1 SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : CIVIL TERM : PART CSCP
2 --X
JOSE RIVERA,
3
Plaintiff,
4
-against- Index No. 16240/13
5
LLOYD LAMPELL, **JURY TRIAL**
6
Defendant.
7 --X
Supreme Courthouse
8 88-11 Sutphin Boulevard
Jamaica, New York 11435
9 March 8, 2016

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B E F O R E:
11
THE HONORABLE MARTIN E. RITHOLTZ,
12 J U S T I C E

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

14
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15 Attorneys for the Plaintiff
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20 WESTBURY, NEW YORK 11590
BY: FRANCIS J. SCAHILL, ESQ.
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25 EILEEN AGNOLETTO
Senior Court Reporter

1 J E R R Y L U B L I N E R, MD, called as a witness by and on
2 behalf of the Plaintiff, after having been first duly sworn, was
3 examined and testified as follows:
4 THE CLERK: Please be seated. In a loud, clear
5 voice, please state your name and business address.
6 THE WITNESS: Jerry Lubliner.
7 THE CLERK: Please spell the two names.
8 THE WITNESS: J-E-R-R-Y, L-U-B-L-I-N-E-R, 215 East
9 73rd Street, New York, New York 10021.
10 THE CLERK: Thank you very much.
11 THE COURT: You may inquire.
12 MR. ACARD: Thank you, your Honor.
13 DIRECT EXAMINATION
14 BY MR. ACARD:
15 Q Good afternoon, Dr. Lubliner.
16 A Good afternoon.
17 Q Just before we get started, that address that you just
18 gave us, is that's your business address?
19 A It is.
20 Q Doctor, are you duly licensed to practice medicine in
21 the State of New York?
22 A Yes.
23 Q And since when?
24 A December of 1980.
25 Q Can you tell the jury a little bit about your

1 educational background?
2 A Sure. I went to Syracuse University. I graduated
3 Summa Cum Laude in 1976. That is the same year I started
4 medical school in New York at State University graduating June
5 of 1980.
6 In July of 1980, I started an internship at Beth Israel
7 Hospital in Manhattan for general surgery, graduating June of
8 1981. In July of 1981, I started a four-year residency program
9 in orthopedic surgery at the New York University Hospital for
10 Joint Diseases, graduating June of 1985.
11 After graduating, I did postgraduate training in Canada
12 called a fellowship. There I trained with the Olympic team
13 doctor and I was the team doctor for the Toronto Blue Jays and
14 some other teams.
15 I came back to New York in '86. In '86, I took part
16 one of the test to be board certified to the American Academy --
17 American Board Association; I passed. In 1986 I took part two,
18 which is a written exam, and then I became board certified in
19 '88 after passing the requirement, one of which is to be in
20 training for two years.
21 Presently I teach and have privileges at Beth Israel
22 Hospital in Manhattan and the NYU Hospital for Joint Diseases
23 where I do surgeries at both institutions.
24 In orthopedic surgery you have to take a board every
25 ten years, you have to be retested, so I was retested in 1998

1 and in 2008. Lastly, in 2008 the boards came out, first time,
2 with the secondary board of sports medicine where you vetted,
3 take a test, and I passed, so now I am board certified in
4 orthopedics and sports medicine.
5 Q Just so we're clear, Doctor, you have a specialty?
6 A My specialty is orthopedic surgery.
7 Q Okay. And you mentioned that you are board certified?
8 A Correct.
9 Q Can you just explain in a little more detail what that
10 means to be board certified?
11 A Board certification is the highest level you can attain
12 in your field. Not every doctor is board certified. First you
13 have to pass an accredited program. Then you take a test and
14 they circulate your name to make sure you keep your nose clean
15 and thing likes that. Then after a couple of years, if you do
16 certain things correctly, they grant you board certification.
17 It's a privilege; it's not a right.
18 Q Are you a member of any professional associates?
19 A Sure. The American Board of Orthopedic Surgeons. I
20 mentioned American Academy of Orthopedic Surgeons and the
21 Arthroscopic Association of North American, to name a few.
22 Q And do you do any type of teaching?
23 A Sure. I teach anatomy every other Thursday at NYU or
24 Beth Israel.
25 Q And do you have surgical privileges?

1 A Yes, at both institutions.
2 Q At which one?
3 A At both institutions.
4 Q And do you actually perform surgery?
5 A I do.
6 Q What type of surgeries do you do?
7 A Orthopedics.
8 Q All forms?
9 A Orthopedics is the branch of medicine that deals with
10 the arms, the legs, and the spine, the back. Any time you have
11 a problem with a broken bone, called a fracture, a herniated
12 disk, like you have today, a ruptured ligament, a torn
13 cartilage, you go to an orthopedic surgeon.
14 Q And you have your own patients that you treat?
15 A Of course.
16 Q And what type of medical problems do you treat with
17 them?
18 A Pain in the legs, pain in the arms, or fractures,
19 herniated disks, disk bulge, ligament rupture, rotator cuff,
20 things like that.
21 Q Now, before today have you ever been recognized in any
22 courts in the State of New York as an expert in your field?
23 A I have.
24 Q On about you how many occasions?
25 A In life? About 250 times.

1 Q And that's all in New York State?
2 A One or two in Jersey.
3 Q How often during a given year do you testify in court?
4 A About once a month.
5 Q And do you offer -- Do you ever offer opinions for
6 defendants as well as plaintiffs?
7 A Yes.
8 Q In addition to treating your own patients, Doctor, are
9 you asked from time to time to do orthopedic examinations for
10 people who are involved in lawsuits?
11 A Yes.
12 Q On a consultation basis?
13 A Yes.
14 Q And when you do that type of thing, what does that
15 involve?
16 A It involves -- it's like a second opinion for surgery.
17 It involves seeing a patient, taking a history, doing a physical
18 examination, reviewing images, reviewing medical records, and
19 then coming to a conclusion, coming to an opinion.
20 There are subtle differences between a defense exam and
21 a plaintiff exam, but that's just at the end of it to talk about
22 causality?
23 Q And were you asked to do that in this case?
24 A Of course, that's why I'm here.
25 Q And that was with regard Jose Rivera?

1 A Yes.
2 Q And did you receive a fee for reviewing the records and
3 examining Jose Rivera?
4 A Absolutely.
5 Q And writing the report?
6 A Absolutely.
7 Q Do you know what that fee was?
8 A My standard fee is $900.
9 Q And are you receiving a fee for your time here in court
10 today?
11 A Yes.
12 Q And are you missing time with patients today as a
13 result of being here?
14 A I rescheduled my patients twice actually for this case,
15 and I would have been seeing patients today this afternoon had I
16 not been here.
17 Q And what is the fee that you are receiving today to be
18 here?
19 A My fee for preparation for the case, for coming here
20 and giving testimony to people is $7,500.
21 Q And is that the standard fee that you give for court
22 time no matter whether you are testifying for plaintiff or
23 defendants?
24 A Correct, for a half a day, yes.
25 Q Now, in this case when did you do an examination of

1 Jose Rivera?
2 A February 17, 2015.
3 Q And, by the way, did you bring a chart or file with you
4 on Mr. Rivera?
5 A I did.
6 Q And is that with you?
7 A It's in my lap. There's really not that much room
8 here.
9 Q Is that the records that you reviewed in the course of
10 your examination?
11 A Yes, there's more on a disk in the back. I didn't
12 print out everything.
13 Q And does referring to your chart assist you in
14 refreshing your recollection for anything?
15 A Yes.
16 Q So feel free to review that as we go along.
17 A Yes.
18 Q With regard to Mr. Rivera's evaluation that you did in
19 February, I believe, 2015 --
20 A Yes.
21 Q -- can you tell me what it is that you reviewed?
22 A Sure. Well, I reviewed the various documents called
23 bill of particulars which state the injuries from the accident,
24 I reviewed MRI reports, and I actually reviewed the images of
25 the MRI for his neck and back. I reviewed treatment records by

1 doctors that he saw, Dr. Kubiak, Dr. Morris. I reviewed
2 treatment records by Dr. Sebastian Lattuga, who operated on the
3 cervical spine and lumbar spine, and I reviewed postop reports
4 and for treatment.
5 I also reviewed treatments for previous accidents where
6 he injured his neck and back, and he had at least three
7 accidents, '98, 2004, and 2008 prior to the 2012 accident.
8 Q Do you know what -- Do you know specifically what
9 records you reviewed for the prior accident? Do you have that
10 with you?
11 A I do.
12 Q Okay. Can you tell us what records those were?
13 A I reviewed medical records of Dr. Steven Ravich,
14 R-A-V-I-C-H, Steven, S-T-E-V-E-N. He saw the patient in 1998
15 and 1999 for treatment to the neck and back. I reviewed a
16 police accident report for an accident 1/21/04. I reviewed
17 medical records of Dr. Scott Andrews from City Care in 2004. I
18 reviewed medical records of Dr. Eric, with a C, Elowitz,
19 E-L-O-W-I-T-Z, spine surgeon, 2003. I reviewed medical records
20 of Primary Health Care Plus 2011. I reviewed electrical studies
21 performed by Dr. Narkhede, N-A-R-K-H-E-D-E, taken February 7th
22 of '98 showing that the patient had bilateral L5-S1
23 radiculopathy.
24 I reviewed a cervical spine MRI taken at Doshi
25 Diagnostic on 12/5/98 showing protrusion at disk C5-6 and C6-7.

1 I reviewed another MRI report from Doshi Diagnostic December 12,
2 '98 showing herniation L5-S1. I reviewed a second MRI of the
3 cervical spine report dated 3/4/03 taken at Doshi Diagnostic
4 showing significant right paracentral forward slash foraminal
5 herniation at L5-S1 creating impingement.
6 Q Doctor, one of the records that you read off that
7 caught my attention was with Dr. Eric Elowitz --
8 A Yes.
9 Q -- a spinal surgeon you said that Mr. Rivera consulted
10 with in 2003?
11 A Yes.
12 Q Do you have that record?
13 A Yes.
14 Q Do you have his report?
15 A I do.
16 Q Okay. And did you review that report?
17 A Yes.
18 Q And when you reviewed that report, did Dr. Elowitz
19 state anything with respect to whether surgery was necessary?
20 MR. SCAHILL: Objection. That's not in evidence.
21 MR. ACARD: Actually, it is. It is part of the
22 Met Life records.
23 THE COURT: In evidence, I'll allow it.
24 MR. ACARD: It's in the Met Life records.
25 MR. SCAHILL: I'd like to see it.

1 THE COURT: Subject to connection.
2 A Yes, the record is dated March 25, '03. And he talks
3 about the herniated disk at L5-S1 and states: I will not
4 recommend any surgery for this patient. I feel that much of his
5 low-back pain is related to a lumbar muscular sprain, although
6 there is a herniation to the right. The right leg symptoms are
7 only a general small component, and his low back pain is the
8 most disabling feature. I recommend anti-inflammatory
9 medication and he may want to consider a formal trial of
10 physical therapy.
11 Q So there was no surgery recommended?
12 A Correct.
13 Q For the back in March of 2003?
14 A Correct.
15 Q And did the review of your records -- Were there any
16 other spinal surgery consultations that you're aware of before
17 July 5, 2012?
18 A No.
19 Q Now, you told us about the prior EMG as well?
20 A Yes.
21 Q Can you tell us a little bit about that, about the
22 findings on that?
23 A It showed nerve irritation down in his spine.
24 Q And what year was that?
25 A '98.

1 Q 1998?
2 A I don't remember the date in February, but I remember
3 it was February '98.
4 Q If I said February 7, 1998, would that be about right?
5 A Yes.
6 Q And did you see any other EMGs that were taken of
7 Mr. Rivera after February of 1998?
8 A Before '12, no.
9 Q Correct. So after reviewing -- Well, what did you
10 learn from Mr. Rivera's history?
11 A He had accidents where he injured his back and neck.
12 He had two herniated disks, one in his neck, one in his back,
13 but he went back to work after every one except for the accident
14 of 7/5/12. You know, you can go through medical records and
15 it's like a detective going through the evidence box. You have
16 to speak to the patient because they are like the eyewitness to
17 bring everything together, so without speaking to a patient you
18 just have various studies and the patient brings it together.
19 Now, what you'll hear from me soon is we are going to
20 go over the operative report. It's very important. In fact,
21 when you have surgery, the most important medical record there
22 is is the operative report because that's when the surgeon sees
23 exactly what is wrong. Okay?
24 So he had herniated disks before. He had irritation of
25 the root. He had irritation by the MRI -- by, excuse me, the

1 EMG, but he got better. He went back to work. He went back to
2 work in '98 and also all those other accidents. In fact,
3 sometimes he got confused about how many accident he had, but,
4 in any case, he was working on the date of the injury on 7/5/12
5 and went back to work after all these accidents. He had in the
6 late 2000s and early 2011 very little treatment for his back,
7 okay.
8 So now we jump forward to 7/5/12 and he has this
9 accident.
10 Q And that's what I'm going to ask you about next. Did
11 you then review the history of Mr. Rivera's treatment following
12 the July 5, 2012 accident?
13 A Of course.
14 Q And what did that include?
15 A To be brief, he had a car accident. He was the driver
16 with an air bag. He was wearing a seat belt, air bag was
17 deployed. Went to two hospitals because one was really busy, so
18 he treated at Mercy Hospital. Then on the 16th of July he went
19 to a private orthopedic surgeon, Dr. Paul Kubiak. Dr. Kubiak
20 examined him and said he had neck and back pain and said he
21 wanted to get new MRIs so he got new MRIs to his neck and his
22 back.
23 Q Now, Doctor, you mentioned before that you reviewed the
24 MRIs.
25 A Not only the report, but this one I reviewed the images

1 themselves.
2 Q And you have experience reviewing MRI films?
3 A Sure.
4 Q And that is something you've done many times in the
5 past?
6 A Do it every time I'm in the office.
7 Q Doctor, I'm going to -- This has already been admitted
8 into evidence. This is Plaintiff's Exhibit 23. You might need
9 to come down off the chair.
10 MR. SCAHILL: All right if I step up?
11 THE COURT: Yes.
12 Q Is this the MRI of Mr. Rivera's lumbar spine that --
13 A Yes, that I reviewed, yes.
14 Q Can you explain to the jury what is going on here in
15 the film?
16 A Sure. Before I do that can I explain what an MRI is?
17 Q Yes, absolutely can.
18 A An X-ray is a beam that goes through your body and then
19 it gets dispersed by calcium and metal, so soft tissue, meaning
20 disk and nerves and everything, are invisible to it. But an MRI
21 comes off water molecules and every living thing has water so
22 you can see not only the bone but the soft tissue, too. When I
23 say soft tissue, anything but bones is called soft tissue. In
24 your body, you have soft tissue and then you have bone.
25 When you look at an MRI, and they take 140 cuts which

1 you don't have to look at. What we did is we selected two of
2 the best cuts so you can see. This is a side-view called the
3 sagittal view where you are looking just like so at the patient.
4 Q You can keep going.
5 A And when you look here you look at bone, which is here.
6 This is the disk. Now, if you look at the disk you see a dark
7 part and you see a whiter part, all right? The dark part is
8 called the annulus and the inner part is called nucleus, and the
9 annulus holds the nucleus in behind it. You see the spinal
10 cord, okay, and then you see the nerve roots, these black things
11 break approximating off.
12 Now, if you look at L3-4 you see a normal-looking disk.
13 L4-5 you see a normal-looking disk. When you look at L5-S1 you
14 see that, one, the bone is not aligned in a straightforward
15 manner, and, two, there is a disk here hitting the spinal canal.
16 Okay? That's the side-view.
17 Now, in is called the axial view, axial is looking
18 straightforward down. So if you take like white bread and you
19 cut it up and then you look down, you take a piece out, take a
20 piece out, that is what you're looking at. You are looking
21 down. Here you are looking at the side, and what this thing
22 shows is this is the spinal canal, and right here, this is the
23 bone, and right here is the disk going into the spinal canal, so
24 he had surgery for this particular problem.
25 Q Doctor, I'm just going to put up what has also be

1 marked into evidence as Plaintiff's Exhibit 25.
2 A Right. So I have reviewed these before I came here to
3 make sure they were correct. The artist is demonstrating what's
4 going on. You can see over here you have the nice looking disk
5 here. This is the posterior longitudinal ligament here. The
6 disk is coming out and it is digging into the spinal sack. What
7 you see here is that the nerve roots are being a little bit
8 compressed by the disk.
9 Q Doctor, I now want to show you what has been marked
10 into evidence as Plaintiff's 24. I'm going to move this. Is
11 that the cervical spine MRI of Jose Rivera?
12 A Yes. So, again, you have a side-view called the
13 sagittal view, and that's looking like this. This is an
14 anatomically correct model of the cervical spine. You can see
15 the brain would be here. You are looking down, just like so,
16 and between levels of C5 and C6 you can see disk herniation.
17 Herniation is about the size of a pencil eraser. They are not
18 usually huge, but there is no space for them, that's the
19 problem. You can see here, you can see bone. This is the
20 posterior longitudinal ligament.
21 When the disk is pushing on the posterior longitudinal
22 ligament it is called a bulge. When it actually gets through
23 the posterior longitudinal ligament it is called a herniation.
24 Here you can see it is obviously through and this white, the
25 fat, and that is the spinal cord from the brain. You can see

1 how it's impinging on the fat into the cord, and you can see on
2 the axial the same thing, that you have impingement on the cord
3 from the disk.
4 Q Now, Doctor, I just want to show you what's been
5 already marked into evidence as Plaintiff's 26.
6 A This is an artist's representation of what you just
7 saw. Here is the disk herniation. Here is the spinal cord.
8 You can see impingement. And, by the way, that was confirmed at
9 the time of surgery, where the doctor saw there was spinal cord
10 compression. And you can see the axial views, that's again
11 looking from the top, and this is the sagittal view looking from
12 the side.
13 Q All right. Thank you, Doctor. Why don't you have a
14 seat. I'll remove these.
15 THE COURT: Quick sidebar.
16 (Whereupon, at this time a discussion was held
17 sidebar.)
18 Q Doctor, I believe you mentioned that you reviewed MRI
19 reports from 1998 as well?
20 A Yes.
21 Q Now, were you able to review those films?
22 A No.
23 Q Why is that?
24 A They weren't given to me.
25 Q Would films normally be available?

1 MR. SCAHILL: Objection.
2 THE COURT: I'll allow it, I'll allow it.
3 A Usually medical records are destroyed between six and
4 seven years.
5 Q And you also reviewed the report from 2003, I believe?
6 A Yes.
7 Q And was that actual film available for your review?
8 A No.
9 Q Now, before you said you reviewed the overall treatment
10 Mr. Rivera received before he had surgery; is that correct?
11 A I reviewed what was presented to me. I never know if I
12 get every single medical record, but I review treatment records.
13 Q Can you tell us about the treatment he received before
14 having the surgery?
15 A He got a lot of medication and physical therapy before
16 the accident of July 5, '12. He didn't have any surgeries.
17 Q And at some point was Mr. Rivera referred to a surgery?
18 A Yes. Dr. Kubiak, who was treating him from Island
19 Musculoskeletal Care, sent him to see Sebastian Lattuga of New
20 York Spine Surgeons.
21 Q And do you know if Dr. Lattuga eventually performed
22 surgery?
23 A Of course I do, and he did.
24 Q Did he perform surgery?
25 A He performed two surgeries. He performed a fusion of

1 the lumbar spine in July of '13. Then his partner, in September
2 of '13, tried epidural injections of the neck. That is putting
3 steroid right into the spine. It didn't work so he performed a
4 cervical fusion in November of 2013.
5 Q Can you tell us a little bit about what an epidural
6 injection is and what that involves?
7 A Yes. What happens is sometimes when nothing works and
8 you still don't want to have surgery, they try to stick a needle
9 in your neck or your back right in the spine and push steroid
10 through so the steroid will deflame the inflammation. You have
11 to do this under fluoroscopy, which means you are watching it as
12 you're doing it because you want to get the right level.
13 But for the neck it means that you get prepped and
14 draped, and then they stick in a needle under X-ray guidance
15 into the area they want. They stick it all the way in and when
16 they get to where they want they actually put two cc's. It's
17 about this much fluid in the hope that will decrease the
18 inflammation.
19 Q And is that done under anesthesia?
20 A Well, local, not general.
21 Q And in this case do you know how many injections Mr.
22 Rivera had?
23 A May I look?
24 Q Yes.
25 A He told me he had four to the back and one to the neck.

1 Q Now, in your review of Mr. Rivera's records, was there
2 any indication that he had ever had any type of epidural
3 injections before July 5, 2012?
4 A No, he did not; he told me so.
5 Q And what leads a doctor to attempt to use an epidural
6 injection? In other words, what are the patients -- what is the
7 patient's situation?
8 A Well, you try to do that to relieve pain, okay. So
9 when you are treating a patient you do the easy things first. I
10 tell my patients it's like walking up a ladder and every step
11 you take it gets harder. First is medication, physical therapy,
12 restriction of activity. If that doesn't work then we might
13 start with a brace. People don't like braces, but it may be
14 necessary. If that doesn't work then we are thinking narcotics.
15 Then if that doesn't work then you start sticking needles in.
16 If that doesn't work then you go to surgery.
17 Q And so in this case did the epidurals work?
18 A No.
19 Q And the surgeries were performed, correct?
20 A Correct.
21 Q Now, you mentioned earlier that you had read operative
22 reports, I believe?
23 A Yes.
24 Q You read both operative reports for his lumbar and the
25 cervical?

1 A Yes.
2 Q Can you just explain to the jury what the purpose of an
3 operative report is?
4 A After a surgeon performs surgery, he's required to
5 dictate a note to document exactly what he did so there is a
6 record of exactly what he did, because not only will the
7 surgeon, after you perform thousands of surgeries forget exactly
8 what you did on every patient, but if another doctor wants to
9 know what is going on they read the report, and that is a
10 requirement across the world that you do that.
11 Q And you reviewed both reports?
12 A Of course.
13 Q Do you know which was the first surgery that Mr. Rivera
14 had?
15 A Yes, of course I do.
16 Q Which was that?
17 A The lumbar spine, 7/16/13.
18 Q An are you familiar with this type of surgery, Doctor?
19 A Of course.
20 Q I'm probably going to ask you to step down again and
21 move everybody around.
22 A I have a question for you.
23 THE COURT: Referring to which exhibit now?
24 MR. ACARD: I'm sorry, Judge, it is Exhibit 27 in
25 evidence.

1 Q All right. Do you have a copy of the operative report,
2 Doctor?
3 A Yes. You have one on the board.
4 Q Excuse me?
5 A You don't have one on the board?
6 Q I do not have a large copy of the operative report.
7 So could you explain to the jury -- First of all, can
8 you tell me what this overall shows in general?
9 A Okay. Basically what it shows is the procedure by an
10 artist, okay, and it's like showing pictures of what happens.
11 You are seeing the first view of the back, but before you get
12 there you have to put the patient on his elbows and his knees.
13 You have to have the belly loose; you can't compress the belly.
14 You put special holders that keep the patient in that position,
15 okay. Obviously it's an electronic table so you get the proper
16 height you want. They adjust you.
17 Where the scar was made -- Now, I measured the scar to
18 be nine sonometers, which is about four inches. The operative
19 report said six inches, but a measure is a measure so, you know,
20 must have got a little smaller by the time I measured it, but
21 first you make an incision and then you start what is shown
22 here.
23 You make the incision. Here is the fat and here's the
24 fascia, and you're using a retractor to hold it away so the
25 surgeon has a little field. Now, the surgeon always has a

1 helper spraying the area for blood and doing cautery, which
2 means getting all the bleeders. You want you dry field to work
3 in. What they are showing here is that in order to get --
4 Let me get my model.
5 (Whereupon, there was a brief pause in the
6 proceedings.)
7 A In order to get to the disk, you have to do what is
8 called a laminectomy, and that is to take away bone because the
9 spinal cord and the nerves are very important and the body
10 surrounds them by bone, okay.
11 If you look at the spaces allotted for each nerve root,
12 if you have a disk herniation, even though it is the size of a
13 pencil eraser, it's pinching the nerve and that creates pain.
14 So what you see here now is the doctor starts to burr
15 out the bone. This is the lamina, the disk is what is behind
16 it, and he's burring the bone to get to the disk herniation,
17 right? Then when he gets to the disk herniation he removed it.
18 Now I want to read from the operative report, if I may,
19 because this is really important. 7/16/13, Surgeon Sebastian
20 Lattuga, pre-op diagnosis, herniated disk at Long Island Jewish
21 Hospital, instability examination, paraparesis and neurological
22 deficit. Okay, before '12 he never had a neurological deficit.
23 MR. SCAHILL: Objection, your Honor. There's no
24 basis to give that opinion.
25 THE COURT: Just use the word objection.

1 Sustained. Lay a foundation.
2 Q Doctor, before you proceed and explain that to the
3 jury, can you tell us, based on your history, whether the
4 neurological deficit had been present before?
5 A It had not. It was never documented before '12.
6 MR. SCAHILL: Objection, your Honor.
7 THE COURT: I'm going to allow it.
8 Q Okay. Proceed with your explanation.
9 A He takes out the disk. Let me tell you, and I'm
10 reading from the operative report itself, and I'm seeing here
11 intraoperative findings consistent with herniated nucleus
12 pulposis and associated with translational instability causing
13 direct nerve root compression as a result.
14 So what he found is after he took out the disk that the
15 bones were unstable so he had to fuse it, meaning he had to take
16 out the bone that was unstable and put in new bone. That's
17 called a graft. Takes the graft from local areas and takes the
18 graft from other areas, and that's what he did.
19 So right now he's mobilizing the nerve roots, he's
20 removing tissue. And if we go to the next, this is a fancy
21 word, I'll explain it. He decorticates the lateral borders, the
22 posterolateral. This is like taking a car and making a
23 convertible. You are taking out a bunch of bone, okay, because
24 the bones, it's causing a problem.
25 So in order to provide stability he's got to put bone,

1 i.e. metal elsewhere, and he takes the graft and puts it on the
2 outside. Why? Because the inside was compressed. He doesn't
3 want compression on the inside. He puts it on the outside, but
4 he also has to put in metal so it doesn't move to allow the bone
5 graft to heal, and that's what it looks like. He has metal,
6 screws, couplets and rods. This is what it looks like when you
7 are looking straightforward and this is what it looks like on
8 the lateral.
9 Q This is Plaintiff's Exhibit 31 in evidence.
10 A Okay, so anyway, this is what it looks like on the
11 lumbar side with the screws, cutlets and the rods to hold
12 everything together so the fusion can take. Fusion takes six to
13 twelve months to heal.
14 Q Are the rods and screws permanent?
15 A Yes.
16 Q And they don't come out?
17 A Sometimes they come out. If it's causing a problem,
18 sometimes they move a little bit, sometimes they get scar tissue
19 and the nerve gets pinched, but we try not to take them out.
20 Q Based on your review of Jose Rivera's history, his
21 medical history, the medical charts and the operative reports,
22 do you have an opinion with a reasonable degree of medical
23 certainty as to whether this surgery was the proper course of
24 treatment?
25 A Yes, it was, it was medically necessary. Dr. Lattuga

1 documents the instability and direct nerve compression as well
2 as paraparesis. Those words don't come from me. They come from
3 the treating doctor. They come from the operative report.
4 Q The judge wants me to move along and so I'm just going
5 to ask you, did you also review the operative report for the
6 cervical surgery?
7 A Yes, so let's just show the end result and I'll
8 explain.
9 Q Well, I have the boards here that show the surgery.
10 This is the Plaintiff's 29 in evidence.
11 Now, before we get to that, can you tell us when that
12 surgery took place?
13 A November 12, '13.
14 Q And was that performed by Dr. Lattuga?
15 A Yes.
16 Q Okay. And can you explain the surgery that took place?
17 A Again, you are making an incision in the neck. This
18 time it's in the front of the neck. You can see he made an
19 incision, goes down, takes away the tissue, finds herniated
20 disk, okay?
21 I'm reading from the operative report now,
22 intraoperative findings. Central disk herniation at C5-6 with
23 cord compression, meaning it was not only herniated, it was
24 impinging on the cord, okay. So you can have a herniation that
25 doesn't bother you if it is not hitting a nerve, but this

1 herniation was hitting the spinal cord so that's why he did the
2 surgery and that's what he found, this herniation here. So he
3 took out the herniation and again you do a fusion, okay, so that
4 the bones don't slide, and that's what he did here.
5 Can I have the next?
6 Q This is Plaintiff's 30 in evidence.
7 A And he put a plate and screws and a graft to hold
8 everything in place while the bone -- the new bone has to heal,
9 and that is a looking at it from the side after he's done. This
10 is a fusion.
11 He loses the movement at that level, but the movement
12 was causing a lot of pain, so you have to make a choice, pain or
13 movement, so he takes out the movement at that level to take out
14 the pain.
15 Q And, Doctor, we're up to Plaintiff's Exhibit --
16 A Oh, okay, fine. That's the final X-ray.
17 Q Those screws are permanent?
18 A Yes. You know one thing. You know I'm in a rush here.
19 You have the vocal cords right there. You have the carotid
20 artery, veins and nerves, right? This, in fact, if you go like
21 this to your neck you'll feel a pulse, so, you know, part of the
22 operation is to move that out of the way before do this. You go
23 in the skin, you move that out of the way, hold it together
24 nicely. Nerves don't like to be touched. Then you do your
25 operation. So there are enemies in the way of this operation

1 which you have to move out of the way in order to do it
2 correctly.
3 Q Now, Doctor, just so we are clear, this is the X-rays
4 of both to cervical and the lumbar spine after the surgery?
5 A My far right is the cervical, which is the stuff in the
6 front. My near right is the lumbar, and you see this is in the
7 back. This is in the front, this is in the back.
8 Q Now, once this surgery gets done, can this area of the
9 lumbar spine where these screws are move?
10 A No.
11 Q Will that ever move again?
12 A No.
13 Q And what about the area where the screws are in the
14 cervical spine, will that ever move?
15 A That area doesn't move.
16 Q And will that ever move again?
17 A No.
18 Q Okay, you can sit down.
19 A Thank you.
20 Q Doctor, these surgeries that you just discussed, do
21 they result in pain going away?
22 A Well, that's why you do it, and you hope that by taking
23 out the disk and taking out the abnormal motion the pain goes
24 away.
25 Q In this case did the pain go away for Jose Rivera?

1 MR. SCAHILL: Objection.

2 MR. ACARD: I'll rephrase it, your Honor.

3 THE COURT: Yes.

4 Q Doctor, you did a physical examination of Jose Rivera
5 at some point, correct?

6 A Yes, 2/17/15.

7 Q And can you tell me what he told you, if he had any
8 physical complaints at that time?

9 A He had complaints of neck and back pain. You know, we
10 try to get the patient to give you a number, zero to ten. I
11 tell them zero is no pain whatsoever, ten is the worst pain you
12 can possibly imagine.

13 The pain in the neck was six out of ten. The pain in
14 the back was seven out of ten. He said that the surgeries
15 helped a little.

16 Q Okay. But now your examination was after both
17 surgeries were performed, correct?

18 A Yes, correct.

19 Q And as part of your history, did you ask Jose if he had
20 been experiencing any pain immediately prior to the July 5th
21 crash?

22 A He said he was not.

23 Q Can you tell us a little bit about your examination of
24 Jose's cervical spine?

25 A I took his height and weight. He was 5'4, 143. He had

1 a three sonometer incision of the neck, which is a little over
2 an inch, and I took his range of motion. He had some loss of
3 range of motion of his neck.
4 Now, on the neck you grade motion in four directions.
5 Going back is called extension. Going forward is called
6 flexion. Going side to side is called lateral flexion, and then
7 you have lateral rotation.
8 So, if you can hit your chin to your chest that's
9 40 degrees, which is normal; he can go 30. If you can go back
10 and look up at the ceiling that's about 40 degrees, which is
11 normal; he had 30. Okay, lateral flexion is 60 degrees is
12 normal, which is going like this, and he can go 40 to the left
13 and 50 to the right. And lateral rotation, which is normally
14 80, he can go 50. This is about 50, this is 80.
15 I checked both arms; they measured equally. I checked
16 his nerves in the upper arms; they were normalized. He didn't
17 have any radiculopathy, meaning the nerves weren't pinched on
18 the exam.
19 I asked him to do gripping on the right. He can do 13
20 on the left, 12. That is about normal, that is about equal.
21 Then I checked his back. He had a nine-centimeter vertical
22 scar, which is about four inches that I measured. You know, if
23 you measure it in extension it's less, if you measure it bent it
24 more, so I measure it into extension.
25 He could flex 30. Flexion is the ability to bend your

1 back forward. Normally it's 70 to 90; he can go 30. He could
2 extend 30; normal is 40. Lateral flexion 30, normal is 60, and
3 laterally rotate 30, normal is 60 to 80. He was limited by
4 pain. He complained of pain when I stretched his sciatic nerve
5 on both sides, okay? His measurements for his legs were about
6 equal; he didn't have atrophy. Then I examined his knees. He
7 had pain on his right knee.
8 Q Now, you just mentioned the range of motion exercises
9 test that you did. What did those findings mean to you?
10 A Well, you know, when you have a fusion you lose motion.
11 You have to lose motion when you have a fusion because you are
12 taking out the motion at that level.
13 When you bend forward, most of the motion is L4-5,
14 L5-S1, so he had a fusion. When you move your neck and rotate
15 it, a lot of it is at C5-6, so he had a fusion. So just by
16 having a fusion you have permanent deformities. He has
17 scarring. He has metal. He has loss of motion at the sites of
18 the fusion.
19 Q Now, Doctor, do you know what the terms subjective and
20 objective mean?
21 A Of course.
22 Q Can you explain for the jury what the difference is
23 between subjective and objective?
24 A Yes, I'll start with objective because it's easier.
25 Objective is something you can see. I just showed you a picture

1 of an X-ray. That's something you can see. You can see the
2 screws. Nobody can say that there's five screws because you saw
3 four screws. That is subjective. Anything you can measure,
4 like a piece of paper 8 1/2 X 11, that's subjective.
5 Something you can't measure or see is called
6 subjective, meaning you are taking the story. When a person
7 gives you a history, that's subjective. They are telling you a
8 story. Can't measure it. When a person tells you their pain
9 level, I can't measure it. You can sit next to the patient, you
10 can't feel their pain, you can't measure their pain. That is
11 subjective.
12 Doctors are trained to take the patient at their word.
13 Eight out of ten, I write down eight out of ten. Subjective is
14 something you hear, but can't measure or see. Objective is
15 something you can see.
16 Q And the range of motion tests that you told us about,
17 are they subjective or objective?
18 A Well, they can be subjective if a patient has no reason
19 to have the loss of motion, but here part of it, at least, is
20 objective because we know he had a fusion, so if he had a fusion
21 he can't have full range of motion.
22 Q Are the range of motion tests an accepted form of
23 testing in the orthopedic field?
24 A Yes.
25 Q Even if they are subjective, why are they done?

1 A Well, because, you know, you try after surgery to
2 regain the patient's motion as best you can so you keep on
3 measuring it to see how he's doing, okay? You start off at
4 30 degrees, maybe go to 40 degrees, maybe go to 50 degrees. You
5 have to have some way to know. You can't eyeball it because
6 that leads to mistakes. You keep on measuring it. It's the
7 best we can do. It's not exact, but it's the best we can do.
8 Q Now, Doctor, you mentioned some earlier changes in
9 Jose's spine. Did he have preexisting changes in his spine?
10 A You mean before 7/5/12?
11 Q Correct.
12 A Absolutely.
13 Q Can you talk to the jury a little bit in layman's terms
14 about what that means?
15 A Okay. So he had a herniation in his neck and his back
16 prior to this accident. He went back to work every time. The
17 key here is what Dr. Lattuga said. In addition to the
18 herniation, he had direct nerve root compression in the back and
19 he had cord compression in the neck. That's what caused the
20 need for surgery. There is no question he had the herniations
21 before, but there's no evidence he had the direct nerve root
22 compression or the cord compression because if he did it would
23 probably be really hard for him to go back to work. That is
24 what I'm talking about, the story, the story that's integrated
25 with the medical records.

1 So you can have a lot of people walking around with
2 disks that bother them a little bit or not so much so they live
3 with them. That's what he did for many, many years. But then
4 he had this accident and immediately he had pain and immediately
5 he didn't go back to work.
6 The most important thing is, we talked about
7 subjective. In this particular case, an operating surgeon with
8 his own eyes found the objective reason; he saw. Remember I
9 said if you see it it's objective? He saw the problem. Not
10 only was it herniated, it had compression on the nerve and
11 that's why he needed surgery.
12 Q And, Doctor, I believe you also mentioned there was
13 instability found in the spine as well.
14 A In the lumbar spine there was instability, too.
15 Q Is that significant?
16 A Yes.
17 Q And can you explain why?
18 A Instability means it moves in places it shouldn't,
19 which you don't find on a picture, an MRI, because if you take a
20 picture they tell you to hold still, you're not moving. But at
21 surgery the surgeon moves things around to see if it holds. He
22 found it doesn't hold. In addition to the cord compression,
23 instability of the cervical spine.
24 Q To get back to the changes we were talking about
25 before, you mentioned that he had herniated disk, Jose had the

1 herniated disk before.
2 A Yes, '98 he had a herniated disk.
3 Q And do herniated disks go away?
4 A They can.
5 Q And the mere fact that somebody has a herniated disk,
6 does that mean that they are walking around in pain?
7 A No. I just mentioned you can have a herniated disk and
8 it's not touching a nerve, you may be okay. You know, there are
9 herniations in the belly called ventral herniations. They don't
10 hurt because there's no disks there, there are no nerves there.
11 The reason you have surgery is the doctors are afraid it will
12 get caught and incarcerate. It is not that painful, just weird
13 looking. But in the back you have the nerves, so a herniated
14 disk the size of a pencil eraser, if it pinches it's going to
15 hurt. If it doesn't pinch it may not hurt.
16 Q Now, when someone has pain in the back from a disk, can
17 that pain go away without surgical intervention?
18 A Yes.
19 Q Under what circumstances?
20 A Disks desiccate, that means sometimes they shrink. If
21 they shrink they are not as big so they don't open, and then
22 they may get bigger again if you have another accident, you have
23 another accident and they hit a nerve, which happened in this
24 case.
25 Q Now, can you tell me in your professional opinion what

1 percentage of the adult population is walking around with
2 degeneration in their spine?
3 A What age?
4 Q Adults in their forties.
5 A You start getting degeneration in your spine, and the
6 studies show if you take X-rays of people who have no pain
7 whatsoever, you'll find at age 40, 30 percent will have
8 degeneration. At age 50, 50 percent will have degeneration. At
9 age 60, 70 percent will have degeneration. That doesn't mean
10 they have a pinched nerve.
11 Q Doctor, can you tell the jury what the terms
12 symptomatic and asymptomatic mean?
13 A Symptomatic means you are painful. Asymptomatic means
14 you're not painful.
15 Q Now, based on the history and the records you reviewed
16 and your exam of Jose Rivera, do you know if, based on those
17 records, do you know if Mr. Rivera was symptomatic or
18 asymptomatic prior to July 5, 2012?
19 A He told me he was asymptomatic prior to July 5, '12 for
20 many months.
21 Q Okay. And what did that mean to you, if anything?
22 A He was getting along.
23 Q And now what is trauma?
24 A Should I continue?
25 Q Yes.

1 A Trauma is an injury.

2 Q I'm sorry?

3 A Injury.

4 Q Okay. And any form of injury?

5 A Yes.

6 (Whereupon, the following was recorded and

7 transcribed by Official Court Reporter Laura Paro.)

8 (Continued on next page.)

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1 DIRECT EXAMINATION CONTINUED
2 BY MR. ACARD:
3 Q Can trauma in any way cause an asymptomatic condition
4 to become symptomatic?
5 A Absolutely.
6 Q Under what circumstances?
7 A Circumstance like this. You have a herniated disk,
8 it's not hitting a nerve, you get trauma, it moves a bit because
9 they do move. It's living tissue and all of a sudden it hits a
10 nerve.
11 Q Doctor, can you explain to the jury what the term
12 exacerbate means?
13 A To make worse.
14 Q Doctor, based upon your review of Jose Rivera's
15 records, do you have an opinion with a reasonable degree of
16 medical certainty as to whether or not the crash of July 5, 2012
17 exacerbated the preexisting changes we just discussed?
18 MR. SCAHILL: Objection.
19 THE COURT: I'll allow it.
20 A Yes.
21 Q What is that opinion?
22 A It did.
23 Q What is that based on?
24 A Based on the history. Based on the fact that he went
25 to the emergency room. He had immediate pain. He went to the

1 doctors. He had immediate pain from July 5, 12. He never went
2 back to work. And from the history after July 5, 12 his life
3 changed.
4 Q Doctor, based upon Jose Rivera's medical history and
5 records that you reviewed, as well as your examination, do you
6 have an opinion within a reasonable degree of medical certainty
7 as to whether or not Jose would have needed the surgeries you
8 described if the crash of July 5 did not take place?
9 MR. SCAHILL: Objection.
10 THE COURT: Overruled.
11 A He had those operations in 2013. If he didn't have the
12 incident, accident in 2012 he wouldn't have needed the surgery
13 in 2013. I don't know if he would never need the surgery. He
14 might have if he had a different accident, but we're talking
15 about this accident. He was getting along, walking around,
16 working for Verizon, driving a car for many years and then after
17 that, boom, that means the boom exacerbated his previous
18 existing condition and made a situation that was not painful
19 painful.
20 Q Do you have an opinion as to whether or not the crash
21 of July 5, 2012 is the competent cause of the pain Jose is
22 experienced since that date?
23 MR. SCAHILL: Objection.
24 THE COURT: Overruled.
25 A It is.

1 Q What is that based on?
2 A Based on the history, physical examination and review
3 of medical records and the findings at the surgery.
4 Q Doctor, do you have an opinion with a reasonable degree
5 of medical certainty as to whether Jose has a permenant injury
6 to his neck?
7 A Of course he does.
8 Q Why is that?
9 A He has metal in his neck, he has a fusion. That's the
10 definition of a permenant injury. It's not like he had a spasm,
11 you had physical therapy and it goes away.
12 Q Do you have an opinion within a reasonable degree of
13 medical certainty as to whether he has a permenant injury to his
14 lumbar spine?
15 A Yes, he does. Same answer. He has a fusion, he has
16 metal. He has scarring and loss of motion.
17 THE COURT: Is that it?
18 MR. ACARD: Just about, your Honor.
19 THE COURT: Keep going.
20 Q Doctor, do you have an opinion within a reasonable
21 degree as to Jose's future prognosis with respect to his neck
22 and back?
23 A When a doctor is asked to give a prognosis they give
24 the prognosis a year after the surgeries. After the year you
25 are supposed to get your result.

1 Now, he had the surgeries in 13, I didn't examine until
2 February of 15. I examined him 18 months after the first
3 surgery and 13 months after the second surgery, 14 months, and
4 he still had these problems.
5 Like I said, pain is subjective, he said he had pain,
6 but he had the metal in his neck, metal in his back, he had the
7 scarring and loss of range of motion. When you have that more
8 than a year after the surgery that means you have a permanent
9 deformity. You have a permenant condition. That doesn't mean
10 every day you are in pain taking narcotic medications, but it
11 means that you never forget about it. It will always come back
12 to you if you move the wrong way or overdo it.
13 Q Doctor, do you have an opinion with a reasonable degree
14 of medical certainty as to whether the injuries Jose Rivera
15 sustained in the July 5, 2012 crash limit his ability to sit?
16 A Based on his history, yes.
17 Q What is that opinion?
18 A He did not give me a history of difficulty sitting.
19 Q Doctor, what I'm asking is, based on his history, do
20 you have an opinion as to whether, to a reasonable degree of
21 medical certainty, as to whether these injuries would affect his
22 ability to sit for an eight hour period of time?
23 A They should, yes.
24 Q They should. And do you have an opinion as to whether
25 these injuries, and do you have an opinion with a reasonable

1 degree of medical certainty, as to whether these injuries would
2 affect his ability to stand for long periods of time?
3 A It would.
4 Q Doctor, I want you to assume at the time of the July 5,
5 2012 crash Jose Rivera's job required him to climb telephone
6 poles and ladders on a daily basis and required him to carry
7 objects more than 15 pounds --
8 A I'm sorry, did you say 15 or 50?
9 Q 15. Do you have an opinion with a reasonable degree of
10 medical certainty as to whether or not Jose Rivera has been
11 disabled from doing that job since the time of the crash?
12 A Yes.
13 Q What is that opinion?
14 A He is.
15 Q And based on what you just told us previously on his
16 prognosis, do you have an opinion as to whether Jose Rivera will
17 remain disabled from doing that job?
18 MR. SCAHILL: Objection.
19 THE COURT: As to form. Rephrase.
20 Q Do you have an opinion with a reasonable degree of
21 medical certainty as to whether Jose will remain disabled from
22 doing that job?
23 MR. SCAHILL: Objection.
24 THE COURT: I'll allow it.
25 A Yes. We also didn't talk about his medications.

1 Q I'm sorry?
2 A His medications.
3 Q Was he on medications?
4 A Yes. And he was on medication. He was taking Tramadol
5 and Flexeril, and those things are muscle relaxers and those
6 things affect your mind and make you sleepy. So if you are
7 taking that you can't be doing driving or operating heavy
8 equipment.
9 Q Doctor, do you have an opinion with a reasonable degree
10 of medical certainty as to whether Jose Rivera sustained a
11 significant limitation of use of a body function or system as a
12 result of the July 5, 2012 crash?
13 A My opinion is he did.
14 Q And do you have an opinion with a reasonable degree of
15 medical certainty as to whether or not Jose Rivera sustained a
16 permenant consequential limitation of use of a body organ or
17 member as a result of the July 5, 2012 crash?
18 A My opinion is, he did.
19 Q Doctor, very briefly, I just want to ask you, have you
20 ever heard of the term secondary gain?
21 A Of course.
22 Q Can you briefly explain what that means?
23 A Secondary gain is when you lie about your symptoms for
24 something else. It's used in these cases when people come to
25 Court because they say if you said you weren't so sick you would

1 get less money. But when you talk about secondary gain, this
2 guy had major surgeries to his neck and back and people don't
3 have major surgeries --
4 MR. SCAHILL: Objection. I ask that that be
5 stricken.
6 THE COURT: Sustained. You asked one question.
7 He's beyond that.
8 MR. ACARD: Right.
9 Q Thank you for explaining secondary gain.
10 Is secondary gain something you would you take into
11 consideration when examining Mr. Rivera?
12 A Yes.
13 Q Did you reach a conclusion to a reasonable degree of
14 medical certainty with respect to whether secondary gain was at
15 play here?
16 A Yes.
17 Q What's that opinion?
18 A My opinion is that you don't have major surgeries to
19 your neck and back and fusions just for secondary gain. You
20 have to have pain. His pain was documented by his doctors.
21 Not only that, the reason for the surgery was very well
22 documented. As I told you, Dr. Lattuga, when he went into the
23 neck and back. Here are the objective findings confirm the
24 subjective complaints.
25 MR. ACARD: Thank you, doctor.

1 THE COURT: Cross examination.
2 MR. SCAHILL: I need a minute to set up.
3 THE COURT: Okay.
4 MR. SCAHILL: May I look through his chart?
5 THE COURT: Yes, please. Let's have the chart
6 given to counsel.
7 MR. SCAHILL: Thank you, your Honor.
8 THE COURT: You may proceed.
9 THE WITNESS: Can I have my notes back?
10 CROSS-EXAMINATION
11 BY MR. SCAHILL:
12 Q Doctor, do you have a financial interest in this case?
13 A No.
14 Q The page that's on top of your notes it's called an
15 assignment of benefits; correct?
16 A Yes.
17 Q Can you read the second paragraph of the assignment of
18 benefits that's in your file?
19 A I authorize and direct my attorney to deduct and
20 immediately pay Jerry Lubliner such fees that may be due and
21 payable from the assigned moneys that may come into my hands and
22 my attorneys' hands and any recovery resulting from any claim or
23 lawsuit.
24 Q You saw Mr. Rivera not as a patient, but as a legal
25 consultation; correct?

1 A Of course.
2 Q Now, you never prescribed any medications for him?
3 A That's correct.
4 Q Correct?
5 A Correct.
6 Q You never prescribed a course of treatment for him?
7 A He already had the treatment.
8 Q He had stopped treating at the time he came to you?
9 A He wasn't treating with me. I wasn't the treating
10 doctor. He had a surgeon.
11 Q You said he wasn't getting any treatment, he had
12 stopped treating at the time he came to you?
13 A He already had his surgeries.
14 Q At the time that he saw you a year ago in February of
15 2015 he had stopped treatment; is that an accurate statement?
16 A I'll tell you in one second. Yes.
17 Q He was no longer under any active treatment a year ago
18 when you saw him in February of 2015?
19 A Correct.
20 Q Now, you saw him once at the request of his lawyers; is
21 that correct?
22 A It is.
23 Q And that was in anticipation of you testifying in this
24 case on his behalf?
25 A Of course, that's the way it goes.

1 Q When you say that's the way it goes, doctor, you've
2 done this many times?
3 A 250.
4 Q 250 times?
5 A Right.
6 Q Each time you get $7,500?
7 A I used to get much less. That's what I get today.
8 Q You said you do this 12 times a year?
9 A Approximately.
10 Q At least?
11 A I didn't say at least. I said 12 times a year
12 approximately.
13 Q So as a consulting legal/medical doctor you come to
14 Court 12 times a year to testify on behalf of plaintiffs in
15 personal injuries cases; correct?
16 A I never said that. I said I come to Court. I come to
17 Court for plaintiffs and defendants.
18 Q Lawyers come to you with their cases and they ask you
19 to testify for them in Court, not to treat their patients, not
20 to treat their clients, but to testify in Court; is that fair to
21 say?
22 A That's fair to say. Just like you did with your
23 expert.
24 Q Now, doctor you saw this plaintiff once; is that
25 correct?

1 A We've established that I saw him once.
2 Q That is the extent of the medical records that you had?
3 A No.
4 Q Is that correct?
5 A No, it's not. You weren't listening. I said I had a
6 disk with a lot of medical records.
7 Q What's on the disk, doctor?
8 A Medical records.
9 Q Tell me what records, from what facilities, what
10 providers?
11 A Okay. We have records from the 12/1/04 and 6/13 --
12 excuse me, 1/14/04 police report. 1/21/04 Brookdale Radiology.
13 1/21/04 Brookdale University Hospital. 1/30/02 to 10/11/02,
14 Sports PT New York.
15 1/8/99 OrthoCare and Surgery. 12/22/99, Hudson Valley
16 Hospital bill. 10/4/01 through 4/9/05 City Care Family Care.
17 1/11/98 to 12/28/98 Mill Basin Physical Medicine and
18 Rehabilitation. 11/30/12 South Shore Ambulatory. 12/12/2000
19 and 3/2011, Davis Vision. Naturally I didn't copy that.
20 12/5/98 to 3/6/03 Doshi Diagnostics. 2/1/97 to
21 6/28/04, City Care.
22 By the way I will need more water. 2/24/99 and
23 8/24/99, Physicians Multi Care. 2/26/01, Rettig, M.D. 3/5/01,
24 Raskin and Rettig Hand Surgery. 3/2/04, Preferred Medical
25 Imaging. 3/22/04, Midwood Medical Care, P.C.

1 3/25/03, Department of Neurology. 4/8/04 through
2 10/3/11 Primary Health Care. 5/15/2000, Revgro, R-E-V-G-R-O.
3 5/23/01 NYU Department of Radiology. 5/8/01, Rosenberg, DDS.
4 6/29/04, treatment. 6/30/11, Ortho Excellence of Long Island.
5 7/1/11, Carecore National. 8/20/02, Health Resources.
6 Q Sorry to cut you off, do you have a lot more?
7 A A lot more.
8 MR. SCAHILL: We only have 25 minutes.
9 A I have 25 minutes just of reading what I read.
10 Q Maybe we'll move on.
11 A Maybe.
12 THE COURT: Excuse me. You have testified before?
13 THE WITNESS: Yes.
14 THE COURT: Instead of having side comments,
15 please just restrict to the question asked of you. If it
16 calls for a yes or no answer give a yes or no answer, but
17 no extraneous comments.
18 Do you understand?
19 THE WITNESS: I do, sir.
20 THE COURT: Thank you.
21 Q Doctor, by the way, you do not do spinal surgeries?
22 A Not anymore.
23 Q You haven't done spinal surgeries for over 25 years;
24 correct?
25 A I would say 15.

1 Q 15 years you stopped doing spinal surgery. So if
2 someone came to you and needed a spinal surgeon you would refer
3 them to a spinal surgeon?
4 A Correct.
5 Q Am I also correct that you never spoke to any of the
6 plaintiff's doctors in this case, you never spoke to Dr. Lattuga
7 or Kubiak or any of the radiologists that did the MRI films?
8 A I spoke to Dr. Kubiak. He was my resident, but not on
9 this case.
10 Q I'm asking you about this case. I'm asking --
11 THE COURT: You see, that's exactly what I said
12 before. It's obvious that we're talking about this case.
13 A I didn't speak to him about this case.
14 THE COURT: Let's answer the question asked of
15 you; okay?
16 THE WITNESS: Yes.
17 THE COURT: Thank you.
18 Q Did you ever discuss Mr. Rivera's medical condition
19 with any of his treating physicians?
20 A No.
21 Q You also indicated that when he came to you he gave you
22 a history of multiple accidents; is that fair to say?
23 A Yes.
24 Q He gave you a history of accidents that dated back 14
25 years to 1998; is that correct?

1 A That's correct. 14 years before this accident, 16
2 years from now.
3 Q He told you that he was involved in accidents where he
4 injured his neck and back in 1998, in 2004 and 2008 and 2011 in
5 addition to the July, 2012 accident?
6 A Yes.
7 Q Did he also advise you that he was involved in prior
8 lawsuits where he claimed injuries to his neck and back?
9 A I didn't discuss that.
10 Q Did you ask him that, did you ever have a lawsuit where
11 you claimed injuries to your neck and back?
12 A No.
13 Q You knew you would be testifying for him in this
14 lawsuit where he claimed injuries to his neck and back when he
15 came to see you for the first time; is that fair?
16 A There was a possibility of it. I didn't know if I was
17 or wasn't.
18 Q He was sent to you by his lawyers not by another
19 doctor?
20 A Correct.
21 Q Was it your assumption at that point that the reason he
22 was sent to you was because you were going to testify on his
23 behalf --
24 A Yes.
25 Q -- in Court. Okay, so in terms of his prior condition

1 he reported to you when you first saw him that he was
2 asymptomatic prior to the July 5, 2012 accident?
3 A He said for many months prior.
4 Q Were you aware that in October of 2011 he took a month
5 off from work and asked for family medical leave because he was
6 having chronic neck and back pain and he had to stay out of work
7 for a month; were you aware of that?
8 A No.
9 Q Would that change your opinion as to whether or not
10 Mr. Rivera was asymptomatic prior to July 5, 2012?
11 A I said for a few months because he had an MRI.
12 Q Doctor, if I can interrupt you for a moment. You just
13 told us that he was asymptomatic for many months, I just told
14 you, and the medical records, if you look at the disability
15 records for MetLife, they have documented that Mr. Rivera took a
16 month off from work in October of 2011, seven months prior to
17 the accident for chronic neck and back pain, would that change
18 your opinion as to whether Mr. Rivera was asymptomatic prior to
19 the motor vehicle accident?
20 A My notes indicate he was asymptomatic from December of
21 11 through the time of the accident.
22 Q You didn't bring that up on direct examination.
23 A I wasn't asked.
24 Q If an individual has chronic neck and bank pain and has
25 to take a month off from work that's not somebody that's

1 asymptomatic; would you agree with that?
2 A At that time he was not asymptomatic when he took off
3 and he went back to work in December of 11.
4 Q It's your opinion that the accident of July 5, 2012
5 caused the injury that lead to the two surgeries; is that your
6 opinion?
7 A That's not what I said.
8 Q Are you claiming that the accident of 2012, or is it
9 your medical opinion that the accident of 2012 caused the injury
10 that lead to the two surgeries?
11 A I said it exacerbated his previous condition to cause
12 him to have the two surgeries.
13 Q If you were going to put a percentage on it, he had
14 accidents in 1998, in 2004, in 2011, in 2012, the accident of
15 July 5, 2012, what percentage in your opinion would be the
16 contributing factor towards the two surgeries that you
17 discussed?
18 A Based on the fact that he went back to work after all
19 the injuries before this, and based on the fact that my notes
20 indicate he was asymptomatic for seven months before this
21 accident, I would have to put it around the 50 percent area.
22 Q So this accident, the July of 2012 accident, was at
23 least 50 percent responsible for the two surgeries that he had,
24 not all of those prior accidents; is that your opinion?
25 A He would not have the surgeries in July of 13 and

1 November of 13 if not for this accident. Whether he would have
2 had surgery in the future without this accident I don't know.
3 No one knows.
4 Q Now, you had indicated earlier that you are basing that
5 opinion because he had nerve root impingement at the levels that
6 you described where the surgery was, L5-S1 and C5-C6?
7 A That's not exactly what I said. I said I based that
8 opinion on the fact that the surgeon who operated on the patient
9 said he had direct nerve root compression at L5-S1 and direct
10 cord compression at C5-6. No one went into his body before.
11 The surgeon said that, not me.
12 Q Those levels that you talked about, were they
13 previously reviewed by MRI?
14 A Yes.
15 Q Did you review the MRIs that were taken before the
16 accident and compare them with the MRIs that were taken after
17 the accident?
18 A I reviewed the reports. The images themselves, I
19 reviewed only the ones after 2012.
20 Q So in terms of the photographs that you went through,
21 and this is plaintiff's exhibit 23, that blackend flattened disk
22 space at L5-S1 you are not saying that that was caused by the
23 accident; correct?
24 A No. What I said was the symptoms --
25 Q Doctor, that was a yes or no question.

1 THE COURT: We got a no. Next question.
2 Q And this condition, this L5-S1, that eventually was
3 operated on by Dr. Lattuga, that existed for many years before
4 this motor vehicle accident; correct?
5 A We don't know. We don't know if he had instability
6 before this accident.
7 Q I'm talking about the flattened and blackened disk
8 encroaching on the spinal canal, that condition existed for many
9 years prior to the motor vehicle accident?
10 A Correct.
11 Q The same with the cervical spine, the photograph that
12 you showed the jury --
13 THE COURT: Exhibit number?
14 MR. SCAHILL: 24.
15 Q C5-C6, that herniation encroaching upon the spinal
16 canal, that existed years before the motor vehicle accident of
17 July 5, 2012?
18 A Encroachment, yes.
19 Q And also that blackened and flattened disk, those are
20 the hallmarks of degeneration; is that fair to say?
21 A I can't see what you are pointing to.
22 Q C5-C6.
23 A What are you pointing to?
24 Q The blackened and flattened --
25 A That's not blackened, that's herniated.

1 Q That's the hallmark of degeneration?
2 A What?
3 Q The flattened disk.
4 A I said L5-S1 was flattened. I said C5-6 was herniated.
5 Flattened never came out of my mouth.
6 Q I'd like to review with you the MRI studies.
7 A I can't see it.
8 Q Can you turn.
9 THE COURT: Actually, step down.
10 THE WITNESS: Can I get up?
11 THE COURT: Sure.
12 Q This is an MRI report of Mr. Rivera's lumbar spine.
13 Do you see the impression at the bottom of the page?
14 A Yes, of course I do.
15 Q The impression is significant right paracentral
16 foraminal herniation L5-S1 creating impingement; is that
17 correct?
18 A That's correct.
19 Q When we talked about these models that were shown to
20 the jury and the MRIs, that impression describes this condition
21 that's shown on exhibit number 23; is that right, doctor?
22 A No.
23 Q Is this a right paracentral foraminal herniation at
24 L5-S1 with impingement?
25 A No.

1 Q Did you look at the MRI report of L5-S1 of Mr. Rivera,
2 do you know when this was taken this MRI with that impression?
3 A I noted this MRI on direct. This MRI was read March 5,
4 03. I don't know what's on top of the page.
5 Q Now, did you compare this report where it indicates
6 right paracentral foraminal herniation L5-S1 creating
7 impingement with the report of the motor vehicle accident of
8 July 5, 2012?
9 A Yes.
10 Q I'm going to show you a report after the accident of
11 July, 2012. This is after the motor vehicle accident of July 5,
12 2012.
13 Do you see the impression as far as the L5-S1 disk
14 space. Is the impression desiccation, loss of height and
15 bulging?
16 A Part of it.
17 Q Is that impression desiccation, loss of height and
18 bulging, is that all hallmarks of degeneration?
19 A Bulging, no. Desiccation, lost of height is.
20 Q The severe canal stenosis and bilateral neural
21 foraminal narrowing, that's the same impression found on his MRI
22 in 2003?
23 A This says bilateral neural foraminal narrowing and the
24 other said right neural foraminal narrowing.
25 Q There is no indication of trauma on this MRI; is that a

1 fair statement?
2 A I can't answer it the way you put it.
3 THE COURT: He can't answer.
4 Q These findings that you see on this MRI report that was
5 taken after the accident, these can be found in individuals with
6 or without trauma at the age that Mr. Rivera was when this MRI
7 was taken; is that a fair statement?
8 A It can, but this is different than the one you showed
9 me in 2003.
10 Q I also ask you to look at the cervical spine MRIs.
11 Did you review the MRI that was taken in 2004?
12 A I reviewed the MRI report.
13 Q This is a 2/23/04 MRI. I'd ask you to look at the
14 impression.
15 Did he have herniated nucleus pulposus, that means the
16 gelatinous material is pressing out from the disk into the
17 posterior longitudinal ligament that you spoke about before;
18 correct?
19 A Yes.
20 Q At C4-C5, C5-C6 and C6- C7, it's deforming the thecal
21 in 2004; is that a fair statement?
22 A What you are saying is not fair. It says --
23 Q Doctor, I'm just asking you, is that a fair statement?
24 Am I reading that correctly?
25 A No. You actually misread it.

1 Q I'll read it again for you, doctor, maybe you can go,
2 diffuse posterior bulging disk C4-C5, C5-C6, C6-C7 deforming the
3 thecal sac in the spinal cord diffusely, that means over a large
4 area?
5 A Correct.
6 Q This is the finding in 2004?
7 A Right.
8 Q Eight years prior to the automobile accident, did you
9 compare that to the findings?
10 A Correct.
11 Q In 2012?
12 A Right. Remember you said bulging here.
13 Q These are the findings in 2012. C4-C5 broad bulge bony
14 ridging with flattening of the thecal sac hypertrophy, loss of
15 water?
16 A No, it wasn't. Hypertrophy is not loss of water.
17 Desiccation is loss of water.
18 Q Thank you, doctor. Is this finding a degenerative
19 finding that can be seen with or without trauma?
20 A C4-5, yes. Let's go to C5-6.
21 Q C4-C5 flattening of the thecal sac, that's all without
22 trauma?
23 A Yes.
24 Q C5-C6, broad paracentral herniation with no contact to
25 the cord, no encroachment of foramina, all that is without

1 trauma; is that fair to say?
2 A No. C5-C6, that is a broad paracentral herniation.
3 What you saw before was a bulge, as I explained to the jury
4 before and as I pointed out, the difference between a bulge is
5 herniation goes through the post longitudinal ligament. There
6 was no evidence of that in the previous MRI.
7 Q Okay, doctor, in terms of the operative report, you
8 said you looked at the operative report and also the records of
9 Dr. Lattuga; is that right?
10 A Correct.
11 Q I'd ask you to look at the records of Dr. Lattuga from
12 September 3, 2013. The plaintiff's own surgeon documents
13 chronic neck pain into the upper extremities?
14 That's a yes or no.
15 A I'm reading.
16 Q Do you see the words patient with chronic neck pain
17 into the upper extremities?
18 A I see patient with continued neck pain. You put the
19 chronic in.
20 Q Well, the first paragraph, patient is doing well
21 postoperatively. However, continues to have pain and symptoms
22 consist with preoperative conditions. Patient with chronic neck
23 pain into the upper extremities?
24 A It says continued over there where you showed me.
25 Continued.

1 Q Do you see the sentence, patient with chronic neck
2 pain?
3 A Yes.
4 Q Chronic was not something that was trauma from an
5 accident?
6 A Sure.
7 Q Chronic is something with a long standing history of
8 problems; is that fair to say?
9 A Medically, chronic is anything over six months.
10 Q So you are --
11 A His --
12 Q -- you are disputing the fact that Mr. Rivera had a 15
13 year history of neck pain prior to the July 5, 2012 accident;
14 yes or no?
15 A Not at all. Chronic means over --
16 THE COURT: Got to listen to the question.
17 Q The preoperative diagnosis, this is Dr. Lattuga's
18 surgical records from the lumbar spine surgery that was done,
19 you refer to this as indicative of a problem that occurred after
20 the accident. The preoperative diagnosis is HNP, that means
21 herniated nucleus pulposus; correct?
22 A Correct.
23 Q Mr. Rivera had that herniated nucleus pulposus at the
24 L5-S1 level as documented by MRI dating back to 1998; is that
25 fair to say?

1 A Fair to say.
2 Q There is also a preoperative diagnosis of
3 radiculopathy. You also told us that you looked at EMG studies
4 dating back to 1998; is that fair to say?
5 A Yes.
6 Q His EMG studies dating back to 1998 documented
7 bilateral radiculopathy at the lumbar spine at the L5-S1 level;
8 is that fair to say?
9 A Correct.
10 Q In terms of the preoperative diagnosis, the herniated
11 nucleus pulposis that was operated on by Dr. Lattuga and the
12 symptom, the radiculopathy that was found by EMG, that all
13 existed going back to 1998; right?
14 A Right. Keep on going.
15 Q I am. Dr. Lattuga also documented instability?
16 A Correct.
17 Q Instability, which is spondylosis, one level of the
18 vertebrae slipping over another.
19 All you have to say is yes or no.
20 A No.
21 Q We don't have to get into a medical debate.
22 THE COURT: He gave you the answer no.
23 Let's go onto the next question.
24 Q In terms of the surgery that was done by Dr. Lattuga
25 and the date of the operation is listed in his report?

1 A 7/16.
2 Q July 16, 2013, preoperative findings all existed years
3 before the motor vehicle accident of July 5, 2012?
4 And that's a yes or no.
5 A No.
6 Q You want to disagree with that, that's fine.
7 THE COURT: Excuse me.
8 A No.
9 THE COURT: We have six minutes and therefore we
10 don't want any extra verbiage.
11 Q I'll ask you the same questions with respect to the
12 cervical surgery done November 12, 2013. Cervical surgery, the
13 preoperative diagnosis was cervical instability at C5-C6 with
14 radiculopathy.
15 You would also agree with me that Mr. Rivera had this
16 cervical instability at C5-C6 with radiculopathy prior to the
17 accident of July 5, 2012?
18 That's also a yes or no.
19 A No.
20 Q You can take your seat, doctor. Thank you.
21 Did you look at the plaintiff's Brookdale Hospital
22 records from his 2004 motor vehicle accident in the course of
23 your review of records?
24 A No.
25 Q Did you look at the Mercy Hospital records in the

1 course of your review of records?
2 A No.
3 Q So you failed to review prior to giving your expert
4 opinion as a legal/medical consultant to this jury, you failed
5 to review hospital records from the date of the accident and
6 from 2004.
7 Are you aware that the hospital record after this
8 accident on the date of the accident makes no mention of neck
9 pain at all; are you aware of that?
10 A No.
11 Q Would that change your opinion as to whether or not
12 Mr. Rivera suffered an injury or an exacerbation to the problem
13 that he had in his neck which ultimately lead to the surgery by
14 Dr. Lattuga in 2013?
15 I just want a yes or no to that.
16 A I can't answer the question the way you posed it.
17 THE COURT: That's an answer. He can't answer yes
18 or no.
19 Next question.
20 Q Would you agree with me Dr. Lattuga is in a better
21 position than you to give an opinion as to whether or not
22 Mr. Rivera's injuries were either caused or exacerbated by the
23 accident of July 5, 2012?
24 A Yes.
25 Q Dr. Lattuga is in a better position to give that

1 opinion to the jury because A, he is a spinal surgeon, and B,
2 he's the one that treated the plaintiff and did the two
3 operations; is that fair to say?
4 A It's fair to say.
5 Q Plus he has experience as a spinal surgeon, something
6 that you haven't done for 15 years; is that also fair to say?
7 A He was the treating doctor, that's why he's in a better
8 position. He saw with his own eyes what the problem was, that's
9 why he's in better position.
10 MR. SCAHILL: No further questions, Judge.
11 Thank you. Thank you, doctor.
12 THE COURT: Redirect.
13 MR. ACARD: Real quick, your Honor.
14 REDIRECT EXAMINATION
15 BY MR. ACARD:
16 Q Doctor, Mr. Scahill just brought up the radiculopothy
17 results of the 1998 EMG; correct?
18 A Correct.
19 Q Now, the fact that the -- first of all, can you explain
20 what radiculopothy is again to the jury?
21 A Radiculopothy means that you have pain from the back
22 that goes back to below the knees. So the sciatic nerve comes
23 from the back and goes down the leg into your foot and the
24 hallmark of radiculopothy is when a pinched nerve gives you pain
25 below the knee into your calf or into your foot.

1 Q Now the fact that Mr. Rivera had a positive finding for
2 radiculopothy in 1998, does that mean that that radiculopothy
3 would have still been present on July 5, 2012?
4 A No.
5 Q Is there any indication from Mr. Rivera's medical
6 records or history that radiculopathy was present prior to July
7 5, 2012?
8 A Not that I reviewed.
9 MR. ACARD: Thank you.
10 THE COURT: You may step down.
11 With all our delays we have two extra minutes. So
12 there is a possibility that we'll get finished, today's is
13 Tuesday, Thursday or even Friday morning. You'll have the
14 summation and charge on Friday morning. There is a
15 possibility. A lot of variables out there.
16 So I'm not going to keep you any longer. Get a
17 good nights sleep. As you can see it's a lot of hard work
18 here. Stretch a little.
19 We'll see you tomorrow morning 9:15.
20 THE COURT OFFICER: All rise. Jury exiting.
21 (Whereupon, the jury exited the courtroom.)
22 (Whereupon, the trial was adjourned to Wednesday, March 9,
23 2016 at 9:15 a.m.)
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