1 SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX: CIVIL TERM: PART 20
2 - X
HENRY ESPACIA,
3
Plaintiff, Index No.
4 816345/2021E
-against-
5
EMERALD 2727 UNIVERSE, LLC, AND RESIDENTIAL MANAGEMENT LLC,
6

7 Defendant.
- X
8
851 Grand Concourse
9 Bronx, New York

10 February 27, 2026

11

12 B E F O R E:

13 THE HONORABLE VERONICA HUMMEL,

14 Justice

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

16 LIPSIG, FREUND AND WISELL, PLLC
For the Plaintiff
17 40 Fulton Street
New York, New York 10038
18 By: MICHAEL A. MARANDO, ESQ.

19

GARTNER & BLOOM, PC
20 For the Defendants
801 Second Avenue
21 New York, New York 10017

22 By: BRIAN FRANKLIN, ESQ.
GAIL GOODE, ESQ.
23

24
Lauren A. Fitzgerald
25 Senior Court Reporter

1 COURT OFFICER: Part 20, the honorable justice
2 Veronica Hummel presiding, Index No. 816345 of 2021, Espacia
3 V. Emerald 2727 University LLC & Residential Management.
4 Plaintiff's counsel, state your name and appearance for the
5 record.
6 MR. MARANDO: Good morning, everyone. Good
7 morning, Your Honor, Madam Reporter, Officer, Bryette.
8 Michael Marando on behalf of the Plaintiff from the Law
9 Offices of Lipsig Freund & Wisell, 40 Fulton, 24th Floor,
10 10038. Good morning.
11 THE COURT: Good morning.
12 MR. FRANKLIN: Good morning, everyone. Brian
13 Franklin on behalf of the Defendants, Emerald 2727 and
14 Residential Management.
15 THE COURT: Okay. Good morning. We are going to
16 bring the jury down. Just one issue for the record, I don't
17 know if it's an issue yet, but I have observed the juror
18 number one seems to have difficulty managing the stairs up
19 to the jury room. If that becomes an issue, then we will
20 have to locate a new courtroom that is on another floor.
21 So far she has not raised it as an issue, but it
22 would just mean moving courtrooms, but I just wanted
23 everyone to be aware of that.
24 MR. FRANKLIN: Your Honor, just before the jury
25 comes in, I want to contemporaneously observe Defendants

1 objections to be preclude from examining Dr. Berkowitz
2 regarding the issues discussed in the pre-trial motions as
3 discussed previously. I just want to preserve it.
4 THE COURT: Sure. Understood. Which motion are we
5 talking about?
6 MR. FRANKLIN: I believe the motion in limine G
7 regarding the whole Rico thing.
8 THE COURT: Understood. You've preserved.
9 And the first witness is?
10 MR. MARANDO: Dr. Dov Berkowitz, Your Honor.
11 THE COURT: That's spelled D-O-V, right, not Doug?
12 MR. MARANDO: Yes, D-O-V.
13 COURT OFFICER: All rise. Jury is entering.
14 (The jury has entered the room.)
15 THE COURT: Good morning, everyone. You can be
16 seated, jury. Good morning. I want to thank you all for
17 getting here on time. It's really helpful. The attorneys
18 were also here on time. We've been doing prep work and
19 having legal discussions and now we are ready to go. Thank
20 you. Go ahead, Counsel.
21 MR. MARANDO: Thank you, Your Honor. Good morning,
22 everyone.
23 THE JURY: Good morning.
24 MR. MARANDO: Your Honor, the Plaintiff calls Dr.
25 Dov Berkowitz. He is in the hallway, and I can grab him or

1 if the officer wants to. Thank you, Judge. Thank you,
2 Officer.
3 (The witness has entered the room.)
4 COURT OFFICER: Remain standing and raise your
5 right hand. Do you swear or affirm the testimony that
6 you're about to give this Court will be the whole truth
7 under the penalty of perjury?
8 THE WITNESS: I affirm.
9 COURT OFFICER: Just state your name and address,
10 for the record.
11 THE WITNESS: First name is Dov, D-O-V Berkowitz,
12 80-02 Kew Gardens Road, Kew Gardens, New York 11415.
13 THE COURT: Okay. You may be seated.
14 THE WITNESS: Thank you, Your Honor.
15 THE COURT: Please use the microphone, otherwise,
16 the court reporter can't hear anything in this courtroom.
17 THE WITNESS: My pleasure.
18 THE COURT: Counsel.
19 MR. MARANDO: Thank you, Judge.
20 DIRECT EXAMINATION
21 BY MR. MARANDO:
22 Q Doctor, good morning.
23 A Good morning.
24 Q Happy Friday. Doctor, can you share with us your
25 current occupation and your medical background?

1 A I am an orthopedic surgeon. Medical background, I
2 guess I went through Mount Sinai School of Medicine here in New
3 York as a medical school, and after that, I went into an
4 internship and then a residency program in orthopedic surgery,
5 and that was at the Mount Sinai School of Medicine to the Mount
6 Sinai Hospital. It's not a very big walk, but it's right there,
7 and then after I finished the residency, I spent one year in a
8 fellowship level training in the new field of arthroscopic
9 surgery, which is now currently the most commonly performed
10 surgical orthopedic procedure in the country.
11 In those days, it was brand new. And then I went out
12 into practice into 1984. It's a long time ago, and I am still
13 active in practicing and operating. That's my background.
14 Q Doctor, are you licensed to practice medicine in the
15 State of New York?
16 A Yes.
17 Q Are you what they call board certified, and if you are,
18 can you share with us what that means?
19 A I am. A board certification is simply that the
20 American Board of Orthopedic Surgery is the only institution in
21 this country that has granted the power to award diplomats of
22 the American board, meaning if you pass their exam, you become
23 board certified. They are the only ones that can do that, and
24 you have to finish a residency accredited in America. If you do
25 something foreign, you still have to do it again coming over

1 here. If you do an American residency, which I did after Mount
2 Sinai School of Medicine, and then you finish the residency, in
3 those days, two years later, you can begin to take the board.
4 The boards are a two day test. One test is an oral
5 test where you have five or six different orthopedic professors
6 firing questions at you from a million different fields, and you
7 have to be prepared for everything, which is almost impossible,
8 but you do your best, and then no matter how well or poorly you
9 do on the first day, you come back for the second day, which is
10 a 250 question, eight-hour written exam, and they take the score
11 from the first oral day, they take the score from the second
12 written day, they put the score together and somebody in the
13 board makes the decision where the cutoff is, so if you are
14 below the cutoff, you don't get it.
15 If you are above the cutoff, you become a diplomat or
16 you are board certified. It was about a 40 percent failure rate
17 in those days after all that education. It's quite an
18 experience.
19 Q Doctor, do you have an affiliations with any hospitals
20 in the State of New York?
21 A Yes.
22 Q Okay. You mentioned it, and do you mind sharing with
23 us?
24 A The New York Hospital of Queens, also Northwell
25 Hospital System and Surgicore of New York and New Jersey.

1 Q Doctor, do you normally treat patients with traumatic
2 injuries?
3 A Yes.
4 Q And what body parts normally?
5 Q So at this point of my career, I went into the field of
6 my fellowship, arthroscopic surgeries, I really just do shoulder
7 and knee surgical cases, all arthroscopic, very rarely --
8 arthroscopic means that you don't make any large incisions. You
9 make a small incision through which you take an instrument that
10 looks like a pen. Inside the pen is a camera, so we call it a
11 scope. It's a scope. So we put the camera through a little
12 nick in the skin. This way we don't have to disrupt all of the
13 normal tissue going into a joint.
14 We just push it through and now we are inside the
15 joint, but since the skin is still in tact all over the place,
16 then you can't see, you have to beam the image up to a large TV
17 screen, so you are looking at the TV screen while you are
18 operating on the knee, and I'm also a shoulder surgeon, so
19 shoulder and knee arthroscopic surgery?
20 Q Doctor, have you ever been qualified to testify as an
21 expert in the field of orthopedic surgery before today?
22 A Sure.
23 Q Roughly, how many times?
24 A Well, it's only for my own practice. I'm not a
25 professional witness, so I just -- I have to come to Court when

1 apparently, there is some kind of litigation, and they need me
2 to testify on what I did on my own patients. I am not
3 interested in being a professional witness, so that, before
4 Covid, it was about eight times a year, maybe nine times a year,
5 then came Covid, and the Courts were shut down for basically
6 three years, and then beginning in the end of '23, beginning of
7 '24 Courts started opening up again, but mostly remotely, so now
8 maybe three times, four times a year compared to what it was
9 then.
10 Q Doctor, in addition to performing orthopedic surgery,
11 do you also review films before you perform surgery yourself?
12 A Yes.
13 Q Now, before today, have you ever been qualified in
14 addition to orthopedic surgery simultaneously as an expert in
15 the field of reading films in connection with your surgery?
16 MR. FRANKLIN: Your Honor, I have an objection.
17 THE COURT: Approach.
18 (Whereupon, a sidebar conference was held.)
19 THE COURT: Sustained.
20 Q Dr. Berkowitz, in connection with each of the surgeries
21 that you do, focusing on the shoulders, before you perform
22 surgery on a shoulder, do you generally review films in
23 connection with those types of procedures beforehand?
24 A Yes.
25 Q Is that the normal part of your practice for every time

1 that it's been done?
2 A Yes.
3 MR. MARANDO: Your Honor, at this time, I would
4 like to move Dr. Berkowitz and qualify him as an expert in
5 the field of orthopedic surgery, and in addition to that,
6 specifically, discussing his review of films in connection
7 with the surgery of this case.
8 MR. FRANKLIN: Note my objection.
9 THE COURT: And also I don't have to qualify him as
10 an expert. You put it in the record either it's there or
11 it's not. Denied.
12 Q Doctor, before today, have you and I -- well before in
13 the hallway this morning, have you and I ever met in person?
14 A No.
15 Q Have you ever met anyone on behalf of my law office
16 during your entire time that you've been a practicing physician?
17 A Well, I don't know the name of your law office, so the
18 answer would be no.
19 Q Lipsip, Fruend & Wisell?
20 A No.
21 THE COURT: Ms. Reporter, I'm going to have to ask
22 you to read back that question. I didn't hear it.
23 (Whereupon, a portion of the record was read back.)
24 Q Doctor, are you being compensated from your time that
25 you are away from your practice today?

1 A Yes.
2 Q And what is that compensation?
3 A $9500.
4 Q Doctor, if you were not here today in Court, what would
5 you be doing?
6 A Surgery.
7 Q And Doctor, prior to today, have you and I ever spoken
8 on the phone?
9 A Just yesterday.
10 Q How long was that conversation?
11 A 20 minutes.
12 Q Doctor, was there a point in time where a man named
13 Henry Espacia came under your care?
14 A Yes.
15 Q Now, Doctor, in connection not only with this specific
16 individual but of your all your patients, do you generally
17 maintain records when you see certain patients?
18 A Absolutely.
19 MR. MIRANDO: Judge, I would like to hand Dr.
20 Berkowitz what's been pre-marked as Plaintiff's Exhibit 15.
21 I actually have it here, Judge.
22 THE COURT: Any objection?
23 MR. FRANKLIN: Yes, Your Honor.
24 THE COURT: Approach.
25 (Whereupon, a sidebar conference was held.)

1 THE COURT: All right. Document is admitted into
2 evidence subject to redaction, so you could mark it.
3 (Whereupon, ^ description was marked as Plaintiff's
4 Exhibit 15 for Evidence.)
5 Q Thank you, Doctor. Doctor, when you first met with Mr.
6 Henry Espacia, what was the history of the injury as you
7 understood it?
8 A If I can recall, I mean, am I allowed to use the
9 records?
10 Q Yes, Mr. Berkowitz. But if you are, just let us know
11 where you are looking.
12 A If I remember the patient was in the process of taking
13 a shower in his apartment and the ceiling came down on him and
14 collapsed on him, causing him to have traumatic injuries to
15 multiple body parts. As a result of the ceiling coming down on
16 him, he basically came down to the ground, I think it was in a
17 crouching position, where he kind of went down, and he sustained
18 injuries to multiple body parts, including his bilateral
19 shoulders, which is what I ultimately was involved in. He also
20 had injuries to his neck, back and some other areas, which I was
21 not involved in.
22 Q Now, Doctor, generally, what are the first steps that
23 you take when you see a new patient, and specifically, in the
24 case of Mr. Espacia on the first visit?
25 A Well, it depends on where I am seeing them, if the

1 patient is in a hospital setting where they get taken to a
2 hospital or they go to the hospital, they generally are
3 evaluated in the hospital itself by various doctors and various
4 disciplines, and there is an emergency room chart, which
5 describes what happens.
6 At this stage of my career, I'm no longer working in
7 the hospitals, and I'm in my own private practice, so I get to
8 see patients after they have already started treatment somewhere
9 else, where they need to have an orthopedic involvement, and so
10 the doctors will send a patient to me, because they don't have
11 that orthopedic expertise.
12 So in this case, the rehabilitation doctor, who is
13 already working with rehabilitation, meaning therapy to this
14 particular patient said that the patient had injuries to the
15 shoulder, that he doesn't deal with, and can I take a look at
16 the patient, and that's how it all started.
17 Q Doctor, in part of making your diagnosis, do you review
18 films in conjunction with your opinion as to any treatment plan?
19 A Commonly I review films, I review the report of the
20 films from the radiologist. It's a combination of both.
21 Q Doctor, have you reviewed films in this case?
22 A Sorry, but I couldn't hear.
23 Q Have you reviewed any films in this case?
24 A Yes.
25 MR. MARANDO: At this point, Your Honor, I would

1 like to admit into evidence pursuant to CPLR 4532, it's been
2 exchanged, the MRI dated May 3, 2021 of the left shoulder.
3 And it's Exhibit 19.
4 THE COURT: Any objection?
5 MR. FRANKLIN: No.
6 THE COURT: That is admitted into evidence as
7 Exhibit 19.
8 (Whereupon, MRI dated May 3, 2021 of the left
9 shoulder was marked as Plaintiff's Exhibit 19 for Evidence.)
10 MR. FRANKLIN: On the record, did you say this was
11 the doctor's document?
12 MR. MARANDO: No, it's not the doctors. This is
13 the MRI that he reviewed.
14 THE COURT: Number 19, the MRI to the left shoulder
15 dated May 3, 2021.
16 MR. MARANDO: The film.
17 MR. FRANKLIN: No, Your Honor.
18 MR. MARANDO: Judge, at this point, I would like to
19 publish to the jury was has been moved into evidence as
20 number 19.
21 THE COURT: Any objection?
22 MR. FRANKLIN: No, Your Honor.
23 THE COURT: Go ahead.
24 Q Dr. Berkowitz, I'm showing you on the screen, and for
25 the Members of the Jury, what has been moved into evidence as

1 Plaintiff's Exhibit 19, and I have on the screen two sets of
2 exhibits.
3 THE COURT: Excuse me one second. If you want to
4 see, you are free to stand here, Counsel, and maybe at lunch
5 we work up a better setup, but for now, we will make do.
6 Q Doctor, if you would like to come down, or you can do
7 it from there with the Court's permission, if it could aid in
8 your testimony, we would appreciate it.
9 THE COURT: Yes, he can approach.
10 MR. MARANDO: Can everybody see?
11 THE COURT: Yes.
12 Q Okay. Doctor, I have the mic here, if you want to use
13 it, it's up to you.
14 A I don't need it.
15 THE COURT: No, actually, Doctor, I'm going to ask
16 you to use the mic because the acoustics are terrible in
17 here and not only does the jury have to hear everything that
18 you say but also the court reporter.
19 THE WITNESS: Sure. The acoustics are bad. I
20 noticed that, and even with the microphone, I still can't
21 hear too well.
22 Q Doctor, did you personally review this film of what's
23 been marked into evidence as Plaintiff's Exhibit 19?
24 A Yes.
25 Q And can you share with us, what are we looking at?

1 A Okay. So basically this is what an MRI film looks
2 like. They are very different types of colors that show up in
3 an MRI film. This is just one type. This is just one type of
4 color. Here (pointing) you have the shoulder joint. You have a
5 face, you have bone on one side, bone on the other, so this is a
6 joint. The joint is made up of two bones coming together. This
7 is the socket of the shoulder right here where the black line at
8 the tip of the socket, and this is the shoulder bone, the
9 humerus, from the elbow to the shoulders the long bone.
10 It's called the humerus and all the way at the top, it
11 looks like kind of an ice cream cone, round kind of thing, and
12 it fits into the socket called the glenoid, so it's a ball and
13 socket joint, unlike the hip, where the ball is completely
14 encased in the socket. You can't even see the ball because the
15 socket goes all around it. The shoulder has kind of a limited
16 socket. It's just kind of straight up, which is why the
17 shoulder can dislocate because the bone isn't completely around
18 it, so it's kind of a strange socket, but it is a socket.
19 So you have the ball and the socket joint, these grey
20 tissues all around represent different muscles around the
21 shoulder, so you have the ball and the socket joint, and here,
22 what's important, and you can see it in both films at the bottom
23 of this black line, you see kind of another black and gray area,
24 and you see there is a little separation between this and this
25 black line.

1 You have to really look hard to see it. There is a
2 little slice right across it. That's the labrum. That's the
3 tissue that he tore. The MRI picked it up and actually the
4 radiologist said that he saw a tear, which is good, but when you
5 go inside with a camera, if you have the opportunity to put the
6 camera, the scope inside the shoulder you see that far better
7 than an MRI sees it. So here, you can see, it's kind of fuzzy.
8 You can interpret it anyway you want, but as someone who has
9 seen about 20 million of these, this is something wrong over
10 here (pointing.) There are other structures that we don't have
11 to go into them because they are not related but the point is
12 the ball and socket, labrum, and here, you see the different
13 colors here from now the bone is not white. It's dark, so it's
14 still ball and socket. This black line where it's the coding
15 and cartilage and right here is where the labrum is here and you
16 can see there is a line right across it.
17 You might not be able to, but there is a line right
18 across it but it looks a little fuzzy. It's not clear, but the
19 idea is that you can see that there is something wrong with the
20 labrum, and of course, if you get the chance to put the camera
21 inside, which I did, and you can really see the damage inside.
22 Q Thank you, Doctor. Now, Doctor, in reviewing the MRI,
23 were your findings that you're mentioning to the jury now, were
24 those consistent to your treatment of Mr. Espacia and the
25 diagnosis as you understood it?

1 A Actually, amazingly so, because commonly the MRI is
2 right. It was actually exactly right. It's not common that the
3 MRI is exactly right. It's always overreading and underreading
4 but when you put the camera inside, there is no overreading or
5 underreading, you see it, and I took pictures of it, and the MRI
6 was exactly on target in this case.
7 Q Doctor, while we have you down here, I am going to show
8 you what's been premarked as Plaintiff's Exhibit 20.
9 MR. MARANDO: And Judge, similarly, I would like to
10 move this into evidence. It is also the MRI but of the
11 right shoulder dated May 4, 2021, and it's been exchanged as
12 CPLR 4532A.
13 THE COURT: Any objection, Counsel?
14 MR. FRANKLIN: No, Your Honor.
15 THE COURT: Admitted into evidence.
16 (Whereupon, MRI of the right shoulder dated May 4,
17 2021 was marked as Plaintiff's Exhibit 20 for Evidence.)
18 THE COURT: This was marked as 20.
19 MR. FRANKLIN: No objection.
20 MR. MARANDO: Thank you, Judge.
21 Q Now, Doctor, I'm showing you on the screen now, I'm
22 showing you what's been pre-marked and moved into evidence as
23 Plaintiff's 20, it's an MRI of the right shoulder, and
24 specifically, before we start, do you notice the date?
25 A Yes.

1 Q Okay. Do you see it says May 4, 2021?
2 A I do.
3 Q And now, going back to the previous MRI, Doctor,
4 Exhibit 19, do you see the date here, May 3rd, 2021?
5 A Yes.
6 Q Now, do you have an opinion as to the closest in time
7 of this MRI to the actual incident of why we are here?
8 MR. FRANKLIN: Objection, Your Honor.
9 THE COURT: Hold on one second, sir. There is an
10 objection. Go ahead.
11 MR. FRANKLIN: Objection. Calls for speculation.
12 THE COURT: Overruled.
13 Q Doctor, going back to the MRI of the right shoulder, in
14 the same fashion, can you explain to us what we are looking at
15 as it relates to the right shoulder?
16 A Now, in looking at MRIs, as we showed last time, the
17 muscles are all around the shoulder, kind of greyish here, this
18 is the deltoid muscles, big muscle in the side, and the rest go
19 --
20 THE COURT: Again, Doctor, I'm going to ask you to
21 please use the microphone. The court reporter cannot hear
22 you.
23 A So here, again, you have the ball and the socket and
24 muscles all around. This is a view from the side. If you are
25 looking straight at somebody's shoulder, you are looking at it

1 like this (indicating) this is the ball and here is the socket,
2 right here, the ball going down to the elbow and the socket.
3 The next would be over here, right in here, this is the black
4 line represents the articulate cartilage, the coating cartilage
5 that is right here is the soft tissue. This soft tissue
6 represents soft tissue structure, not bone, among them the
7 labrum, and once again, something is wrong here. It looks very
8 fuzzy, you see the white in the midst of the black. This is a
9 very subtle point.
10 When you have white in the midst of the black,
11 something is wrong, something is altered. You can call it a
12 tear, maybe it's not a tear. You don't know for sure, so that
13 is why when you see an MRI, you just can't say, oh, he has got a
14 problem, she's got a problem. You have to ask the patient are
15 you in pain. So if you have MRI findings that look like this
16 white intercepting a lot of the black, then you know there is a
17 problem. If you see there is a white space here that is the
18 joint space and all of a sudden there is black tissue right in
19 the middle of the joint space with white in the middle of it,
20 and I know it's hard to see when you are over there.
21 I understand, but it just alerts you after many
22 years of experience, to be so sure of everything you are
23 seeing, but I think something is wrong here, how is the
24 patient feeling and how is the patient doing. Ultimately,
25 when you could do a scope, an arthroscopic procedure, you

1 get to know the truth, and in this case, these suggestions
2 on the MRIs turned out to be absolutely true.
3 Q Doctor, were those findings you were mentioning to the
4 jury, were those consistent to the type of symptoms that
5 Mr. Espacia was discussing with you in your first, second and
6 third visit?
7 A Absolutely, yes.
8 Q That's all I have for this MRI. You can take a seat,
9 Doctor. Thank you. And as you are making your way back, what
10 is the standard approach an orthopedic surgery before proceeding
11 --
12 THE COURT: Counsel, why don't you let him sit so
13 he can speak into the mic?
14 MR. MARANDO: Yes, sorry, Judge.
15 THE COURT: Why don't you start over?
16 Q Doctor, what is the standard approach in orthopedic
17 practice before proceeding with surgery based on these types of
18 findings for the left shoulder and the right shoulder,
19 generally?
20 A Okay. That's a huge question and answer and unless --
21 I'm glad you qualified it in this particular patient.
22 Basically, what you want to do is as an orthopedic surgeon is
23 first listen to why the patient is in your office, why are you
24 here, what's wrong. Now, commonly they come already with MRI
25 tests, because they are referred by other doctors who did the

1 MRIs that this patient has this problem, let me send them to the
2 orthopedic surgeon, so the patient comes with or without the
3 MRI. They get the MRI eventually, and we say, what do you feel
4 like, tell me what you can do, can you do your normal activities
5 of daily living, what kind of work do you do, is it hard for you
6 to function, can you sleep at night, all reasonable questions to
7 ask people and then you do a physical examination of the patient
8 and you see how well they can move their shoulders, certain
9 ranges of motion it's called, the ability to move the joint in
10 the certain manners.
11 There is limitations that the patient may have.
12 Sometimes they have a full range of motion, but it hurts them to
13 move and so you are watching to see if they are in pain while
14 you are doing your examination, and you do certain maneuvers to
15 try to elicit if there is pain or if there is not pain.
16 And so with the combination of physical examination,
17 the patient's complaints and the MRI results, you come to a
18 conclusion. You form an opinion, and then you form an opinion
19 and say okay, I think you have this problem, this is what we can
20 do. Sometimes it's just go for therapy. Maybe you will get
21 better, but there are certain conditions where therapy is just
22 not going to make a difference, and in those cases, you want to
23 recommend doing arthroscopic surgery or open surgery, depending
24 on what the problem is.
25 Sometimes you want to wait for physical therapy to see

1 if it works or not, but certain times that is just a waste of
2 time, because you are just knowing it's not going to work based
3 on what you see.
4 Q Doctor, I'm not going to have you discuss them, but I
5 would like to hand you what's been premarked as Plaintiff's
6 Exhibit 13, the physical therapy records.
7 MR. MARANDO: Judge, may I approach with the
8 Exhibit 13 that's been only premarked?
9 THE COURT: Yes. Okay. Just for the record, this
10 is Plaintiff's Exhibit 13 premarked physical medicine rehab
11 of New York records.
12 Q Now, Doctor, for the first few visits that you met with
13 Mr. Espacia, did he report to you that he had undergone physical
14 therapy?
15 A Yes.
16 Q When was the second time that you saw Mr. Espacia, if
17 you can recall?
18 A Okay, the second time.
19 THE COURT: Counsel, are you using this just to
20 refresh his recollection or are you trying to submit it into
21 evidence?
22 MR. MARANDO: Well, Judge pursuant to CPLR 3122A
23 they are here in the courtroom. They have been subpoenaed
24 with certification. They should be deemed as a matter of
25 law and moved into evidence. I don't know if there is an

1 objection.
2 THE COURT: Any objections?
3 MR. FRANKLIN: I object to the witness reading from
4 it but he can refer.
5 THE COURT: So they are moved into evidence without
6 objection, then you can. Let's get it marked.
7 MR. MARANDO: So the CDs and both of those
8 documents collectively has to be marked.
9 (Whereupon, physical medicine rehab of New York
10 records was marked as Plaintiff's Exhibit 13 for Evidence.)
11 Q Doctor, was there a gap in between the first visit and
12 the second visit when you saw him, and if there was, can you
13 explain how big that gap was?
14 A Yes. There was a gap. The first visit was in May of
15 of 2021. The second visit was in July of 2022.
16 Q Now, through that gap of time, now that you have what's
17 been moved into evidence as the physical therapy records, do you
18 have an understanding of as to whether or not he was seeking
19 specific treatment in connection with your initial diagnosis?
20 A Absolutely. The patient was trying to do his best to
21 avoid having any surgery and so he went through physical therapy
22 with a physical therapist and a rehabilitation doctor as well,
23 but unfortunately, for the patient, the patient did not progress
24 and did not do well and was very unhappy. He tried a long time,
25 so more than a year of doing this.

1 Q And when he returned to you in July of 2022, in your
2 second visit, did you have an opinion as to future treatment
3 care at that point after the physical therapy?
4 A Absolutely.
5 Q And what was your treatment plan?
6 A Well, some people would give a cortisone injection but
7 when you already have tears inside the shoulder giving cortisone
8 makes it more difficult for those tears to heal, so I don't
9 recommend cortisone injections when there are tears. He has
10 already had extensive physical therapy doing poorly. He really
11 needs an arthroscopic. He did need at that time an
12 arthroscopic, he needed it when I saw him originally, but he
13 wanted to go through the rehabilitation situation, and clearly,
14 he needed arthroscopic surgery, and at this point, he was more
15 receptive, as he tried therapy extensively, and it was just not
16 doing well.
17 Q Doctor, at some point did you perform a surgery on the
18 left shoulder?
19 A I did.
20 Q And do you have the date of that procedure?
21 A I do.
22 Q What is that date?
23 A September 21, 2022.
24 Q Now, Doctor, when you performed surgeries, do you
25 generally take something called intraoperative photographs, and

1 if you do, can you share with us what those are?
2 A Sure. Intraoperative films, remember I told you that
3 there is an instrument that looks like a pen, inside the pen is
4 a camera, and so we call it a scope, okay, now, you can put your
5 eye directly against the scope, but that's really very
6 complicated to do, so we have a fiberoptic technology where what
7 I'm seeing through the scope is being placed on a big TV screen,
8 and so I have the ability on the camera itself, okay, to just
9 flip a button. And when you do that, it takes a picture, so
10 it's in real-time. You see it, you take a picture.
11 You could also make a movie out of it as it, and I
12 don't mean that in terms of in a weird way. You don't have to
13 just snap a picture, you can make it a video, and you can have
14 an extensive video, but I prefer to take snapshots.
15 Q So Doctor, those pictures, the snapshots, that you're
16 taking inside the shoulder, are they taken by actually you or
17 someone else?
18 A Right. Well, it's me. I'm the one who snaps the
19 picture.
20 Q And those photographs are snapshots that you're taking,
21 are those generally kept in the ordinary course of business?
22 A Absolutely.
23 MR. MARANDO: Judge, what's already been marked
24 into evidence subject to redactions are the intraoperative
25 photographs, Your Honor, and I would like to publish that to

1 the jury.
2 THE COURT: Which exhibit is that?
3 MR. MARANDO: Within his records, Judge,
4 Plaintiff's Exhibit 15, which has already been moved into
5 evidence.
6 THE COURT: It's in evidence. Any objections?
7 MR. FRANKLIN: No. It's in evidence.
8 MR. MARANDO: And then Judge, simultaneously not to
9 move into evidence, but I have a surgical demonstration that
10 I would like to use as demonstrative purposes that will be
11 useful for the doctor in his testimony in explaining the
12 type of procedure that you did, compared to the
13 intraoperative photographs that you took yourself.
14 THE WITNESS: Sure.
15 THE COURT: Any objections?
16 MR. FRANKLIN: No.
17 MR. MARANDO: Doctor, you can step down.
18 THE COURT: So how would you describe the diagram?
19 MR. MARANDO: Judge, on the left, we have what's
20 been premarked for ID as demonstrative purposes and that's
21 Plaintiff's Exhibit 23, and then we have what's in evidence
22 as Plaintiff's Exhibit 15.
23 Q So Doctor, if you can, just while using the microphone
24 again, just share with us what we are looking at.
25 A Okay. So on the left is an arthroscopic rendition of

1 what things look like in the shoulder. On the right you see the
2 real thing, not these snapshots of the pictures that I take
3 during surgery, so here you can see this is what the
4 instrumentation looks like when you do an arthroscopic
5 procedure. This is kind of like the pen that I showed inside
6 would be a camera. These are just different instruments. This
7 is a shaver, just penetrating through a little incision
8 penetrating through, so I don't have to cut muscle to get inside
9 the shoulder. You just push things through much more easily to
10 go through rehabilitation and recovery.
11 So here you have the shaver, here you have drains,
12 cameras, okay, here is inside the shoulder, here is the ball,
13 just like we saw before, and the socket is in here. It's hard
14 to see the socket right now, because it's all flared opened, so
15 to speak, and here you can see shavers shaving out tissue inside
16 the shoulder. This is pointing to a labral tear.
17 Again, it's hard to see. You will see it much better
18 in the real life photos, but again, this is more of a clean
19 representation. This is the ball, and the socket is right here
20 surrounded by this white tissue, the socket is right in there.
21 Again, you can see the shoulder because it's easily
22 able to dislocate. There is nothing blocking it, except for
23 soft tissues. To the right is the actuality, and here it's much
24 more clear. Normally when you look inside the shoulder, the
25 bones are white, this is the ball, the socket, it's white.

1 Okay. The soft tissue around here you see this structure right
2 here, this white structure that looks like it's sitting out in
3 the air, that white structure belongs right against the socket
4 of the shoulder, and you can see strands like this, strands of
5 big things.
6 These are all tears, tear that are sticking up towards
7 the camera instead of being flat against the socket. There is
8 like a tear and the piece that is torn kind of flips up because
9 it's not attached anymore to where it was originally. So on the
10 MRI it was a little fuzzy, like you could interpret it almost
11 any way that you want, but when you put a camera inside, this a
12 big tear coming all the way up here, coming here, in here, in
13 here, in here, all in here, very large tear of the labra.
14 So as a reference point, this is the biceps, the biceps
15 muscle. It looks like a cylindrical structure because here
16 muscles turn into tendons, tendons attach into bones, the muscle
17 never attaches into a bone. The muscle turns into a tendon,
18 circular structure and the tendon will attach into the bone.
19 The muscle pulls, the tendon pulls, and you have some motion in
20 that.
21 Q Doctor, how is what you're able to see on an MRI
22 differ, if anything, compared to what you are able to see
23 intraoperatively?
24 A In this case or in general?
25 Q In general and in this case.

1 A Well, in general, when you see an MRI and you read a
2 report, you take a look at stuff and make your own conclusions,
3 but you know, it's not a hundred percent what you are going to
4 see because it's not always correct. When you go inside the
5 shoulder, you can't mistake this. This is big tears sticking up
6 right at you, big tears. So here, there is no question that the
7 MRI was actually right, but the MRI was fuzzy. Here, it's very
8 --
9 THE COURT: Sorry, Doctor, the Court Reporter can't
10 hear you.
11 A In this case the surgery showed that the actual damage
12 was real and the MRI was correct. It was just a little fuzzy.
13 I wasn't exactly sure, but here is big time, big time tear.
14 Q Doctor, this finding intraoperatively, was this
15 consistent to the type of symptoms that Mr. Espacia was
16 complaining to you about?
17 A Yes, and one more point, before I can go back, you can
18 see right away if the tear is old or if a tear is relatively
19 new, and you can see if there is a lot of arthritis in the
20 joints, or if it is a relatively younger joint. The fact that
21 the ball is so smooth, and it's not pockmarked with pieces of
22 the cartilage out over time, wearing down over time, which
23 happens to everybody shows you this is a relatively younger aged
24 patient, and there is no significant damage to the bones.
25 The soft tissue also if it's a chronic tear, the tear

1 happened three years ago, four years ago, the quality of the
2 tissue when you are looking at it is completely different than
3 when you have a relatively new or an acute tear.
4 In this case, you can see the quality of the tissue is
5 new, and it's not old, so this was very demonstrative of a
6 recent injury.
7 Q Doctor, while I have you up here, before you sit down,
8 did there come a point, and I know we looked at the right
9 shoulder MRI, did there come a point in time where you performed
10 a surgery to the right shoulder?
11 A Yes.
12 Q Do you have the date for the procedure?
13 A I don't have --
14 Q If I told you February 15, 2023, would that be
15 consistent to what your chart would say?
16 A I hope so.
17 MR. MARANDO: Judge, at this time I would like to,
18 well, at the same time, it's already in evidence, but show
19 the surgical demonstration that we have here in conjunction
20 with Plaintiff's Exhibit 15 already in evidence, and it's
21 the surgical intraoperative photographs that were in
22 connection with the second procedure, and Doctor, I'll put
23 them on the screen now.
24 THE COURT: Any objection?
25 MR. FRANKLIN: No, your Honor.

1 THE COURT: Thank you. Go ahead.
2 Q Doctor, now we have the surgical illustration side by
3 side with the intraoperative photographs that you took in
4 connection with the --
5 THE COURT: It's hard to see if you want to move it
6 over.
7 MR. MARANDO: Yes.
8 Q In connection with the right shoulder surgery, so can
9 you walk us through, what, if anything, we are looking at?
10 A Well, the left side is the same point. It's the
11 artistic rendition. This is real life pictures, okay, now, this
12 is the opposite shoulder, so the ball and socket are on
13 different sides. Here is something you didn't see before. This
14 is the rotator cuff, the big white long structure going from
15 here to here. This is the rotator cuff that lifts the shoulder.
16 You see, if you can, you will see this kind of greyish darker
17 area from the white of the tendon, the rotator cuff tendon, this
18 represents a tear. Okay.
19 Sometimes tears are very, very big, like this, the
20 labral before is coming right at you. Other times it's a little
21 more subtle. This is the tear of the rotator cuff, which he did
22 not have on the other side.
23 Here, again, is that black area, white here, he had
24 another tear of his labrum in this shoulder too, and the tear of
25 of the labrum, this whole area right here, here is the ball, the

1 socket you can't really see. It's right in there, and the
2 labrum is all damaged, all damaged. I'm already with my shaver
3 cleaning it up, and so he had a big tear.
4 That's why I had to clean it up from all over here,
5 big, long. I used the shaver, I cleaned it up. I also -- you
6 could see the shaver inside. I also took care of the rotator
7 cuff problem. If you don't take care of the problems, the
8 problems tend to get bigger and bigger as you keep trying to use
9 the shoulder, the muscles and the tendons pull on that tear, and
10 the tear propagates and gets bigger and bigger, so it's good to
11 take care of it as soon as you can.
12 Q Thank you, Doctor. You can take a seat. Thank you.
13 Doctor, after the second surgery, up until around October of
14 2024, did Mr. Espacia continue to treat with you?
15 A Yes.
16 Q And okay, and approximately how many visits were there
17 in between the second surgery and late in 2024?
18 A Approximately is a good word. I would say somewhere
19 between --
20 Q If I told you it was four or five, is that consistent
21 to what your records would say?
22 A Absolutely.
23 MR. MARANDO: Now, Judge, at this point, I would
24 like to move into evidence pursuant to CPLR 4532A the image
25 of the left shoulder, which has been pursuant to CPLR 4532A,

1 and it's Exhibit 21.
2 THE COURT: Dated April 10th, is that correct?
3 MR. MARANDO: Yes, Judge.
4 THE COURT: Any objection?
5 MR. FRANKLIN: No, Your Honor.
6 THE COURT: That's admitted into evidence. Give
7 the court reporter a moment to mark it.
8 (Whereupon, the image of the left shoulder was
9 marked as Plaintiff's Exhibit 21 for Evidence.)
10 Q Doctor, just generally, what significance, if any, is
11 there that the fact that still in 2025 within the past 12 months
12 not over a year ago that Mr. Espacia is still going out and
13 getting MRIs on your opinion as to his medical diagnosis?
14 A Significance is very clear. Arthroscopic surgery has a
15 very excellent record in terms of making patients better, well
16 over 90 percent. There are 10 percent of patients that just
17 don't do well with the same surgery that 90 percent do well
18 with, and how do you know, because after surgery it's okay to
19 have pain for a little bit, couple of weeks, maybe even a month
20 or two, but when a patient is already 6 months, 8 months,
21 10 months, a year saying that they still have persistent pain,
22 that's already unusual, and in this particular case, the
23 patient's left shoulder, despite the fact that I did what I did
24 on the left shoulder had a big tear, he still had persistent
25 complaints of pain.

1 He did do extensive therapy as long as he could, and
2 the right shoulder also started out a little bit poorly. He
3 improved more on the right shoulder than the left, but the left
4 was so significantly bad for him that I decided to send him for
5 another MRI, which is very unusual, and that is the significance
6 that it means that something is really going on, that something
7 is really troubling him.
8 Q Doctor, in your visits with Mr. Espacia, do you do
9 something called a physical exam of the shoulders?
10 A Every time.
11 Q And what is a physical exam, and if you use any
12 instruments can you share with us what those types of
13 instruments are?
14 A Well, when you do a physical examination you try to see
15 how well the shoulder is moving. Sometimes the patient is in
16 pain, and they don't want to move, so you take the patient's arm
17 and you slowly move it for them, and you see how far they can
18 go. You do various maneuvers, you do rotational movements,
19 which really hurt when the patient is having difficulty.
20 You test for strength, to see what kind of strength
21 they have, and you see also if there is any kind of infection,
22 because sometimes poor results come from infections, but he
23 didn't have infections.
24 MR. MARANDO: Now, Your Honor, at this point,
25 what's already been marked into evidence as Plaintiff's

1 Exhibit 15. There are two specific visits that I would like
2 to show the doctor, and I have a courtesy copy, so that you
3 don't have to skim through them since it was two visits I
4 would like to compare. I can show defense counsel as a
5 courtesy to speed things up.
6 THE COURT: Go ahead.
7 MR. MARANDO: And specifically, Mr. Franklin and
8 the Court, those visits are, and for you, Doctor, July 5th,
9 2022, comparing to your physical exam on March 19th, 2024,
10 and in the moment I will hand you both of those visits.
11 THE COURT: Any objection?
12 MR. FRANKLIN: It's already in evidence.
13 THE COURT: Any objection?
14 MR. FRANKLIN: No.
15 Q Doctor, starting with the very first of the two, okay,
16 the former, the July 5th, 2022, can you share with us generally
17 if you performed the physical exam that day and what was the
18 physical exam as you saw it based on that specific visit?
19 A Well, they are very similar findings in the shoulders
20 they were markedly reduced range of motion. So what does that
21 mean? Normally, if anybody takes their arms and brings it in
22 front of them, they should be able to point straight up to the
23 ceiling. The older you get, the harder it gets to do that, but
24 in general, straight up to the ceiling, so 90 degrees would be
25 straight out. 180 degrees would be up to the ceiling, so normal

1 range of motion would be 100 to 80 degrees of going straight up
2 and going to the side is the same thing, 90 degrees straight
3 out, 180 degrees all the way up to the ceiling, and then you
4 have rotational movements, where you turn the shoulder inside
5 like to button a button on your shirt, or for the ladies, to go
6 behind, so that they can get dressed in the behind, so they can
7 go this way, (indicating.) That's called internal rotation,
8 external rotation.
9 In this case, the forward flexion, meaning going
10 straight out should be 180. It was only 90 -- it was 100
11 degrees, so it's basically one half of the normal range of
12 motion. That's a big loss. The abduction.
13 THE COURT: Sorry, which shoulder are you talking
14 about, Doctor? Which shoulder are you speaking about?
15 THE WITNESS: This is both shoulders.
16 THE COURT: Okay.
17 A Going to the side, also only up to 90 degrees, so
18 basically half the motion from 180 degrees. Internal rotation
19 normally is about 80 degrees, only 20 degrees. So if this is
20 neutral position, 0 rotation, this is about 20 degrees. It's
21 very limited. External rotation which is normally almost
22 90 degrees was only 35 degrees, so it was very limited up, down,
23 sideways, rotation, very limited.
24 Q Doctor, if you can, just share with us your findings
25 basically two years later March 19, 2024 during that physical

1 exam with respect to these specific degrees of loss or not loss?
2 A So, the right shoulder showed improvement but not full,
3 but it showed improvement, so the right shoulder, which
4 originally would go 90 degrees to the front and 90 degrees to
5 the side. Now, it's going to the front was 140 degrees, so it
6 was about like that. That's already an improvement (pointing.)
7 So now, going to the side, was approximately
8 130 degrees, so I would say something like that. Big difference
9 from just like this (indicating.) The rotational movements, he
10 went from 20 degrees internal to 40 degrees. External rotation
11 I think went from 35 to 50. Normal, again, is almost 80/90, so
12 still limitations but certainly progress.
13 The other shoulder, which is the one that I wound up
14 sending him for another MRI for because he just didn't get
15 better, the forward flexion, which was about 90 to 100 degree
16 for this way forward flexion was not 110 degrees, an improvement
17 but still very limited.
18 The abduction, which was 90 degrees before the surgery
19 was still only 90 degrees even after therapy and rotational
20 movements had minimal changes from what it was before, so the
21 left shoulder was not progressing to the degree that you would
22 expect. The right shoulder was making some progress, which is
23 why, to me, I only about did an MRI on the left shoulder, again,
24 to check into it.
25 Q Doctor, based on these physical exams and based on the

1 MRI that was done, just in the past 12 months, I think 10 months
2 or 8 months ago, based on your continued evaluation of what you
3 are reviewing, will Mr. Espacia require future medical treatment
4 in the future, based on your opinion?
5 A Well, certainly, because he has limited motion in both
6 shoulders, even though the right one was a little better than
7 the left or significantly better than the left. The patient
8 would definitely benefit from continued at minimum physical
9 therapy to both shoulders, but he's been getting that for years,
10 and it's really not getting anywhere, so what's the point of
11 just sending him back to therapy. This patient is a candidate
12 for further surgery on the left side. Why even consider it when
13 he didn't do well with the first surgery? Because with therapy,
14 it is just not going to get any further or it's not going to get
15 any better. Sometimes a second procedure, which doesn't happen
16 very often in cases in over a 40 year career but the few times
17 that I had to do it most patients do significantly improve with
18 a second procedure, so he is likely to need a second procedure
19 on the left shoulder at the very least with continued therapy.
20 Q Doctor, within a reasonable degree of medical certainty
21 are Mr. Henry Espacia's injuries to his shoulders causally
22 related to what occurred on April 21, 2021, the ceiling
23 collapse?
24 MR. FRANKLIN: Objection. Calls for speculation.
25 THE COURT: Overruled.

1 A Yes. I do believe that the patient's injuries are
2 related to the trauma that he sustained at the time of the
3 ceiling collapse.
4 Q And were both of those surgeries and the continued
5 treatment for him until now medically necessary as a result of
6 those injuries?
7 A Absolutely.
8 Q Are the conditions you observed including the labral
9 tears and the biceps tears to the tendon a competent-producing
10 cause of pain and functional limitations?
11 A Without doubt.
12 Q Now, Doctor, are his shoulders injuries permanent in
13 nature?
14 A Absolutely.
15 MR. MARANDO: Doctor, I have nothing further.
16 Thank you, Judge.
17 MR. FRANKLIN: May, I Your Honor?
18 THE COURT: Sure. Go ahead, Counsel.
19 CROSS EXAMINATION
20 BY MR. FRANKLIN:
21 Q When did you first meet with Espacia?
22 A I think I can only reference from my record.
23 Q I have a copy.
24 A I have it here.
25 Q So you have it?

1 A Yes. My personal records are over there but these are
2 the copies, as he said before, so it's May.
3 THE COURT: Hang on. I'm going to stop the
4 questions for a second. Counsel, do you want to approach --
5 (Whereupon, there was a sidebar conference.)
6 THE COURT: We are going to give everyone a break,
7 and we are going to take a ten minute break.
8 COURT OFFICER: All rise. The jury is exiting.
9 (The jury has exited the room.)
10 (Whereupon, a brief recess was taken.)
11 COURT OFFICER: All rise. The jury is entering.
12 (The jury has entered the room.)
13 THE COURT: Okay. You can be seated. Thank you.
14 Counsel. Thank you.
15 Q Dr. Berkowitz, Hi. How much of your practice is
16 devoted to the treatment of individuals who are involved in an
17 accident?
18 A I would say close to 50 percent.
19 Q What's the other 50 percent of your practice devoted
20 to?
21 A Regular patients not involved in Workers' Comp injuries
22 or motor vehicle accidents. Patients come off the street.
23 Q Okay. Focusing on the 50 percent of your practice as
24 devoted to people involved in accidents, how much of that
25 percentage of your practice is devoted to representing

1 Plaintiffs?
2 A I'm not sure. I understand as opposed to representing
3 Defendants? I don't distinguish. Whoever is referred to me is
4 who I evaluate and treat. So there was one time in my career
5 only once where I was in a courtroom like this and the opposing
6 courtroom liked the way that I testified and he asked me if I
7 could help him on one of his problem cases, and I did. I don't
8 distinguish Plaintiff from Defendant. Whoever comes in.
9 Q Do you ever perform what's called an independent
10 medical evaluation?
11 A I think 30 or 40 years ago when I first started the
12 practice I was open to everything. I didn't like doing those
13 evaluations and I stopped at least 30 years ago, if not more.
14 Q So for the past 30 years that 50 percent of your
15 practice that is devoted to representing or treating patients
16 involved in accidents, you're on the Plaintiff's side, does that
17 make sense? Do you need me to --
18 A It depends who sends the patient. It happens to be
19 like I'm testifying only on patients that I have had treatment
20 with or operated on, so I'm very rarely in a courtroom, and I
21 don't get called as an expert witness on the defense side. I
22 can. It just hasn't happened. I don't have a shingle that says
23 only Plaintiffs come here. I'm not involved in a practice like
24 that.
25 Q How long has your practice been solely focused on

1 shoulders and knees?
2 A Oh boy. That's a tough question. I would say probably
3 20 to 25 years with maybe an occasional exception, maybe even 30
4 years.
5 Q Is it fair to say that in the last 20 to 25 or 30 years
6 you've done a lot of labral tears, rotator cuff tears?
7 A That's very fair to say.
8 Q You've done a lot of operations?
9 A Yes.
10 Q In how many of your patients do you recommend surgery
11 the first time you meet them?
12 A That's a very complicated question. It all depends at
13 what point in time. Sometimes I get to see patients 3 or
14 4 months after an injury. Sometimes I get to see patients a
15 week after an injury. Sometimes I get to see them right away.
16 It all depends on how long it is from the time of the injury and
17 also depends on what the injury is. There are some injuries
18 where you are wasting your time doing physical therapy. It just
19 doesn't pay to do it. You are just wasting time, giving the
20 patient a lot more suffering. Those patients you say you are
21 candidate for surgery, it's up to you what you want to do but
22 therapy is a choice, but statistics aren't very good at results
23 with therapy in certain types of injuries. Some injuries you
24 don't do surgery at all.
25 Q All right. Now, counsel referred to a standard

1 approach, would you agree that there is a standard approach of
2 conservative treatment before you go straight to surgery?
3 A I think, again, it all depends on what the problem is.
4 If you have a patient that is relatively young that has a full
5 thickness rotator cuff tear, you are really wasting your time
6 doing therapy. They are just not going to make the grade.
7 Q We are not talking about a sports injury here. We are
8 talking about someone in their 50's and you met him the first
9 time and you recommended surgery?
10 A The patient was 48 when I saw the patient and in
11 orthopedics that is considered young. That's not old.
12 Q There are certain I guess maximums of medical practice
13 such as the Hippocratic Oath?
14 A Yes.
15 Q That is to do no harm?
16 A Are you asking me?
17 Q Is that the Hippocratic Oath?
18 A I think so.
19 Q So as a doctor you should do no harm?
20 A You try. Everybody tries to do the right thing.
21 Q When you first met Mr. Espacia, the condition in his --
22 did you say it was his right shoulder, it was better than after
23 he had the procedure you had gave him; is that right?
24 A The right shoulder was improved. Still wasn't great
25 but it was improved.

1 Q Sorry. So it was the left shoulder that got worse?
2 A It didn't get worse. It just didn't -- Oh, I see what
3 you're trying to say. The patient did not get worse with the
4 surgery. His range of motion had improved a little bit. It did
5 not deteriorate and surgical results are not subject to do no
6 harm. You don't know what is going to happen in surgery. It's
7 not like you're going in there and you're saying I want to harm
8 you, I hope you have a worse outcome than you had before.
9 Q No. I'm not suggesting that but certainly with any
10 surgical procedure involving a joint such as a shoulder, you do
11 know that you need strenuous physical therapy in order to bounce
12 back, right?
13 A After surgery, you try to do as much physical therapy
14 as possible.
15 Q And Mr. Espacia wasn't doing physical therapy, isn't
16 that right?
17 A He had a gap but he was doing some therapy
18 postoperatively.
19 Q And your records reflect that he wasn't doing physical
20 therapy; isn't that right?
21 A There was a period of time, not the whole time. There
22 was a period of time where he was not doing physical therapy.
23 It's true.
24 Q Okay. And even after he had the surgical procedure he
25 waited -- was it a couple of months before he even started

1 physical therapy?
2 A I don't have the exact date, unfortunately, you can
3 only recommend the patient do certain things. The patient will
4 do what they are going to do.
5 Q Okay. You said you had an affiliation with Surgicore
6 and you described them as a hospital, Surgicore is not a
7 hospital, is it?
8 A Surgicore has a hospital in New Jersey.
9 Q And Advanced Orthopedics, how would would you describe
10 that company, you own it, right?
11 A Advances orthopedics.
12 Q Yes.
13 A That's my practice, sole owner. Never had anyone with
14 any ownership position.
15 Q And you have an ownership interest in Surgicore where
16 you referred Mr. Espacia to have the procedures done, right?
17 A I have an ownership with Surgicore.
18 Q You, in fact, had Mr. Espacia sign a waiver of the
19 potential conflict of interest in that you have an ownership
20 interest in Surgicore, isn't that right?
21 A That is disclosed to the parent. There is no conflict
22 of interest, as long as you disclose to the patient that this is
23 where you do your surgery. If there is any problem, let us
24 know, but by law, we disclose it to the patient. That law only
25 came into effect a number of years ago.

1 MR. FRANKLIN: Give me one moment. May I approach
2 the witness?
3 THE COURT: Sure.
4 Q Doctor, I'm just going to show you this document here,
5 and if you could just tell us what this --
6 MR. MARANDO: Counsel, can I see what he is looking
7 at, first?
8 Mr. Franklin: My apologies. This is the surgicore
9 records. I can show counsel.
10 MR. MARANDO: Yes.
11 THE COURT: Okay. Are they Plaintiff's exhibit?
12 MR. FRANKLIN: They are defense exhibit, Your
13 Honor.
14 THE COURT: So this defense exhibit has been
15 marked?
16 MR. MARANDO: Was it premarked?
17 MR. FRANKLIN: Yes. It's premarked as defense
18 exhibit, it's omnibus exhibit, Your Honor.
19 THE COURT: I'm sorry. Say that again.
20 MR. FRANKLIN: It's a medical records.
21 THE COURT: Which one.
22 MR. FRANKLIN: But I don't have a specific marking
23 for it.
24 THE COURT: Well, it has to be premarked.
25 MR. MARANDO: I will object, Judge.

1 THE COURT: Unless you are just doing it for
2 refreshing his recollection.
3 MR. FRANKLIN: It's just for refreshing.
4 THE COURT: Objection withdrawn. So he can't read
5 from it. Could you just for the record what you are
6 showing the witness? Just say it again for the record.
7 MR. FRANKLIN: Would you like me to state what the
8 record is?
9 THE COURT: Just the title of it, what are you
10 showing him right now.
11 MR. FRANKLIN: I'm showing him a record from
12 Surgicore that has a signature of a patient on it.
13 THE COURT: What date is it?
14 MR. FRANKLIN: Let me pull out my copy. The date
15 on this September 21, 2022.
16 THE COURT: Okay. Go ahead.
17 Q Doctor, is this a disclosure of financial interest?
18 A This says disclosure of physician financial interest in
19 Surgicore Jersey City.
20 Q And that you have a financial interest in the surgical
21 location where you're sending the Plaintiff to have his
22 procedure?
23 A Yes.
24 Q Now, you mentioned that you were being paid for your
25 testimony here today, right?

1 A Yes.
2 Q And how much would you say that you've been paid for
3 the procedures that you've rendered to Mr. Espacia?
4 MR. MARANDO: Objection, Judge, pursuant to
5 pretrial motions in limine.
6 MR. FRANKLIN: I can rephrase it.
7 THE COURT: Approach. Overruled.
8 (Whereupon, a sidebar conference was held.)
9 Q Doctor, how much was the cost of the right shoulder
10 surgery?
11 A I don't have those records in front of me. If you do,
12 then just let us know.
13 THE COURT: Can you describe what you're showing
14 the witness?
15 MR. FRANKLIN: Yes what I'm showing is a portion of
16 the Surgicore subpoenaed records.
17 THE COURT: Is it in evidence?
18 MR. MARANDO: Subpoenaed to the courthouse?
19 MR. FRANKLIN: I don't believe they have been but
20 it's just to refresh the witness's recollection.
21 THE COURT: You can only read it and then you can
22 ask him questions.
23 MR. MARANDO: It's not a courthouse, right?
24 MR. FRANKLIN: I believe it's right over there.
25 THE COURT: And what date is it?

1 MR. FRANKLIN: This is a document of date of
2 July 7th, 2021. May I approach?
3 THE COURT: Yes.
4 Q Showing you this document for the purposes of
5 refreshing your recollection, Doctor.
6 A Okay.
7 Q Does that refresh your recollection?
8 A Yes, absolutely.
9 Q How much was the cost of the right shoulder surgery?
10 A $3,000.
11 Q Was that the full amount or was that a portion of the
12 amount?
13 A I don't have those records in front of me, but that is
14 the standard number when there is no insurance on the patient.
15 Q And was that the amount that was paid to Surgicore?
16 A I have no idea. I am not involved with the surgical
17 center's payments that they get.
18 Q Would it refresh your recollection to refer to the
19 document that I just showed you?
20 A Sure. Whatever it says.
21 MR. FRANKLIN: May I approach.
22 THE COURT: Sure.
23 A Surgeon fees and anesthesia, so $3500 to Surgicore.
24 Q Okay. While I'm here, the amount payable to Advanced
25 Orthopedics your company?

1 A I think it said $3,000.
2 MR. MARANDO: Judge, I object to him reading from
3 the record. It's not in evidence.
4 THE COURT: Ask him in a question. If he can't
5 recall then he can use the document to refresh his
6 recollection.
7 Q What was the amount that was paid to your company,
8 Advanced Orthopedics?
9 A I can't hear. Sorry,
10 Q What was the amount paid to your company, Advanced
11 Orthopedics?
12 A I think you said it said $3,000.
13 Q Okay. And Roxbury Anesthesia, do you know what that
14 company is?
15 A That's an anesthesia group that goes to the surgery
16 center. I don't know what that do. I just know that they are
17 the anesthesiologists. I don't get involved in their economic
18 activities.
19 Q And you don't have a stake in that company?
20 A I don't have what?
21 Q Financial interest in that company?
22 A None.
23 Q Do you do a lot of referrals to that company?
24 A No. I give no referrals to that company. That company
25 supplies anesthesia to the center and many other centers. I

1 have no involvement. I just need an anesthesiologist when I do
2 surgery to provide anesthesia services. The center for the
3 ambulatory surgical center is responsible to have those services
4 provided by either that group or this group. Those groups
5 change all the time. I don't get involved in the politics or
6 the economics.
7 Q When you say the ambulatory service center, are you
8 referring to Surgicore?
9 A Every ambulatory service center has to have
10 anesthesiologists providing anesthesia services for the surgery
11 that goes on. Who they contract with I have no idea.
12 Q So although you have a financial interest in Surgicore,
13 you don't know if they do referrals regularly to the
14 anesthesiologists?
15 A Absolutely no. I have no idea. I have enough to worry
16 about on my own. I don't get involved in other people's
17 business.
18 Q Prior to Covid you said that you testified about 8 to 9
19 times a year?
20 A Before Covid I was in practice already for over
21 30 years so I started off maybe once or twice a year, and over
22 time, it built up.
23 Q And of those 8 to 9 times a year testifying, how many
24 times are on behalf of Plaintiff?
25 A Every one except for one time, as I told you, when the

1 defense counsel asked me to help him out, but those are all my
2 patients. They are not -- I am not a professional witness asked
3 to do testifying on behalf of somebody else, only on the
4 patients that I treat.
5 Q And those 8 or 9 times a year, in how much of those
6 cases have you performed a surgery on the patient?
7 A This is -- I don't know. It's over a 30, 40 year
8 career, so I would if I could venture to guess, which maybe
9 worthless in this situation, I would say that I am probably
10 called in to testify on a case where surgery was done, but it
11 doesn't have to be.
12 Q And in a case where you performed the surgery?
13 A Absolutely.
14 Q Now, did you do a thorough review of Mr. Espacia's
15 medical history before you recommended surgery?
16 A I only reviewed the part of the history that the
17 patient advises us about in his documentation before he comes
18 into the room, do you have hypertension, do you have cardiac
19 issues, and if the patient has significant issues and they need
20 surgery, then they have to get a medical clearance, which I
21 don't do. I'm the surgeon. I am not the internist, and so the
22 only time that I get involved is when the medical doctor says he
23 is not ready for surgery. We have to fix the diabetes or we
24 have to fix his blood pressure, or you just can never do the
25 surgery if the patient is too sick.

1 Q Okay. But do you collect their medical records?
2 A From who?
3 Q From anywhere. Their primary treater, anyone who would
4 have their history?
5 A No. I don't collect people's medical records. If they
6 are one doctor involved in the case or 30 doctors. I don't get
7 their records, unless I specifically have a question.
8 Q So when you recommended surgery to Mr. Espacia was it
9 just based on what he told you verbally?
10 A As opposed to what else?
11 Q As opposed to review of his medical records and
12 history?
13 A I don't really need medical records from other people
14 unless there is something specific that I'm concerned about, and
15 in this case, he told us his issues, he told us the medical
16 stuff, and I understand that we always ask if he has any prior
17 history of any problems with his shoulders in this case before,
18 and if there is a significant history with surgery or something
19 else, then in that case, I will try to find out more of what's
20 going on.
21 Q Did he tell you about his prior motor vehicle accident?
22 A No.
23 Q When you met with Mr. Espacia, how long did you meet
24 with him that first time?
25 A You're talking about five years ago? I don't have any

1 idea.
2 Q Would your medical records reference how long your
3 meeting was?
4 A No.
5 Q I want to ask you about your first meeting with
6 Mr. Espacia, and what you've written in your medical records,
7 and I think what I will do, Your Honor, if I could is just refer
8 to what has been marked as Plaintiff Eight's Exhibit A, Dr.
9 Berkowitz's full set of medical records.
10 MR. MARANDO: Plaintiff's is numbers.
11 THE COURT: Say that again, so you're referring to
12 --
13 MR. FRANKLIN: Plaintiff's Exhibit 15. Plaintiff's
14 exhibit is Advanced Orthopedic records. Just trying to get
15 this sorted. Okay.
16 THE WITNESS: I have the medical records here that
17 are certified.
18 MR. FRANKLIN: I don't want to have an evidentiary
19 issue, so let me just -- sorry this is the wrong one. It's
20 number 13 that I have certified.
21 MR. MARANDO: I think 15 is up there already.
22 Q So you have Plaintiff's 15 Exhibit in front of you?
23 A Yes.
24 Q Can you refer to the first visit?
25 A You have to speak up. Sorry. I can't hear you.

1 Q Can you refer to the first visit?
2 A Of course.
3 THE COURT: Sorry, but I just want to be clear.
4 Can you tell us what's in front of you? Is it Plaintiff's
5 marked 15.
6 THE WITNESS: Yes. This is 15.
7 THE COURT: Thank you. Go ahead, counsel.
8 Q Do you have your first visit in front of you, Doctor?
9 A Yes, sir.
10 Q Can you tell me what's included in the history that you
11 took from Mr. Espacia when you met him the first time?
12 A Sure. This is an orthopedic history. It's not a
13 medical history where an internist would go through a lot of
14 things. I'm very focused on orthopedics. So do you want me to
15 read it?
16 Q I don't want you to read it, but was it basically his
17 description of the accident and where it hurts?
18 A Oh sure, that's okay. So he was saying basically he
19 was taking a shower.
20 Q Well, I don't need you to read the entire thing.
21 A No, no. I'm paraphrasing. The ceiling collapsed, it
22 injured his shoulders, both shoulders, his neck, his back, right
23 hip and both lower extremities. He was taken to Presbyterian
24 Hospital, came under the care of Dr. Kakar, initiated physical
25 therapy before I saw him. He continued to complain of both

1 shoulders exacerbated by activity. He has difficulty with
2 certain activities in particular, and he has difficulty doing
3 activities of daily living, such as getting dressed, brushing
4 his hair. Pain is 8 out of 10. Exacerbated by activities so
5 that is a very focused history about his orthopedic complaints,
6 not about if he has any medical heart issues and so on and so
7 forth.
8 COURT REPORTER: Can you spell the doctor's name,
9 please?
10 THE WITNESS: Which one, mine?
11 COURT REPORTER: Dr. K that you just read from,
12 please.
13 THE WITNESS: K-H-A-K-H-A-R.
14 COURT REPORTER: Thank you.
15 Q And you performed a physical examination?
16 A Yes.
17 Q Then did you order MRIs at that point or did you read
18 MRIs?
19 A He already had imaging studies when he came to me.
20 Q Did you review any MRIs or any imaging from the ER on
21 the day of the accident?
22 A No, sir.
23 Q Is there a reason why you didn't read the ER imaging?
24 A What kind of imaging would that be, that I would be
25 interested in seeing?

1 Q How about any imaging about whether he had any
2 fractures or anything like that?
3 A I don't need the imaging. I just know from history
4 that he didn't have any fractures.
5 Q Okay. So you didn't look at the imaging from --
6 A I didn't need it. He didn't have broken bones.
7 Q All right. Now, I think you said the next time that
8 you met with Mr. Espacia, was that in July of the following
9 year?
10 A Yes.
11 Q And when you met him the second time did you again
12 recommend surgery?
13 A Did I what?
14 Q Did you again recommend surgery?
15 A Let's take a look. Yes.
16 Q And did you collect any additional history, like say
17 anything that may have occurred from May of 2021 up until the
18 time that you saw him in July of 2022?
19 A I'm not aware of any intervening injuries.
20 Q But that wasn't exactly my question. My question is:
21 Did you collect any medical history for that year long period?
22 A No.
23 Q And then the next time that you saw him was two months
24 later when you performed the operation?
25 A After I did the surgery, that's correct.

1 Q And did you have a pre-op visit?
2 A That would be the visit that we just talked about, when
3 I recommended the surgery, and he wanted to go for it. That
4 would be the pre-op visit. We wouldn't need another one.
5 Q So you met with him in July and the next time you met
6 with him was at the Surgicore?
7 A Yes, sir.
8 Q Okay. And did you have a post-op visit with him?
9 A That's the one you are talking about now, October 18.
10 Q Okay. Now, tell me was he in physical therapy at the
11 time of the post-op visit?
12 A It says in the history on October 18th that he had been
13 doing physical therapy with minimal improvement.
14 Q Are you looking at the one for October 18th?
15 A Yes. Under the column history, the next to the last
16 line.
17 Q Okay. Can you read three lines up where it says he
18 started?
19 A He started with some at home exercises.
20 Q Okay. So was he doing at home exercises or was he in a
21 physical therapy treatment?
22 A I don't have that information. He started at home
23 exercises, and he said that that was therapy, but I recommended
24 and prescribed physical therapy, like I do with every patient
25 after every surgery.

1 Q And the next time that you saw him, was that in
2 November of 2022?
3 A Yes, it is.
4 Q Was he doing physical therapy at that time?
5 A It does not say.
6 Q Does it, in fact, say that he is going to return to a
7 former course of physical therapy, the third line?
8 A Third line, since then he has limited range of motion
9 and pain to the shoulder. He does also have --
10 Q No. The third line. Where it says he will under the
11 plan.
12 A Under where.
13 Q Under the plan section, the third line.
14 A Oh plan, sorry.
15 Q Third line.
16 A He will return to a formal course of physical therapy
17 this time with the focus on range of motion and strengthening.
18 Q Does that imply that he wasn't doing that?
19 A Yes. That's what that implies.
20 Q And can you read the next line right behind it?
21 A Underneath it?
22 Q No. Right next to. Pick up right where you left off.
23 A He states that in physical therapy at this time, they
24 do not do any exercises to the shoulder.
25 Q No exercises to the shoulder. Would that be something

1 disappointing for you to hear, if your patient is not doing
2 physical therapy?
3 A Absolutely. That is probably why he was doing his own
4 exercises at home because he wasn't getting the care he wanted
5 and I wanted at physical therapy, so that's why I doubled down
6 on him and gave him a note. He needs to do something more
7 specific. I can't control physical therapy and how they do
8 things.
9 Q Now, did you have any further visits with Mr. Espacia
10 before doing the neck shoulder surgery?
11 A Let me see. January 31st.
12 THE COURT: Of what year?
13 THE WITNESS: 2023 is the next visit that he had
14 and the surgery was one month later.
15 Q Can you read under the plan, the third line?
16 A Which visit?
17 Q For the one that you were just talking about, January
18 31, 2023?
19 A Third line, he denies new accidents or injuries to the
20 left shoulder.
21 Q Keep going?
22 A He has tried and failed extensive post-op therapy of
23 the left shoulder. Despite physical therapy his pain persists
24 and his range of motion is severely limited.
25 Q When you say he tried and failed extensive

1 post-operative physical therapy of the left shoulder, does that
2 indicate to you that he is just not doing the physical therapy?
3 A Does that indicate to me what?
4 Q That he is not doing his physical therapy?
5 A It indicates to me that he is trying to do therapy,
6 whether its on his own or in physical therapy office, which I
7 formally requested him do.
8 Q Was that concerning to you that this is a patient you
9 operated on and is not following your advice?
10 A It's always concerning if the patient is not going to
11 the post-op treatment that I'm recommending. It tends to lead
12 to difficulties, but not always.
13 Q Nonetheless you proceeded with the right shoulder
14 surgery next, right?
15 A The right shoulder had nothing to do with his left
16 shoulder post-operative complaints.
17 Q Okay. But you nonetheless continued with another
18 surgery?
19 A Of course. He was in big trouble with his right
20 shoulder.
21 Q Was the neck surgery also, did you refer him to
22 Surgicore?
23 A I believe so. I hope so. My other records I have it
24 exactly but if you have the records there.
25 Q I can approach. I believe it's right next to it?

1 MR. MARANDO: Can I see a courtesy copy of that?
2 THE WITNESS: Maybe I have it.
3 MR. MARANDO: This is not in evidence though,
4 right?
5 THE COURT: Can you describe what you are showing
6 the witness?
7 MR. FRANKLIN: I am showing the witness the full
8 set of Surgicore records.
9 THE WITNESS: I have it.
10 THE COURT: Is that an exhibit?
11 THE WITNESS: I find the operative report.
12 THE COURT: Is that an exhibit?
13 MR. FRANKLIN: Yes, Your Honor. I'm not entering
14 it into evidence. I'm just refreshing the witness's
15 recollection.
16 THE COURT: I still need to know what you're
17 describing.
18 MR. MARANDO: Judge, I would object to the extent
19 that they are not in evidence, and he is reading from
20 documents or potentially will be reading from documents not
21 in evidence. I understand it's for the purposes of
22 refreshing his recollection but there is sort of a
23 workaround now.
24 THE COURT: Okay. Before I rule on that, Doctor,
25 did you find an answer from the document that you are

1 looking at that is in evidence.
2 THE WITNESS: I just found the answer in the
3 operative report.
4 THE COURT: Okay. Why don't you ask your question
5 again, Counsel?
6 Q Did you refer the patient to Surgicore for the second
7 surgery?
8 A Yes.
9 Q And was the cost for that procedure roughly the same
10 for the cost for the left shoulder surgery?
11 A It should be.
12 Q Can you -- referring to your set of records,
13 Plaintiff's Exhibit 15, finding your November -- excuse me, your
14 February 15, 2023 operative report for the right shoulder?
15 A Sure. I was just there. February 15th, 2023, I have
16 it.
17 Q Okay. Now, under Item Number 4 under your examination,
18 you reference a Grade 3 chondral lesion, is that not an
19 indication that something consistent with a chronic overuse of
20 the shoulder?
21 A It could also be acute. It can be both.
22 Q Okay. But it could be consistent with chronic?
23 A Yes.
24 Q And did you also find extensive hypertrophic synovitis?
25 A Yes.

1 Q Could that be consistent with a chronic condition?
2 A That can come on within a few weeks of having an
3 injury.
4 Q But could that also be consistent with a chronic
5 condition?
6 A Sure.
7 Q Now, can you refer to your next visit, and I believe it
8 was a week after that procedure February 21, 2023?
9 A Of course. February 21st, I have it.
10 Q Okay. Was Mr. Espacia doing any type of physical
11 therapy at this time to either shoulder?
12 A He has not started a formal cost of postop physical
13 therapy one week after the surgery.
14 Q Just curious, when you have a surgery like this on your
15 shoulder, aren't you supposed to get back into physical therapy
16 within like days, isn't that the goal?
17 A We usually try to get the patient back ASAP. Commonly,
18 patients and physical therapy want to wait until sutures come
19 out, but I agree with you, and I would love for them to go to
20 therapy the next day.
21 Q Isn't it that you want them to get up right away and
22 start exercising those shoulders?
23 A Unless you're dealing with a repair with sutures, you
24 would want them to go back as soon as possible. Certain types
25 of surgery you can't start therapy for weeks.

1 Q When is the next time that you saw Mr. Espacia?
2 A So this was February 21, 2023. The next is April 4th,
3 2023.
4 Q And at that time was he in physical therapy?
5 A He wrote, I mean, he said that he was doing physical
6 therapy with minimal progress.
7 Q Now, you wrote at this point in time that he is not a
8 candidate for any revision procedures currently in the left
9 shoulder. Why did you do that?
10 A Is this where? In the end?
11 Q It's in the same plan for April 4th, 2023. That's
12 about the third line from the bottom?
13 A Yes. I'm going through it. Yes.
14 Q Why did you say that he is not a candidate at this time
15 for any further surgeries?
16 A Because I wanted to give him more time. I don't like
17 to rush into doing a second surgery on the same body part right
18 away. I like to give it -- unless something really is crazy, I
19 like to give it at least a year before re-operating, and at this
20 point, he was not doing well, and I was very concerned, so I put
21 it in the note that we are not ready to do anything but it's a
22 signal to me because I write these notes for me to look back on
23 them and see I am concerned. Maybe he is a candidate, but right
24 now, not yet.
25 Q Can you read the next line in your report?

1 A Sure.
2 Q Where it says we will see.
3 A April 4th, 2023, which part?
4 Q We will see?
5 A Oh okay. We will see how he does with assisted
6 aggressive range of motion and strengthening on the left
7 shoulder, and he will be re-evaluated in about two or three
8 months.
9 Q And keep reading.
10 A Currently, he is not working. He is out on disability.
11 Q So was Mr. Espacia just not doing anything at the time,
12 physically?
13 A Is he not doing anything? He is just not doing his
14 work. I don't know if he is not doing anything, but he is not
15 working at his prior job.
16 Q When you say assisted aggressive range of motion and
17 strengthening, are you referring to sending him somewhere that
18 he will have like a personal trainer?
19 A No. I'm talking about in physical therapy they should
20 provide him with a much more aggressive physical therapy because
21 he is not making enough progress for me to be happy with it.
22 Q And when is the next time that you saw Mr. Espacia?
23 A June 20th.
24 Q Was he doing his physical therapy at this time?
25 A He has been doing physical therapy over these past few

1 months on the left shoulder with minimal improvement.
2 Q Can you look under the plan on the next page?
3 A Yes, sir.
4 Q Did you say you were going to try a cortisone injection
5 on the next visit?
6 A Yes.
7 Q Is that to help alleviate pain?
8 A Yes, and to give him a chance to have a better chance
9 of success with physical therapy.
10 Q So when a patient says they just can't do the physical
11 therapy because it's too painful, then you try to give them a
12 cortisone shot?
13 A Not necessarily. If there are tears, it could make the
14 tears worse, and it could also limit the healing, so cortisone
15 injection is meant in the situation that he is in to try to
16 alleviate the pain to give him a better chance of improving with
17 the physical therapy.
18 Q So you were recommending a cortisone injection on the
19 next visit?
20 A Yes.
21 Q And then you said he needs to continue with assisted
22 aggressive range of motion and strengthening?
23 A Absolutely.
24 Q Is one of the concerns that a patient who has been
25 operated on who is not following the doctor's advice that there

1 might be atrophy?
2 A Atrophy is when there is no -- when the patient is not
3 using their arm, so clearly when a patient has limited
4 functions, they are going to develop some of that atrophy over
5 time. That is true.
6 Q So that is like muscle loss, isn't that what atrophy
7 is?
8 A Shrinkage of the muscles, yes.
9 Q Is that what you found was happening here?
10 A I didn't see it.
11 Q And when is the next time that you saw Mr. Espacia?
12 A September 19th, 2023.
13 Q Was he doing his physical therapy?
14 A Just home exercise program on both shoulders. Due to
15 personal issues he is unable to go to formal physical therapy as
16 recommended.
17 Q Okay. And did you offer him another corticosteroid
18 injection?
19 A Yes.
20 Q And did he turn you down?
21 A Yes.
22 Q And then did you write him a prescription for
23 something?
24 A Yes.
25 Q What was that?

1 A More physical therapy.
2 Q For both shoulder?
3 A Yes.
4 Q And assisted aggressive range of motion and
5 strengthening exercises?
6 A Yes.
7 Q And did you have one final visit with Mr. Espacia?
8 A March 19th, 2024.
9 Q Was he doing his physical therapy?
10 A Always, yes.
11 Q When you say always yes, we've just been discussing how
12 he wasn't doing his physical therapy. Had it changed at this
13 point?
14 A I always do a physical exam to see if there is any
15 changes in his clinical abilities, so the right shoulder once
16 again showed about the same improvement that he had earlier and
17 the left shoulder had barely any improvement, barely anything at
18 all.
19 Q Okay. And you said the patient last had formal therapy
20 in February of 2024; is that right?
21 A That's what it says.
22 Q Was that the last time that you saw Mr. Espacia?
23 A March 19th 2024?
24 Q Yes.
25 A That was on the record. It looks like that was the

1 last time.
2 Q Now, you wrote a narrative report after that, right?
3 A Yes.
4 Q And you met with him in order to prepare that narrative
5 report?
6 A I don't know actually if I actually met with him or
7 not. The narrative report is not in this. I don't commonly
8 need to meet with him, but it's possible that if there was a
9 period of time, then yes.
10 Q So Mr. Espacia's last treatment with you then was March
11 of 2024?
12 A Treatment, yes. Narrative report is not treatment.
13 It's just a summary of events that occurred. It's not
14 treatment. You're correct 2024 was the last official visit
15 treatment concept.
16 Q So March 19th of 2024?
17 A Yes.
18 Q Do you know if Mr. Espacia has treated anywhere since?
19 A I haven't seen him.
20 Q Before providing Mr. Espacia surgeries to both
21 shoulders, you never tried cortisone injections?
22 A Not with tears, I won't do it.
23 Q Do you regret that decision?
24 A Why would I?
25 Q Well, the surgeries didn't seem to serve him well.

1 MR. MARANDO: Objection.
2 A I don't believe that is true. His right shoulder --
3 THE COURT: Hang on, Doctor, there is an objection.
4 I'm going to overrule. Go ahead.
5 A The right shoulder is certainly improved from where he
6 was. He is not perfect, but he is much better. Left shoulder
7 is not working out well. It's true. It happens.
8 MR. FRANKLIN: I am just going to check my notes.
9 I think that is all I have. Thank you.
10 THE WITNESS: You're welcome.
11 THE COURT: Counsel.
12 MR. MARANDO: Yes, Judge, just briefly.
13 RE-DIRECT EXAMINATION
14 BY MR. MARANDO:
15 Q Doctor Berkowitz, as you mentioned, you were familiar
16 with the fact that not only or in addition to the shoulder
17 injuries, there were also cervical and lumbar injuries, correct?
18 A Yes.
19 Q I'm not asking you to comment on that, but now that we
20 have the physical therapy records actually in evidence as
21 Plaintiff's Exhibit 13, would it change your opinion as to
22 anything you mentioned either on direct or cross when you hear
23 that in the evidence before you met with him for the first time
24 he sought physical therapy 16 times?
25 MR. FRANKLIN: Objection. Beyond the scope.

1 MR. MARANDO: Judge, we are talking about --
2 THE COURT: No. I'm going to overrule.
3 Q So the fact that he had 16 physical therapy visits
4 before you saw him for the first time, would that change any of
5 your testimony?
6 A It would only strengthen it. He wasn't going to do
7 well without surgery.
8 Q Doctor, there was on cross-examination a mention of a
9 gap of treatment, but if I told you what is in evidence as
10 Plaintiff's Exhibit 13 the physical therapy records, not home
11 visits, that showed 89 physical visits, during that gap of
12 treatment, would you consider that a gap of treatment?
13 MR. FRANKLIN: Objection. Speculating.
14 A It certainly wouldn't be a gap in --
15 THE COURT: Hold on, Doctor. Overruled.
16 A How can it be a gap if he is getting 89 physical
17 therapy treatments. There is is no gap.
18 Q And Doctor, because maybe one visit he was getting
19 treatment for one body part or another visit to another, can we
20 agree that maybe on some visits when he would see you it would
21 periodically change between the injuries that you were seeing
22 him for and maybe other injuries?
23 A Absolutely.
24 Q From September 21, 2022 when you saw him for the first
25 surgery, up until the present time, if I told you there was 142

1 physical therapy visits in evidence, would that change your
2 testimony as to anything to a reasonable degree of medical
3 certainty?
4 A Absolutely not. It would just make me consider that he
5 needs further surgery on that left shoulder because therapy
6 clearly is not working, and as pointed out during the
7 testifying, I didn't want to go right ahead and rush into a
8 second procedure on the left shoulder. I wanted to give him
9 more time. It turns out he is doing a hundred and something
10 visits trying to get the left shoulder better with therapy. I
11 mean, I give him credit.
12 Q Doctor, if my math is correct, that from the very first
13 moment you saw him until the present day today in this
14 courtroom, if my math is correct in evidence there are 262
15 separate physical therapy visits, would that change any of your
16 testimony today?
17 MR. FRANKLIN: I am going to object, Your Honor.
18 It's hypothetical.
19 THE COURT: Yes, I am going to sustain that.
20 THE WITNESS: May I answer?
21 THE COURT: No. Move on.
22 Q Doctor, mentioned on cross that you are paid for your
23 testimony. Are you being paid for your time out of your
24 practice today?
25 A Yes.

1 Q And if you weren't here, what would you be doing?
2 A Surgery.
3 Q And the surgery cost money?
4 A Yes, it does.
5 Q And you were asked about pricing, in some cases, and we
6 cannot go into them, in some cases are there discounted rates
7 for surgeries?
8 A It depends on a patient. I guess, there are sometimes
9 you try to do the best you can in an economic problem with the
10 patient where there is no insurance coverage, and you are not
11 getting --
12 Q We can't go into that, Doctor. But Doctor, for
13 whatever reason, is it always a guarantee that there can be a
14 discounted rate in a surgery, yes or no?
15 MR. FRANKLIN: Objection.
16 THE COURT: I'm going to sustain that. Move on,
17 counsel.
18 MR. MARANDO: That's all I have, Your Honor.
19 THE COURT: Counsel?
20 MR. FRANKLIN: Just briefly, Your Honor.
21 RE-CROSS EXAMINATION
22 BY MR. FRANKLIN:
23 Q Doctor, based on your records, you didn't follow
24 Mr. Espacia recovery's very thoroughly, did you?
25 A I saw him quite frequently. I don't know what you

1 mean.

2 Q You didn't know about two hundred and whatever physical

3 therapy appointments?

4 A I only know what the patient told me. 4.

5 MR. FRANKLIN: All right. Nothing further.

6 THE COURT: Okay. Thank you, Doctor.

7 THE WITNESS: Thank you.

8 THE COURT: Let's just take a 10 minute break.

9 COURT OFFICER: All rise. The jury is exiting the

10 room.

11 (The jury has exited the room.)

12 (Whereupon, a brief recess was taken.)

13 COURT OFFICER: All rice. The jury is entering.

14 (The jury has entered the room.)

15 THE COURT: You can be seated. Welcome back. Go

16 ahead, Counsel, and call your next witness.

17 MR. MARANDO: Good afternoon, officially. Your

18 Honor, the Plaintiff at this time calls Dr. Angel Eduardo

19 Macagno.

20 (The witness has entered the room.)

21 COURT OFFICER: Remain standing and raise your

22 right hand. Do you swear or affirm the testimony you're

23 about to give this Court will be the whole truth undere the

24 penalty of perjury?

25 THE WITNESS: I do.

1 COURT OFFICER: Just your name and address, for the
2 record.
3 THE WITNESS: First name Angel, last name is
4 Macagno, M-A-C-A-N-G-O, 761 Merrick Avenue Westbury, New
5 York.
6 THE COURT: Okay. Doctor, I'm going to ask you
7 something that sounds really simply but it's actually really
8 important. Pull the mic towards you, and I'm asking that
9 you speak as loudly I am. It feeds directly into the court
10 reporter's headphones and that way she can get down every
11 word you say.
12 THE WITNESS: Sure. Absolutely.
13 THE COURT: Go ahead, Counsel.
14 DIRECT EXAMINATION
15 BY MR. MARANDO:
16 Q Doctor, how are you?
17 A Hi, how are you doing?
18 Q Thank you for being here and happy Friday. Can you
19 share with us your current occupation and medical background
20 with the jury.
21 A Okay. I am complete medical school in Argentina --
22 sorry, a course, complete medical school in Argentina.
23 THE COURT: Sorry, Doctor, but you are going to
24 have to speak slower because you are a little hoarse, and
25 it's hard to understand you. Keep going.

1 A Complete medical school in Argentina. I do it in 1988.
2 I was a full trainer surgeon there, then I came to this country
3 about 2002, completed full residency in orthopedic surgery at
4 Downstate in Brooklyn here, and then I performed two fellowships
5 in spine surgery, one in Children at Miami Children Hospital and
6 the other one here in NYU?
7 Q Doctor, are you licensed to practice medicine in the
8 State of New York?
9 A Yes, since 2013.
10 Q And can you share with us are you what they call board
11 certified?
12 A I'm board certified in orthopedic surgery.
13 Q We heard what that means this morning but thank you for
14 sharing. Doctor, do you regularly treat patients with traumatic
15 orthopedic injuries?
16 A Yes.
17 Q And Doctor, in your practice or your educational
18 background, are you trained in also how to read diagnostic
19 films?
20 A Say that again, sorry.
21 Q Are you also trained in your practice in how to read
22 diagnostic films like MRIs or X-rays and things like that?
23 A Yes. We have to.
24 Q Now, Doctor, before today, have you ever been qualified
25 in a courthouse in the State of New York as an expert in the

1 field of orthopedic surgery?
2 A Yes.
3 Q And roughly, how many times?
4 A Say that again I'm sorry.
5 Q How many times, roughly? If you can estimate, that's
6 okay.
7 A About 20, 25.
8 Q Okay. And that's in your entire career?
9 A Say that again.
10 Q In your career?
11 A In my career here as a spine surgeon, yes.
12 Q Thank you, Doctor.
13 MR. MARANDO: Your Honor, at this time I would like
14 to move Dr. Macagno and offer him as an expert in the field
15 of orthopedic surgery, specifically for the spine.
16 THE COURT: It's not necessary for the Court to
17 qualify him. It's already been established by the records.
18 Go ahead, Counsel.
19 Q Doctor, are you being compensate for your time away
20 from your practice today?
21 A Yes.
22 Q Do you own a practice?
23 A Say that again.
24 Q Do you own a practice?
25 A Yes.

1 Q Just if you can, share with us that practice and what
2 sort of patients you see, for what reason?
3 A Well, I work in a private practice for New York Spine
4 Institute.
5 THE COURT: I'm sorry. Which institute?
6 A New York Spine Institute. I am an employee of New York
7 Spine Institute doing surgeries in multiple hospitals in New
8 York City and New Jersey.
9 Q And Doctor, if you were not here today, where would you
10 be?
11 A For office hours or surgery, but today was 70 percent
12 patients that I had to cancel.
13 Q So 70 patients had to get cancelled?
14 A Yes.
15 THE COURT: I'm sorry, how many, 70?
16 THE WITNESS: 70, yes.
17 Q Now, because we don't have the luxury of just for the
18 morning session, and I know you were here early this morning in
19 the hallway and the afternoon, but what is your full day hourly
20 rate, the fact that you are out and unable to be at your
21 practice doing what you do every day?
22 A Well, that is to cancel the patients.
23 Q What is the fee for your testimony being out of your
24 practice today for the full day?
25 A I'm not totally sure because I am employee. I get

1 30 percent of whatever New York Spine Institute gets for the
2 testimony.
3 Q Do you know what it is generally?
4 A Could be 20,000 total that they charge.
5 Q And now, Doctor, before three minutes ago in the
6 hallway, have you and I ever met in person?
7 A No idea. I was never in a situation in the trial with
8 him.
9 Q My law firm is Lipsig, Freund & Wisell, do you remember
10 if you've ever met anyone on behalf of my law firm?
11 A I do not recall. Pretty sure no.
12 Q Now, at some point before today, did you and I talk on
13 the phone?
14 A Say that again.
15 Q At some point before today, did you and I discuss on
16 the phone?
17 A Well, we are were about 10, 15 minutes, just when is
18 going to be the trial, and what time should I get here and just
19 coordinating that.
20 THE COURT: I'm sorry, but I did not understand
21 your last sentence.
22 A We were coordinating for about 10 to 15 minutes to come
23 for today, what was the trial, what time and all of that stuff.
24 Q So besides the 10 to 15 minutes that we spoke this week
25 that one time, you and I have never had any other interaction at

1 all?
2 A No.
3 Q Doctor, did there come a point in time where Henry
4 Espacia came under your care?
5 A Yes.
6 Q Doctor, do you have any notes or records with you
7 anything like that?
8 A I have the records that my office provided.
9 Q Now, Doctor, when you first met with Henry Espacia, do
10 you know generally when that time was?
11 A When?
12 Q When the first visit with you and Mr. Henry Espacia?
13 A I think it was 2021. I'm not sure of the dates.
14 Q One second, Doctor. Do you want some water? I know it
15 sounds like?
16 A It's going to be great, yes.
17 THE COURT: I know it sounds like you're not
18 feeling well, but I am going to just ask you again to speak
19 slower. Slower is better on all occasions.
20 THE WITNESS: I will. Thank you.
21 Q So Doctor, if I told you that on July 26th, 2021, that
22 that was the very first time that you met with Mr. Henry
23 Espacia, would that be consistent to what your records may say?
24 A Yes, I do believe so.
25 Q And generally, when you meet with someone, a new

1 patient for the first time, can you share with us, just
2 generally, what are you looking for, what are you looking at, do
3 you look at films, something else, just generally?
4 A Yes. First, the patient is going to tell us the
5 complaints, okay, I treat only spine cervical and lumbar mostly.
6 We ask the first part, the patient is going to relate to us the
7 history of the problem, the history of present illness. We ask
8 what happened, how he fell or not fell either it was whether car
9 accident, no car accident, what are the main complaints.
10 After that we perform a physical exam in the patient,
11 the physical exam mostly is located to this neck, the lower
12 back. I don't do shoulders or knees or anything like that, and
13 then if the patient have some images, we don't work with
14 reports. We want to see the images of basically MRIs, X-rays or
15 CT scans and we review those also.
16 Q And in this case, you did, in fact, review several
17 films before you met with him on that first day?
18 A Yes.
19 MR. MARANDO: Judge, Your Honor, at this point I
20 would like to offer into evidence pursuant to CPLR 4532
21 Plaintiff's Exhibit 16, which is the MRIs of the neck dated
22 May 3rd 2021. I have the exhibit on a CD, Judge.
23 THE COURT: Any objection?
24 MR. FRANKLIN: No, Your Honor, not at this time.
25 THE COURT: So admitted.

1 (Whereupon, ^ description was marked as Plaintiff's
2 Exhibit 16 for Identification.)
3 THE COURT: Go ahead, Counsel.
4 MR. MARANDO: Judge, at this time, since it was
5 marked into evidence, Plaintiff's 16, I would like to
6 publish it to the jury, and have the doctor comment on the
7 findings and the review of that specific exhibit, the MRIs.
8 THE COURT: Any objections?
9 MR. FRANKLIN: No, Your Honor.
10 THE COURT: Go ahead, Counsel.
11 Q Dr. Macagno, I'm showing you on the screen, and if you
12 would like to come down to discuss, I may hold the microphone
13 for you since the acoustics in this room are not very well.
14 A Okay.
15 Q If you can while you are walking down, just share with
16 us your review of this specific MRI?
17 A Yes.
18 Q Okay. And what are we looking at?
19 A Basically this is an MRI of the cervical spine. We can
20 see the MRI is useful for this. For us, it's really important
21 we can see the first, the image in the left is going to be the
22 patient seen from the side we call sagittal. The patient is
23 seen from the side, but basically, what you can see, and what is
24 playing -- one second, I will try to show it. We can see here.
25 As I said before, this is the patient is seen from this side.

1 You see facing this side, and this is like I see the patient
2 from the top, okay, and they are synchronized images, and I can
3 navigate from one to the other it's important to, and on this, I
4 think image here the gray one, that is the spinal cord. We
5 never want to touch that because you paralyze the patient.
6 COURT REPORTER: Doctor, I cannot hear you.
7 THE COURT: Doctor, again, please talk into the
8 microphone. The court reporter cannot hear you.
9 A Because you will paralyze the patient or worse. That
10 is why the surgery is done from the front when you do it, but
11 basically you can see that the spinal cord has all white around
12 that is the fluid, but when the disc herniation are compressing
13 the spinal cord, you can see, there is fluid there.
14 MR. MARANDO: Doctor, I will have you step over
15 here, so that the jury can hear you.
16 Q But Doctor, looking at this specific exhibit, you
17 mentioned the white is the spinal fluid. Is there a reason why
18 that the spinal fluid seems to stop at some point?
19 A Yes. Because cushion for you to have an idea the disc
20 is like a small in the neck, small like this circular, and it's
21 a cartilage any you have gel, and this is cushion and everything
22 that you move to the disc and the gel is stay inside because it
23 going to cushion between the bones. When you have an accident,
24 that gel came out that is the disc cartilage, no more
25 cushioning, but if you coordinate one to the other, then you can

1 see here that is the disc herniation. That is something that
2 came from inside the disc. This is one of the --
3 Q Doctor, can you share with us the difference, if there
4 is a difference between a herniation involving an impingement on
5 the spinal cord versus an impingement on the neural brain and if
6 you can what that means?
7 COURT REPORTER: Sorry, Counsel, I cannot hear the
8 question. It's too far from the Mic.
9 Q Doctor, can you share with us the difference, if any,
10 with respect to a disc herniation in regards to either an
11 impingement on the spinal cord or an impingement on the neural
12 foraminal? And I don't have the spelling. I'm sorry.
13 THE COURT: Doctor, into the mic, and you have to
14 talk really slow. Go ahead.
15 A Basically it will be the same action. The spinal cord
16 you can see there it's all nerves inside. The nerves are coming
17 from the brain are coming to the spinal cord, and they are going
18 to exit the spinal cord. That is the foramina, where they
19 exiting could be compressed, but also could be compressed in the
20 middle of the spinal cord, like here (indicating.)
21 Q So Doctor, each level of the cervical spine, does
22 anything exit the nerve, the actual spinal nerve into the neural
23 foramina?
24 A I don't understand the question.
25 Q So the spinal cord itself at each level, does it branch

1 out into each level of the cervical spine?
2 A Yes that is correct.
3 Q So there could be an impingement on those specific
4 nerve roots?
5 A (No verbal answer.)
6 Q But in this case is it something different or is it an
7 impingement on the neural foramina?
8 A Let me see. Also at the same time as you can see there
9 you have the compression of the spinal cord.
10 Q On the actual spinal cord?
11 A Yes.
12 Q Just stick around, I'm not done with this one, Doctor.
13 Now, Doctor, when you met with Mr. Espacia in that first visit,
14 after reviewing this specific MRI, speaking with him, hearing
15 his corners, were these findings that you reviewed consistent to
16 what it shows on the MRI?
17 A Yes. Absolutely, yes.
18 Q Doctor, did you also evaluate Mr. Espacia's lower back?
19 A Yes. Because he was complaining of that issue also.
20 Q Now, specifically, did you review an MRI dated
21 June 10th, 2021 in conjunction with your very first visit?
22 A I do believe so. I don't recall exactly, but I do
23 believe so.
24 MR. MARANDO: Judge, at this time, it's actually
25 Exhibit 17 pursuant to CPLR 4532, I would like to offer into

1 evidence the lumbar MRI dated June 10th, 2021.
2 THE COURT: Any objections?
3 MR. FRANKLIN: No, Your Honor.
4 THE COURT: So it's in evidence.
5 (Whereupon, ^ description was marked as Plaintiff's
6 Exhibit 17 for Evidence.)
7 Q Now, Doctor, just like before, can you share with us
8 what we are looking at with respect to the MRI of the spine now?
9 A It's the same that we saw in the neck. Now it's going
10 to be the lower back, okay, here this white stuff is fat where
11 we have everyone has it under the skin. These are the
12 vertebras.
13 COURT REPORTER: Excuse me, Doctor, I can't hear
14 you again. Please speak into the mic.
15 THE COURT: The what?
16 THE WITNESS: The bones.
17 THE COURT: Okay. The vertebra and the bone.
18 A The vertebra and the bone in the middle you have -- you
19 are going to see the discs and under on the discs this is more
20 like the image you are going to see, they are gray or white, but
21 gray because they are full of cartilage, and full of gel. They
22 are full of water inside, and this is good disc of cushioning.
23 If you can see the last one, and you move the line from there.
24 You can see the last one that disc doesn't exist anymore
25 apparently, you have an injury. And it's only one disc, and at

1 the same time, you see the side. If yoy can see here, but it
2 has a significant disc herniation that is outside of the present
3 nerve root also. We call the disc black disc because of the
4 color of it. You can see it's totally different than the other.
5 Q Doctor, at some point starting with the cervical spine,
6 was there ultimately surgery performed on Mr. Espacia's neck?
7 A Well, the actual thing that you can do in this case is
8 what we did was in the name of the surgery is anterior cervical
9 discectomy and fusion because we approach from the front, sounds
10 scary, but it's less dangerous approach. Cervical because it's
11 the neck, discectomy because we remove the disc. We cannot
12 replace or put anything inside the disc it's destroyed and it's
13 not existing anymore.
14 Q Doctor, before you continue, would it assist your
15 testimony if I show a demonstrative illustration of the surgical
16 procedure in discussing exactly what you did side by side with
17 the MRI, I'm sorry, X-ray dated December 20, 2021 of the
18 post-surgical imagining of the hardware?
19 A Should be great.
20 MR. MARANDO: Judge, at this time, I would like to
21 for demonstrative purposes show what's been premarked as
22 Plaintiff's Exhibit 22, and side by side, Judge, with what
23 I'm about to offer into evidence pursuant to CPLR 4532, the
24 12/20/2021 X-ray of the cervical spine, the post-surgical
25 X-ray.

1 THE COURT: Just is that Plaintiff's Exhibit 18 or?
2 MR. MARANDO: That exhibit of the illustration.
3 THE COURT: I see it's 22, but what was the second
4 thing you wanted. I see of 18 is X-rays of the neck.
5 MR. MARANDO: 18, yes, as well. 18 would be what
6 I'm moving into evidence and for demonstrative purposes, it
7 would be Exhibit 22.
8 THE COURT: Okay. And just so we are clear, 18 is
9 the X-rays of neck dated December 2021 and March 9th 2023.
10 MR. MARANDO: Yes.
11 THE COURT: Any objection?
12 MR. FRANKLIN: No, Your Honor.
13 (Whereupon, ^ description was marked as Plaintiff's
14 Exhibit 18 for Evidence.)
15 (Whereupon, ^ description was marked as Plaintiff's
16 Exhibit 22 for Evidence.)
17 Q Okay. So Doctor, I am showing you on screen now, if
18 you can, just talk with us what you did here with respect to the
19 your findings on the initial MRI. And if you want, Doctor, I
20 also have a physical demonstrative, and it's an actual spine, or
21 if you would rather use the TV screen.
22 A I think this is great. This is physical pictures.
23 Basically this is what I was saying before, okay, everything is
24 smaller that is incision, you don't want to to do this. The
25 surgery performed almost ten times more commonly in woman and

1 you don't want to leave the scar, believe me, it's going to be
2 bad for your facial. That means the incision is small, one inch
3 --
4 THE COURT: Doctor, you have to go a little slower.
5 I'm having trouble understanding you. It's just very hard
6 to hear you with your hoarse coarse voice. Go ahead.
7 A The significance is you cannot go in the middle, you
8 have bad things here. If you go to the side, you will have like
9 a hole. You can touch it there. The spine is right there.
10 It's not in the back of the neck. We make it small incision put
11 the microscope. That is what they call laser. It's not really
12 laser. You don't destroy things with the laser. We get to the
13 disc, okay, we target the disc in the case and the two discs
14 from the disk herniation, and you remove the disk.
15 Q Now, Doctor, in treating this specific patient, did you
16 create in the ordinary course of business create records based
17 on those visits and dealings with the patient?
18 A Yes. You have to, and you have to do prepare a report
19 after the surgery also.
20 MR. MARANDO: Judge, subject to redaction, I would
21 like to offer into evidence his records for this patient
22 kept in the ordinary course of business, Plaintiff's Exhibit
23 14 subject to the redaction.
24 THE COURT: Any objection?
25 MR. FRANKLIN: No, Your Honor.

1 THE COURT: Okay. So it's admitted into evidence.
2 Plaintiff's Exhibit 14, subject to redaction. Just give the
3 court reporter a moment to mark it.
4 (Whereupon, ^ description was marked as Plaintiff's
5 Exhibit 14 for Evidence.)
6 Q Doctor, when you hear something called a gold standard
7 in comparison between looking at an MRI and actually being in
8 there during surgery, can you share with us that what means?
9 A Well, actually MRIs are pretty good exams for this
10 kind, but when you get in with the microscope, you are going to
11 see everything. You see the real parts. You see the disc
12 herniation. You see the posterior part of the discs is broken.
13 You also going to see the spinal cord, but the spinal cord is in
14 the back. That is the best way that you can have.
15 Q Now, Doctor, following the surgery, and you can take a
16 seat.
17 A Thank you.
18 Q Now, Doctor, based on your notes, did you continue to
19 treat him or see Mr. Henry Espacia following this specific
20 surgical procedure?
21 A Yes. We follow all of the patients for about one year,
22 more or less always. This my standard of care, not necessarily
23 everyone does the same, but I want to follow the patient at
24 least the one year.
25 Q Now, through the present time, do you know how many

1 following visits that you had following this specific surgery?
2 A No, sir. I should check the records, but I don't
3 remember.
4 Q If I told you from December 2021 up until July 2024
5 there was about six visits, would that consistent to what your
6 records would show?
7 A Correct.
8 Q Okay. Doctor, I'm going to show you a comparison of
9 two X-rays, and Your Honor, those specific two X-rays are what's
10 already in evidence, I believe as Plaintiff's Exhibit 18.
11 THE COURT: Okay. Any objection?
12 MR. FRANKLIN: Can you identify what is the date,
13 what's the subject?
14 MR. MARANDO: I'm comparing December 20 2021 to
15 March 9, 2023.
16 THE COURT: Okay. And that was admitted into
17 evidence, so go ahead.
18 Q So Doctor, if you want to stay up there, that is fine,
19 and I know that I just sent you back up there, but looking at
20 these two X-rays what appears to be two years apart, not
21 focusing on the intervertebral bodies but focusing on them
22 vertebrals themselves, do you have any opinion as to the
23 vertebral body below the metal, what we see here?
24 A They are not showing the X-rays.
25 Q I'm sorry. So, Doctor, on the screen, I have

1 Plaintiff's Exhibit 18 into evidence. On the left we have
2 December 20, 2021, and on the right we have about two years
3 later or a little less than that, March 9th 2023, and just
4 focusing on not the intervertebral body, but the bone, the
5 vertebral body, can you share with us the comparison and
6 significance, if any, when it comes to the disc height or not
7 the disc height but the vertebral bodies themselves underneath
8 where the fusion was done?
9 A Which one is the latest.
10 Q The C6.
11 A But we just -- what year is the, what view is the
12 latest view?
13 Q Sorry.
14 A What view is the latest view?
15 Q This is from year and a half later March 9, 2023 on the
16 right and so March 9, 2023 and this is later. This is before.
17 This is December 20, 2021 and this is March 9, 2023.
18 A Yes. Basically, what we are seeing there is a lateral
19 view of the neck, okay, and you can see a plate that we would
20 put in the front on the two cages that they are replacing the
21 discs. The one in the right is a little more oblique, the
22 X-ray. That is why it's difficult to compare. It seems to me
23 that the right the disc blow is the space is smaller than the
24 one on the left. That is going to be C6-C7 disc.
25 Q Now, Doctor, what is adjacent segmental disease called

1 and share with us what that means?
2 A Yes. Every time that we do a surgery fusion in the
3 lower back or in the neck or any other part, you are fusing that
4 but the stress, you don't have movement in those discs. That
5 means the stress is going to go to the healthy or not healthy
6 discs involved and the discs below. Over time we know most, you
7 do it in younger people that the other discs probably is going
8 to undergo another surgery because it's going to start getting
9 worse and worse.
10 Mostly these patient he has already injured discs
11 C6-C7, but it was not for surgery, okay, at that time, I don't
12 like to do surgery at every level that is showing disc
13 herniation, only the ones that give us real symptoms relating to
14 that disc.
15 Q Now, Doctor, when we are looking at the metal on the
16 cervical spine, the specific level of the spinal column, are
17 they fused in one joint or how is the flexibility when it comes
18 to those specific levels of the cervical spine after the
19 surgery, is it supposed to move the same way as before,
20 something else? Please show us.
21 A Basically the rotation that we have is not going to
22 change because it's not in between the first two vertebras and
23 that is below that, and you can lose some flexion, but actually
24 if you do one or two levels, it's a smaller surgery and the
25 range of motion will be no so terrible. It's not going to

1 change a lot.
2 Q On that topic, Doctor, I'm going to show you two
3 medical notes from your office visits, and specifically,
4 July 26th, 2021, and July 9th, 2024, and I'll ask you about your
5 physical exam. I have a courtesy copy, so you don't have to
6 worry about going through your notes, and I'll show defense
7 counsel?
8 THE COURT: Can you give me the dates again?
9 MR. MARANDO: Yes, Judge, the specific dates of the
10 visits, the first visit, Your Honor, July 26th, 2021 and the
11 second visit, well, not the second visit but the comparison
12 visit is July 9th, 2024.
13 THE COURT: 2024, okay.
14 MR. MARANDO: This is the July 9th 2024.
15 THE COURT: Okay. Thank you.
16 MR. FRANKLIN: This is in evidence as which number?
17 MR. MARANDO: New York Spine Records, I believe it
18 was Number 14 in evidence. Judge, I seem to have misplaced
19 -- we have the full record in evidence with respect to the
20 earlier visit, I can skim through the big binder for the
21 purpose of the question.
22 Q Sir, I may just tell you, specifically, what your
23 findings were, and you will tell me if your records indicate
24 that is consistent. I have the second record, the July 9th,
25 2024, and I'll ask you to opine on the different, if any, is

1 that fair?
2 MR. FRANKLIN: Your Honor, I just object to counsel
3 telling the doctor anything and having the doctor just
4 agree.
5 THE COURT: So what are we missing?
6 MR. MARANDO: I thought if we could just take two
7 minutes.
8 THE COURT: Do you have the one July 26th?
9 MR. MARANDO: Yes, just the initial visit.
10 THE COURT: Do you have the July 9th, 2024 visit?
11 MR. FRANKLIN: New York spine.
12 THE COURT: Which one are you missing?
13 MR. MARANDO: July 26th, 2021, the initial visit.
14 May I approach.
15 THE COURT: Yes.
16 (Whereupon, a sidebar conference was held.)
17 Q Doctor, so here I have the earlier visit, I believe is
18 your first consultation, and I'm specifically going to ask you
19 questions on your physical exam.
20 THE COURT: And since they are both July visits,
21 say not only the date, but the year.
22 Q For the purposes of these questions I'll just refer to
23 them as the 2021 visit versus the 2024 visit, Doctor, is that
24 fair?
25 A Yes.

1 Q Okay. So Doctor, in the 2021 visit, can you share with
2 us your finding of the physical exam of the cervical spine? And
3 if you want to briefly mention what that physician exam really
4 helps for the jury.
5 A The exam is basically two things that we check. First,
6 the range of motion of the neck, okay, but this is related to
7 the muscle spasm of the patient. The range of motion actually
8 is not the sign in surgery for us, and it's pretty much illegal
9 to something like that because it depends on how patient is
10 feeling, if he took medication the day that he came to the visit
11 because it's reflected mostly the spasm of the neck.
12 The first time, that's the range of motion. The
13 first time I saw him he was really, really bad shape, and
14 the range of motion was really, really, really decreased.
15 Q Well, Doctor, starting with the flexion of the cervical
16 spine what number do you have in terms of --
17 A I have the flexion of 30 degrees for normal of about 50
18 degrees.
19 Q What about the extension?
20 A The extension it was to movement and is going to be 20
21 degrees for 60 degrees normal.
22 Q And right rotation?
23 A Right rotation and left rotation were really, really
24 limited, right was 20 for a normal of 80 and left were 15 for a
25 normal of 80.

1 THE COURT: 50 or 15?
2 THE WITNESS: 15.
3 THE COURT: And it's normally 80?
4 THE WITNESS: Normal 80.
5 Q And then for left and right lateral flexion the normal
6 is 45 degrees?
7 A Yes. And was decreased also to 15 to one side and to
8 20 the other side.
9 Q Well, 20 to the right, 15 to the left?
10 A Yes.
11 Q What were your findings with respect to that visit on
12 your physical exam of the cervical spine?
13 A The lumbar?
14 Q Sorry. I apologize, the lumbar.
15 A It was similar. It was muscle spasm, it was tender to
16 palpation. The range of motion was decreased. Flexion it was
17 30 for a normal of 60. Extension 20 for a normal of 45. And
18 left lateral flexion 20 for the normal of 45. Same number for
19 the right lateral flexion 20 for a normal of 45.
20 Q Thank you. Now, Doctor, quickly I'm going to shift to
21 the 2024 visit and your physical exam.
22 A Yes.
23 Q Now, Doctor, your July 9, 2024 exam, physical exam, can
24 you share with us your cervical spine findings with respect to
25 the physical exam on that day?

1 A Okay. The range of motion is improved compared with
2 the surgical range of motion, the flexion, as I said, was now 40
3 for a normal of 50, extension 30 for a normal of 60, right
4 rotation was 30 and left rotation 20 for a normal of 80,
5 20 degrees for left lateral flexion and right lateral flexion.
6 Q So specifically for flexion for the cervical spine,
7 there is still a ten degree area of loss at this visit two years
8 later, three years later?
9 A Yes, but if I can clarify something.
10 Q Yes.
11 A I was reviewing the chart last night and they improved
12 significantly the range of motion after surgery and something
13 like this, but this visit, the patient came because he was
14 having more problems with the neck. He was like, again, problem
15 with the arms and it was getting stiff again with more muscles
16 spasms. That is why this is still good, but it was better
17 results before.
18 Q And extension even though it's improved at 30 degrees
19 for the cervical spine it is still considered a 30-degree loss
20 compared to the normal?
21 A Yes. It's 50 percent, yes.
22 Q And with the right rotation that's about a 50-degree
23 loss?
24 A Yes both.
25 Q So even though it's improved it's still 50 degrees of

1 of loss compared to what's normal?
2 A Yes.
3 Q Left rotation 60 degrees of loss?
4 A Yes.
5 Q And this is the 2024 visit three years later?
6 A Correct.
7 Q And the right lateral flexion it's stayed about the
8 same with a 25-degree of loss compared to what's normal?
9 A That's correct.
10 Q Okay. Now, Doctor, did you prepare a future medical
11 care plan for Mr. Espacia?
12 A I think it should be included in the narrative that we
13 do at the end.
14 Q Now, Doctor, starting with the cervical spine, and I
15 can try to find you the narrative and I think that I have it
16 here.
17 MR. FRANKLIN: I'm going to object with respect to
18 the characterization of this is a planned medical care
19 planned and there is no foundation.
20 THE COURT: I'm going to overrule that. Go ahead.
21 Q I'm just going to come up and grab the binder, just to
22 see if I can find that. You have it.
23 THE COURT: So just to clear the record, state what
24 you're referring to, Counsel, if you are referring to an
25 exhibit.

1 MR. MARANDO: Yes, Judge, so subject to redaction
2 just his testimony with respect to the cost of future care
3 is this area.
4 THE COURT: What exhibit is it.
5 MR. MARANDO: This is the New York Spine records
6 which are in evidence but subject to redaction as
7 Plaintiff's Exhibit 14.
8 THE COURT: Thank you. Go ahead.
9 MR. FRANKLIN: For now what was on the CD.
10 THE COURT: Okay. Go ahead.
11 Q Now, Doctor, did you prepare future medical treatment
12 for Mr. Espacia?
13 A Yes. Mostly related to surgeries, yes.
14 Q Now, starting with the cervical spine, what, if any,
15 future medical care have you anticipated with a reasonable
16 degree of medical certainty?
17 A As I said before, it's pretty common that this patient,
18 mostly this patient is going to have another surgery in the
19 future. It's called adjust segment surgery. It's anticipated,
20 because as I said before, the other discs was not excellent, but
21 was not in the shape that you need to do surgery yet, that these
22 are the charges that we charge as a private New York Spine
23 Institute, it could be another people can with another numbers,
24 but basically we charge $75,000 per surgery including the
25 surgeon and the assistant surgeon.

1 Q And that's just for the cervical spine?
2 A Correct.
3 Q Did you have any findings as to future surgery for the
4 lumbar spine?
5 A The lumbar spine, as we saw before, he has really bad
6 disc shape. It's last disc on the treatment, it will be another
7 fusion in the future and the price is more like the same, like I
8 think.
9 Q Go on.
10 A It's about 50,000 that I have in my chart for the
11 lumbar?
12 Q Now, going back to that earlier X-ray that we saw, when
13 we compared the hardware on the left and the hardware on the
14 right and the disc below the hardware, when you mentioned that
15 future cervical surgery, is that something that that specific
16 surgery would involve?
17 A Yes. It's going to be the disc below the worse one
18 was, as I said, before the C6-C7, that's the name of the disc.
19 It's crazy. We never put names in the discs. It's like the
20 vertebral below and it's going to be almost sure having a new
21 surgery in the future, yes.
22 Q And Doctor, have you recommended anything in terms of
23 future treatment involving physical therapy?
24 A Yes. Correct. This patient basically the problem with
25 this kind of surgery is not indicated for neck pain or lower

1 back pain. People have to understand that. It's indicated for
2 the compressed the nerves. If the patient doesn't do his or her
3 part that is going to be getting muscle strengthening in future.
4 It's not only physical therapy. It's not going to work and
5 basically in these surgeries for the rest of the life that you
6 are having to do exercises and physical therapy. I don't know
7 where we put here.
8 Q How many times per week, Doctor, have you recommended
9 for physical therapy?
10 A The perfect time is going to be three times a week then
11 it's going to be --
12 THE COURT: I'm sorry.
13 A Three times a week but not everyone can do it. It's
14 like we work, and we have to pay the bills. It's no time for
15 that.
16 Q This is in a perfect scenario?
17 A Correct.
18 Q A patient could potentially get less and a patient
19 could potentially get more, is that fair, Doctor?
20 A That's correct.
21 Q Or a patient could potentially get nothing?
22 A That's correct.
23 Q Now, Doctor, with respect to the price, based on, you
24 know, being a physician and your practice and doing what you do,
25 generally, what price to would that be?

1 MR. FRANKLIN: Objection. Vague.
2 THE COURT: Overruled.
3 A It's going to be -- this is the question from the
4 practice as I work as a private patient it's going to be three
5 times a week $375 per every session that the patient go.
6 Q Okay. Doctor, and what about continued orthopedic
7 consultations, what would that look like, if any?
8 A We normally want to follow the patient 3, 4 times a
9 year or two times a year, and it's going to be about three times
10 a year, what we put here, and it's going to be $377 per time
11 that the patient sees us.
12 Q And with a reasonable degree of medical certainty, what
13 would the price of that look like for the orthopedic visit per
14 visit?
15 A That is the $377 per visit, three times a year.
16 Q Doctor, is there any future medical care suggestions
17 for diagnostic films, X-rays, MRIs?
18 A Yes. It's more happenening for this patient. If the
19 patient have symptoms again, we are going to do MRIs all the
20 time. About one per year is more or less the average, and it's
21 going to be about $2,000 per MRI.
22 Q Okay. And Doctor, with respect to without contrast or
23 with contrast, is there a difference in pricing?
24 A Yes. Always because with contrast you have to have a
25 doctor that is injecting the contrast and more care for the

1 patient it's going to be $3500 per MRI.
2 Q Now, Doctor, same thing, this is a perfect world, it
3 doesn't mean the patient would get it, they may get more or
4 less, is that fair?
5 A That is correct.
6 Q Now, Doctor, what about with respect to the lumbar
7 spine?
8 A Well, I am pretty positive this patient at some time
9 will need surgery. I cannot predict the future but seeing the
10 disc that is pretty bad, and it's more or less the same that we
11 said before, and in this case, if the patient have surgery it's
12 going to be $50,000 for the surgeon and the assistant and then
13 the physical therapy MRIs, it's going to be all the same as the
14 other one.
15 Q Now, Doctor, would the prices be the same consistent to
16 those of the cervical fine?
17 A Yes. It's going to be the same kind of follow-up.
18 Q And that would be as you mentioned here, would that be
19 a separate cost for the lumbar spine treatment, specifically, to
20 that body part based on practice and what you have written down
21 here?
22 A Yes, that's correct.
23 Q And that's 375?
24 A As I said before, 375 physical therapy, 377 for
25 orthopedic surgeon visit.

1 Q Would the same apply to the diagnostic films either
2 without contrast or with contrast?
3 A Yes, the same price.
4 Q Now, Doctor, based on your treatment analysis, are all
5 of those consistent with prevailing medical charges within New
6 York, as you see them in your practice?
7 A Say that again. I'm sorry.
8 Q Are those charges that you mentioned, the prices
9 consistent with the prevailing medical charges based on you
10 being a physician in New York for the period of time in which
11 you've been an orthopedic surgeon?
12 A That's correct.
13 Q And Doctor, based on your analysis and treatment and
14 your review of records, do you believe that with a reasonable
15 degree of medical certainty that he will need those specific
16 treatments?
17 A I do.
18 MR. FRANKLIN: Objection. Calls for speculation.
19 THE COURT: Denied.
20 Q Doctor, if after this point when you stepped down and
21 at a later time if someone else comes up here and testifies
22 consistent to a report that Mr. Espacia's spinal findings in the
23 MRIs that you reviewed are degenerative in nature and not caused
24 by the ceiling collapse on April 21, 2021, do you agree or
25 disagree?

1 A I disagree one hundred percent.
2 Q Why?
3 A I see this all the time. Okay. This patient is
4 50-something.
5 Q He is 54 today.
6 A 53, you have arthritis, that is changes arthritis. We
7 have it everyone. It's life. But in this case, besides the
8 arthritis, it's an acute event, like a trauma that made the
9 discs come out. That image as you show the disc they are the
10 small white thing. That is acute. That is fluid inside. When
11 you have -- I mean, this happens every time that I come into
12 these trials, but when if it were born degenerative means that
13 the bone is going to start compressing it. You are not going to
14 see water inside or gel inside. It's going to be bone ossified,
15 pieces of bone corrected. This is acute. The trauma is acute.
16 Yes, he has arthritis, of course. Everyone has it. We cannot
17 avoid that.
18 THE COURT: Counsel, it's time. We are going to
19 have to break for lunch.
20 MR. MARANDO: I only have about three questions
21 left, Your Honor.
22 THE COURT: Okay. You have four minutes.
23 Q You're aware from your note that Mr. Espacia was
24 involved in a motor vehicle accident collision ten years before
25 this occurred?

1 A Yes, if I recall, ten years but nothing significant.
2 Q Assuming for the purposes of the question if there is
3 two medical visits for physical therapy compared to a ten year
4 span versus 261 visits for physical therapy after this occurred,
5 what is the significance based on that, if any, with respect to
6 your diagnosis?
7 MR. FRANKLIN: Objection. Vague. Leading.
8 THE COURT: Overruled.
9 A If the patient got better in the past with two sessions
10 of physical therapy and went back to work and that means that
11 the trauma was not significant, and we want before even doing
12 surgery at least six weeks of physical therapy without result.
13 This patient in two times did okay and I'm not really concerned
14 for that accident. Everyone is going to have one.
15 Q Thank you. Doctor, with a reasonable degree of medical
16 certainty for the following questions, are Mr. Espacia's
17 cervical and lumbar injuries causally related to the April 21,
18 2021 ceiling collapse?
19 A I do believe so.
20 MR. FRANKLIN: Objection. Calls for speculation.
21 THE COURT: Overruled.
22 Q Was the surgery you performed medically necessary as a
23 result of those injuries?
24 A Yes.
25 Q Are the conditions you observed, the herniation, the

1 impingements a competent producing cause of pain and functional
2 limitation?
3 A Yes.
4 Q Now, sir, are his cervical and lumbar injuries
5 permanent in nature?
6 A Yes.
7 Q And as you mentioned he will require future medical
8 care in a perfect world, we spoke about the numbers, correct?
9 A Yes, he will.
10 MR. MARANDO: And my last question, just for the
11 purposes of formality, I have the NYPD hospital records,
12 subject to redaction and I have not put them into evidence
13 yet but they are here pursuant to 3122A with certification
14 in the courthouse for about five months.
15 THE COURT: Are you moving to admit them into
16 evidence?
17 MR. MARANDO: Yes, Judge.
18 THE COURT: And that's number 12.
19 MR. MARANDO: Yes, Judge.
20 MR. FRANKLIN: This is New York Presbyterian.
21 MR. MARANDO: Yes.
22 THE COURT: Okay. Number 12.
23 MR. MARANDO: Yes.
24 THE COURT: Any objection?
25 MR. FRANKLIN: No, Your Honor.

1 MR. MARANDO: Yes. And I'm actually done.
2 (Whereupon, ^ description was marked as Plaintiff's
3 Exhibit 12 for Evidence.)
4 THE COURT: Okay. Thank you, Doctor.
5 MR. FRANKLIN: Your Honor, cross, please.
6 THE COURT: Yes, after lunch. So now we are going
7 to break for lunch, and we would ask everyone to be back at
8 2, and we will pick up right away. Thank you.
9 COURT OFFICER: All rise as jury is exiting.
10 (The jury has exited the room.)
11 (Whereupon, a lunch break was taken.)
12 COURT OFFICER: All rise. The jury is entering.
13 (The jury has entered the room.)
14 THE COURT: Okay. You can all be seated. Welcome
15 back. Thank you for being so prompt and timely. It allows
16 us to move forward and keep the trial going, and so go
17 ahead, Counsel. I'm going to ask you to pull the mic
18 closer. Everybody, please use the mics.
19 Q Dr. Macagno, you would agree that the most reliable
20 indicator of an acute traumatic cervical spine injury is a
21 contemporaneous image, correct, contemporaneous image?
22 A It's important, but I don't think it's the most
23 important.
24 Q What about imaging from the day of the accident, you
25 would agree that that would be more accurate in identifying an

1 acute injury than saying something that maybe took a month or
2 two later?
3 A No. One or two months later it's significant because
4 changes keep coming in order. It's not everything happen in the
5 moment. That's why some patients, not this case, particular
6 symptoms, numbness, tingling in the arms at the beginning, okay.
7 I would explain better, so it's like --
8 Q Well, before you go there.
9 MR. MARANDO: Objection, Judge. Can we approach
10 for two seconds?
11 THE COURT: Step up.
12 (Whereupon, a sidebar conference was held.)
13 THE COURT: Sustained. Go ahead.
14 Q You reviewed the ER records?
15 A I do not recall.
16 Q You don't recall if you -- well, let me see if I could
17 refresh your recollection. I'm going to show what has been
18 marked into evidence as I believe it's Plaintiff's Exhibit 12,
19 and I have a copy of it, which is Defense Exhibit G. I'm now
20 something you the ER records. Does that refresh your
21 recollection, Doctor?
22 A No, but I have the record.
23 Q So you don't recall if you reviewed any emergency room
24 records?
25 A No, not really, only with reviewing the records.

1 Q So you saw Mr. Espacia for the first time -- when did
2 you say was your first visit?
3 A I don't recall right now.
4 Q You don't recall your first visit --
5 A It was 2021 but I don't recall.
6 THE COURT: Doctor, I'm sorry but you have to speak
7 a little slower. You have a hoarse throat. You have to
8 speak slower and clearer the court reporter and I think you
9 interrupted his question. Go ahead.
10 Q Doctor, do you recall the first time that you saw Mr.
11 Espacia?
12 A I don't recall exactly the date. It was 2021 but I
13 don't recall. I don't have the records.
14 Q Would it refresh your recollection to review your own
15 records?
16 A Yes.
17 Q Do you want to review them?
18 A Yes. I saw him on July 26, 2021?
19 Q You saw him July 26, 2021, about three months after
20 this accident?
21 A Correct.
22 Q And you're prepared to offer opinions as to causation
23 without referring -- without knowing if you reviewed the
24 emergency department records?
25 A Absolutely, yes. I don't need to review anything from

1 the emergency department.
2 Q Well, and Your Honor, I'm not going to ask him about
3 the things that we discussed, but let me ask you about the other
4 things in the emergency room records. Can you go ahead and take
5 a look at those?
6 MR. MARANDO: Just I would ask if we can get
7 clarification. It's about 400 pages. I'm not no sure what
8 is the question.
9 THE COURT: Well, he is asking him to look at it.
10 Just give him a second to look at it, and he will ask the
11 questions.
12 Q Doctor, can you look at the bottom right-hand corner?
13 A Yes.
14 Q There is one that starts with a Page No. 2, page 2, why
15 don't we start right there, and if you want we can start with
16 page 1?
17 A Okay.
18 Q Doctor, were you aware that Mr. Espacia was seen in the
19 ER of New York Presbyterian on April 21, 2021?
20 A I do not recall at this time, but I think after the
21 accident he was seen in the ER. I have it in my records.
22 Q Doctor, when you first met with Mr. Espacia, did you
23 review any of his medical history?
24 A I'm sorry. What are you referring to medical history
25 the trauma or?

1 Q Any history on any medical records any of his past
2 medical records?
3 A I do not recall this.
4 Q Doctor, when you say see a new patient don't you
5 typically to read up on the file?
6 A Absolutely not.
7 Q Absolutely not?
8 A Absolutely not.
9 Q Suppose you're about to treat a patient in a room,
10 isn't there a file and before you start operating, you open up
11 the file and read it?
12 A Absolutely not. You're wrong. I'm a doctor for more
13 than 20 careers. We don't do that as routine, only in specific
14 cases.
15 Q So is it your testimony as you sit here today that
16 you've never reviewed the ER records concerning Mr. Espacia's
17 injury on April 21, 2021?
18 A No. It's not the standard of care to review them by me
19 or any other doctor that treat the patient in this way.
20 Q Just yes or no. Is that no that you did not review it?
21 A No.
22 Q No, you did not?
23 A No.
24 Q So if hypothetically speaking, those records had
25 something to say about his cervical, is it fair to say that you

1 know nothing about it?
2 A I don't know what you're referring to for say about the
3 cervical, they are going to say -- I know what they are going to
4 say.
5 Q Do you know if there was a CT scan taken?
6 MR. MARANDO: Objection, Judge.
7 THE COURT: Overruled.
8 A The CT scan is not the standard of care. That's why we
9 don't care.
10 Q The question is yes or no, Doctor?
11 A No, I do not.
12 Q Do you know if there was an MRI taken?
13 A I do not recall. This not the standard of care to look
14 at the MRI in the ER.
15 Q Do you know if there was an evaluation of Mr. Espacia's
16 neck?
17 A Probably for the nurse, yes, someone is going to see
18 it.
19 THE COURT: Doctor, answer his question.
20 A Yes. Someone going to check the patient, yes.
21 Q The question is do you know what the ER records say
22 about the evaluation of Mr. Espacia's neck in the emergency
23 room?
24 A As I said before, no, I do not review records there is
25 not necessary to be reviewed in this case.

1 Q And to this day, you came here and you're sitting on
2 the stand, you're testifying and you've never even looked?
3 A To what? I'm sorry.
4 Q You're here today testifying in this case and you have
5 never to this day ever even looked at the ER records from the
6 day of the accident?
7 A Absolutely not. I didn't. I don't need it. You don't
8 do it.
9 Q Okay. What type of facility, Dr. Macagno, is New York
10 Spine Institute?
11 A New York Spine Institute is a teaching hospital. I
12 have multiple facilities.
13 Q Is it your business?
14 A No, it's not. I have privileges with New York Spine.
15 I'm an employee, as I said before.
16 Q Do you own it?
17 A No, I don't. I'm an employee.
18 Q Do you own ownership interest in it?
19 A No.
20 Q How long have you been with New York Spine Institute?
21 A Since I finish about eight years, I would say.
22 Q How many doctors are there at New York Spine Institute?
23 A There was change, currently 1, 2, 3, 4 spine surgeons,
24 two pain doctors and just another orthopedic surgeon came in
25 about one week ago, two weeks ago.

1 Q Is it a clinical practice?
2 A Say that again, please.
3 Q Is it a clinical practice?
4 A Correct, but in my case as a spinal surgeon, yes, it's
5 clinical, we don't do procedures there. Okay. We do surgeries
6 in hospitals, different hospitals, but for example, pain
7 management can do injections, yes, but in my case as a surgeon,
8 no, we don't do any kind of procedure.
9 Q Okay. Do you do procedures on an outpatient basis?
10 A No, not at that time.
11 COURT REPORTER: Can you repeat that?
12 A Not at that time.
13 Q The procedure that you performed on Mr. Espacia in
14 2021, where did you perform that procedure?
15 A I think it was NYU Langone in the city.
16 Q Okay. Was it at a clinic at a hospital?
17 A It's a hospital. Yes.
18 Q Now, when you first met Mr. Espacia, you immediately
19 recommended surgery?
20 A I do not recall, but I think -- I don't recall surgery
21 first. Never. Unless it's an emergency. I give the patient
22 the options of treatment, the different treatments that he can
23 go. One of these in this case was surgery because he already
24 accepted conservative treatment.
25 MR. FRANKLIN: Madam Court Reporter, can you read

1 my question back?
2 (Whereupon, a portion of the record was read back.)
3 Q And your answer?
4 A I did not recommend surgery. I recommend different
5 options of treatment and one of those was surgery.
6 Q Okay. So one of them was surgery?
7 A Absolutely, yes.
8 Q Doctor, do you know if on the day of the accident
9 Mr. Espacia's neck was showing any malalignment?
10 A No.
11 Q Do you know if it was showing any traumatic
12 subluxation?
13 A Absolutely. It didn't have any subluxation. It's
14 another kind of treatment.
15 Q I'm asking if you know on the day of the accident if he
16 --
17 A No. He did not have any. He didn't have any.
18 Q Are you telling me he didn't because he told you that
19 he didn't?
20 A No. I would explain because I think --
21 THE COURT: Please just explain a little slower.
22 A I will explain a little bit because this is how it
23 works medicine in every place in the world even in this country.
24 You do CT scans, no MRI's in the ER because you are looking for
25 trauma, so subluxation, fractures. These are not emergencies.

1 Patient is never going to leave the hospital or the ER without
2 any treatment if he has a subluxation, fracture, trauma. That
3 is why it's designed. After that patient is need conservative
4 treatment for months and then some and no the answer is no he
5 didn't have any.
6 Q Doctor, is a subluxation another word for a
7 dislocation?
8 A Well, it's similar. Dis location is the ultimate
9 degree of the subluxation, but yes, you can compare that, yes.
10 Q Can a dislocation occur in the vertebra?
11 A Yes. It requires surgery immediately, immediately, not
12 after 3 months.
13 Q Do you know if on the day of this accident Mr. Espacia
14 had a subluxation in his neck?
15 A No, did not because I have MRIs and I have X-rays.
16 Q So you know that he did not?
17 A Yes.
18 Q I just wanted to confirm. Do you know if he had a
19 malalignment of the vertebra?
20 A It's the same thing. No. He didn't have any.
21 MR. MARANDO: Judge, I would just object to the
22 fact that he said that he hadn't reviewed any records. He
23 relied upon --
24 THE COURT: Counsel, do you have an objection?
25 MR. MARANDO: Yes. At this point it's been asked

1 and answered.
2 THE COURT: Overruled. Go ahead, Counsel.
3 Continue.
4 Q Do you know, Doctor, if on the day of the accident
5 Mr. Espacia had a disc bulge as opposed to a herniation?
6 MR. MARANDO: Objection, Judge. Same objection as
7 before.
8 THE COURT: Denied.
9 Q Do you know, Doctor?
10 A You show me an MRI showing the disc bulge, and I would
11 be happy to compare it with it.
12 Q But the question is do you know if he had a disc bulge
13 as opposed to a herniation on the day of the accident?
14 A That is you're talking about wording, something that is
15 not real. If you show me an MRI. I didn't see a status thing.
16 It's not changing absolutely anything. Show me an MRI, not a
17 CAT scan. CAT scan is not good for diagnosing soft tissues.
18 Okay. Show me an MRI of the date, and I will read it and I will
19 tell you, yes, you have disc bulge. It's going to be read
20 differently by whoever read this.
21 Q You would agree that a disc bulge is less than a
22 herniation?
23 A Absolutely not. That is a narrow and simple error by
24 everyone, and if I can explain the difference between disc
25 bulge. This is what I teach my students, the residents at NYU.

1 It's an atomic difference, okay. The disc has a circumference.
2 When the base of the gel that is protruded is more than
3 25 percent, that is a disc bulge. More than 25 percent of the
4 circumstance. When it's less it's disc herniation, and the
5 answer is yes disc herniation are more.
6 Q Progressive?
7 A More prone to the symptoms but the disc bulge can give
8 perfectly symptoms that require surgery.
9 Q Is it pretty common a disc bulge is that pretty
10 commonly seen in the degenerative age-related conditions?
11 A Everyone, not only this narrative, you can have. You
12 can have disc bulge at 11 years old, 12 years old. Without
13 symptoms it doesn't mean anything.
14 Q So you or I could have a disc budge and we might not
15 even know about it?
16 A You could have disc herniation and not have symptoms
17 and you don't know you have it.
18 Q Yes, you're right. I could have disc herniation and
19 not even notice?
20 A That is always the same, the same answer.
21 Q Did you see any radiographic evidence of a ligamentous
22 disruption?
23 A No, in the MRI don't show it.
24 Q No, you did not?
25 A The MRIs don't show it. I showed you the MRIs. It's

1 the only one that can check ligament.
2 Q And did you see any evidence of an endplate fracture?
3 A Say again.
4 Q Did you see any evidence of an endplate fracture in any
5 of the photographs?
6 A No. He did not have a fracture.
7 Q Okay. So we know that his bones were not fractured; is
8 that correct?
9 A No fracture, yes.
10 Q Did you see any evidence of traumatic instability in
11 his neck?
12 A I don't believe so. I don't recall but I don't think
13 so. Nothing serious. Nothing terrible. Nothing evident.
14 Q Did you see anything that indicated spinal cord signal
15 change?
16 A No. He has no myolysis changes.
17 Q So nothing indicating that his neurological status was
18 off?
19 A Absolutely yes, my physical exam.
20 THE COURT: You're what?
21 A My physical exam, which by the way, is the most
22 important tool. We don't do surgeries in the images, we treat
23 human beings, and you have to see the patient, and you have to
24 examine the patient. That is the most important tool.
25 Answering the question that you asked me before, not MRIs.

1 Q But as of his emergency room visit, you wouldn't know
2 if he had any indication of a neurological issue?
3 A No. We didn't.
4 Q Do you know if his motor strength was 5 out of 5 in the
5 emergency room.
6 A I worked in the emergency room at Bellevue, okay, it
7 depends who did examine, but yes, could be 5 out of 5. That's
8 pretty common. It's acute.
9 Q All right. And you have the emergency room records in
10 front of you, would you mind taking a look and letting me know
11 if you see something there that indicates that it was --
12 A Okay. What pages?
13 Q Take a look. I have them in front of you, the New York
14 Presbyterian records?
15 A Yes.
16 Q If you turn to page number three, and all the way at
17 the bottom, right, where it says extremities and then there is
18 upper extremities and then there is muscle strength?
19 A Correct.
20 Q And what is indicated?
21 A They said that there is no -- he's talking about
22 extremities. Nothing to talk about cervical or the lumbar, but
23 I can tell you it says the upper extremities, it's no bone
24 tenderness, when you touch the bone, it's nothing to do with the
25 neck.

1 Q The range of motion is in tact?
2 A The range of motion is in tact of the upper extremity.
3 Q Good distal pulse?
4 A The range of motion is of the upper extremity, not
5 neck. It's not talking about the neck.
6 Q And the muscle strength is 5 out of 5?
7 A Muscle strength say 5 out of 5, yes.
8 Q Okay. Do any of those findings, do they indicate --
9 actually, let me make sure I say this, are they pathonomic for a
10 traumatic injury?
11 A Say that again. I'm sorry.
12 Q Let me see say it in a different way than the medical
13 terms. Do any of those findings that we just looked at in the
14 ER record, are they indicative of a particular disease?
15 A Not specific, no.
16 Q Are they indicative of a traumatic injury?
17 A No. This is incorrect question. The trauma exists,
18 but there is nothing here in the exam that said because that is
19 developed over time. At least you have a fracture or something
20 really serious like we talking about before, that is why the
21 come. The patient is going to be 90 percent of the time in tact
22 at the moment of the exam, initial exam.
23 Q But in the New York Presbyterian Hospital records,
24 there is no indication of a traumatic injury; is that correct?
25 A I'm pretty sure that it said that the patient doesn't

1 show anything serious. That is why emergency exists. That's
2 when the patient is going to be something serious. That's why
3 they do the CT scan to rule out this location or something like
4 that. Nothing serious. That is why the patient was released,
5 treated and to follow-up with the doctor. That's the standard
6 of care.
7 Q Did you have any MRIs that pre-dated the MRIs of May
8 3rd that you could compare to say like before and after?
9 A No.
10 Q And so the MRI is just the snapshot in time, but it
11 can't tell you when the symptoms that you see in the MRI first
12 developed, right?
13 A No. That's incorrect, and I explained before. Yes, no
14 one will tell me the MRIs, no one is going to tell me the time,
15 date that the injury was, but yes, they are going to tell me
16 that there is an injury that is not chronic as explained before.
17 It's not arthritis, it's not degen. It's a traumatic kind of
18 injury.
19 Q Referring to the emergency room records from New York
20 Presbyterian, was there an indication in there that Mr. Espacia
21 had mild facet arthropathy?
22 A I don't know. That I already explained that, he could
23 have it, yes.
24 Q Did you want to refer to page 6 of the emergency room
25 records all the way at the top right where it's talking about

1 lumbar first?
2 A Yes, mild, even the arthritis was really mild of this
3 patient, yes, I thought it was worse.
4 Q So he has arthritis in his lower back. Do you know if
5 he had arthritis in his neck?
6 A Of course he has. I told you before. It's like he has
7 arthritis. That is the condition, but I can explain why in the
8 neck and why in the lower back that I believe it's trauma that
9 brought the symptoms and the arthritis.
10 Q Okay. Now, you did a surgery impacting not only C5,
11 but C4-C5 and C5-C6, two levels?
12 A Correct.
13 Q And did you have any studies indicating that there was
14 any issue with either C6 or C4?
15 A I don't understand. I did two levels because you put a
16 lot of things together, the MRI that it was positive and the
17 physical exam that was positive. I explained that before also.
18 Q Did you have any electrodiagnostic studies indicating
19 any radiculopathy?
20 A Useless. They are useless for these. I don't use it,
21 and EMG is you are talking about then are no indicated. They
22 are torture for the patient, and they have a high incidents of
23 false negatives. That means I use it only when I have to
24 differentiate between a peripheral injury and a brain injury.
25 That's the only reason to use the EMG's.

1 Q So you did not provide any electroradiology studies?
2 A I will not.
3 Q And no EMG evidence of myelopathy or cord compression
4 or cord compromise?
5 A What was the question, that the EMG?
6 Q Yes. Was there any EMG evidence of myelopathy or cord
7 compromise?
8 A It was not in my exam. I don't know the EMG but I know
9 usually EMG for that, and the EMG is not indicated for that.
10 It's more -- my exam is important for the myelopathy, and it's
11 going to be the MRIs that confirm it that it was not myelopathy.
12 Q And a myelopathy is an injury to the spinal cord,
13 right?
14 A It's in the spinal cord, secondary to a trauma, yes.
15 Q And you didn't run any test that is indicated
16 myelopathy?
17 A I was not clear or maybe you're not understanding what
18 I'm saying. I don't need a test to rely on myelopathy. The
19 physical exam is mandatory. It's going to be part of the exam
20 that I'm going to be positive I can explain all of that long.
21 Anything you are going to see the images in the spinal cord that
22 show the -- of the spinal cord. These are the two diagnosis
23 studies, physical exam first, MRI studies second, and they are
24 going to show what we call my myelomalacia. That is the
25 symptoms or the consequences and the origin of the myelopathy.

1 That's it.
2 Q Isn't an acute traumatic disc herniation going to
3 reveal itself immediately? Isn't it going to show up
4 immediately?
5 A Not necessarily. Absolutely not.
6 Q And in this case you didn't see any evidence that it
7 showed up immediately?
8 A Based on what in the exam?
9 Q That's what I'm asking you. Before you recommended
10 surgery, did you have any evidence, any objective evidence that
11 there was any acute traumatic disc herniation?
12 A I don't need to show that it's acute for me to perform
13 a surgery, and I want to explain myself. You can perform
14 surgery on patients that don't have the acute injury. That is
15 why -- why you do surgery in patients that have this problem?
16 Because the nerve is compressed and because the patient over
17 time is having worsening symptoms. That is why it's not an
18 emergency. We need first to do physical therapy and give it
19 sometime, but over time when the symptoms of the compression of
20 the nerve are getting worse, that they are not going to show
21 immediately. They are going to show over time, changes in the
22 reflexus atrophy, the numbness, the tingling and the shooting
23 pain, these are but all -- not am emergency or anything like
24 that, that is why examine and that is why I didn't tell the
25 patient it was an emergency. He had signs of nerve injury.

1 That is the reason for why we indicate surgery.
2 Q Before rushing to surgery, don't you think you should
3 stop and observe maybe take a baseline reading and then come
4 back in a couple of weeks and then check it out again?
5 A No. I will explain why. We are spinal surgeons.
6 Normally, the patient is referred to us after completing a
7 reasonable treatment of conservative treatment. The patient
8 that is examined to me and if I see a patient that came first
9 time I will say go to do six weeks, and that is the standard of
10 care of physical therapy, and you have the option of injections
11 and medications. But after 3 months that I saw the patient, he
12 already was sent for conservative treatment, and he already had
13 signs of nerve recitation irritation/compression. Why we do the
14 surgery in patient with this kind of nerve injuries? Because we
15 cannot fix nerves. I cannot fix the nerves. That means the
16 patient is coming to me -- or with the foot drop or would say
17 that that is late and because probably even with surgery, he is
18 not going to recall never.
19 Q If I can refer you to your own records, Plaintiff's
20 Exhibit 14. Do you have those in front of you?
21 A What day? I'm sorry.
22 Q Your first visit.
23 A Yes. Again.
24 THE COURT: Counsel, which one is it?
25 MR. FRANKLIN: Plaintiff Exhibit 14 is a courtesy

1 copy of Volume III of the binders, which is defense exhibit
2 G, Plaintiff's medical records.
3 THE COURT: Thank you.
4 Q Now, Doctor, do you have the July 26, 2021 first
5 initial encounter report?
6 A Yes, I do.
7 Q Okay. And you took a history from the patient that was
8 verbal, right?
9 A Correct.
10 Q That means you asked him what happened and you asked
11 him how he is feeling?
12 A Yes.
13 Q You didn't look at any of his medical records and you
14 didn't look at any of the emergency room records, correct?
15 A That's correct, yes.
16 Q And then you said you personally reviewed all studies
17 available. Now, when you say you personally reviewed all
18 studies available as of July 26, 2021 are you referring to a
19 single MRI dated May 3, 2021?
20 A Correct. These are the studies that we request and
21 these are the studies available and MRIs of the cervical and
22 lumbar spine.
23 THE COURT: Doctor, can you say your answer again
24 but slower. Actually Madam Reporter, can you read the
25 question back for him?

1 (Whereupon, a portion of the record was read back.)
2 A Yes. I saw two MRIs one of the lumbar spine and one of
3 the cervical spine. That is correct. That is the only thing
4 that I need.
5 Q Doctor, you've been practicing long enough to know that
6 not all radiologists agree even when they are looking at the
7 same film, right?
8 A Yes. That is why I review the films. I don't work
9 with the reports. We are trained to review films and I review
10 films and sometimes I do not agree with the readings. That is
11 why reading is basically comes with the notes from the other
12 doctor, and I will say, I will tell the patient you have to give
13 me the images because you don't want me to perform a surgery on
14 you when you get the surgery based on what on something that
15 other doctors say. I want to be convinced to do the surgery and
16 see the images.
17 Q So you recommend that your patients get a second
18 opinion, is that what you're saying?
19 A Absolutely not. No. I don't recommend. I said that
20 their reading is not enough for me. If I have to perform a
21 surgery on your neck, I will say listen, yes, this gentleman
22 that I don't know read the MRI from and I don't know the
23 patient, don't know you, don't know the symptoms is sitting in a
24 room reading MRIs, you think that I will perform surgery based
25 on that or do you want me to see the images? Your answer is

1 going to be see the images. You don't do surgery in papers.
2 Q And in this case, you saw one image?
3 A No. I saw full MRI that and multiple images that
4 scroll though the MRI.
5 Q Just one MRI?
6 A It's more than enough. It's what we do.
7 Q Now, you have here in your report cervical MRI done at
8 stand-up MRI on May 3, 2021, multi-level disc herniation most
9 significant C4-C5 C6-C6 and C6-C7?
10 A That is correct and I reviewed MRIs last night also.
11 Yes.
12 Q Well, you would agree that a multi-level disc
13 herniation is indicative of a degenerative condition?
14 A No, it's not.
15 Q So what is a disc --
16 (Unintelligible crosstalk.)
17 A That is not real. These are disc herniations.
18 Degenerative problems, as I said before, is going to be mostly
19 the bone compensating and the arthritis. We are talking about
20 arthritis. The bone growing and not the acute disc herniation.
21 This patient have multiple, and the most important word, the
22 three that I said there and that they are really, really acute,
23 yes.
24 Q Doctor, when you applied that hardware in Mr. Espacia's
25 neck and those screws that were drilled into his bone, did you

1 determine if he was having any instability issues in his neck
2 before you did that?
3 A No, before we do the surgery we request X-rays, part of
4 the pre-op is the X-rays with flexion extension views.
5 Q Did the patient tell you that they were having
6 instability in their neck?
7 A No, the patient did not tell me that.
8 Q Okay. Did you have records showing that he was having
9 a neurological decline?
10 A Can you repeat this?
11 Q Did you have any records indicating that he was have a
12 neurological decline based on a pinched nerve or something?
13 A I have in my physical exam, yes.
14 Q Okay. So from your physical exam, but not based on
15 observing him over a brief period of time?
16 A I have my physical exam. There are -- when you make a
17 diagnosis of something, you need to put multiple points on.
18 They have to be -- I will say they have to be consistent. They
19 making something injury, the complaints of the patient, okay, my
20 physical exam and the images results, when I see the images. If
21 you don't have this four component, something is wrong, but when
22 you have everything together, it's another story.
23 That is what you use not to decide that the patient is
24 surgical or not. It's not an emergency. That's why I didn't
25 write it here. I wrote that you can try more conservative

1 treatment, but that is a red flags. You start dropping things,
2 you lose extremity in the legs. You have to do something.
3 Q Mr. Espacia never told you that he was starting to drop
4 things, did he?
5 A No, not that I have a record here, no.
6 Q Now, with regard to his lumbar and -- excuse me, his
7 lumbar back, did the MRIs that you viewed or the single MRI for
8 the lower back dated June 10, 2021, did that indicate disc
9 declaration?
10 A Absolutely yes, at one level.
11 Q Is disc dehydration not indicative of a chronic
12 condition?
13 A That is not, no. That is the error. You have chronic
14 condition, like aging, we get old, you're going to show the
15 problems in every disc in your body. When you have just one
16 disc that is -- I show it there. I explain. You see the other
17 discs are grey because they are puffy and they are in nice
18 cushioning. You have just one disc, when you have one disc it's
19 more trauma than others. That is how you define arthritis or
20 not.
21 Q If you were to describe it in layman's term would you
22 say a healthy disc is like filled with moisture but a dry
23 dehydrated disc is something that is not healthy?
24 A Correct. That is why I show it there, and we call it
25 black disc because this on the MRI you're going to see that it's

1 black, because the water, the gel are going to be white or
2 clear, like we see there, and I explain to the jury, they see
3 it. The only thing that was black was the last one, and it have
4 big disc herniation, by the way, that is consequences of trauma.
5 Q And it's your testimony that disc dehydration happens
6 over a couple of months as opposed to a couple of years?
7 A After the trauma, yes, because you lost the gel. If
8 you are telling me if you are getting old, and this is only
9 arthritis, you are going to have all of your spinal problems
10 that we see some people at 90. This case, is not. He has
11 arthritis, but the disc with injury, that is one, that is pretty
12 good.
13 Q Doctor, as we get older, do we sometimes lose some
14 height, and we shrink because the discs height shrinks, that's
15 one of the --
16 A No. That's incorrect. We shrink because the bone is
17 because osteoporosis. The bone is start crushing, not the disc.
18 The disc is the main component of the shrinking or getting
19 shorter. It's the bone that start crushing because the quality
20 is bad and it starts crushing slowly.
21 Q So the disc space gets narrower?
22 A I would say the bone. You asked me the question, and I
23 say the bone is what we shrink, not the disc.
24 Q Okay. But these are things that happen over time?
25 A Oh, yes, absolutely, yes, all your body is over time is

1 degen, when it's something that is going on.
2 Q Doctor, what social history did Mr. Espacia provide you
3 that you have documented in your report?
4 A Let me see what I have.
5 Q Page 1 of your report.
6 A At the time he denies any significant history.
7 Q Can you find the report?
8 A Yes, I have report. He denies significant history.
9 Q And I want you to look at page 1 of 4. Do you have
10 page 1 of your initial encounter.
11 A Yes. Of my report?
12 Q Yes, your report.
13 A Yes.
14 Q Are you able to see it?
15 A No. Where it says the medical history it says deny
16 significant medical history.
17 MR. FRANKLIN: May I approach and show the witness
18 the page number?
19 THE COURT: Yes.
20 MR. FRANKLIN: Volume III is the courtesy copy.
21 MR. MARANDO: What's the date of the record?
22 THE COURT: Are you still on Plaintiff's
23 Exhibit 14?
24 MR. FRANKLIN: It is Plaintiff's Exhibit 14 but the
25 defense binder has them all printed out.

1 THE COURT: Can you say what page?
2 MR. FRANKLIN: It's under the records tab New York
3 Spine Institute, and it is page number -- oh, you have it,
4 Doctor.
5 THE WITNESS: I have it here. You asked me, and I
6 said yes. I have with me. Denies significant past medical
7 history.
8 THE COURT: Okay. So go ahead.
9 MR. MARANDO: Counsel, what date.
10 THE COURT: So Doctor, you have it?
11 THE WITNESS: Absolutely. I answered already the
12 question based on this.
13 THE COURT: Go ahead and ask another question,
14 Counsel.
15 Q Doctor, further down the page under social history, can
16 you please tell us what you wrote, social history?
17 A Denies.
18 Q No. Social history.
19 A Social history I'm reading. Oh, you want occupation?
20 Q Yes.
21 A Occupation is installation of commercial beer machines.
22 Q Occupation is installation of commercial beer machines.
23 Why was it necessary for you to include that in your report?
24 A Because it's part of the chart whenever the patient is
25 doing before the accident.

1 Q Did he indicate to you that he was involved in lifting
2 of heavy objects?
3 A Before the accident, yes.
4 Q Okay. And did he tell you how heavy the objects how
5 heavy they were that he was lifting?
6 A I don't have those. No.
7 Q Did he tell you how many years he lifted those heavy
8 objects?
9 A I don't know. I imagine long many years because it was
10 his profession but I don't know.
11 Q And you didn't think to record it in your records?
12 A Absolutely not. It's not part of the records. It's
13 not important. It's not important at all.
14 Q You indicated allergies. Was that important to your
15 diagnosis of his neck on the next page?
16 A Yes.
17 Q How so?
18 A It's no known allergies. We know because if we need to
19 give medication and that is related, not the job.
20 Q If you could please look at the third page of your
21 report. Now, you've got an area there that says lumbar spine
22 and right above it it says cervical, and it looks like the only
23 thing you recorded are, you know, different angles. Did you
24 have him like bend over and then you measured the angle?
25 A Yes.

1 Q And then you had him, you know, you have him lift his
2 arm and see how high he could lift?
3 A No. That is not part of exam. That's the neck and
4 lower back range of motion of the cervical and lumbar. I don't
5 take shoulders or elbow.
6 Q So it's just of the neck and the back?
7 A That's the neck and back.
8 Q And you're not concerned with the shoulders?
9 A Yes. It depends where the injury is. Sometimes you
10 make the patient, if you are not sure, the shoulder pain could
11 be coming from the neck that went involves the C4-C5 which is
12 recent or could be coming from the shoulder injury or from both.
13 Normally they are both surgeries. What normally you are going
14 to put here is everything that is possible, okay, you have the
15 shoulder injury. The patient is going to be unable to do this,
16 and you have a cervical which that is mostly the symptom coming
17 from there then the patient is going to be able to do this.
18 Q Did you check to see if he could do that with the
19 shoulder?
20 A It was negative.
21 Q That's not something you looked at?
22 A I looked when I need to look. When they don't know
23 where it's coming from, and I have like sometimes patient's
24 referred by sport medicine guy that said oh, I'm not sure, it
25 could be coming from the shoulder or the neck. That is the

1 fastest thing.
2 Q Anywhere in your report do you document a shoulder
3 injury?
4 A No. I don't document that unless the patient is on the
5 surgery or anything like that.
6 Q So you saw Mr. Espacia on July 26, 2021, three months
7 after this accident and you didn't even discuss whether he had a
8 shoulder injury?
9 A Why I am a spine surgeon? He has orthopedic taking
10 care of that?
11 Q Did he tell you that he was being looked at by someone?
12 A I don't recall nothing significant that is not in the
13 chart.
14 Q Okay. But it's just not something that you concerned
15 yourself with?
16 A No. I didn't say that. I said that only we only
17 record positive things. We cannot record no -- he didn't have
18 this, didn't have that, didn't have that. The record positive.
19 It was nothing significant for me to record there.
20 Q So you just said that the shoulder could be impacting
21 the neck, but now you're saying that it wasn't significant
22 enough for you to consider it?
23 A No. I didn't say that. I said the other way. I said
24 the neck, the shoulder could be too recent for the shoulder to
25 be painful. The recent one is because of the neck injury that

1 happened here or because of the shoulder injury. I didn't say
2 the shoulder impact the neck. It's the other way. The neck
3 could impact the shoulder.
4 Q Okay. Did Mr. Espacia tell you that his shoulders were
5 being impacted by his neck?
6 A That is why I'm a doctor. He is not going to tell me
7 that.
8 Q So you are interpreting the things that he was telling
9 you but nothing that he was telling you caused you to write in
10 your report that there was any issues impacting his shoulders?
11 A It's nothing there because it's nothing. It's not
12 important.
13 Q It just wasn't important to you?
14 A It's not going to change the indication for surgery.
15 Okay. The patient could have a fracture in the toe, and I'm not
16 going to record that unless it's impacting my treatment or my
17 surgery or whatever is there. More than one time I tell the
18 patient I think that your problem is coming from the shoulder.
19 You should see the other doctor. This is not the case.
20 Q Did you make a referral for Mr. Espacia to see a
21 shoulder specialist?
22 A I don't remember. I can check.
23 Q Yes, please.
24 A I can check. In the first, one, no? I don't have it
25 here any referral to the shoulder.

1 Q So you just focused on providing treatment to his neck?
2 A No. That's incorrect. Multiple times I tell the
3 patient, listen, I think you could have a shoulder injury, and I
4 recommend go to the shoulder doctor or go to the neurologist
5 because I think you have trauma in the neck and the head or
6 something like that. In this case, I did not relationship
7 between one or the other.
8 Q And is that to a reasonable degree of medical
9 certainty?
10 A Yes, absolutely.
11 Q So there was not an issue with the shoulders that you
12 were making a recommendation for Mr. Espacia?
13 A No. That's not like that. It was nothing important
14 for the surgeon to perform the surgery or anything, send to the
15 shoulder specialist and that's why I didn't wrote it here.
16 Q Is it fair to say, Doctor, that your recommendation in
17 addition to being based on the flexing and the angles that you
18 took --
19 A Absolutely not. I explained that before --
20 Q I was not finished.
21 THE COURT: Sorry, Doctor, he did not finish his
22 question, so if you can just let him finish it. Go ahead,
23 Counsel.
24 Q Is it true that your recommendation for neck surgery
25 was based upon the angle movements that you took and based upon

1 Mr. Espacia's subjective complaints?
2 A Absolutely not, neither of both. First, I said before
3 clear we don't do recommendation related to the range of motion.
4 Range of motion is not an indication for surgery at all. We
5 don't care because it's going to change unless it's extreme
6 separation or something with the patient like can't move for
7 years, something like that, but no, the range of motion we
8 mention it here because it's mostly little and it's required.
9 All of my charges and other insurance have no range of motion.
10 It's no indication for surgery. It's not indication. What is
11 the indication for surgery? The neurologic exam, the witness,
12 the atrophy over time, the changes in the how he feels,
13 numbness, tingling. That is what's important.
14 Q So what you had to go by on your first encounter with
15 Mr. Espacia was that one MRI and his subjective complaints?
16 A No. Physical exam is not subjective. Absolutely not.
17 For example, I think I put spurling sign. That is a specific
18 sign that something that we use commonly, okay, in order to see
19 the patient. There are patients that are looking for secondary
20 gain. We know that that they are looking for other things and
21 they come and try to trick us with exam, but there is not so
22 easy over the years, and you notice and the spurling sign is you
23 twist the head towards the side of where the problem is, the arm
24 is more they have the problems, you bend it and you push on it.
25 When you do that the patient is going to shout because they have

1 a shooting pain to the tip of the fingers because you are
2 compressing the nerve. It's not nice but the patient cannot be
3 trained for that, so that is completely objective. Atrophy is
4 subjective. It's really difficult, because as I said before,
5 every nerve is going to a difference place. If the patient is
6 telling me, oh, I have numbness in my buttocks in my thigh, my
7 knee, that is not positive.
8 Q Doctor, if you can refer to your next report. Is your
9 next report July 9, 2024, or were there other reports?
10 A July 26 was the first one. I think the next one is
11 October 25.
12 THE COURT: Of what year?
13 THE WITNESS: 2021. I saw him first time 7/26/21.
14 Q Was that a post-op visit?
15 A No, no. That was the first visit. July 26, 2021 is I
16 saw the patient for first time. I saw him again on October 25,
17 2021.
18 Q Okay.
19 A Before the surgery.
20 Q Got it. And then you saw him again in November and
21 December?
22 A But I think that was after the surgery, no?
23 Q Okay. Got it. And then there was a break from
24 February of 2022 until August of 2023?
25 A Yes. I imagine so, yes.

1 Q Do you know why there was such a long break almost a
2 year and a half?
3 A Let me see. What's 12/19? What dates are you saying?
4 I'm sorry.
5 Q You saw him on 2/8/22 and then not again until 8/8 of
6 '23.
7 A Okay. Yes, because he is still coming. That is --
8 normally we wait, normally we follow the patient for one year.
9 That is my way to do it. I see the patient at six weeks after
10 the surgery with X-rays, 3 months, 6 month, and one year. That
11 is going to be the visit. There I decide the patient doesn't
12 need any more surgeries at that moment, and then it is going to
13 come six months or as needed. That is why he came back. That
14 is why I do believe this. It's not that I request him to come
15 back.
16 Q Is there any type of physical therapy that a person who
17 has the implant of the metal and screws into the neck? Is there
18 any type of physical therapy that they have to undergo?
19 A No. That is another problem in the country. Serious
20 problem. Physical therapy is really, really horrible for
21 post-op patients. It's all about money, like many things here.
22 Physical therapy should focus, at least should focus on muscle
23 strengthening, no massage or put some heat or something like
24 that and that you can do at home, but they don't do it, and that
25 is why the patient keep complaining of neck pain, for example,

1 because he never recovered the muscle.
2 THE COURT: I'm sorry, because he what?
3 A Never recovered the muscles. Never. That is a big
4 problem. When you have an athlete that make money and a lot of
5 people make money the first day after surgery or whatever the
6 first months he going to be in the swimming pool. Why? Because
7 you recover muscles for muscle strengthening. This patient
8 never do it.
9 Q What type of muscle strengthening do you need for your
10 neck?
11 A Well, for the neck it depends. The trapezius is part
12 of the neck, it's muscle that is the neck, that I don't care.
13 That the muscle that you have to do to exercise and you do it.
14 I should explain this to the patient but I do it because now I
15 explain. That's why I sent the patient to the swimming pool,
16 not to the gym. I can give you ten exercises for the neck
17 between two people but they are dangerous because they are maybe
18 old people and they never did it. If you go to the swimming
19 pools three times a week for 3 months, 1 hour each time to
20 moving in the water, you are going to strengthen all of the body
21 and all of the muscles in the body and it's low risk.
22 Q And you said Mr. Espacia never did any strengthening?
23 A They never sent him to do that, yes.
24 Q Sorry?
25 A They never sent him to do that. Normally because

1 physical therapy to take care of that, normally in some place
2 have to be they recommend gym for muscle strengthening and
3 swimming pool.
4 Q But your observation was that he was not doing physical
5 therapy?
6 A He did physical therapy.
7 Q But he was not strengthening the muscles?
8 A Correct. It's useless, temporary relief.
9 Q Were you hoping that he would do more strengthening?
10 A Say again.
11 Q Would you have liked to have seen him do more
12 strengthening?
13 A When you refer to physical therapy, that is not here on
14 the referral. It says range of motion, muscle strengthening.
15 For the neck and I think it's going to be upper extremities and
16 it's going to be going paravertebral muscles, it's going to be
17 trapezius muscles, I don't care muscles, and it's everything
18 there, but the patient never do it. It's really strange that
19 the physical therapy is going to work in that way.
20 Q Okay. But would you have liked to have see him
21 strengthen those muscles?
22 A I told him. I always tell the patient if he keeps
23 having neck pain -- some patients don't have neck pain. That
24 apply only for the neck pain. The surgery is not designed for
25 neck pain. The surgery is designed for the nerve injuries,

1 okay, the neck is going to improve when the patient exercise the
2 muscles. That is why the patient is coming to me and saying you
3 have numbness, tingling any my neck is killing me, do something,
4 go to the gym, go to the swimming pool and not going to fix you,
5 not surgical.
6 Q That surgery that you did on Mr. Espacia was not to fix
7 the neck, it was to fix the nerve endings?
8 A That is the reason to do it, yes.
9 Q Did he not come to you with complaints of neck pain
10 though?
11 A Yes, because I think I wrote -- the patients always
12 complain of posterior neck pain, related to the muscles spasm,
13 it's pretty common, but it's not what is important to us, unless
14 it's escalate. But normally you tell the patient -- when I see
15 them the last time, you think you do it and I have neck pain and
16 I tell them listen, you have to go to the swimming pool or the
17 gym, if you can, because not everyone can do it.
18 Q Now, with several years having passed by, are you
19 recommending or are you suggesting that Mr. Espacia is going to
20 have to have more screws put in his neck adjacent to the ones
21 that are already there?
22 A Correct.
23 Q So you're going to have screws going all up the neck?
24 A In this patient, more than one surgery is going to do
25 three disc herniation the first day is going to do all of the

1 disc herniations I didn't do it and I explained why, one or two
2 levels of surgical in the neck, two discs is the same surgery.
3 When you do three levels or more, it's a bigger surgery, okay,
4 that I try not to do it.
5 Q Is that medically reasonably to put all of the screws
6 up someone's neck?
7 A No, it's not. You shouldn't, unless it's needed. Not
8 in this case.
9 Q Do you think maybe Mr. Espacia should not have had that
10 original surgery?
11 A No. It's not that Mr. Espacia's decision. It depends
12 how the nerves are compromised. If the other discs is starting
13 to get worse and compressing the nerve, it's going to have to
14 have another surgery, and it's probably he has but you cannot do
15 surgery, just in case something happened.
16 Q And you got a number of numbers you have come up with
17 for the cost of these various future surgeries. Has Mr. Espacia
18 ever indicated to you that he is even remotely interested in any
19 of these procedures?
20 A I think the last time that I saw him he is not
21 interested, he came, and we discussed it, and he doesn't want
22 it. That's okay. It's not mandatory. It's not an emergency.
23 Q So he has never told you that he is interested in any
24 of these proceeding?
25 A I think that he has increased in pain and he has new

1 symptoms in the arms, and that is due to the other level and I
2 told him one of the options will be new surgery, but we never
3 did it, because he is not interested in having at that time.
4 Q And he is not experiencing those symptoms --
5 A He is experiencing symptoms in the last record, I think
6 it's from 2024, the patient came back because he is having
7 increasing neck pain and increasing symptoms in the upper
8 extremities.
9 Q So you're recommending a bunch of different studies,
10 MRI studies every year, for what, the rest of his life?
11 A That is going to be the perfect world, okay, because
12 the patient is difficult to calculate perfectly that, but the
13 patient, this patient is normally if they come to see me like if
14 he come after one year I can do MRI because you have increasing
15 symptoms, and that is more or less what is going to happen.
16 Q And you're recommending more screws be put in his neck
17 every 10 to 12 years?
18 A No. I did not recommend that. That is literature.
19 That is what we know about what is going to happen. That is
20 described in patients over time you have a percentage of those
21 patients that are going to have a second surgery because they
22 are going to have that disc compromised. I talked about that
23 with the jury about the stress that you having in the other
24 levels. In this case, it's more trouble because he already have
25 damaged disc, okay, and then people are coming after 5 years,

1 you see, Doctor, we should do this the first day, and now we are
2 doing another surgery. My answer is always the same. If I
3 thought that you needed it, I charge for this. They pay me per
4 disc and I will do it. I don't care. I will do it and make
5 more money, make my ex-wife happy. I don't care about that, but
6 I don't -- I didn't do it, because I don't believe it, and six
7 more years, it's important time but I didn't indicate that he
8 will have it.
9 Q You said future adjacent level surgery is anticipated
10 at an interval of 10 to 12 years for the rest of this patient's
11 life?
12 A That's correct.
13 Q And you're also recommending physical therapy three
14 times a week at $375 per session, continued orthopedic care at
15 an annual rate of three times a year for the rest of the
16 patient's life at a cost of $377 per visit, plus $200 per X-ray?
17 A That is in a perfect world.
18 Q So what is going to be making all of ever this money?
19 MR. MARANDO: Objection.
20 A Not me.
21 THE COURT: Overruled.
22 MR. FRANKLIN: I have nothing further.
23 THE COURT: Okay. Counsel.
24 RE-DIRECT EXAMINATION
25 BY MR. MARANDO:

1 Q Now, Doctor, I want to show you what is already in
2 evidence as Exhibit 12, which is the NYP Hospital Records, and I
3 know you've been looking at them, now, specifically, I want to
4 pull and publish to the jury a page and specifically it's
5 page 342 of the NYP hospital records. Now, Doctor, if I were to
6 show that there was a reference made by a doctor of pain to
7 head, neck, back and shoulders, would that be consistent to
8 focusing on the spine to what you deemed was the diagnosis when
9 you saw him for the first time?
10 MR. FRANKLIN: Objection. Vague.
11 THE COURT: I will ask that you to rephrase that,
12 Counsel.
13 Q Now, Doctor, I'm showing you what's in evidence as
14 Exhibit 12, which is the NYP records. Can you see it on the
15 screen?
16 A I see something, yes.
17 Q Do you see where it says a doctor's name, I imagine
18 M.D. having personally seen and evaluated this patient, my
19 findings are as follows, hand, which I imagine would be pain, 5
20 to head, neck, back and shoulders, do you see that?
21 A Yes. I read it when -- I saw the records.
22 Q Do you see the date of this note of February 21, 2021?
23 A Okay.
24 Q And that's the date of the ceiling collapse?
25 A I think that's the day of the accident, yes.

1 Q Now, Doctor, in terms of a mention of nonserious, when
2 you have an emergency room, when something is deemed nonserious
3 where it's a possible, is it true that it could potentially mean
4 a non-fatality issue where the patient could necessarily have
5 issues but they may not pass away at that time, so they are sent
6 out for orthopedic consultation?
7 A Absolutely. That is the purpose of that.
8 Q Now, Doctor, from 2022, specifically, so February 2,
9 2022, to August 8, 2023, on cross-examination you were spoken
10 about a long break. That's a very big time, right, about a
11 year, year and a half?
12 A Yes.
13 Q If I told you that there were 159 physical therapy
14 visits in evidence, not home visits, but actual physical therapy
15 visits in as Exhibit 13, would you consider that a long break?
16 MR. FRANKLIN: Objection. Hypothetical.
17 MR. MARANDO: It's in evidence, Judge. It's not
18 hypothetical.
19 THE COURT: Step up.
20 (Whereupon, a sidebar conference was held.)
21 THE COURT: Overruled.
22 Q So Doctor, I'll ask you the question again, from that
23 year and a half from where on the cross-examination you
24 mentioned there was a long break, just to be clear, the physical
25 therapy records in evidence, not home visits, show 159 visits,

1 okay, that's almost a visit every other day if my math is
2 correct, and it may not be, would you consider that a long
3 break?
4 A No. Absolutely not.
5 Q Now, Doctor, the MRI that was taken, even though it
6 wasn't taken on the same day, during that time period of booking
7 an MRI at that point of Covid, just ten days later, is that
8 still consistent to something as close in time to February 21,
9 2021 to diagnosis something here?
10 A Absolutely.
11 Q Doctor, we spoke about the MRI, and we spoke about the
12 physical exam but in terms of the actual procedure and looking
13 into the actual intervertebral body during the procedure would
14 you consider that to be additional gold standard?
15 A This is what is certified defined at the ends, right,
16 but you cannot -- you have to have an idea what you are going to
17 do, but yes, when we did the procedure in the note said that the
18 disc herniation were there were present.
19 Q Now, Doctor, when someone says why would someone rush
20 to surgery, but if I were to tell you that in evidence that
21 there was 41 physical therapy visits before you even saw this
22 patient, and when you first saw the patient until the surgery,
23 there was an additional 66 physical therapy visits, would you
24 still consider that rushing to surgery?
25 A Absolutely not. And I didn't even rush to surgery.

1 Q And also in evidence is the physical therapy record
2 that mentioned an actual injection before you even saw the
3 patient. So in this case would you still consider that rushing
4 to surgery, 100 visits, injections, yes or no?
5 A Absolutely no rushing there.
6 Q Doctor, we spoke about the cost of physical therapy
7 visits, a surgery, in a perfect world, if a patient gets
8 something or doesn't get something, is it still your reasonable
9 degree to a medical certainty to opine as to a perfect world if
10 he were to get it, yes or no?
11 A That is what we will do, yes.
12 MR. FRANKLIN: Objection.
13 THE COURT: Overruled.
14 Q Now, Doctor, just because a patient does not get a
15 surgery during a 12 or 24 month span, does that necessarily mean
16 that all roads may lead to them eventually getting surgery?
17 MR. FRANKLIN: Objection. Vague.
18 THE COURT: I'm going to ask you to rephrase,
19 Counsel.
20 MR. MARANDO: I'll withdraw, Your Honor.
21 Q Doctor, in your records, you're not a foot doctor,
22 correct?
23 A Correct, yes.
24 Q You're a spine doctor?
25 A Correct.

1 Q And when you record notes, are you focusing on the
2 spine?
3 A Yes. Absolutely, yes.
4 Q When we saw the first day that this happened, April 21,
5 2021, is that consistent to the complaints that may have
6 occurred but you're focusing on the neck and the back?
7 A Absolutely, yes.
8 MR. FRANKLIN: Objection. Compound.
9 THE COURT: Overruled.
10 MR. MARANDO: Nothing further, Your Honor. Thank
11 you, Doctor.
12 THE COURT: Counsel?
13 MR. FRANKLIN: Nothing further.
14 THE COURT: Thank you, doctor. We are just going
15 to take a ten minute break.
16 COURT OFFICER: All rise as the jury exits.
17 (The jury has exited the room.)
18 (Whereupon, a brief recess was taken.)
19 COURT OFFICER: All rise as the jury is entering.
20 (The jury has entered the room.)
21 THE COURT: All right, Counsel, call your next
22 witness.
23 MR. MARANDO: The Plaintiff calls Professor Debra
24 Dwyer.
25 (The witness has entered the room.)

1 COURT OFFICER: Remain standing. Raise your right
2 hand. Do you swear or affirm that the testimony you're
3 about to give this Court will be the whole truth under the
4 penalty of perjury?
5 THE WITNESS: I do.
6 COURT OFFICER: State your name and address for the
7 record.
8 THE WITNESS: Debra Dwyer and the address is 17
9 Springbriar Lane, Centereach, New York 11720.
10 THE COURT: Thank you. You may be seated. Please
11 speak into the mic so that the court reporter and the jury
12 can hear you. Go ahead, Counsel.
13 MR. MARANDO: Thank you, Your Honor.
14 DIRECT EXAMINATION
15 BY MR. MARANDO:
16 Q Hi Professor, how are you?
17 A Good. How are you?
18 Q Happy almost weekend?
19 A You too. Thank you.
20 Q Professor, can you briefly describe your occupation and
21 your educational background for the jury.
22 A I got my Bachelor's degree from Queens College in
23 Flushing, New York, and that was in economics and English
24 literature. I went on to get my master's and my P.H.D from
25 Cornell University, and that was in economics with specialities

1 in Labor Health and public economics. I did a one year post
2 doctoral fellowship at Syracuse University in the center for
3 policy research.
4 After working for a couple of years in Washington D.C.
5 for the Division Of Economic Research for the Social Security
6 Administration, I've been spending the last couple of decades in
7 the State University of New York system where I work as a
8 professor, chairperson and a dean at Stony Brook University, and
9 more recently, teaching at Farmingdale State College. I also
10 started my own business where I do this kind of work as well as
11 other economic consulting.
12 Q And Professor, can you share with us approximately how
13 long you've been working in the field of economics?
14 A About 30, 31 years about that.
15 Q Before today, have you ever been qualified as an expert
16 in the field of economics in the State of New York?
17 A Yes, I have.
18 Q Including this building?
19 A Yes.
20 MR. MARANDO: Your Honor, at this point I would
21 offer Professor Dwyer as an expert in the field of
22 economics.
23 THE COURT: Yes. The Court does not have to
24 certify someone as the record establishes it. Go ahead,
25 Counsel.

1 Q Professor, coming here today to testify, are you being
2 compensated for your time away from your practice and being a
3 professor and your business?
4 A Yes.
5 Q And what is that rate of compensation?
6 A It's a flat rate of $5,000.
7 Q Is it the same rate depends on who retains you?
8 A No. I'm sorry. Yes. You asked is it the same rate,
9 yes, it is.
10 Q Now, approximately what percentage of your work is for
11 Plaintiffs versus Defendants?
12 A Over 95 percent is for Plaintiffs. I do work for
13 defense as well, but I'm asked way more often by Plaintiff
14 attorneys.
15 Q So previously you have come to Court before and
16 testified on behalf of defense attorneys?
17 A I have.
18 Q Have you ever testified on a case where I was the
19 handling attorney?
20 A I believe at one point at one time I have.
21 Q Okay. Besides that one trial, was there any other
22 cases where I was the handling attorney where you testified?
23 A Well, I've met you before, but I think it was only
24 once.
25 Q Yes. And I think prior to today I don't think I've

1 seen you for 2, 3 years?
2 A That's correct.
3 Q And Professor, what about my firm as a whole,
4 generally, over the past 10 to 15 or 20 years, how many trials
5 total have you been on where my firm has been the trial counsel?
6 A So I've been doing this for about 14 years, and I
7 worked with your firm probably about a dozen times.
8 Q And specifically, the prior firm is Harmon Linder, can
9 you recall whether or not you've testified in a case where they
10 were trial counsel?
11 A I don't believe so. It was Lipsig, Shapey that I'm
12 familiar with.
13 Q Professor, did you perform an economic analysis in
14 connection with this specific case?
15 A Yes, I did.
16 Q Can you tell us what your analysis included and really
17 what it is based on and that it means?
18 A My role in this case or in cases like this is to
19 determine how much money the Plaintiff in this case Mr. Espacia
20 will need to cover the medical expenses associated with his
21 injuries for the rest of his life. I'm not a medical doctor.
22 My degree is in economics. My job is to account for inflation,
23 basically I reply upon the medical expert opinion of a medical
24 expert who prescribes the types of treatments or recommends the
25 types of the treatment, how much they cost in current dollars,

1 how frequently they will need it. We know that prices go up
2 over time, so my main reason for being here is that I have the
3 expertise to be able to predict into the future what I believe
4 is going to happen to the prices for the care that Mr. Espacia
5 requires.
6 Q Now, Professor, normally it doesn't work like this
7 where, just fortunately with scheduling we were able to get a
8 bunch of witnesses today and as you stepped on, Dr. Macagno just
9 stepped out into the hallway. Have you ever met Dr. Macagno?
10 A No, I have not.
11 Q And you mentioned that you're not worried about the
12 actual medical, you're worried about the numbers, true?
13 A That's correct.
14 Q Now, based on your calculations, was that based on a
15 report from Dr. Macagno?
16 A Yes. So in this case I received the life care plan for
17 Mr. Espacia from Dr. Macagno.
18 Q Now, when you prepared your analysis, did you prepare a
19 chart in connection with that specific analysis and your growth?
20 A Yes.
21 Q And does that specific chart contain the analysis, the
22 growth, the testimony that maybe in connection with your
23 analysis, the frequency, everything that we are about to talk
24 about?
25 A Yes, it does.

1 Q And does it fairly and accurately depict all of those
2 growth rates, numbers, everything in connection with your
3 intended testimony and the initial numbers based on Dr.
4 Macagno's report?
5 A Yes, it does.
6 Q Would it assist you in discussing with the jury if I
7 were to show you a demonstrative of that specific chart?
8 A Yes, it would.
9 MR. MARANDO: Judge, at this time, I do have what's
10 been pre-marked for ID as Plaintiff's Exhibit 25. It's only
11 the very first board that's marked against the wall by the
12 officer.
13 THE COURT: You said it's pre-marked?
14 MR. MARANDO: Pre-marked as Plaintiff's Exhibit 25.
15 May I approach, Judge?
16 THE COURT: Yes.
17 MR. MARANDO: Your Honor, at this point I would
18 like to for ID publish this to the jury while Professor
19 Dwyer discusses her testimony.
20 THE COURT: Any objection?
21 MR. FRANKLIN: For use of demonstrative purposes,
22 no.
23 Q Professor, I don't have have an easel, if you are okay
24 with it, if it would aid your testimony, maybe come down with
25 the Court's permission, and I can hold it, and we can find a way

1 to just keep it propped up.
2 Now, Professor, in calculating the future healthcare
3 costs, just let us know what we are looking at?
4 A Sure. This is the summary chart of my findings on the
5 costs associated with the care prescribed by Dr. Macagno for
6 Mr. Espacia, and you can see it begins in 2025, and that's when
7 I originally wrote the report back in September of 2025. I am
8 going to start the losses in 2026, so let me just pause there
9 and explain why.
10 My job here is only to determine what the future costs
11 are, not the past. Anything that incurred in the past is known.
12 We have receipts, and they can figure it out. They don't need
13 me. My job is to deal with the fact that we don't know what's
14 going to happen in the future. There is uncertainty and so I'm
15 only here to tell you costs from today forward.
16 Q So Professor, so where it says 2025, if this trial was
17 previously scheduled for when you made the report, now you
18 saying that it would be appropriate to start with 2026?
19 A That's correct. So a lot of this row is going to be
20 eliminated in that total. That total included, I will give you
21 the new total eliminating that, so I just wanted to say that off
22 the bat. So you see that this continues into the future and
23 that's why I am here, to tell you what I think is going to
24 happen to prices over time, and these rates that you see going
25 across the columns are the inflation rates that I applied to

1 each category of medical services, and where that comes from of
2 is the Department of Labor U.S. Bureau of Labors Statistics
3 collects data that puts -- it trends in prices for goods and
4 services that the typical household consumes and in order to do
5 that they have to collect data on all different goods and
6 services, and they make that data available to the public, so I
7 can look at that data and match the categories prescribed by Dr.
8 Macagno that you see here to the closest match from the
9 Department of Labor data. I go back 25 years, and I take an
10 average, and the reason I take that average is some years prices
11 go up by a lot with high inflation and some years they go up by
12 less, so it's lower inflation.
13 They don't tend to go down, but they increase at
14 different rates. If I just took the current rates, I would
15 exaggerate because I'm projecting over 25 years here. Roughly,
16 so if I'm projecting over 25 years, and I assume that inflation
17 is going to stay high for 25 years, the amount that I come up
18 with is going to be much higher than it needs to be.
19 Q Professor, just to cut you and I apologize, if I
20 understand what you're saying that even though these percentages
21 that are listed here could say, you know, 2.2 percent or 2.8
22 percent potentially, the growth is based on that number, but in
23 ten years from now it could be substantially higher?
24 A Or lower. So that's the whole point. Right now it is
25 high and it has been high. We don't expect for the next

1 25 years that it's going to remain that high and so what we do
2 is we take an average. And how far back we go to take that
3 average is really why you need my expertise.
4 You want to get the right amount of highs and lows that
5 are accurately going to predict over the next 25 years with
6 reasonable certainty, and so that is what I do to get these
7 growth rates, so for each column, I take what the doctor
8 recommends, I take the current annual cost of that and I project
9 that over the remainder of Mr. Espacia's life how much money he
10 is going to need.
11 Q Professor, looking at this, why are some columns only
12 showing maybe two numbers, but some columns have numbers for
13 every single year annually?
14 A So I am going to go column by column and explain that
15 now.
16 Q Thank you, Professor?
17 A So with the first category that you see here, Dr.
18 Macagno recommended cervical spine surgeries, and the total cost
19 in current dollars at the time that he wrote the report was
20 $75,000 that I continued to include in my total because that is
21 surgery hasn't happened yet, so I did the report in September
22 and we don't know with certainty when he is going to have that
23 surgery, but I do include that $75,000 surgery, and Dr. Macagno
24 said that that surgery will have to be revised or redone every
25 11 years, well, when he actually said 10 to 12 years, whenever

1 he gives me a range, I take the midpoint so that it is a 50/50
2 chance that it will 10 or 12, so 11 years later the same surgery
3 is going to cost $117,925. It's not a more expensive surgery.
4 It's the same surgery. It's just that with the 4.2% growth
5 rate, that is just what the cost is going to be in the year.
6 Why 4.2%? I can tell you because I just crunched the
7 numbers because they just came out with the year end for 2025
8 data for the Department of Labor and that growth rate is
9 actually over 5% right now. So 4.2% is within reason and it's
10 being on the conservative end. So using that 4.2% growth rate
11 the same surgery will cost over $115,000 in 11 years from now,
12 so the total cost of the spine surgery is $192,925.
13 Physical therapy, Dr. Macagno broke it down into
14 cervical and lumbar. They are exactly the same, but he
15 separated them into three visits per week for 1 and 3 visits per
16 week for the other and so I separated them as well. Annually
17 three visits per week of physical therapy in current dollars for
18 all 52 weeks is $58,500, so that's how much it will cost for
19 physical therapy in today's dollars, and this I don't commence
20 until the year 2026, so I cross out this number in the total at
21 the bottom, and I start March 1st.
22 So starting in March we expect that the cost by the end
23 of this year will be annually $59,787, and that's for the full
24 year, but I count starting in March. The 2.2% growth rate is
25 the 25 year average on a category of medical services called

1 other professional services and that is things like physical
2 therapy, chiropractor, psychotherapy and that sort of thing.
3 The growth rate is lower than other growth rates in healthcare.
4 The lifetime cost, now I'm going to change that,
5 because that includes 2025 and part of 2026 and this shouldn't
6 be included. The new total is $1,927,302, so it's just slightly
7 less because I removed the earlier part of the year, and last
8 year. By the way, that is the same for lumbar so we are going
9 to have the same total for lumbar $1,927,302, so it's close to
10 $4,000 worth of physical therapy over the remainder of his life,
11 which is about 25 years. The orthopedic visits annually I
12 believe it was 6 per year come out to $2,062. Dr. Macagno also
13 said there would be X-rays associated with that, but he didn't
14 tell us how many, and so I just left it out to be conservative.
15 This is just the orthopedics visit. The growth rate of 6.8%
16 period of time is the 25 year average for specialist and office
17 visits bases on the Department of Labor data. The good news
18 here is that a lot of the medical growth rates are lower than
19 the general rate of inflation in things like pharmaceuticals,
20 hospitalizations, nursing homes. Those have much higher rates
21 but a lot of just the basic medical care has come down with
22 inflation over the last 25 years. So that over the next 25
23 years, the total cost for orthopedic visits is expected to be
24 80,975 and again, I'm writing all of this because it's slightly
25 lower than what you see there.

1 The next category that has to study are MRIs basically,
2 and again, Dr. Macagno separated it for cervical and lumbar, but
3 it's 3500 for that one MRI each year. He prescribed it with and
4 without contrast. It wasn't very clear to me whether he meant
5 he needed both every year. I just took the price of the one
6 $3500 which is with and without contrast and annually $3500.
7 Growth rate of 2.8% because it takes place in the doctor's
8 office typically and it's reviewed by a doctor, and so it's the
9 same cost range and growth rate as office visits or medical
10 care.
11 The lifetime cost for the diagnostics is now $125,293
12 dollars. And it's the same for lumbar and cervical, and the
13 last thing is the lumbar surgeries. It's a little bit cheaper
14 than the cervical surgeries that he prescribed so $50,000.
15 Again, I do include it even though I list it in 2025 just
16 because I'm including the first one in current dollars.
17 Again, growth rate of 4.2% just like the cervical.
18 That same surgery is expected to cost $78,617 in 11 years from
19 now, and the lifetime cost is the same at $128,617 dollars so
20 this total future cost of healthcare commencing, and I'm going
21 to change that to March 1, 2026 is $4,507,707, so that is the
22 lifetime costs based on the lifetime care of Dr. Macagno for the
23 next 25 years.
24 Q Professor, these growth rates are generally accepted
25 into the field of economics?

1 A Yes. These are on the conservative end.
2 Q Now, is there a reason why it stops at 2050?
3 A I didn't mention one of my assumptions. You know, we
4 are not projecting into the future. I'm making assumptions
5 because I don't have a crystal ball, so the only assumption that
6 I hadn't mentioned was the life expectancy, and that comes from
7 the National Center for Health Statistics. They put out what is
8 called life tables every year and those tables are survivor
9 probability, given the year you were born and your gender, how
10 many years that you have left on average, and the average based
11 upon the charts that are relied upon by the Courts is 79.1, so
12 it takes us to the age that Mr. Espacia reaches the age of 79.1,
13 so that's why we stop in the year 2050, and you can see it's
14 partial year, so it's based on when he turns that age.
15 Q And Professor, you mentioned that this is the number
16 that the Courts relied upon, but in terms of a number, it could
17 potentially be even less, which would bring all of the numbers
18 less, right?
19 A Yes. It could be lower or it could be higher.
20 Q Right. It could work both ways but that is based on
21 the numbers suggested?
22 A Because that's an average within that range.
23 Q Is there typically a difference between men and women
24 when it comes to life expectancy?
25 A Yes. For men, it is lower, and these tables that I'm

1 relying upon are the 2020 tables. The 2024 tables are
2 available, but the Courts rely upon the 2020 ones so each year
3 the survivor probability have been going up. They haven't been
4 going up by much.
5 Q Professor, in making this analysis, is any part of your
6 calculation anything at all consist of diagnosing or giving
7 medical treatment opinions or is it just simply growing the
8 number?
9 A Just growing the numbers. I'm not a medical doctor.
10 Q So you never met with Mr. Espacia with respect to
11 checking his neck or his back to see if he will need anything,
12 this is simply you are given numbers, possibly numbers for a
13 perfect world, and you were asked to grow them, is that fair?
14 A Yes.
15 Q Professor, are these corrections and this board, does
16 it fairly and accurately relate to your testimony as we hear
17 today in relation to the way you grew these numbers based on Dr.
18 Macagno's report?
19 A Yes.
20 Q And now, are these numbers accurate as to a reasonable
21 degree of economic certainty?
22 A Yes.
23 MR. MARANDO: Judge, just for the reason that it's
24 consistent with your testimony, that the jury has just
25 heard, we had pre-marked for ID as Plaintiff's 25.

1 Plaintiff does move at this time to move the board into
2 evidence.
3 THE COURT: Any objection?
4 MR. FRANKLIN: Yes, Your Honor. It's hearsay.
5 THE COURT: Overruled. That is Plaintiff's exhibit
6 what?
7 MR. MARANDO: 25.
8 (Whereupon, growth rate demonstrative was marked as
9 Plaintiff's Exhibit 25 for Evidence.)
10 Q And professor, the total of economic lost that we have
11 calculated on the bottom, is that based on your opinions stated
12 within a reasonable degree of economic certainty?
13 A It is.
14 MR. MARANDO: Professor, I have nothing further.
15 Thank you.
16 THE WITNESS: You're welcome.
17 THE COURT: Okay, professor, just take your seat.
18 Counsel, when you're ready.
19 CROSS EXAMINATION
20 BY MR. FRANKLIN:
21 Q Just briefly. Professor, Dr. Macagno could be wrong,
22 right?
23 A Yes. I'm not qualified to speak to that.
24 Q And then your numbers would all be wrong?
25 A Sure.

1 Q What was the source of your growth rates?
2 A The U.S. Bureau of Labor Statistics, the Consumer Price
3 Index Data.
4 Q Okay. Were there any sources specific to the medical
5 industry?
6 A Yes.
7 Q And which ones were those?
8 A So within the Department of Labor data you can find
9 they list the categories of medical services that they collect
10 the prices on, and the price changes, and then they tell you
11 what's included in those categories, so I've studied those
12 pretty carefully, so for example, physical therapy falls under
13 other professional services. There is a category called under
14 medical other professional services and that's the data that I
15 would use, and that's just one example.
16 Q Is there only one source?
17 A Yes, for the price data.
18 Q Just for --
19 A The most reliable.
20 Q For medical services?
21 A Yes. I mean, you could go to other sources to get what
22 costs are but the most reliable is the Department of Labor.
23 Q What are some of the other sources?
24 A So in research we sometimes rely on Medicare Data and
25 Medicare pricing, although that is a little bit different than

1 what the Department of Labor does. They calculate what is
2 actually in practice, the changes in cost Medicare is more
3 reimbursement rates, so it's not quite the right variable that
4 I'm looking for.
5 Q And your calculations, do they assume that this growth
6 rate remains constant?
7 A No. So you mean the Department of Labor?
8 Q The ones that you used?
9 A The ones that I used, yes -- well, it's not really I'm
10 assuming they remain constant. I'm assuming that they may go up
11 and down, but they will balance out or average to that growth
12 rate, so that after 25 years, it's a wash, so again, in the next
13 few years, I expect them to be high, then I expect them possibly
14 hopefully to come down but it evens out in the end is the point.
15 MR. FRANKLIN: Okay. Thank you.
16 THE COURT: Counsel?
17 MR. MARANDO: Nothing further, Judge.
18 THE COURT: Okay. Thank you.
19 THE WITNESS: Thank you.
20 THE COURT: Okay. We are going to a five minute
21 break.
22 COURT OFFICER: All rise as the jury exits.
23 (The jury has exited the room.)
24 THE COURT: You can be seated. So what witnesses
25 do we have Monday?

1 MR. MARANDO: Justin Malloy, Fatlum Malouku and the
2 Plaintiff.
3 THE COURT: Go ahead. For the morning you have
4 Fatlum Malouku.
5 MR. MARANDO: Fatlum Malouku 9:30 and then after
6 that we have Justin Malloy and then we have the Plaintiff.
7 THE COURT: So we will discuss further scheduling
8 and other issues but we agree that I can let the jury go and
9 tell to be back Monday.
10 COURT OFFICER: All rise. The Jury is entering.
11 (The jury has entered the room.)
12 THE COURT: Okay. You can be seated. All right.
13 Well, I think you got quite a bit of information today, so
14 we will call it a day. I'm going to remind you please don't
15 discuss this with anyone over the weekend, and we will see
16 you all Monday at 9:30. All right. Thank you.
17 COURT OFFICER: All rise. The jury is exiting.
18 (The jury has exited the room.)
19 THE COURT: Okay. You can be seated. So on the
20 record, we are going to do some administrative things to
21 start. So in terms of scheduling, we have Monday Plaintiff
22 just put it on the record?
23 MR. MARANDO: Yes, Judge, it will being Fatlum
24 Malouku at 9:30 following by Justin Malloy and then Henry
25 Espacia, the Plaintiff.

1 THE COURT: And then you're resting?
2 MR. MARANDO: Yes, Judge.
3 THE COURT: And for Tuesday?
4 MR. FRANKLIN: Your Honor, Dr. Bezos is available
5 for the afternoon, although we think the questioning will
6 continue with those three civil witnesses into Tuesday.
7 THE COURT: So can we do that in the afternoon. It
8 may be Plaintiff in the morning. And Wednesday?
9 MR. FRANKLIN: Wednesday we have Dr. Bendo in the
10 afternoon. We were requesting that he be accorded the
11 courtesy of being able to appear by Zoom, but if that cannot
12 be accommodated, then we will plan on trying to get him down
13 here.
14 THE COURT: We will come back for that. You don't
15 have anybody for Wednesday morning?
16 MR. FRANKLIN: For Wednesday morning we have the
17 EMS eyewitness, but he is in Arizona so we would be
18 requesting that he be permitted to appear via Zoom.
19 THE COURT: I will get back to that. And then
20 Thursday this part is down, although some parts on Thursday
21 probably afternoon, we will be having a charge conference
22 and the verdict sheet conference. I will probably squeeze
23 another one in between with my Court attorney. He does the
24 official Court attorney with you Thursday afternoon and you
25 should plan on final conference charge.

1 MR. FRANKLIN: So we will have the morning free?
2 THE COURT: Yep.
3 MR. MARANDO: Sorry, charge conference on Thursday?
4 THE COURT: Thursday afternoon. So Thursday
5 mornings are full. And then Friday?
6 MR. FRANKLIN: Friday we have the defense
7 economist, then Manny Silverberg.
8 THE COURT: Who is Manny Silverberg?
9 MR. MARANDO: I would object to that witness,
10 Judge. There has been no witness exchange of Manny
11 Silverberg. There has been nothing, no exchange. No
12 deposition.
13 THE COURT: Let me just get an answer. Who is
14 Manny Silverberg?
15 MR. FRANKLIN: He's on our witness list, but he
16 works with the -- he is the supervisor over Fatlum Malouku
17 and the handyman Justin Malloy.
18 MR. MARANDO: It's been on the trial with respect
19 to five years and he's never appeared in one, both at this
20 firm and the prior firm, any witness list in terms of anyone
21 with knowledge. There is no transcripts and I'm going into
22 this completely blind.
23 THE COURT: You don't have to. He's a nonparty,
24 right?
25 MR. FRANKLIN: Well, I mean he is a witness. He is

1 a party witness.
2 THE COURT: Is he a fact witness?
3 MR. FRANKLIN: Well, yes, he is a fact witness.
4 There has been no discovery as to any of these witnesses
5 that we've been hearing from.
6 THE COURT: I'll hear arguments on that on Monday.
7 And then the following Monday theoretically.
8 MR. FRANKLIN: Dr. Lastic, in the morning. He is
9 the radiologist.
10 THE COURT: Okay. And then we do closings that
11 day.
12 MR. FRANKLIN: Yes, Judge.
13 MR. MARANDO: Then I will just reserve my arguments
14 for objection when it comes to their economist. I think we
15 spoke about it before. It's been a long day. I can just
16 simply revisit it on Monday, Your Honor.
17 THE COURT: Let me just get back to in terms of the
18 Wednesday witnesses being remote or virtual. Plaintiff
19 counsel, are you consenting to either one?
20 MR. MARANDO: I can not consent to a virtual
21 cross-examination of a treating physician in this case or
22 the Arizona. I hate to do this.
23 MR. FRANKLIN: He's an EMT.
24 MR. MARANDO: It must be in person. I can't
25 consent.

1 MR. FRANKLIN: He's an unavailable witness outside
2 the jurisdiction.
3 THE COURT: Okay. So we will have oral arguments
4 on that on Monday or Tuesday, let's see. Let's plan on oral
5 arguments on that. We will have to fit it in Monday because
6 then you need to know.
7 MR. FRANKLIN: Your Honor, there is also a
8 possibility that our investigator will also be testifying
9 one of those days.
10 THE COURT: Which day?
11 MR. FRANKLIN: I need to confirm with him, but
12 likely Wednesday or Friday.
13 THE COURT: And counselor what is you're objecting
14 to Defendant's economist, just for the record?
15 MR. MARANDO: Yes. The economist, Judge, they are
16 the four corners of their report they only opined to the
17 lost wages. They don't give anything in terms of any
18 information or reliance they don't even mention the future
19 healthcare costs at all. All they say is we are not talking
20 about that. We are just focused on the lost wage. That is
21 the reason and I have no 3101 when it comes to the specific
22 witness Dr. Kelly, the economist, and they have put them on
23 notice. They were on notice about five months ago, only
24 looking to only attack the lost wages. This is the first
25 time I'm hearing about it that oh, we may want to put them

1 on to talk about the future healthcare costs. They should
2 have put something in the --
3 MR. FRANKLIN: In the four corners they do state
4 that they rely on Dr. Bendo and Dr. Bezos in projecting that
5 there is no future healthcare costs, but we also identify
6 them as a rebuttal witness to the Plaintiff's economist, so
7 they will address the Plaintiff's economist, wage growth the
8 sources of the wage growth.
9 THE COURT: No but they didn't testify as to wage
10 growth.
11 MR. FRANKLIN: The economist just now did.
12 MR. MARANDO: Not to wages.
13 THE COURT: Not to wages.
14 MR. FRANKLIN: I'm sorry, not to wages, it's late,
15 healthcare costs, Your Honor. So Plaintiff's economist
16 addressed healthcare growth charts for healthcare growth and
17 the Plaintiff's economist addressed certain sources she went
18 to the Bureau of Labor and chose certain sources. Our
19 economist takes issues with both of those.
20 THE COURT: Where is your 3101D and the expert's
21 economist report?
22 MR. FRANKLIN: It's been submitted. It's probably
23 on NYCEF. I don't know if I have a copy here.
24 THE COURT: Counsel, in essence then what?
25 MR. MARANDO: Yes, Judge. What I've seen in the

1 past is as follows they are trying to saying the economists
2 in general in the defense side we disagree -- we are going
3 to not even consider it because our expert physician says he
4 doesn't need any future healthcare costs, so its 0, however,
5 assuming innuendo that the jurors consider it these are the
6 numbers we are going to rely upon that are more accurate.
7 They did nothing with respect to that. They don't comment
8 anything on future healthcare. I'm going in completely
9 blind. This is not a wrap around rebuttal witness.
10 THE COURT: Hang on a second.
11 MR. FRANKLIN: Well, I wasn't prepared for a motion
12 to preclude an expert.
13 THE COURT: I mean frankly, counsel, I asked you to
14 raise these issues generally of that it's deemed waived so.
15 MR. MARANDO: Judge, I only withdraw the wage claim
16 two days ago and Your Honor mentioned that we will bring it
17 up the following day.
18 THE COURT: So where is the report?
19 MR. MARANDO: 3101.
20 MR. FRANKLIN: The Plaintiffs disclosed the 3101 in
21 September of last year. The defense disclosed theirs in
22 October of last year. The Plaintiff has now withdrawn the
23 wage claim and surprising this defense with this last minute
24 motion to preclude. The defense has actually incurred quite
25 a bit of defense in addressing those wage claims that the

1 Plaintiff is now withdrawing.
2 MR. MARANDO: At that time, and I understand that,
3 and I pulled out a million dollars in lost wages and when it
4 comes to being prepared for the case in the middle of trial,
5 how would I have known that your experts were going to
6 testify?
7 THE COURT: Let's see. Let's look at the report.
8 Can someone give me the NYCEF number.
9 MR. MARANDO: Yes, Judge. I will pull it up now.
10 MR. FRANKLIN: I will look as well.
11 THE COURT: Are we talking about two different,
12 Kelly and --
13 MR. MARANDO: Yes, Judge.
14 MR. FRANKLIN: The defense's number of 69, Your
15 Honor, document number 69. At the bottom it's on the page 6
16 of 13. It says future costs of healthcare, future medical
17 courts are estimated at 0 per the reports by Steven Lastick,
18 M.D.
19 THE COURT: They are not worth anything and so that
20 is my ruling on that, you can note your objection.
21 MR. MARANDO: Yes, Judge. Note my exception.
22 THE COURT: As to the request to have the
23 Defendant's expert testify remotely, what is the reason for
24 that, what good cause can you demonstrate, Counsel?
25 MR. FRANKLIN: For Dr. Bendo, he cleared his entire

1 medical calendar two possibly, three times so testifying via
2 Zoom would allow him to at least hold half of his day's
3 calendar and see some patients, but I mean that is the
4 reason.
5 THE COURT: And counsel for Plaintiff.
6 MR. MARANDO: Just looking at today, Judge, how
7 rigorous the cross-examination was of the spine, the spinal
8 physician. This is their spine doctor and to have that
9 taken away from Plaintiff the opportunity to equally be on
10 the same page and starting line when it comes to
11 cross-examination. Mr. Franklin was about an hour and a
12 half and very intense, moving around, showing him documents.
13 It's just not the same, and it will be very unfairly
14 prejudicial to Plaintiff in this regard.
15 THE COURT: Yes. I am going to agree with that and
16 say that, unfortunately, as I've said over and over, we've
17 all been subject to having to adjourn our schedules and
18 change of the schedules. That is the nature of a trial and
19 snowstorm, so I'm going to deny the request to testify
20 remotely.
21 MR. FRANKLIN: Then I believe he will be here in
22 person.
23 THE COURT: As to the EMT what is the good cause
24 for asking for the remote testimony?
25 MR. FRANKLIN: The EMT is perhaps the

1 quintessential fact witness. He was the first one that was
2 there. He is now in Arizona and so it's merely that he is
3 outside the jurisdiction.
4 THE COURT: Counsel?
5 MR. MARANDO: Judge, I think it would just confuse
6 the jury, with respect to having someone not be here in
7 Court on this trial and it's been for five months now and
8 Mr. Franklin just got that on the same day of trial, the
9 same day we started, February 17th is when he gave Judge
10 Capella, the so ordered application. Judge, I need to so
11 ordered. That could have been done five months ago to lay
12 the foundation for Court for no good reason it was done
13 February 17th when we had notice of this trial for five.
14 Every person should be consistent. It's going to confuse
15 the jury, and more importantly, I don't know why there's a
16 delay on the actual start of trial from day one to get a
17 so-ordered subpoena.
18 MR. FRANKLIN: Your Honor, with all due respect the
19 Plaintiff was on notice from Senior Care this is not FDNY.
20 It's not FDNY. It's senior care.
21 THE COURT: It's not FDNY, it's what?
22 MR. FRANKLIN: Senior care. The senior care was in
23 there and Plaintiff has been on notice of it, and in fact, I
24 won't rehash other issues, Your Honor, but it's been -- they
25 have been on notice of it.

1 THE COURT: Okay. I'm going to allow the remote
2 testimony of the EMT. You can note your objection.
3 MR. MARANDO: Yes, Judge, note my exception.
4 MR. FRANKLIN: And that would be on Wednesday?
5 THE COURT: Let's hope. And I believe there was
6 another witness you had an objection to counsel for
7 Plaintiff.
8 MR. MARANDO: Manny Silverberg was never aside from
9 a trial exchange five years later for through the course of
10 five years of discovery, there was never a formal witness
11 exchange as to Manny Silverberg being a person with
12 knowledge. It may have come up once in terms of oh, he is
13 my supervisor but we have repeatedly asked with anyone with
14 knowledge through discovery, it was only Justin and Fatlum
15 that day. Now, for the very first time, I have no idea what
16 he is going to say, and he's saying, no, he is a fact
17 witness. I have no idea what he is going to testify to,
18 when those discovery demands people with knowledge and now
19 it sounds like this is just trial --
20 THE COURT: Which entity does he work for?
21 MR. FRANKLIN: Your Honor. He works for
22 Residential Management, and his name appears on the key
23 piece of evidence that Plaintiff have had from day one, the
24 incident report written by Fatlum Malouku to Manny
25 Silverberg. Plaintiff has had this document since discovery

1 before it was closed.
2 THE COURT: One at a time. So starting with so he
3 works for Residential Management but has not been produced
4 for the deposition?
5 MR. FRANKLIN: Your Honor, I inherited this case.
6 The prior counsel only did one deposition for each side. I
7 don't know why prior counsel chose not to conduct discovery
8 and plaintiff chose not conduct discovery.
9 THE COURT: Okay. But he is named in instant
10 report. Go ahead.
11 MR. FRANKLIN: He is the recipient of the incident
12 report. He has been the recipient. His name has been
13 available to the Plaintiff and he was disclosed in
14 discovery, in fact because these documents were provided to
15 the Plaintiff.
16 THE COURT: When were they provided.
17 MR. FRANKLIN: Before discovery closed, so I don't
18 know Plaintiff chose not to inquire. The individual is
19 still here. He is still employed with Residential
20 Management. There is absolutely no proof that Plaintiff can
21 provide the Court that they did not have this name.
22 THE COURT: Counsel.
23 MR. MARANDO: If I may, we did discovery demands
24 asking for witnesses with knowledge. It's simple discovery
25 that as a courtesy if there is anyone with knowledge you let

1 us know. That is not what happened here. We were put on
2 notice of Justin and Fatlum. If I work for Best Buy and I'm
3 the supervisor and something happened in Best Buy and
4 someone wrote an accident report to the main supervisor over
5 50 employees and I don't put notice of that person's name in
6 a discovery response when I demanded all persons with
7 knowledge and then now on trial, it's oh, actually he might
8 know everything about everything about this case. That's
9 trial by ambush, Judge, by definition.
10 MR. FRANKLIN: Your Honor, it's a statement.
11 THE COURT: Was this asked about at the deposition?
12 Who testified?
13 MR. FRANKLIN: Yes, Fatlum Malouku called him Manny
14 Silver but Fatlum Malouku also was shown I believe at his
15 deposition the same incident report it was discussed, so
16 they have had the name Manny Silverberg from before
17 discovery closed.
18 THE COURT: What is he going to add?
19 MR. FRANKLIN: Manny Silverberg is going to testify
20 to his knowledge and his monitoring of the situation.
21 THE COURT: Was he there?
22 MR. MARANDO: No, Judge.
23 MR. FRANKLIN: I don't know if he was physically on
24 site, but he certainly was the recipient of --
25 THE COURT: Well I'm not going to allow cumulative

1 testimony, testimony so what I'm going to do is I'm going to
2 reserve decision on this until Monday morning. Any other
3 issue about the witnesses?
4 MR. MARANDO: No, Your Honor, just that I tried
5 very hard to get three witnesses in one date so the jury
6 couldn't be upset with one witness a day over the course of
7 three days. I mean.
8 THE COURT: Let me look at the schedule now that
9 you mention that. Well I have Monday we have quite a few
10 witnesses, Tuesday, Plaintiff in the morning and Dr. Bezos
11 in the afternoon, so that is two, Wednesday theoretically we
12 have two, the EMT and the doctor, Thursday down and the
13 charge conference.
14 MR. MARANDO: Just Tuesday, Judge because I only
15 plan to be 30 minutes with both Malouku and Malloy, not long
16 and then I don't think it will take half the morning and
17 then the full afternoon.
18 MR. FRANKLIN: Well, we are going to be calling
19 them as our primary witnesses.
20 THE COURT: Well, counsel, now that you asked for
21 the EMT, you better make sure he is available because now
22 counsel is right.
23 MR. FRANKLIN: If the EMT doesn't come then the
24 investigator will more than likely be there.
25 THE COURT: And when will you know about the

1 investigator. Let us know Monday.
2 MR. FRANKLIN: By Monday I will.
3 THE COURT: Let me make a note of that. Then
4 Friday we would have the economist and maybe, maybe not
5 Mr. Silverberg and maybe, maybe not the investigator. And
6 then Monday we have the final doctor and we do closings.
7 Okay. I reserve decision on one question about Manny
8 Silverberg, and I will hear more arguments on Monday
9 morning, so feel free to bring case law, if you have any.
10 We will do it orally. Don't upload anything. Just show up
11 with if you have case law, and I know you are all real
12 tired, but Plaintiff can I talk to you in the back for a
13 minute.
14 * * * *
15 I, Lauren A. Fitzgerald, hereby certify that the
16 foregoing transcript is a true and accurate record of the
17 proceedings.
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21 _______________________
LAUREN A. FITZGERALD
Senior Court Reporter
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