kolb, nice to meet you.

24 A Same here.

25 Q Would you agree this is the first time we met?

1 A I don't remember ever meeting you before.

2 Q I would remember if I met you.

3 MR. KELLY: Objection. Come on, we don't need the
4 cocktail party banter.

5 THE COURT: Overruled, you can answer.

6 A I'm not aware of meeting you before.

7 Q Okay. I'm going to ask you to limit your answers to
8 yes or no; okay?

9 A Yes.

10 Q Yes, okay.

11 If you need to go beyond the yes or no, you'll tell me,
12 and I will try to give you that opportunity to go beyond a yes
13 or no; okay?

14 A Yes.

15 Q Good.

16 I looked at your, what you've brought to court today,
17 and I laid it out in front of you, while the jury was out, I
18 reviewed it; okay, is that your complete file?

19 A Yes.

20 Q Do you have any billing records?

21 A There are billing records, I'm sure, because I was seen
22 by -- he was seen by me as a patient, there are billing records.

23 Q Would that be part of your file?

24 A Yes.

25 Q Did you bring that with you?

1 A No.

2 Q What other portions of your file with respect to
3 Mr. Perez did you not bring with you?

4 A There are patient registration sheets where patients
5 are asked questions.

6 Q What else, doctor?

7 A That should be it, patient registration, I can't think
8 of anything else.

9 Q What about communications between you and the Gorayeb
10 Law Firm?

11 MR. KELLY: Objection.

12 A About this patient?

13 Q Yes, just about this patient?

14 THE COURT: One moment one moment, you can answer.

15 THE WITNESS: Sure.

16 A They are sent to my secretary, if they want me to
17 review a case, there's usually I think a cover letter, that's
18 please review that case.

19 Q Did you bring that with you, where is that?

20 A No.

21 Q Doctor, your office was served with a subpoena by my
22 office; were you aware of that?

23 A If it's regular standard procedure, then, yeah, okay.

24 Q I don't know what that means.

25 A I don't know.

1 Q Were you aware that your office was served with a
2 subpoena by my office to produce?

3 MR. KELLY: Objection, they served us. Judge, I'm
4 not his lawyer.

5 MR. ALVARADO: Okay.

6 THE COURT: Overruled, you can answer.

7 Q Let me ask the question again for the jury.

8 Were you aware that your office was served with a
9 subpoena for you to bring your entire file today?

10 A No.

11 Q Do have a practice of medicine; right?

12 A Yes.

13 Q At -- let me finish, 106 East 61st Street?

14 A That was an old address, that is correct.

15 Q You still have a Val that works there?

16 A I don't know.

17 Q But that was an office for you; yes?

18 A Up through 2018, maybe, maybe seven years ago.

19 Q Okay. Was that while you're not aware there was a
20 subpoena served to you?

21 A I don't know why, I'm not aware.

22 Q Did you know we served a subpoena on Mr. Kelly?

23 A No.

24 Q Did he tell you to bring your file today?

25 A He told me to bring my records, yes.

1 Q But I asked you about the records, you didn't bring the
2 billing records?

3 A Correct.

4 Q You didn't bring the intake sheets, and you didn't
5 bring any correspondence between you and Mr. Kelly's office, why
6 is that?

7 A It's -- I was never asked to bring it.

8 Q He said bring the records, why didn't you bring the
9 records?

10 A I don't have any better answer for you other than I
11 brought the medical records.

12 Q The answer is you don't have any other better answer?

13 MR. KELLY: Objection.

14 THE COURT: Overruled.

15 Q The answer is I don't have a better answer, I just
16 decided not to bring it?

17 MR. KELLY: Objection.

18 THE COURT: Sustained.

19 Q You keep shaking your head.

20 MR. KELLY: Can we have with it stricken? He keeps
21 talking.

22 MR. ALVARADO: He's shaking his head, I want an
23 answer.

24 MR. KELLY: Objection, it has been sustained.

25 THE WITNESS: Sustained?

1 Sustained, what does that mean?

2 THE COURT: Don't answer, don't answer.

3 Q This isn't the first time you've testified in court,
4 right, doctor?

5 A That is correct.

6 Q And you've been, how long have you been testifying for
7 over 30 years?

8 A I would say 30 years, I think.

9 Q 30 years plus, 34?

10 A I don't know if it's 30 or 34.

11 Q And this isn't the first time you've testified for the
12 Gorayeb firm?

13 A Correct.

14 Q I know Mr. Kelly asked you on direct that he
15 testified -- that you testified five or six times?

16 A I didn't hear that.

17 Q I know Mr. Kelly asked you on direct examination if you
18 testified for him, for his case five or six times before today;
19 correct?

20 A That's what I think he said.

21 Q Now, tell me how many times for the last 30 plus,
22 34 years, you have been retained by the Gorayeb firms to review
23 films?

24 A I testify in court approximately five.

25 Q I just asked you about how many times Gorayeb firm, I

1 don't want to be beyond that, just Gorayeb firm.

2 A I don't have an answer.

3 Q More than 50 times?

4 A I don't have an answer.

5 Q More than 100 times?

6 A I don't have an answer.

7 Q You testified five to six times a year?

8 A I testify about five to six times per year, roughly.

9 Q You testify mostly for law firms who represent the
10 persons who are injured; correct?

11 A That's correct.

12 Q Not for firms like mine, defense firms?

13 A Unless I'm sent firms by defense firms yes, I do.

14 Q I would say 99 percent of the time you're retained by
15 the Plaintiff's law firm?

16 A If I've done an MRI on them.

17 Q You're not answering the question.

18 A I don't know if it's 99 percent for the majority as you
19 said, it is for the Plaintiff's law firm, yes.

20 Q Okay. Your bill today is \$12,000 just to appear in
21 court today; right?

22 A Yes.

23 Q You billed them before today, I know you don't have
24 your billing records, I'm asking off your memory?

25 A We can count up, it would be about 900 for every MRI

1 and CT I didn't do that was sent to me, and roughly \$500 for an
2 X-ray.

3 Q And now I know you can't tell me the number of times
4 you have been retained by Gorayeb firm, how many times if you
5 remember by year, in the average you have been retained by them?

6 A I can't give you an answer to that.

7 Q More than 100 times?

8 A I can't give you an answer to that.

9 Q In the last 30 years, more than 500 times; I'm trying
10 to see if it jogs your memory?

11 A I won't choose a number for you, I don't remember.

12 Q Say you don't remember?

13 A I don't remember.

14 Q I don't need you to choose a number, I'm just probing;
15 okay?

16 A Okay.

17 Q Alright, good.

18 Over the number of years, the last 30 plus years, how
19 much money have you earned testifying for the Gorayeb firm?

20 A I don't know.

21 Q More than a million dollars?

22 A I don't know.

23 Q More than \$2 million?

24 A It's the same answer, I don't know.

25 Q You don't know.

1 Now, you also said that at times, you get referrals
2 from the law firms such as Gorayeb's office, and they sent you
3 the films and times you get referrals from the doctors; right,
4 and they sent you the patient?

5 A Yes.

6 Q In this particular case, who sent you the Mr. Abreu
7 Perez, was it the Gorayeb firm or was it the doctor?

8 A Initially it was the doctor.

9 Q Which doctor?

10 A Dr. Grimm.

11 Q Had you ever met Dr. Grimm before?

12 A No, I've never met him.

13 Q Have you ever been retained in a case by the Gorayeb
14 firm where Dr. Grimm is also a doctor retained by the Gorayeb
15 firm?

16 A I don't know.

17 Q Have you ever been retained by the Gorayeb firm where
18 Dr. Kaplan is also retained by the Gorayeb firm?

19 A I know there have been doctors, I can't answer your
20 question, because I don't know if it's a case they have been
21 retained, I don't know, I don't know.

22 Q You don't know.

23 Have you also testified -- strike that.

24 Have you been retained by the Gorayeb firm where they
25 retained you, Dr. Kaplan, and Dr. Grimm and Dr. Weinstein?

1 A It's possible, I don't know, I don't know.

2 Q I'm going to show you a list of cases, a list of
3 plaintiffs, officer, I can't approach without your permission, I
4 want to see if this refreshes your memory, there are --

5 MR. KELLY: Objection. He's going to read a
6 number, if he's going to show him.

7 THE COURT: Overruled.

8 MR. KELLY: Exception.

9 Q I'm, just, I can't tell you the names, you can count
10 the two pages, you can count some of these plaintiffs, they're
11 from my office and I will represent to you for purposes of
12 hypothetical, it's where you, Dr. Kaplan, Dr. Grimm and
13 Dr. Weinstein have been retained by the Gorayeb firm; do you
14 recognize any of the names there?

15 MR. KELLY: Objection.

16 THE COURT: Overruled.

17 A No.

18 Q You don't recognize any of those names?

19 MR. KELLY: Objection.

20 THE COURT: Overruled.

21 A Correct.

22 Q How many cases do you count?

23 MR. KELLY: I'm going to object. It is not in
24 evidence, it's not refresh his recollection. He said it
25 doesn't.

1 A I think there are 61 names.

2 Q You don't remember any of those 61 people?

3 MR. KELLY: Objection.

4 THE COURT: Overruled.

5 A Correct.

6 Q Where all 40 are coincidentally retained by the same
7 firm?

8 A I don't know whose doing this case, prior cases, I
9 don't know.

10 Q Wait a minute.

11 A That is correct.

12 Q You just said that your reports from any MRIs you get,
13 and you get referrals from doctors; correct?

14 A Yeah.

15 Q Tell the jury where some of these reports that you
16 drafted, where are they going, to what doctors, you know the
17 doctors, don't play, go ahead, read them?

18 MR. KELLY: Objection.

19 THE COURT: Overruled.

20 A Excuse me, excuse me.

21 Q Read them?

22 A I will read the doctors, I'm more than happy to.

23 Q Good.

24 A It's the same answer.

25 THE COURT: Don't read it out loud read it to

1 yourself.

2 A Yes, I see doctors on my reports here.

3 Q So you see Dr. Kaplan?

4 A Yes.

5 Q Dr. Grimm maybe?

6 A Yes, I think that's his name.

7 Q Dr. Weinstein?

8 A Yes.

9 Q So there's a pattern here, right, you know when they're
10 on your files on your -- they're also seeing your patients you
11 know that, because you're issuing the reports to them unless
12 you're issuing them to the Gorayeb firm?

13 A Of course, I'm issuing reports to them, you asked me if
14 I know that they're testifying the same cases that I'm involved
15 with, and the answer is to that is I have no idea.

16 Q Okay. You do know that they're also involved in the
17 cases where you are, because sometimes you issue reports to
18 them?

19 A The answer is, I know that part, I don't know the
20 majority of what you're asking me, I have no idea whether a
21 doctor who sends me a case is involved in any way more than a
22 certain treatment that was given.

23 So the answer is the same, I don't know.

24 Q Okay, you don't know other than their involvement in
25 issuing reports then; correct?

1 A Correct.

2 Q You said that you testified five to six times per year;
3 right?

4 A On the average.

5 Q On the average, how many times have you testified on
6 cases for the Gorayeb firm?

7 A Again, I can't give you a number.

8 Q So let me just see this, I want to make sure we have
9 this right, you don't know how many cases the Gorayeb firm has
10 retained you on; correct, just yes or no?

11 A Correct, I can't give you a number, correct.

12 Q You don't know how many times you have testified for
13 them each year; correct?

14 A Correct.

15 Q You don't know when you testified for them where you
16 have Dr. Kaplan, Dr. Grimm and Dr. Weinstein all retained on the
17 same case, you don't know that either?

18 A Absolutely correct.

19 Q You don't know any of the 61 names on of the injured
20 alleged victims; you don't know any of them?

21 A That's right.

22 Q Yet, all 40 you have you were retained on those cases?

23 A I would have no way of knowing that.

24 MR. KELLY: Objection.

25 THE COURT: Overruled.

1 Q Again, let's see how this works, you said sometimes
2 Plaintiff's firm sends you patients; right, Gorayeb firm has
3 sent you, either their clients directly; correct?

4 A No, they -- no.

5 Q It's not, it's always from the doctors?

6 A No, they send me images that are already done.

7 Q That's what I meant.

8 A Oh.

9 Q They sent you the images, I stand corrected, I
10 apologize?

11 A Yes.

12 Q When the doctors sent you a referral, they send you the
13 patient?

14 A Yes.

15 Q But when you do cases like this, where you're involved
16 in personal injury lawsuits, you have the Gorayeb firm that
17 retains the clients; correct?

18 A Yes.

19 Q And then they will send you the films; correct?

20 A Yes.

21 Q And they will also retain, at least in some of these
22 cases that you're retained, Dr. Kaplan and Dr. Grimm?

23 A I wouldn't know, because I'm writing reports.

24 Q Okay.

25 A Six or seven years after I have actually seen the

1 patient.

2 Q I'm sorry, do you still work for the Gorayeb firm?

3 A I don't work for Gorayeb firm, I'm -- the patient was
4 sent to me in 2000, whatever, '17, '18, '20, I then get films
5 done that were done in the past, that I look at, within the past
6 year, six or seven years later, I don't know when I read the
7 MRIs, and send the report to the doctor, whether it's is,
8 there's a court issue or there's a legal issue or what, I just
9 don't know.

10 Q You just told this jury that you've never worked for
11 the Gorayeb firm?

12 A The word "work".

13 Q Worked for Gorayeb firm?

14 A If you want to define the word "work," I have been
15 compensated for doing image review. If you want to say that's
16 work, I'm very happy to agree with you that I've worked with
17 them.

18 Q Let's stick to my instruction yes or no; okay?

19 A Yes, yes.

20 Q You just told the jury that you've never worked for the
21 Gorayeb firm?

22 A I will amend that and say I did work, I see what you
23 mean. When I read an MRI, you consider that working for them
24 and getting paid by them, so I will agree with you.

25 Q I'm sorry, I'm sorry, how do you see what I mean?

1 MR. KELLY: It's a semantics argument, he's trying
2 to mislead the jury.

3 MR. ALVARADO: He just made a statement.

4 Q How do you see what I do?

5 A I'm changing the statement I work for them.

6 Q What is your statement now?

7 A I'm agreeing with you, I have worked for the Gorayeb
8 firm.

9 Q You have worked for the Gorayeb firm, because you've
10 testified in court that way?

11 A That's correct.

12 Q So what you just said before is wrong?

13 MR. KELLY: Objection.

14 THE COURT: Overruled.

15 Q It was wrong, you can say it, it was wrong?

16 MR. KELLY: Objection, to the word "work". I ask
17 the Court to take judicial notice --

18 THE COURT: One.

19 MR. KELLY: -- of legal definition of the word
20 "work" in New York.

21 THE COURT: Overruled, speak one at a time.

22 Counsel allow him to answer the question.

23 Q You were just wrong before, I'm going to ask it.

24 A Okay.

25 Q When you told the jury, that you never worked for the

1 Gorayeb firm, that was wrong?

2 A Yes, I interpreted your word differently now if you
3 want, I'm more than happy to say I worked them.

4 Q How do you interpret it?

5 MR. KELLY: Objection.

6 A I don't work for them the firm, no one has asked me if
7 I worked for them.

8 Q No one has asked you if you ever worked?

9 A I don't remember anyone asked for it I'm more than
10 happy to say I worked for them, to agree with you, I'm more than
11 happy.

12 Q I don't want you to agree, I want you to tell the jury.

13 MR. KELLY: Objection.

14 THE COURT: Overruled.

15 A I will say the truth, I worked for the Gorayeb firm.

16 Q You did?

17 A Yeah.

18 Q You've worked with them for how long?

19 A If you consider going to court for a case like this, I
20 guess it's been more than 20, 30 years.

21 Q You have worked, I want to make sure I get this right?

22 A Sure.

23 Q You have worked for Gorayeb firm for more than
24 30 years?

25 A Given what we've defined here, yes.

1 Q Are you on their payroll?

2 A I'm --

3 Q Are you on their payroll?

4 A What does "payroll" mean?

5 Q Do they pay you or give you a W-2, 1099, what do they
6 give you?

7 A I don't know the tax ramifications, but they do pay me,
8 the answer according to what you ask me, I guess I'm on their
9 payroll if they paid me, it's -- it has to be taxed.

10 Q Is it just yes or no or yes, you're on the payroll?

11 A I need to understand what you mean. I have never been
12 asked that question before.

13 Q You have never been asked if you worked for the Gorayeb
14 firm?

15 MR. KELLY: Objection, he's in the middle of answer
16 and he's cut off.

17 Q This gets better --

18 MR. KELLY: Your Honor, can we stop the editorial
19 speaking to the jury directly.

20 THE COURT: Counsel, one at a time, overruled.

21 Q Doctor, you have testified in this courthouse before,
22 haven't you?

23 A Yes.

24 Q How many times, do you know that?

25 A I don't --

1 Q You don't know that.

2 How many times have you testified for the Gorayeb firm
3 here?

4 A I don't know.

5 Q Did you testify in a matter of Saul Rosales versus
6 Zeida Realty Corp. and Dadamaya, Inc., Index Number 511147 of
7 2017.

8 A In -- I don't know.

9 Q Did you testify on November 8th of 2023?

10 A Sorry, I'm sorry, is there a question?

11 Q Did you testify on November 8th of 2023?

12 A I don't know.

13 Q Did you testify for Damon Velardi, an associate or
14 attorney with their firm?

15 A Have I testified for Damon Velardi, do I know him?

16 Q You know him; yes?

17 A Yes.

18 Q Do you remember testifying before Judge Larry Martin?

19 A No.

20 Q On page 55 --

21 MR. KELLY: Objection, this was subject to a motion
22 in limine, we're going to have to talk about it, Judge, you
23 already ruled.

24 THE COURT: What are you referring to, counsel?

25 MR. KELLY: You've already ruled.

1 MR. ALVARADO: A transcript where he testified for
2 that court.

3 MR. KELLY: You've already ruled.

4 MR. ALVARADO: Ruled on what?

5 MR. KELLY: We will have to approach.

6 (Whereupon, an off the record bench discussion was
7 held.)

8 THE COURT: Counsel, you may continue.

9 MR. ALVARADO: Thank you.

10 Q Before I ask you the question, doctor, about your prior
11 testimony about whether you work for Gorayeb, I gave you a list
12 of cases from my office where you were retained along with
13 Dr. Kaplan, Dr. Weinstein and Dr. Grimm by the Gorayeb firm; do
14 you still have that list?

15 A Yes.

16 Q You told this jury that you didn't recognize any of the
17 names on the list?

18 A Yes.

19 Q Why don't you read the first one?

20 MR. KELLY: Objection.

21 THE COURT: Read it to yourself.

22 Q Read it to yourself?

23 A Yes, I've read it.

24 Q Do you recognize that name?

25 A I do.

1 Q Who is it?

2 A The current patient from today.

3 Q Did you even read that list which I gave it to you?

4 A I did, I thought it was obvious we knew the patient
5 from today, I'm so sorry, if you thought it different, I'm
6 sorry.

7 Q Doctor, if you don't understand my questions, you let
8 me know?

9 A Okay.

10 Q Don't think of it differently, I'm not playing games,
11 I'm asking you straightforward question.

12 A There is one patient on this list I recognize.

13 Q Do you want to take a look at the list and see if there
14 are others?

15 A I don't.

16 Q Now that you missed the first one?

17 A Again let me say I didn't miss it, I thought it was
18 obvious, it was today's patient, as you wish, and I don't recall
19 any of the other patients on this list.

20 Q Okay. Just to refresh the jury's memory, you told the
21 jury, you didn't know any of them?

22 A Yes, I did say that ten minutes ago.

23 Q And that was not right, that was not correct?

24 A I made an assumption that was incorrect.

25 Q Okay. Now, I asked you whether you had been asked

1 before whether you worked for the Gorayeb firm; do you remember
2 that?

3 A Yes.

4 Q I asked you about this Rosales case?

5 A Sorry.

6 Q Rosales?

7 A Okay. Is that the one you mentioned ten minutes ago?

8 Q Where you were testifying for Mr. Velardi who you say
9 you know?

10 A Yes.

11 Q On page 55, line 18:

12 "QUESTION: No, no, I understand, but you've known
13 the Gorayeb law firm for quite some time?

14 ANSWER: For sure.

15 QUESTION: Like 25 years or so you've been working
16 for them?" And you said --

17 "ANSWER: Whatever the number is for sure."

18 A Yeah, I agree with you.

19 Q You've said that before?

20 A Yeah.

21 Q You understood the question then?

22 A I'm agreeing with that, and I'm agreeing today, yes.

23 Q Now, correct me if I'm wrong, right, when you, I looked
24 at your file, there's nothing in your file that tells you what
25 Mr. Abreu Perez's conditions was before he even came to see you

1 or before you saw the film, I'm sorry?

2 A Is that a question?

3 Q Yes.

4 A Yes.

5 Q There's nothing in your file that tells you what his
6 pre-accident health was before this accident?

7 A Right.

8 Q Do you remember when the date of this accident
9 occurred?

10 A Just one second. I think it was June 26th --
11 June 27th, 2017.

12 Q Did you ask either, I'm sorry -- strike that.

13 When you were referred Mr. Abreu Perez, who was the
14 doctor that referred him to you?

15 A Sorry, Dr. Grimm referred him to me on September --
16 September 20, 2017, and Dr. Kaplan referred him to me on
17 July 29, 2017.

18 Q Did you ever ask Dr. Grimm or Dr. Kaplan if there were
19 any MRIs, CAT scans or other diagnostic testing taken of Roberto
20 Abreu Perez before June 27, 2017?

21 A No.

22 Q Did you ever, I'm sorry -- strike that.

23 As I read your file, correct me if I'm wrong, there is
24 no mention of you ever getting a history from Mr. Abreu Perez;
25 correct?

1 A Yes, and the medical records that I have brought today,
2 yes.

3 Q Are there more medical records that you're not showing
4 me that would tell you that?

5 A You're the one who discussed that with me before, we
6 had a patient intake history sheet I don't have.

7 Q You didn't bring that, did you?

8 A No.

9 Q What would that tell you?

10 A He could have answered questions as to what his pain
11 was like or whether he had metal in his body, whether he had
12 present surgeries.

13 Q Or what his health was?

14 A I'm not sure that was a question.

15 Q You didn't bring that with you today?

16 A That is correct.

17 Q Doctor, there were other radiologists, correct, that
18 took MRIs and CAT scans and X-rays of Mr. Abreu Perez besides
19 you?

20 A Correct, if that's the question, yes.

21 Q That's the question.

22 A Yes.

23 Q I don't see those MRIs, reports or CAT scans or X-rays
24 in your file.

25 A Yes.

1 Q Why?

2 A It's not my file.

3 Q Did you ever ask if there were any other doctors that
4 took MRIs, CAT scans or X-rays of Mr. Abreu Perez besides you?

5 A Sometimes I'm sent -- sometimes I'm not -- I read
6 whatever I'm sent.

7 Q Correct me if I'm wrong, would that have been something
8 you should have known, you want to know if he was seeing other
9 radiologists who were taking films of the same body parts as
10 you?

11 A No, that wouldn't make a difference.

12 Q That would not make a difference?

13 A In other words, you're asking me, to be clear, if I
14 reviewed imaging study on a patient that was done some time
15 earlier, that a different radiologist read at some point earlier
16 in time, whether I need that radiologist's report to review the
17 image that I was sent, and the answer is no.

18 Q Would it have been important for you to understand or
19 at least talk to that radiologist about his findings or her
20 findings?

21 A No.

22 Q Do you know who Dr. Sherman is?

23 A No.

24 Q So you don't know, you don't have any of his reports
25 here; correct?

1 A Correct.

2 Q Brian, the cervical spine film from June 20, 2017, the
3 report.

4 MR. KELLY: Objection. What is he going to show?

5 MR. ALVARADO: The report that's apparently in
6 evidence, Kolb records that he has in his files from
7 9/20/2017.

8 MR. KELLY: It's Dr. Kolb's records, I don't have
9 an objection, they're supposed to tell me before they show
10 it on the screen.

11 THE COURT: They did.

12 MR. KELLY: He cited a date, he didn't say where it
13 was from or who it was from.

14 THE COURT: You can show it.

15 Q You have your report from 9/20/2017, it is a cervical
16 spine film taken in your office?

17 A Yes.

18 Q Now, according to this report, it was requested by
19 Dr. Grimm?

20 A Correct.

21 Q And first thing you have here is indication "status
22 post trauma"; you knew he was allegedly involved in some trauma?

23 A Correct.

24 Q By the way, by the way, before I continue with this,
25 are you aware of any other accidents that Mr. Abreu Perez may

1 have been involved in?

2 A No.

3 Q You're not aware that he was involved in a motor
4 vehicle accident in December of 2022?

5 A No.

6 Q Okay, let's go through your findings real quick, you
7 made sure to tell the jury about nerve roots and the thecal sac,
8 and I had wanted to make sure I read this correctly.

9 So this is the first film that, this is you doing it
10 right you're interpreting it?

11 A Yes.

12 Q So C3, you see that no disc, no bulge?

13 A No disc bulge or herniation.

14 Q It says "neural foramen and exiting nerve roots are
15 remarkable (sic.)"; what does that mean?

16 A Unremarkable.

17 Q Unremarkable, thank you for correcting me,
18 unremarkable?

19 A Means they're normal.

20 Q And C3-C4, same thing?

21 A Yes.

22 Q At C4-C5 the same thing?

23 A Yes.

24 Q At C6-C7, you read, "posterior disc herniation";
25 correct?

1 A Yes.

2 Q "Impinging on the thecal sac"; correct?

3 A Yes.

4 Q "Narrowing the left greater than right neural foramen"?

5 A Left greater than right.

6 Q Yes, my understanding is this could have been
7 preexisting as well; correct?

8 A Well, I can't say no to that, it could have been.

9 Q Why don't you say the truth, it could have been
10 preexisting?

11 MR. KELLY: Objection, he's in the middle of
12 answer.

13 A Yes, it could have been -- this could have been
14 preexisting, yes.

15 Q 100 percent?

16 A Yes.

17 Q Yes.

18 Now, let's just read, "the discs are normal in height";
19 what do you mean?

20 A The height of the discs are all normal and equal.

21 Q "The narrow (sic.) signal and cord signal are normal";
22 what does that mean?

23 A Marrow, marrow.

24 Q The "marrow signal," sorry, I should have my glasses
25 on.

1 A It means that the bone and spinal cord are normal
2 signal, not abnormality.

3 Q So based on this film, there's nothing touching or
4 impinging upon the spinal cord?

5 A Nothing touching, I would agree with that.

6 Q Yes.

7 And it says "there's no fracture or listhesis."

8 What is listhesis?

9 A Slippage of bone one on top of the other.

10 Q "And cranial cervical junction unremarkable"; what does
11 that mean?

12 A Base of the brain is normal.

13 Q I will ask you straight up, is this something you would
14 expect to see in a 45-year-old man who is a construction worker?

15 A I don't know what the word "expect" means, a
16 45-year-old can have this, or cannot have this, or more severe
17 or less severe.

18 Q Right, right, can or cannot, but this could be all
19 preexisting conditions, just the herniation at C6-7; correct,
20 that's the only condition he's got?

21 A Yeah, yeah.

22 Q Is there any sign of degeneration at that level?

23 A No, not on the MRI.

24 Q Now, the -- when you say "left greater than right
25 foraminal narrowing," could that also be preexisting?

1 A Yes.

2 Q Is there any edema here?

3 A No.

4 Q What is edema?

5 A Soft tissue swelling.

6 Q Is that something you would expect to see that would be
7 dramatically reduced?

8 A Three months after a trauma, probably unlikely, but
9 everybody is an individual.

10 Q But it could be there?

11 A Anything could be anywhere, again, three months after a
12 trauma, unlikely.

13 Q Now, that narrowing of foraminal left greater than
14 right, you said it could be preexisting, could that be from
15 degenerative disc disease?

16 A I didn't see degenerative disc disease on here.

17 Q It could have arthritis?

18 A Again, anything could be anything, I can't give you --

19 Q It could be congenital?

20 A Congenital?

21 Q Yes.

22 A I mean congenital, one level with a disc herniation,
23 that would be pretty unlikely.

24 Q Do you know a Dr. David Milbauer?

25 A No.

1 Q Do you know Lenox Hill Radiology?

2 A I do.

3 Q Do you know if they did any cervical spine MRI films?

4 A I don't know.

5 Q Do you know if Dr. Weinstein, who you know is in this
6 case, was provided with any films from them?

7 A I don't know.

8 Q Brian, the lumbar film July 29th, lumbar spine film
9 report -- sorry, from July 29, 2017?

10 A Yes.

11 Q Tell me when you're there?

12 A I'm sorry.

13 Q Tell me when you're there?

14 A I'm there.

15 Q I forgot you have the script.

16 Now, again, this was taken by you and you sent it to
17 Dr. Kaplan?

18 A Correct.

19 Q Was this the first time, as far as your records show,
20 that you were actually seeing a film from the lumbar spine with
21 respect to Mr. Abreu Perez?

22 A Yes.

23 Q If we go through your findings, you saw a small sub --
24 how do you pronounce that word?

25 A Subligamentous.

25 THE COURT: Hold on, one moment, counsel.

1 Q I'm looking at MRI lumbar spine, 7/29/2017.

2 MR. KELLY: Exhibit number?

3 THE COURT: What Exhibit Number?

4 MR. ALVARADO: I will, 21.

5 THE COURT: 21, okay.

6 Q Now, doctor, when a disc is degenerated, do we see
7 something different on the film?

8 A You can.

9 Q With respect to that disc, what do you see?

10 A I went through it before, I will repeat, you get a loss
11 of water within the disc, that's the first thing that happens
12 which is called desiccation, it dries out.

13 The second thing that happens the space narrows down,
14 there's not, again, water as a shock absorber, and number three,
15 the third phase is osteophytes or bone spurs.

16 Q Here is my question to you, the disc in the lumbar
17 spine, you've all see them with white, right, with soft white
18 shading?

19 A Yes.

20 Q What does that mean?

21 A Water in the disc.

22 Q Water; the disc at L5-S1, is not completely shaded,
23 why?

24 A It's not completely what?

25 Q Not completely shaded white.

1 A Shaded white.

2 Q Yes.

3 A Yes, it's on the bottom of the coil, you can see that
4 depending on the patient's positioning; in other words, first of
5 all, it's normal, let me say I disagree with you about the
6 shading.

7 Q Okay.

8 A But as you get lower down as the coil, bottom of the
9 coil you will have differences in signal, you have to take that
10 into account, that's a normal looking disc.

11 Q That is a normal looking disc?

12 A Yes.

13 Q So if Dr. Sherman came here and said that disc is
14 dehydrated, you would disagree with him?

15 A Yeah.

16 MR. KELLY: Objection.

17 THE COURT: Overruled.

18 A I would disagree with that.

19 Q You would disagree with him?

20 A Yes.

21 Q I get it.

22 A Yeah.

23 Q You made me forget my question I was going to ask you,
24 I forgot the question. I will come back to it.

25 Finishing up, after L4-L5 you have L3-L4, L2-L3, and

1 L1-L2, again, doctor, no bulges, no herniations; correct?

2 A Yes.

3 Q Neural foramen and exiting nerve roots are
4 unremarkable?

5 A Correct.

6 Q Correct, so you even say at the bottom there, the discs
7 are of normal height?

8 A Yes, yes.

9 Q No fracture, no listhesis?

10 A Correct.

11 Q You even say there that the marrow signal, and I can't
12 read your typing but "are unremarkable"?

13 A "Conus medullaris."

14 Q Which means?

15 A The bottom of the spinal cord.

16 Q So it's all normal?

17 A Those areas that you mentioned are all normal, yes,
18 they are.

19 Q That's your summary at the bottom; isn't that right?

20 A This is there normal and abnormal. I agree everything
21 you just said is normal is normal.

22 Q Again, there's no signs of edema here in your report?

23 A Right.

24 Q Brian, the next report is 3/29/2018, lumbar spine film,
25 if you have it.

1 Doctor, I have to give directions, doctor, did you hear
2 me?

3 A 3/29/2018?

4 Q Yes.

5 Do you have it there?

6 A That's not my report.

7 THE COURT: Take that off.

8 MR. ALVARADO: Brian, do you want me to show it to
9 you? Don't put it up until you're sure, let's not do that.

10 (Pause in the proceedings.)

11 MR. ALVARADO: While you're doing that, can I ask
12 the witness a question?

13 THE COURT: Yes, that's fine.

14 Q Now, Mr. Kelly asked you about films, what you see on
15 films is trauma.

16 Is it important for you to know when one of your, I
17 will call it patient, has sustained trauma, the date of the
18 trauma; correct?

19 A No.

20 Q Not at all?

21 A No.

22 Q It doesn't matter in your mind if you have been
23 involved in one accident, two accident or more?

24 A Correct, I'm reading what I see on the film, correct.

25 Q You can't say what's traumatically induced based on

1 films, you would need more, a history; right?

2 A Yes.

3 Q And anything else more than that; yeah?

4 A No.

5 Q Diagnostic testing maybe, maybe clinical test; yes?

6 A Okay, yes.

7 MR. ALVARADO: Brian, do you have it, I can't hear
8 you. You don't have it.

9 Q The lumbar spine film from 3/29/18, I can't show it to
10 the jury, I know you have it.

11 A Yes.

12 Q Actually, it is an X-ray, excuse me?

13 A Okay, hold on.

14 Q Sorry about that, Brian, do you have it, don't put it
15 up until you have it.

16 You're there?

17 A I am.

18 Q And if we get it up, put it up.

19 There again, oh, I'm sorry, you told us before that the
20 doctors send you the patients and that they were the ones that
21 request the films, but in this particular report, you put exam
22 requested by Gorayeb?

23 A Jeffrey Kaplan.

24 Q No, nope, nope?

25 THE COURT: No.

1 Q I'm looking at X-ray of 3/29.

2 A Yes, 3/29, that was one of the many films that were
3 sent to me by Gorayeb law firm to look at, yes.

4 Q So they requested that you, not the doctor, they did?

5 A They requested me that I review films that were done
6 six years earlier, yes, correct.

7 Q And according to this, you said there's an L4-5 now you
8 see osteophytes; correct.

9 A Yes.

10 Q Explain to the jury what osteophytes mean?

11 A They're bone spurs.

12 Q They're formed because?

13 A They're formed because there's arthritis, degeneration.

14 Q And then you, in fact, that's what you take from this
15 X-ray; correct?

16 A Yes.

17 Q Did you see any osteophytes there at L5-S1?

18 A I saw the osteophytes are from the bone, so they were
19 at L4 and L5.

20 Q And how about the next one, L5-S1, the next one down?

21 A Again, it's not in between the two, there's nothing at
22 S1, there's only L4 and L5.

23 MR. ALVARADO: Do you have the MRI from 3/29/2018
24 do you have it, Brian?

25 What do you want me to do, I have a few more.

Dr. Kolb - Plaintiff - Cross/Mr Alvarado

1 THE COURT: Alright, members of the jury.

2 MR. ALVARADO: I didn't realize the time.

3 THE COURT: We're going to break here for lunch,
4 I'm going to ask everyone to be back by 2:30.

5 COURT OFFICER: All rise, jury exiting.

6 (Whereupon, the jury exited the courtroom.)

7 THE COURT: Doctor, you can step down, but don't
8 speak to -- don't speak to Mr. Kelly during the lunch about
9 your testimony in this case.

10 THE WITNESS: I won't.

11 THE COURT: Thank you, you can talk to him --

12 THE WITNESS: No, I won't even talk to him.

13 THE COURT: Alright, 2:30.

14 (Whereupon, Dr. Kolb exited the witness stand.)

15 (Whereupon, a lunch break was taken.)

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

17 (Whereupon, Dr. Kolb resumed the witness stand.)

18 COURT OFFICER: All rise, the Honorable Lisa Lewis
19 presiding.

20 THE COURT: You can take a seat everyone.

21 MR. JOHNSON: Your Honor, we want so make a quick
22 motion on the record outside the presence of the jury.

23 THE COURT: If it's quick.

24 MR. JOHNSON: As we talked about back in chambers
25 earlier today, I think it was the fourth time that

1 Plaintiff's counsel spoke to in front of the jury about our
2 failure to take responsibility and our failure to adhere to
3 safety regulations under the Labor Law, which in our
4 opinion, violated our constitutional right to a fair and
5 impartial trial, you know, in New York and country-wide case
6 law is pretty uniform that you can't talk about liability on
7 a damages trial, nor can you imply that a Defendant failed
8 to take responsibility.

9 We made a motion in limine about this, that he
10 called an advisory opinion, which is no longer an advisory
11 opinion. I think you've ruled at least twice now he cannot
12 talk about failure to take safety, because that phase of the
13 trial is over. All he can say is liability has been
14 established. I think he's violated that Order From the
15 Court twice.

16 So, in that regard, we're making a motion for a
17 mistrial.

18 MR. KELLY: I didn't say anything about failure to
19 take responsibility this morning, I didn't violate your
20 order in any way. It was qualifying the witness under the
21 Frye test whether he has experience in managing cases of the
22 Plaintiff's kind.

23 The reference was to breach of 240, or unsafe
24 workplace, there wasn't any specifics about their failure to
25 tie back the ladder or anything else raised in front of the

1 jury. The jury charge is that you can talk about some
2 background material with respect to the happening of the
3 accident in -- in setting the tone for the case.

4 I completely disagree with that characterization,
5 what was said, I didn't say anything about their failure to
6 take responsibility and the law in New York is, I can dare
7 say that they failed, they didn't take responsibility. You
8 didn't rule on that, you reserved on that based on how the
9 trial goes.

10 THE COURT: With respect to counsel's questioning,
11 there was questioning involving unsafe work conditions which
12 was sustained and in the back, counsel did represent that he
13 was framing that as a hypothetical, and counsel then came
14 back on the record and rephrased question, and the Court
15 stated in the back the liability has been established, there
16 will be no mention of unsafe workplace, or what is the other
17 thing, oh, a violation of 240.

18 So the motion for a mistrial is denied at this
19 time.

20 MR. JOHNSON: Thank you.

21 COURT OFFICER: All rise, jury entering.

22 (Whereupon, the jury entered the courtroom.)

23 MR. ALVARADO: Thank you, Dr. Kolb, I don't think I
24 have too much for more you.

25 Q Did you know that the Plaintiff was seen first after

1 this accident at New York Presbyterian Hospital?

2 A Did I know?

3 Q Yes.

4 A No.

5 Q So is it fair to say you haven't seen any films from
6 there?

7 A I only have films I reported. If I haven't reported or
8 brought them there, I have not seen the films.

9 Q What does a CAT scan show?

10 A A CAT scan of what?

11 Q Of the cervical spine.

12 A On what date?

13 Q Taken at the hospital right after it occurred.

14 A What's the date?

15 Q 6/27/17, I don't know if you have it, it's from New
16 York Presbyterian, I don't know if you have it?

17 A I can tell you if I have a date and CAT scan of the
18 cervical spine, I have a CAT scan of the -- dated 6/27/2017.

19 Q From where?

20 A I didn't write in any report where it was done, I gave
21 the date and the body part and the patient's neck.

22 Q Did you ever, you said you never looked at that CT
23 scan; right?

24 A I looked at it, because I have a report.

25 Q Okay, what did you find?

1 A I found 2-3, 3-4, 4-5, 5-6 all normal, 6-7 there are
2 beam hardy artifacts, which limited evaluation of the C6-7
3 level, and that was my impression was examination is limited to
4 thin section axial views of the cervical spine. Beam hardy
5 artifacts at C6-7 limit evaluation at this level.

6 Q Can I see that, please?

7 A Yes.

8 Q This is part of your file?

9 A Yes.

10 Q You wrote here -- strike that.

11 Reading your report, there's no objective sign that he
12 injured his cervical spine after this accident; correct?

13 A Well, it's limited, it's a limited scan, I can't tell
14 you for sure.

15 Q The one thing you didn't write in is what the doctor at
16 the hospital wrote in, do you know what Keith Hentel?

17 A No.

18 Q Can you read the last sentence above his name that he
19 wrote?

20 A "No evidence of acute cervical spine injury."

21 Q What does that mean to you?

22 A It means no evidence of acute cervical spine injury.

23 Q I mean there's no evidence that he injured his spine
24 here, objectively as a result of this accident?

25 A That's what it says, I'm reading it like you are, yeah.

1 Q But you didn't put that in your report?

2 A Can I see my report?

3 Q (Handing.)

4 A So it doesn't say there was any acute -- you want me
5 to --

6 Q You --

7 A I'm sorry, your question is why I did I write no
8 evidence of acute cervical spine injury in my report?

9 Q That wasn't my question. My question was you didn't
10 write that in your report?

11 A Right, so you're asking me why I didn't write no
12 evidence of acute cervical spine injury.

13 Q I didn't say why, you keep adding words to my question,
14 I said you didn't include that statement from Dr. Hentel, who
15 took that at New York Presbyterian, you didn't include that
16 statement, there was no evidence of cervical spine injury -- I'm
17 sorry, acute cervical spine injury?

18 A I will ask you the same thing, are you asking me --

19 THE COURT: No, no, no, he's just asking.

20 THE WITNESS: I don't understand.

21 THE COURT: He's just asking you a yes or no is the
22 sentence it your report.

23 THE WITNESS: Sorry.

24 THE COURT: He just wants to know if the sentence
25 is in your report?

1 THE WITNESS: That particular sentence, those six
2 words?

3 THE COURT: Yes.

4 THE WITNESS: Not in my report, you have to
5 actually read my report and you would see, my report is
6 here.

7 Q I understand that.

8 A Yeah.

9 Q What does "acute" mean?

10 A Recent.

11 Q So there's no evidence of recent spine injury,
12 cervical spine injury, isn't that what Dr. Hentel wrote; yes or
13 no?

14 A Yes, I would agree with that.

15 Q You agree that's what he wrote or do you agree there's
16 no evidence in there of recent cervical spine injury?

17 A I agree that's what he wrote, and I agree up until
18 C6-7, C6-7 is limited, that's what he's in my report.

19 Q I see.

20 A I can't go any further than that.

21 Q I see.

22 Do you have the lumbar spine MRI, 3/29/18, that's where
23 we left off this morning, MRI of the lumbar spine, perfect,
24 thank you.

25 Now, this is your MRI dated March 29, 2018, again, I

1 guess you did this MRI at the request not of another doctor, but
2 of the lawyers your employers?

3 A Yes, as you say, correct.

4 Q As we read the MRI together, the only thing you found
5 was, again, a shallow posterior disc herniation, mildly
6 impinging upon the anterior epidural fat?

7 A Yes.

8 Q Neural foramen, the spacing?

9 A Neural foramen.

10 Q Are unremarkable?

11 A Yes.

12 Q Normal?

13 A The neural foramen are normal, yes.

14 Q As I go through these findings at the various sites,
15 you have L4-L5, make it very quick, doctor, shallow posterior
16 disc bulge; correct?

17 A Yes.

18 Q Impinging on, that's correct?

19 A Yes.

20 Q Again, the neural foramen are normal, unremarkable?

21 A Yes.

22 Q At L3-L4, L2-L3, and L1-L2, your findings are all the
23 same, no disc bulge, no herniation, the nerve roots are
24 unremarkable?

25 A Yes.

1 Q As I read your report, you actually say there's no
2 impingement on the nerve roots at all?

3 A Yeah, I don't get -- I don't see any nerve root
4 impingement on this report or on the films.

5 Q Okay. X-ray of the lumbar spine 10/23/19, if you have
6 it.

7 Doctor, again, showing you, this is your report;
8 correct?

9 A Yes, it is.

10 Q Again, done at the request of your employer, Gorayeb &
11 Associates?

12 A Yes.

13 Q Not at the request of the doctor?

14 A Very correct.

15 Q The only thing you have found here who is "mild
16 hypotrophic changes at the anterior L4-L5 levels"; correct?

17 A Yes.

18 Q Mild changes means what?

19 A Arthritis, degenerative changes.

20 Q So you're already starting to see degenerative changes
21 here?

22 A Yes, yes.

23 Q I will try to go through these quicker, Brian, L-spine
24 1/24/20.

25 Again, doctor, there is this a report done at the

1 request of your employer, for Gorayeb & Associates?

2 A As you say.

3 Q Yes.

4 A Yes, as you say.

5 Q And I will make it quickly, we don't have to go through
6 everything, the jury can see it, again, there's no impingement
7 on the nerve roots at any level here; right?

8 A That is correct.

9 Q And this is how many months post-accident?

10 A Well, the accident was 2017.

11 Q Yes.

12 A So three years, give or take.

13 Q Yes, going on three years.

14 6/8/21, Brian, X-ray of the lumbar spine.

15 Again, just so we go quickly, this is another MRI that
16 you did of the X-ray of the -- sorry, this is an X-ray of the
17 lumbar spine done at the request of Gorayeb & Associates, your
18 employer, dated, the exam is 6/8/21?

19 A The exam wasn't done at the request of Gorayeb, my
20 employer. The interpretation of an X-ray that was already done
21 was asked of me by Gorayeb & Associates.

22 Q I stand corrected. Again, you see the same things you
23 reported before, just minimal hypothetical changes at L4-5?

24 A Yes.

25 Q Degenerative conditions?

1 A Yes.

2 Q Brian, 12/1/22, L-spine, again, this is an X-ray that
3 Gorayeb & Associates asked you to review that was done back on
4 December 1st of 2022?

5 A No, this was a patient sent to me by a doctor, for me
6 to actually do the report, to do the films and interpret them.

7 Q Are you looking at the same thing I am?

8 A 12/1/2022, you're looking at the X-ray, I'm looking at
9 the CAT scan.

10 Q Yes.

11 A Same date X-ray.

12 Q Yes, again, your diagnosing, your findings haven't
13 changed, right, mild degenerative changes at L4-5/L5-S1?

14 A Yes.

15 Q All degenerative conditions?

16 A Yes.

17 Q So assume for purposes of my question that the
18 Plaintiff had an accident on December 27th of 2022 which is
19 after this accident.

20 Based on this film, at L4-5 and L5-S1, all he showed
21 were degenerative changes; correct?

22 A Can you repeat it?

23 Q Do you want me to repeat it or I'll ask it again?

24 MR. ALVARADO: I will ask it again if that's fine,
25 Judge.

1 THE COURT: Yes.

2 Q Assume for purposes of my question the Plaintiff was
3 involved in a motor vehicle accident on December 27, 2022, and
4 based on this film that was dated 12/1/22, the conditions in the
5 lumbar spine that you saw were only degenerative conditions at
6 L4-5 and L5-S1 based on this film?

7 A I don't understand the question. He had an accident
8 three weeks after, and you're asking me a question about the
9 film that was done three weeks before?

10 Q That's correct, I'm asking you based on this film.

11 A Yeah.

12 Q The only condition that he saw on the lumbar spine at
13 L4-5/L5-S1 were all degenerative conditions?

14 A On an X-ray, not CAT scan or MRI. You mean the X-ray.

15 Q That's not my question.

16 I said on this, based on your report based on your
17 review of this, based on your review of the X-rays done?

18 A Yes, that's correct, just on the X-ray, you're right.

19 Q Yes, correct.

20 A Right.

21 Q Doctor, just yes or no, have you ever intentionally
22 only given positive findings of diagnostic tests that you've
23 done and eliminated and not included any degenerative findings?

24 A No, not that I'm aware of.

25 MR. ALVARADO: Judge, if I can have ten seconds, I

1 think I'm done.

2 (Pause in the proceedings.)

3 MR. ALVARADO: I have nothing further.

4 THE COURT: Counsel, redirect.

5 MR. KELLY: I'm sorry, are you --

6 MR. RAMIN: No cross from Third-Party Defendant,
7 thank you, your Honor.

8 THE COURT: Redirect.

9 REDIRECT EXAMINATION BY

10 MR. KELLY:

11 Q So doctor, we heard a lot about X-rays.

12 Do the X-rays show the soft tissue injury that
13 Mr. Abreu Perez had?

14 A No.

15 Q So is any of that questioning about the X-rays, the
16 X-rays, the X-rays, change your opinion of anything that you
17 gave on direct examination?

18 A No.

19 Q Doctor, let's talk about the semantic argument that
20 Defense Counsel wanted to say that you work for the Gorayeb &
21 Associates.

22 Do you have an office in our office?

23 A No.

24 Q Does my firm control the means and methods of your
25 work?

1 A No.

2 Q Does my firm annotate or amend your professional
3 opinion in any way?

4 MR. ALVARADO: Note my objection to the leading
5 questions, you can ask, they're leading.

6 MR. KELLY: They're elements to work in New York,
7 Judge, I will ask each elements as set up by the Court of
8 Appeals.

9 THE COURT: Overruled.

10 Q Do we provide you an office, do we give you a weekly
11 pay?

12 A No.

13 Q Do we set your sick time and vacation time?

14 A No.

15 Q Do we control the conditions of your professional
16 service?

17 A No.

18 Q Can we hire and fire you from the practice radiology?

19 A No.

20 Q Do we occasionally retain you for your opinion as a
21 radiologist?

22 A Yes.

23 Q Is that opinion independently developed?

24 A Yes.

25 Q So when we say "work for," it's misleading to say you

1 work for us; is it not?

2 A I thought it was before I answered his question.

3 Q Withdrawn.

4 Do you get a W-2?

5 A I don't know, I get whatever taxes I pay, I get a
6 statement at the end of the year saying you were paid, and you
7 have to pay tax.

8 Q You don't get an W-2, an employee statement?

9 A I'm not an employee, I don't get an W-2 employee
10 statement.

11 Q In no way, shape or form are you an employee of the
12 Gorayeb & Associates; is that correct?

13 MR. ALVARADO: Note my objection.

14 THE COURT: Sustained as to that question.

15 Q Are you an employee of the Gorayeb & Associates?

16 A No.

17 Q You just do work for us sometimes?

18 MR. ALVARADO: Again, note my objection to leading.

19 MR. KELLY: He went over this, this is his --

20 THE COURT: Rephrase, counsel.

21 MR. KELLY: Can I have it read back?

22 THE COURT: Read it back.

23 (Whereupon, the question was read back by the Court
24 Reporter.)

25 MR. KELLY: Is that the objection, you just do work

1 for us sometimes?

2 THE COURT: That's the objection, counsel.

3 MR. ALVARADO: Yes, leading, leading.

4 THE COURT: Rephrase.

5 Q Do you do work for us sometimes?

6 A Yes.

7 Q And is the nature of your work examining films and
8 testifying?

9 A Yes.

10 MR. ALVARADO: Leading objection.

11 THE COURT: Overruled.

12 Q So you wouldn't expect the X-rays to show the disc
13 herniations or the disc bulges; correct?

14 MR. ALVARADO: Note my objection, leading.

15 THE COURT: Sustained, rephrase.

16 Q Would you expect the X-rays to show disc herniations
17 and soft tissue injury?

18 MR. ALVARADO: Objection, leading.

19 MR. KELLY: I asked when he would expect it.

20 THE COURT: Rephrase the question.

21 Q What do the X-rays show?

22 A As I said, they show bones, for the most, part they
23 show bones.

24 Q And is the MRI -- well, what is the MRI show?

25 A It shows all of the soft tissue structures, the discs,

1 the ligaments, the muscles, arteries, veins, tendons.

2 Q Now, now you were questioned by counsel about a guy
3 name doctor Dr. Sherman; do you recall that?

4 A Yes.

5 Q Dr. Sherman was retained by the Defendant to provide a
6 defense in this case?

7 A Oh, okay.

8 Q And Dr. Sherman rendered a report in which he finds
9 there's a disc bulge at C6-7 and indentation on the thecal sac.
10 Is that a positive finding?

11 MR. ALVARADO: Objection, I asked if he reviewed
12 anything brought in by Dr. Sherman, so this is, and it's not
13 in his 3101 (d), so this is the first time again eliciting
14 such an opinion, maybe, as you say, put me on notice.

15 THE COURT: Sustained.

16 MR. KELLY: Judge, it's developed by the Defendant
17 in cross-examination, it's unfair for me not to rehabilitate
18 it now.

19 MR. ALVARADO: I didn't.

20 MR. KELLY: This is, by the way --

21 THE COURT: It's beyond the scope.

22 MR. KELLY: It is their expert disclosure.

23 THE COURT: It's beyond the scope.

24 MR. KELLY: Sure, under the rules of evidence, it's
25 self-proving and self-authenticating, and they served it on

1 him.

2 THE COURT: You can't ask him that question, beyond
3 the scope.

4 MR. KELLY: Exception.

5 Q So if a defense doctor was retained and found positive
6 findings in the neck and back, would that be consistent with
7 your findings?

8 MR. ALVARADO: Note my objection, same objection.

9 MR. KELLY: Theoretically, Judge.

10 Q Hypothetically, if they got someone to defend this
11 case, not provide treatment but defend this case, and that
12 person found a disc bulge with imposition on the thecal sac; is
13 that a positive finding?

14 MR. ALVARADO: Note my objection.

15 THE COURT: Sustained, that's the same question.

16 MR. KELLY: Judge, can we approach on this?

17 That's, he opened the door to this.

18 THE COURT: What is the basis of your objection?

19 MR. ALVARADO: Beyond the scope, he didn't even
20 review -- I asked him had you ever reviewed anything of
21 Dr. Sherman, he said no, that was the only question I ever
22 asked.

23 If he's going to open this door, he should have put
24 me on notice of that Number one, he didn't.

25 MR. KELLY: Judge, he's on notice of it, because he

1 served me with Dr. Sherman report.

2 THE COURT: It's beyond the scope.

3 MR. KELLY: Exception.

4 Q Just generally, is a disc herniation -- withdrawn.

5 Is a disc bulge a positive finding on an MRI?

6 A Yes.

7 Q And indentation on the thecal sac, remind us again,
8 what implication that may have for the patient?

9 A That causes pressure to the spinal cord and to
10 nerve roots, and could cause the patient to have symptoms.

11 Q Okay, it was raised on cross-examination that there's
12 no actual touching or imposition on the spinal cord; is that
13 correct in this case?

14 A Yes.

15 Q Does that matter in this case?

16 A I'm not sure it matters, but again, to repeat, it
17 causes abnormal pressure on the -- it's a closed system. And so
18 if you push a disc herniation or even a disc bulge into the
19 thecal sac, it causes pressure where pressure shouldn't be and
20 that pressure is transmitted to the spinal cord, spinal cord,
21 and nerve roots, and the patient may have symptoms.

22 Q Doctor, you were asked a lot about a number of times
23 you've testified and all of this different -- so over the last,
24 so you were given a list of 61 case names over 30 years, that's
25 2.003 cases every year; is that correct? You don't have to do

1 the math?

2 A So it's that's two times 60 is 120 over 30 years, yeah,
3 you're actually right, two cases per year.

4 Q Counsel threw out a number and said a million dollars
5 over 30 years, that's \$33,333, right, every year?

6 A Yes.

7 MR. KELLY: I have nothing further for you, doctor,
8 thank you.

9 MR. ALVARADO: Recross.

10 RECROSS EXAMINATION BY

11 MR. ALVARADO:

12 Q Just a few questions, doctor.

13 Let me ask you something, if you are not employed by
14 the Gorayeb & Associates, why on earth would you testify here in
15 Supreme Court before a judge, like Judge Lewis and testify that
16 you work for Gorayeb firm; why would you do that?

17 MR. KELLY: Objection, it's semantics argument,
18 we've proved it.

19 THE COURT: Overruled.

20 Q Why?

21 A Again, we're using the word "work" and "employed," it
22 sounds like there's a legal definition to it. I don't know what
23 the legal definition is.

24 I was asked to give a review. I'm asked to give
25 reviews. Every once in a while I go to court, my office gets

1 paid for being here, that's the most I can answer you in terms
2 of employed, work, I don't know legal definitions. I mean I
3 can't answer any better than that, I mean.

4 Q Are you confused, are you telling me, you seem like a
5 very smart man, are you confused by the question who do you work
6 for?

7 A I'm confused that we're talking about this for
8 20 minutes.

9 MR. KELLY: Objection to the form.

10 A I don't understand anymore than that, he has work
11 definitions that don't apply to me. You're asking me
12 work/employed, what does that mean? I told you that --

13 Q I don't care about your criticism.

14 MR. KELLY: He's answering.

15 THE COURT: One at a time.

16 A I told you I get reimbursed, I told you the amounts. I
17 don't know what else I can say to you.

18 Q So you're --

19 A I will just say yes to you.

20 Q Again, the reason you said that before trial is a
21 matter of semantics?

22 A Said what before trial?

23 Q That you worked for the Gorayeb firm?

24 A I don't under --

25 Q If you don't know, you don't know?

1 A I'm colloquial, in terms of work and employment, I
2 don't know definitions legally that I'm being confronted with.
3 I'm telling you the facts, the facts are I'm here.

4 Q Okay.

5 A The fact I'm getting reimbursed for being here, and
6 facts are I read this and I'm here. The fact I work and I'm
7 employed for them, then I am. If it doesn't, then I'm not. I
8 don't know what else to say to you.

9 Q Well, you seem to answer when Mr. Kelly asked you do
10 you get an W-2, do you have an office; you understood those
11 questions?

12 A You keep asking me the same questions, I will give you
13 the answers, that's fine.

14 Q Here is my other question.

15 A Yeah.

16 Q On recross -- redirect you said you were occasionally
17 retained by the Gorayeb & Associates; correct?

18 A I think that's what he asked me, yes.

19 Q How often, I asked you that on cross?

20 A I don't know the exact number. I told you that I come
21 to court five to six times per year in general, how many of
22 those, I don't know, you gave me --

23 Q And how many of those were --

24 MR. KELLY: Objection, he's in the middle of
25 answer, Judge.

1 THE COURT: One moment, one moment.

2 A I don't.

3 MR. KELLY: Can he finish the answer?

4 Q Finish, alright, I'm sorry, go ahead.

5 A I don't know the answer to that.

6 Q Now, Mr. Kelly asked you about the list of cases that I
7 questioned you about; correct?

8 A Yes.

9 Q And I don't know, 60 something, you didn't recognize
10 any of the names including Mr. Abreu Perez?

11 A I don't understand that's --

12 MR. KELLY: Objection, we've gone over that, Judge.

13 THE COURT: Overruled.

14 Q Now, that list that I represented to you was from my
15 law firm, how many other defense firms are in the City?

16 MR. KELLY: Objection.

17 A No idea.

18 THE COURT: Sustained.

19 Q And for what time period does that list even cover; do
20 you know?

21 MR. KELLY: Objection.

22 THE COURT: Sustained.

23 Q Within the last year or two years?

24 MR. KELLY: Objection.

25 THE COURT: Sustained.

1 Q You also testified on redirect, Mr. Kelly asked you
2 indentation on the thecal sac could put pressure on the
3 spinal cord; correct?

4 A Yes.

5 Q But we went through your reports on cervical and lumbar
6 I asked you, did you write anywhere that there was any
7 impingement of the spinal cord at all?

8 A You did ask me that.

9 Q Your answer was?

10 A No, there isn't, same answer.

11 MR. ALVARADO: Thank you.

12 RE-REDIRECT EXAMINATION BY

13 MR. KELLY:

14 Q On the X-rays; right?

15 MR. ALVARADO: I'm sorry, that's inappropriate now.

16 MR. KELLY: Why?

17 MR. ALVARADO: His answer is inappropriate now on
18 the X-rays.

19 THE COURT: Are you finished?

20 MR. ALVARADO: I'm finished.

21 MR. KELLY: Right.

22 Q On the X-rays, right you he just asked you?

23 THE COURT: He's asking you a question.

24 MR. KELLY: You can sit down.

25 A Do you want to repeat? In my report, what I heard was,

1 in my reports show any impingement upon the spinal cord, and I
2 said no.

3 MR. ALVARADO: I said reports.

4 MR. KELLY: Right, your Honor, it is my turn, why
5 is he standing in the way?

6 Q From the X-rays; right?

7 MR. ALVARADO: Leading.

8 THE COURT: Overruled.

9 A On all of my reports.

10 MR. KELLY: Very good, thank you.

11 THE COURT: Alright, doctor, you may step down.

12 (Whereupon Dr. Kolb exited the witness stand.)

13 THE COURT: Mr. Kelly, you can call your next
14 witness.

15 MR. KELLY: Dr. Kaplan.

16 MR. FRITTOLA: Can we take a two-minute recess?

17 MR. KELLY: Do you want to switch?

18 THE COURT: Yes, real quick.

19 (Pause in the proceedings.)

20 THE COURT: What is her name?

21 MR. KELLY: Dr. Kaplan, Jeffrey Kaplan.

22 THE COURT: Counsel you can call your witness.

23 MR. KELLY: Dr. Kaplan, please.

24 (Whereupon, Dr. Kaplan took the witness stand.)

25 THE CLERK: Good afternoon, can you remain standing