SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK ::::: PART 50
----------X

KENNETH MURPHY

Plaintiff,

-against-

INDEX NO.
000943/2015
JURY TRIAL
(EXCERPT TESTIMONY)

CHRISTOPHER ADAMO

Defendant.

----------X

November 30, 2017
Riverhead, New York

B E F O R E:

Hon. Martha L. Luft
Supreme Court Justice

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

JOHN J. BREEN, ESQ.
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BY: FRANCIS J. SCAHILL, ESQ.

MR. BREEN: Plaintiff calls Dr. Thomas Dowling to the stand.

THE COURT: Dr. Dowling.

COURT OFFICER: Stand behind the chair and raise your right hand and face the clerk, please.

T H O M A S J. D O W L I N G, J.R., having been first sworn as a witness by the Clerk of the court, testified as follows:

COURT CLERK: Your name and your address?

THE WITNESS: Thomas Joseph Dowling, Jr., 1763 Larkfield Road, Commack, New York, 11725.

THE COURT: Thank you.

Please be seated, Dr. Dowling.

MR. BREEN: May I inquire, Judge?

THE COURT: Yes, please.

MR. BREEN: Thank you.

DIRECT EXAMINATION

BY MR. BREEN:

Q Good morning, Dr. Dowling.

A Good morning.

Q Are you a medical doctor?

A Yes, I am.

Q Tell the jury a little bit about your background, if you would.

A I graduated from Boston University School of

Medicine through a six-year program in 1981, where you do college and medical school straight through in six years. After 1981, I went to North Shore University in Manhasset, where I did a general surgical internship. You're managing surgical patients and learning surgery. The second year I did a year of neurosurgical fellowship managing brain and spine patients at the same institution.

I left there in 1983 and went to the University of Stony Brook, University Hospital, there, for four years, did my orthopedic training. And that was from 1983 to 1987.

In 1987, I left to go to the University of Toronto, which is Toronto General Hospital and Children's Hospital, for sick children, and Mount Sinai Hospital for an orthopedic spine fellowship, where I just did spine surgery for one year, under a gentleman named John Kostovich (ph), who is one of the more preeminent spine fellows back in that era.

After 1988, I left to come back to New York, and I've been in practice since 1988 in New York.

Q Where do you practice, Doctor?

A My current practice location is in Commack, New York. I founded a group, specifically for spine surgery, in 1992 in Commack.

Q And, Doctor, can I, or can we presume that you've done spinal surgery in the past?

A I am a Board certified orthopedic surgeon, and my specialized focus is spine surgery. I've been doing spine surgery from 1988 on. I did some general orthopedics when I was on call for emergency rooms, where I couldn't hand off the surgery to another surgeon because it needed to be attended with.

So I did some general surgery up until the early 1990s, and from probably around '92 or '93, I specialized just in spine surgery.

Q Did there come a time in your practice that Kenneth Murphy presented himself to your offices?

A He presented to our offices in 2014.

Q And do you know when?

A He presented --

Q You have your records in front of you, I presume --

A I do.

Q -- so use them, if you need, to refresh your recollection.

A He presented to our offices in -- his initial visit was on 9-25-14.

Q And what do you do when a new patient shows up? What is the first thing you want to learn from that

patient?

A Well, the first thing is why they're coming to you. You ask them what the presentation is. Is there a history? What -- they tell you what happened to them because, obviously, none of us are usually around to see what happened to the patient.

You want to get a background of what they do, you know, what they do, what occupation; what they do for recreation, generally; what habits they have, good or bad; what prior histories they have; to understand what's going on. And then what brought them specifically, at this point, to your office. What kind of treatments they may have had prior to their coming. Basically, as detailed a history as you can get them -- out of them initially.

Q Why is the history so important?

A Well, the history -- 90 percent of the time if you listen to a patient, the patient will tell you what's wrong with them. The examination we do either confirms that, or you may find something else occasionally or in conjunction with it. And then the studies we order generally confirm our initial impression.

So, really, the history, when taken well -- and sometimes, you know, people are not able to verbalize as well, that you have to guide them with certain questions.

But, generally, you want to sit back and listen. If you give them enough time to explain what's going on, you can generally figure out what's going on.

Q Now, when Kenneth Murphy first presented to your office, he saw one of your associates.

A He did.

Q Who was that?

A That was a Dr. Faguna Patel, she's a physiatrist, or rehabilitation doctor, who specializes in pain management.

Q When Kenneth Murphy presented himself, did he give a history to Dr. Patel?

A He did.

Q What did he say?

A He basically said that, you know, he presented at the time from a motor vehicle accident, that he was picking up supplies for work at the time of the accident. The date of the accident was given at 9-13-14. At that time he was 53 years old.

His main complaint was back pain. It was radiating into the leg. It was going to the left leg primarily, specifically wrapping into the thigh region from the back part of the thigh right to the front of the knee, and that he denied certain things. Like he denied any problems going to the bathroom, he denied any

numbness or tingling in the leg. He felt a sensation of weakness in the leg about the knee itself, this was on the left side. And he stated specifically that this pain pattern occurred contemporaneously around the time of the motor vehicle accident of 9-13-14.

And then he went on to describe what the accident was. He stated he was the driver of his vehicle; it was rear-ended. He felt some back pain but he continued to work. He stated his occupation, which he owned a bakery and is a baker. And secondary to increasing pain, he eventually presented to the University Hospital of Stony Brook emergency room several days later.

He stated studies were done at the emergency room. These were X-rays; they were done that day. He was given medication. He was given a muscle relaxant for spasms of the back, and he was given what's called a medrol dose pack, which is a prepackaged form of steroids.

Steroids are very potent anti-inflammatories, like when you take Advil or Aleve or Asprin, they're what's called nonsteroid anti-inflammatories. The steroids are the most potent anti-inflammatories you can give somebody to bring down inflammation. And he was given a medrol dose pack, which is generally a six-day

course of slowly decreasing dosages of steroids, to try to control the pain and inflammation.

Q Did the fact that he presented with pain going into, I think you said into the thigh, did that tell the doctor something, or is that something that is significant?

A The patterns of the pain are significant depending where they're originating from. Back pain associated with pain into the leg, and the distance down the leg can be important.

We have the -- the spine itself structurally, you know, if you injured your back, some people can get back pain that's localized just to the back. Sometimes the back pain can be referred, not necessarily radiating, but referred pain into the leg. But generally, it's more into the buttock or upper leg, not usually going past the midthigh.

So, if you've got a severe enough pain in the back -- not necessarily more distal to the midthigh or going past the middle of the thigh, you can hurt your enough and pain will radiate. Like if I punched -- got punched in the shoulder, if it was punched hard enough, I may feel pain more down the arm than just in the shoulder. So it all depends on the degree of pain.

But when you have pain that goes to like the

knee or to the foot, typically it's called sciatica when it goes distal to the knee. Sciatica just means there's an irritation, or pinching, of the nerve, when it goes to the foot itself.

There's two major nerves in the leg itself, the femoral nerve and the sciatic nerve. The sciatic nerve is a nerve that conducts messages from our brain to our lower leg, the femoral nerve is another nerve that conducts messages from our brain to our upper leg. It typically -- to the knee itself.

So, in the spine there are bones and discs and then nerve elements, and different nerves come out at different levels. And each of these nerves is like a wiring in the wall that goes to a certain level. Like if I can flick on that light switch, it controls these lights.

So, these nerves control like my sensation in my thigh, my sensation in my foot. But each nerve has a different pattern. There's some overlap. We don't come out with the same blueprint all the time. So, there's about a 15 percent overlap in terms of where those pain patterns may go. But typically, his description was an L3-4 pattern description of pain. It wrapped around the thigh into the front of the knee, suggesting a femoral nerve pattern, or a femoral radiculopathy.

Q And when you say "L3-4," that's a certain level of the spine?

A The 3-4 -- there are a number of bones in the spine. There's a cervical spine, which is the neck, the thoracic spine, which the chest, and the lower back, which is the lumbar spine, and the tailbone and the sacrum area, which is the pelvis area around the hips, and nerves come out at every level. And there are discs separating almost every level of the bone. So, we label the bones in the neck C1 through C7, the thoracic spine T1 to T12, and the lower back typically L1-L5. Some people have extra --

THE COURT: Doctor, if you could just --

THE WITNESS: Sorry.

A Some people have extra bones, partially fused bones. Some people have three kidney's, some people have two kidneys, one kidney.

Q None of that exists here, though, Doctor?

A Excuse me?

THE COURT: I'm sorry. I just need to interrupt for a moment.

If I can ask the doctor to just slow down a little bit with the testimony because it's getting a little hard for the stenographer to --

Q Okay. Let me ask you a question.

A Sure.

Q Dr. Patel, upon hearing Kenneth Murphy's symptoms, immediately took a course of action?

A Yes.

Q And if I read your notes correctly, he was getting epidural steroid injections the next week.

A Well, she examined him and then made a recommendation for an MRI to further evaluate. She was suspicious, obviously, that something was happening. And then based on her exam, her review of the studies, indicated him for an injection into his back. The higher dose steroid injection as the medrol dose pack --

Q Okay.

A A higher dose steroid injection as the oral steroids had not really helped him.

Q All right. Can we, at this point, take a look at the MRI films?

The MRI films were ordered by your office?

A Correct.

Q And where did he go to have those performed, do you know?

A I believe -- there's multiple locations, but I think the facility was Zwanger Pesiri.

Q Okay.

THE COURT: Mr. Breen, would this be one of

the exhibits on the exhibit list? An item on the exhibit list?

MR. BREEN: That's a good question.

THE COURT: I think it's good for the record.

MR. SCAHILL: It is, your Honor.

MR. BREEN: Which one -- did we mark it?

MR. SCAHILL: Thirteen.

COURT OFFICER: The Defendant's exhibit?

MR. SCAHILL: Yes.

MR. BREEN: It would be a letter.

COURT OFFICER: It would be a DVD, L.

I believe it would be a DVD, correct?

THE COURT: That appears to be the only DVD on the list.

COURT OFFICER: Defendant's L in evidence.

Do you need this copy?

MR. BREEN: No, I don't think so. But maybe.

COURT OFFICER: I'll keep it handy.

THE COURT: At the ready.

Q Doctor, I'm going to give you the computer so you can do your thing. And I'll give you a little -- okay. (Indicating.)

A Sure.

THE COURT: Pointer.

Q That may be helpful to you in terms of pointing out things, all right?

MR. SCAHILL: Judge, if it's all right, if I just move --

THE COURT: Absolutely, certainly. Wherever it takes.

THE WITNESS: I have to go to the file line.

THE COURT: Everyone can see? The jury can see?

(All jurors nod in the affirmative.)

Q Well, that's the end product?

A That's the end product. I punch up the MRI, but it's not punching up. There it goes.

So, this is what's called a "localized film." So, I'm just going to go to another film and hopefully --

THE COURT: Mr. Breen, would it help if we turn the lights off --

MR. BREEN: It may.

THE COURT: -- for the contrast? Let's give that a try.

COURT OFFICER: They have a key; so, we can't.

THE COURT: All right. Sorry.

A I'm just moving this picture now to a point,

it's almost a midline, but. Let's see.

So this is a picture of the lower back. He's lying down on the table. I believe this is a -- it's a three -- the magnets have different sizes. This is a three telsa (sic) magnet, which is a very high-powered magnet, so it gives a lot of detail. Not necessarily you need this amount of detail for the spine, but the brain or something.

He's lying down; his tush would be right about here. This is the sacrum, or tailbone, going this way. The bones of the spine are stacked just like a layer cake, one on top of the other with the discs being layers, these spaces.

So, if I'm moving around, it may be easier, because I took steroids last night for asthma, so I may get up and get a little closer.

Q Do you want to bring that computer closer. Then, too?

A Well, I think I can just show this from here --

Q Okay.

A -- and then go from there.

THE COURT: But --

A So, you can see that the normal disc spaces -- I'll show a disc here. These two are fairly normal. This one is fairly normal. So at the bottom of the spine

there's the sacrum. This is L5, L4 -3 -2 -1, and up. The whiter discs are discs that have a higher water content. Water born, the discs have 90 percent of water, and there's a lot of other proteins -- other structures that make support of the spine.

As we get older, the discs actually dry out. Just like a pieces of rubber on a car, if you leave it in the garage for awhile, it's going to crack and dry out. Our aging process starts at age 10 in the spine. By age 50, a lot of people have degenerative changes. Males, for whatever reason, compared to females, are almost like a decade ahead in terms of the way our spines age.

So what happens is that, MRIs change depending on what age you get the MRI. So, at an age of a middle-aged male, there's certain expectations I'm going to see on an MRI that'd be different than, say, if this was an 18-year-old male.

So, he has degenerative changes in his lower back, really narrowed disc here, white changes to the bone above and below, almost like someone was polishing, or burnishing, of the bone. That means that's it's a longstanding, degenerative process that's been going on for years. So based on his age, that's not unanticipated. Having some degenerative changes at the two levels above, that also suggests that this is not a

young guy, it's an older guy.

Now, there are genetic variations. Some people have inherited back problems. I have inherited arthritis. So, you may see more advanced findings on an MRI when you have a family history of that. Oh, yeah, my dad had back pain, my mom had back pain. My brothers and sisters had back surgeries. And then you're going to say in my head, okay, I'm going to expect this stuff on an MRI. So, yeah, there's three levels of degenerative changes.

What you do see is, there's a bump here and here. So, those discs are not in the normal position as in the discs above. Those protrusions, or bumps, are herniations, meaning they're out of place.

Q What does that mean, herniations, Doctor?

A Well, herniations can occur for a number of reasons. Herniations can occur --

Q Well, in this case, what is your opinion?

A He's coming to me with back pain. He has a history of some back pain and he has leg pain. He has a herniation at L3-4, and he has pain pattern in the L3-4 area. So, okay, he has some symptoms, he's got a history, and he's got an MRI matching what I see.

Q Okay.

A And this is what Dr. Patel saw, cause she had

ordered this MRI and reviewed it and got an MRI -- and ordered him an epidural based on her clinical judgment.

Q What is the epidural? What is it and what is it supposed to do?

A If you came to me with a knee problem or a shoulder problem, and you couldn't move -- you had an impingement of your shoulder where you couldn't move it and medication wasn't helping you, or it was so painful where you couldn't even sleep at night, I could do a cortisone shot into the shoulder and knock down the inflammation. A lot of times it works immediately. An epidural is just a fancy name for a shot in the back.

There's a canal in the spine where the nerves travel. That's -- the nerves are this white and dark area. The white is the cerebral spinal fluid. So, from -- the spinal cord actually ends at the junction of the thoracic spine and the lower back. And all the nerves dangle down just like a horse's tail. And the Latin word, what we call it is the "cauda equina," literally meaning the horse's tail, and it's wrapped in a sac, a dural sac. So, if you took Saran Wrap, and you took a bunch of spaghetti noodles -- Saran Wrap and put a floor on the bottom and filled it with water, you can squeeze the sack of nerves, and that's called a thecal sac. And that's what present in that canal.

Now, when something bumps into that canal, there's a potential that it can press on the nerves or the sac of nerves and cause symptoms of pain down one or both legs, numbness, tingling, sensation, and weakness, or true weakness depending on the degree of compression, it can occur.

Now, people are born with big feet, little feet, average-sized feet. People are born with big canals, little canals, average canals. So, you have to take into context what size canal they have. With age, the canals narrow, just like a drain pipe in your backyard. For 30 years, it gets filled up with debris and stuff, and that drain will narrow and doesn't clear as quickly. The spine does the same thing. As we age, degenerative processes occur.

So, people can have more symptoms as they get old. Because if they do have herniated discs, there's less room or less clearance. Just like a truck going under the bridge on Northern State; doesn't make it. You know, so these things can happen.

Q Does this MRI conform to the pain that Mr. Murphy was expressing in the office?

A Yes. There are other -- I can show more detailed pictures, which are crosscuts. Just like, I can take the spine and cut it like a piece of bread.

Q Okay. Would you do that, Doctor?

A I just have to find the next picture on that.

Q Okay.

A The computer's nerves don't function that well.

That's a cross-sectional picture. I'll just bring this picture up so we can get an idea of what the anatomy looks like now from cross-section.

So, this picture is actually, if I sliced right through the lower back, and this is an upper level of the lower back. And, so, now we're seeing this little Y thing in the middle. Almost looks like, you know, a turkey dinner, your little --

Q -- wishbone.

A -- wishbone. And that's the sail that you feel when you touch the middle of your back. There's a group of bones running up and down your spine that stick upright, just like a mast on a ship. And that bone has all these muscle attachments. And you can see all these muscles, this area here and this side. So, this is the left side and this is the right side. So, when you feel the little mound on each side of your back, that's the group of muscles that help support your back.

And then in the middle, there's a little dip, and that's the dip above that bone. And that's where you see that little canal area in your back, for most people.

And then there's a layer of skin and fat under the muscles. And then this is the actual sac of nerves. You can actually see all the little black dots there. Those are actual nerves inside the sac.

And he's lying on the back, so they floated a little bit back here. You see more water, or spinal fluid, appear down here because gravity is pulling down. And there's nerves exiting here and here to go out down the spine, either down the right or left leg. And the neural foramen. And those are the nerves physically at that level, like an L3-4 level or a 4-5 level, and a right side and left side.

And then this is all your guts upfront. This is an actual kidney on either side. This is your aorta. These are smaller muscles up front, and then the intestines. And the MRI is not focused at that level. It's really more focused, just like a camera taking a picture of the lower back, so it's more -- the focus of the picture is more intent on the spine.

Q Can you, Doctor, get to the level that you were talking about earlier, that you said were the problem areas for Mr. Murphy?

A Yeah. That's a normal level.

Q Okay.

A It's just slower. Probably easier, I'm just

going to start from the bottom and come up. Easier to count.

Q Okay.

A I went through about ten slices, so it's going to take a few minutes for this computer to react up there.

Q Okay.

A Or not.

Q Is it working? Or do we need some technical assistance here?

A Let me see. I'll page it again and see what happens.

MR. SCAHILL: Okay. If the tech --

THE COURT: Yes, please. I would --

THE WITNESS: Here it goes. We got some movement here.

THE COURT: See, you just came up here --

THE WITNESS: Scared it. The network error occurred. It gave up.

(Technician approaches the visual equipment.)

A Okay. So, this is the lowest level of his spine, this is the L5-S1 level. It's just easier to count up because you're going through levels that are bad less than the levels that are good.

So, here this is the paraspinal muscles, those big muscles. You can see down in the back the bone is bigger as you get further down the spine. Everything gets bigger because it's bearing more load. This is the sac of nerves. You can see there's less nerves inside that white sac because most of the nerves have exited and go down the legs. But you can see the space; it's funny here.

You can see that this space is triangular rather than it's oval. Just like grandma pinching your cheeks, it looks like a little mouse with ears going out either side, with the face and the nose. And it gets squished in from either side. That's due to some degenerative changes, enlargement of these facet joints, which are little joints to the back.

At every level of the spine, there's a disc and two joints, just like a three-legged stool, and that's the major support of the spine. And these joints can become painful if they're injured or arthritic, and they can narrow, the nerve hole, or narrow where the nerves exit.

But you can see there's a diffuse change in the irregularity of the disc along here, and there's disc herniations narrowing the nerve hole at L5-S1 both left and right. So that's at 5-1.

Q Okay.

A Let me go up a level as we slice through. This is L4-5. L4-5, again you see these joints not as big as the ones below, but a little bit bigger than a younger joint. But they vary, too. There's a herniation right in the middle here. This little white area pressing down the nerve sac. You can see a little more nerves here. You can see --

THE COURT: I mean, is it necessary to stand up at this point? Or what works best for the, you know, I mean --

THE WITNESS: Going slower for me.

THE COURT: Going slower would be good. But I think it's -- maybe it's easier.

THE WITNESS: I'm just going to use this.

THE COURT: Let's give that a try.

Thank you.

A So, there's a nerve out here in that white area. And then you can see -- you don't see it as much on the other side, right side, there's a more pinching of the nerve on the right side. But generally, the whole nerve space is narrowed to a combination of some aging facet joints and a herniation at the L4-5 level affecting both nerve exits.

Now, I'm going to go up to this level, and this

is the 3-4 level. Another disc that's herniated, not as much as the 4-5 disc, but there's an indentation here more to the right, and the narrowing of the left side, but not as bad, either, and that's 3-4.

And I'll go up to a normal level. And you can see the roof of the spine here is concave, or going upwards rather than down like the other levels. That's what the perimeter of the discs should look like in the nerve canal. So, that's a normal level.

And now we're up higher in the lower back.

Q Okay. If I heard your testimony correct, it was the 3-4 and the 4-5 area that had herniations that were affecting Mr. Murphy essentially?

A The pattern of the pain was consistent with those levels. I wasn't 100 percent sure how much 4-5 versus 3-4 were contributing to it because there is some overlap in humans, about 15 percent, in terms of our wiring as to how much of the pain can come from one or both levels.

Q Okay. Doctor, did you review the MRI report from 2002, or 2003, that was taken of Ken Murphy? And I believe it's part of your file.

A It was 2003.

Q Okay. Did you review that?

A Yes, I did.

Q And is it essentially the same as this? Or you tell me.

A The report is different. Again, I don't believe I saw the actual films; I have to go by what the report said. The report said -- there's a body of the report which describes everything they see, and then they write a conclusion at the end.

Body of the report talked about a herniation at 5-1, and a bulging disc and some degenerative changes at 3-4. The conclusion said two herniated discs.

Q Did you agree with what it said?

A Well, the conclusion didn't match the report itself, so either it was a typo or just dictated wrong on the following report. So, I can't tell what it -- you know, I didn't see the pictures, so I can't comment other than saying there was a bulging disc in the main report. But then when he wrote the conclusion, he talked about two herniated discs, when he only stated one herniated disc at L5-S1.

Q Well, let me ask you this, Doctor. You saw Kenneth Murphy, I think on -- you want to grab your computer back?

A Okay.

Q You saw Kenneth Murphy on, I think, January 15th -- I mean, in January of 2015.

A Yes.

Q You saw Mr. Murphy in January of 2015; is that correct, Doctor?

A Yes.

Q And at that time you had the advantage of knowing the fact that he had given a history that he had an MRI, and that he had at least, I guess, three epidural injections by that time; is that correct?

A Yes.

Q And did he get any relief? Did his pain pattern change? Or you tell me.

A He was sent to me because he wasn't getting better.

Q Okay.

MR. BREEN: Can you bring up that MRI film? You know, the report that we looked at yesterday.

MR. SCAHILL: The 2003?

MR. BREEN: Yes.

THE COURT: Mr. Scahill, would you know which exhibit this would be?

MR. BREEN: This is part of the --

THE COURT: This is in Defendant's list?

MR. SCAHILL: Yes, Judge.

THE COURT: I just think it's helpful for the record, so the record is going to reflect which

exhibit he is looking at.

MR. SCAHILL: D.

MR. BREEN: Exhibit D.

THE COURT: Thank you.

Q This is the report that you're referring to before when you said back in 2003?

A Yes. Well, it says the date is January 6, 2003, is the actual taking -- the report is dated January 6th, but the actual imaging was done on -- in January 6, 2003.

Q Okay. There are some things highlighted here.

A Yes.

Q The first says there is loss of disc signal desiccation at L4-5, L5-S1. What does that mean?

A That means when we look at the pictures of the disc, they look darker than the -- in certain images than others, than the more water, or hydrated disc. Desiccation means drying up or dried out. So, the loss of signal is that whiteness, it gets darker. And he noticed it at 4-5 and 5-1.

Q Okay. Is that a normal finding of a man of 50 years old? Or is that an abnormal finding?

A Again, there are multiple variables. But, you know, a middle-aged gentleman is going to have degenerative changes at the base of the spine because the higher loads are carried at the base of the spine. So,

those discs wear out earlier than the other discs over time.

Q Okay. And then what is this L3-4, what does that mean, Doctor?

A At L3-4, he describes a central meeting in the middle -- to right-sided, which is the paracentral, off to the right a little bit, spondylitic change. "Spondylo" means spine in Greek, and Latin, "litic" means degenerative change. Spondylitic change and a disc budge with mild stenosis. When I talked about a narrowing where the nerve roots exit, "stenosis" is the medical word for "narrowing."

Q And L5-S1?

A At L5-S1, which we saw that most degenerative level had a broad-based disc herniation, which it had back there -- disc herniation running -- going across that whole level, and spondylitic change, again that's degenerative change, of the spine itself, in addition to the endplates marrow signals changes noted.

Remember how white above and below the disc those bones were? Those are the marrow changes. That means it's a very advanced degenerative changes going on at that level.

Q Doctor, I want you to assume that this is, obviously, was in 2003, and Mr. Murphy was treating with

a chiropractor, essentially, during this time. And I think your records may reflect that.

Do you have that in your history in January?

A He gives me a history of pain on and off, where he had treatments at various times from the '90s on.

Q Okay. And including up to what point? Do you know?

A Early 2000s.

Q Would 2007 be what you have in your record there, on January 5th?

A That range, somewhere in mid-2000s.

MR. BREEN: Can you bring up that one from Dr. Sperling, Frank?

MR. SCAHILL: I don't have the --

Q Doctor, I want you to assume that Kenneth Murphy went to see Dr. Sterling at North Shore Sports Medicine and Rehabilitation on April 29, 2008, okay?

MR. BREEN: And this is an exhibit that we have, officer, in the box.

COURT OFFICER: North Shore Sports Medicine and Rehabilitation. That would can Defendant's Exhibit G.

THE COURT: G, right.

MR. BREEN: G?

COURT OFFICER: G, in evidence.

THE COURT: Do you need that shown to the witness?

MR. BREEN: I'm going to hand it to the witness.

THE COURT: I'd like to have the court officer hand the --

MR. BREEN: Okay. G.

COURT OFFICER: Showing the witness Defendant's Exhibit G in evidence. (Handing.)

Q Doctor, could you flip to the point where you see the April 29, 2008, record? And it's like a half a page, and down at the bottom it says, FJS, which is Dr. Sterling.

MR. BREEN: May I help the doctor find it?

A These are handwritten notes, so.

MR. BREEN: It's going to look like this. (Showing.)

Here it is right here.

A Thank you.

Q Okay.

THE COURT: No, that's not it.

MR. BREEN: That's May. There we go.

A April.

Q Okay. All right. Doctor, I want you to assume that Kenneth Murphy testified that he went to

Dr. Sterling, and essentially, that was the last doctor he saw before this motor vehicle accident, which took place six years later, six-and-a-half years later. All right?

And, Doctor, you see the history that Dr. Sterling took at that time? And you reviewed that, right?

A Yes.

Q You see where it says that, He complains of achy lower back pain, predominantly left side, which is nonradicular in nature and not associated with lower extremity weakness. What does that mean?

A Most common complaint after the common cold people see people for a doctor is back pain. And typical back pain is just that, back pain. And it's not a radicular, it's localized to the back. And basically, he's saying the guy is coming in complaining of this pain that doesn't shoot out of the back into the legs. And he's specifically denying that he has any nerve involvement. And the more important nerve involvement is the strength, or lack of that, or weakness. And he's denying that.

Q So, we looked at that 2003 MRI that showed at least one herniation and some desiccation. From using that and this note, would it be your opinion that

Mr. Murphy was not suffering from compression on his nerves at that point?

MR. SCAHILL: Objection.

THE COURT: I'm sorry. Could you please read the question back?

(Whereupon, the requested portion of the record was read back in open court.)

THE COURT: I'm going to overrule.

You may answer, Doctor.

Q Go ahead, Doctor. You can answer that question.

A He was complaining of back pain, which is most likely not due to any compression of any nerves itself.

Q Further down in that same note, where it says: Physical examination. Do you see that?

A Yes.

Q It says, Orthopedic signs and provocative testing were negative. What does that mean?

A Means that he was examining the patient, looking at him, and then physically moving him around to see if he can provoke any findings or symptoms by the patient, like lifting his leg up, stretching the nerve, see if he says ouch or not.

Q And all of that was negative?

A That was negative.

Q And do you see right down on the next line, it

says, Lower extremities had full range of motion with normal strength?

A Correct.

Q What does that mean?

A That the -- the joints were not involved in any problems. His hips and knees were moving, his ankles were moving. He can lift the legs up. And he had good strength.

The way we measure strength, we test it in a scale, generally, from a 0 to 5, and zero is no movement and no strength. He noted full strength on the exam.

Q Doctor, knowing that that was the last orthopedic visit that he had, or any visit to any doctor complaining of back pain, back in 2008, and then he shows up at your office six years later with complaints of back pain telling you the history of a motor vehicle accident, do you have an opinion, with a reasonable degree of medical probability, as to what was the source of his pain, or what was the cause of his pain at that point?

MR. SCAHILL: Objection.

THE COURT: At the earlier point?

MR. BREEN: At the time that he came to Dr. Dowling's office.

THE COURT: Your question pertains to the --

MR. BREEN: Right.

THE COURT: I'll overrule the objection.

A Given the history and the timeline of facts, it was my impression that the patient's problem was due to his motor vehicle accident, particularly with what he had described and the treatment he had gone through up to the several months he had come to me.

Q What did you notice in the MRIs that were taken at the direction of your office that were now new findings with regard to his lower back?

A The findings were the changes at the adjacent segments to 5-1. The adjacent levels were 4-5 and 3-4. 5-1 had the herniation, the severe degenerative changes. The degenerative changes had now climbed up his back, but, you know, he's older at this point, so I'm expecting that. But he had the herniations at the other levels as well.

Q And did those herniations cause nerve compression?

A Specifically, the L4-5 and the 3-4 levels were patterns of pain that were consistent with that. The 3-4 level was more paracentral right, 4-5 was broad-based. So, based on the two levels and the pattern of the pain, it was my opinion that his problem was primarily 3-4, 4-5.

Q And the problems that you observed at 3-4 and 4-5, do you have an opinion, with a reasonable degree of medical probability, as to whether or not those problems were either caused or exacerbated by these motor vehicle accidents?

MR. SCAHILL: Objection.

THE COURT: Overruled.

A The patient gives me a history of chronic on and off back pain. You know, he gives a history of seeing doctors periodically. He may have had some back pain here and there in between, like a lot of patients can. But the pattern of the pain, and the consistency of the pain, and the location of the pain were very consistent with the findings of the MRI, in my clinical evaluation.

Q And the MRI was done within a month of the accident?

A It was done after the accident, yes.

Q Right. Doctor, I want you to assume that Kenneth Murphy testified, and we showed this to the jury already, that these were some of the activities -- can you see that?

A Yes.

Q -- that these were some of the activities that he enjoyed between the time period of 2008 and the date of the accident, okay?

A Okay.

Q And I want you to assume that Ken described for the jury that he was snowmobiling, for example, that he was rock climbing, that he was doing his imitation, you know, of a yogi or whatever, all the these things, that he was zip lining a month before this accident. Would those kind of activities be the kind of activities that someone could do if they were suffering from the nerve compression pain that you're talking about, that you found after the accident?

MR. SCAHILL: Objection.

THE COURT: Overruled.

A Typically not, no.

Q It would certainly be a surprise to you?

A Yes. Or just toughing it out and getting real aggravation of his back pain, if it was.

Q Okay. Now, Doctor, did there came a point -- when you saw Kenneth Murphy in January, you made some recommendations as to his treatment going forward?

A Correct.

Q What did you suggest to him?

A Well, we talked. He had already had the symptoms going on. And I basically said, you know, we have some changes in your back that I saw at the facet joints, let's see if we can do some injections into the

joints themselves on the left side and the right, because he had back pain and the left side pain, to see if we can help with another type of injection.

Just like the shoulder joint, the joint is the facet joint. If a lot of pain was coming from the joint, it may not be the 100 percent of it, but if it's 50 percent or 60 percent and giving him that relief, he may be able to function better and go on with his life. And, so, I suggested that.

Q Did he go along with that?

A He did. He felt somewhat better, but not 100 percent. We tried a more selective block after that, a medial branch block, trying to recreate the same thing. But instead of injecting the joint, we injected the nerve to the joint, just like going to the dentist and getting a root canal. We decided to try to pinpoint the nerve to the joint itself, specifically to see if we can do the same thing.

Q Was that successful?

A It gave him some relief again, but not a lot of relief.

Q Did there come a time that you had a discussion with Kenneth Murphy with regard to possibly undergoing surgery?

A Yes.

Q And what did you say and what was the cause of that?

A At that point he had been going through a number of months of ongoing symptoms. He had gone through treatments. The biggest treatment is time. If we're going to get better, we're going to do it over a period of time. A lot of things that we do for a patient help them manage through that time, giving them medication, physical therapy, going to a chiropractor, giving them injections, allowing the body to heal. He wasn't getting better.

And it came to a point where I said, Listen, you're at that point now where you can either live with the symptoms and see what happens, or do something about it, and the only option you have left is surgery. And I said, Here are the risks and benefits going on like you like, or doing surgery, the risks and benefits and the potential outcomes. And I offered him a surgical option. Not that he had to do it. He wasn't going to die from this, he wasn't going to become paralyzed from this, but it was going to restrict him and limit him. So the question became, What do you want to do at this stage?

Q And before undergoing surgery, you go through an informed consent with the patient, right? Meaning, you tell him what the risks and the benefits are?

A I go through a very detailed explanation of what the surgery means, the downtime, what it means, the healing process. I tell patients, Listen, this is something I'm fixing. I'm not giving you back a normal back. I'm taking something that's bad, not good, but you can still live with it. We're going to do the surgery and make it better, but I'm not making it normal. We're going to improve.

The question is, you know, we can't always predict the success rate on everybody. We give them averages. And I went through that. I went through the down sides of the surgery, the pluses of the surgery, the potential that you may need more surgery if things didn't heal the right way. Because I'm altering the mechanics of the spine by fusing it, I create stress risers or problems that potentially could occur at the level above that may require further surgery down the future. That risk, you know, is not high, but it's not zero either. It's maybe a 5 percent risk, 10 percent risk. But, they have to be aware of that because 20 years from now, 10 years from now they come back to me and say, I thought you fixed me. I say, okay, this is what's happening.

But this is what you have and you're going to have restrictions on your life, because I'm giving you rods and screws and a fusion. I don't want you bungee

cord jumping out of a plane, you know, doing things that are going to stress out your back. Do the normal things, stay healthy, exercise, and going through a lifestyle change, too, and how to accommodate it.

Q And, you know, we saw it on the board briefly there before. But this is the end result of your handy work, right, Doctor?

A That's the metal and screws that we use to enhance the fusion at the multiple levels.

Q What is the purpose of this, Doctor?

A Okay. So, spinal surgery has been done a long time. Specifically, surgery like this, it's been done probably since the 80s on, in terms of what we have in terms of instrumentation. Bones heal if you put them close together, in general. When we're doing a single level fusion, you don't necessarily need rods and screws to get a fusion to heal, they heal. So the outcome of doing a one level fusion, with or without instrumentation, is the same. Generally, 90 percent of the success rate of the bones healing. Unless there are risk factors involved, being a smoker, being a diabetic, underactive thyroid, then there's higher risks of certain issues of healing. Once you get more than two levels fusing when you put rods and screws in a back, it acts like an internal brace, or stabilizer. There's a higher

rate or a higher rate of healing. So maybe you go from 50 or 60 percent healing rate without rods or screws, to an 80 percent healing rate with the rods and screws. So the addition of the rods and screws is not to make a picture where people say, Oh, my God, my back, it's really to enhance the fusion rate. So we needed to stabilize, rigidly, three levels of his spine to enhance the rate of the fusion taking. At those same levels, I unroofed the spine, just like a doll house, the old-fashioned doll house, you can take the roof off and look inside. He had a tight canal, narrowed canal due to his age-related changes. The discs herniated into it, and the facet joints being a little enlarged. I incorporated 5-1 because they had changes down there. I didn't want to do 3-4 and 4-5 alone because, if I took those segments that were normally moving and fused it, I'm now putting additional stresses on a bad level, and I knew he would come back to me saying, My back is not doing better, either not within the next couple of months, or, but within a year or two, and I'd have to fuse that level.

So I'd had to do 5-1, because I did not have a normal level to go to. Whereas, the 2-3 level, the level above the highest disc, that disc space was normal, and I didn't have to worry about adjacent segment disease more

than what the average should be over time for a regular person at his age.

Q So, if you were to only do two levels, you'd be worried that one of the these other levels which is not a healthy level, would continue to give him problems and be a source of future pain?

A With his history, giving me the fact that he had back pain in the past, and that 5-1 disc level was so bad so long that I said, if I didn't include the 5-1 level, that would be the case, yes.

Q Okay. Now, Doctor --

THE COURT: Excuse me.

Which exhibit was that, Mr. Breen? I just like to have that for the record.

MR. BREEN: That was Plaintiff's 4.

THE COURT: Okay. Thank you.

And we're finished with this Exhibit G from the North -- Sports Medicine?

MR. BREEN: Yes, yes.

THE WITNESS: (Handing.)

Q Doctor, is a degenerative disc more susceptible to injury by herniation than a normal healthy disc?

A Anything that starts to wear out doesn't have the same structural integrity. If a tire with 50,000 miles on it, you hit a pothole, you know, what's the rate

of that tire popping versus a tire that has 5,000 miles on it? Different.

A spine, when you look at the peak incidents of disc herniations in the human, it's between the ages of 30 and 50. Primarily, because when we're 35 or 40, we still think we're 20, we're still doing things that way. But our spine is not like when we were 20, and the loads are the same, but the discs themselves are not necessarily the same. So, there's more stress on a disc that's starting to wear out.

So, we generally see disc herniations and discs that are degenerative. It doesn't mean I can't get a 25-year-old kid who decided to squat and take up 400 pounds off the floor and gets an acute disc herniation just because he just overloaded the disc, or his knee -- whereas, he blew out his disc or knee because he just overloaded a normal disc, which you can do, too.

But the incidence of disc herniations are generally higher in a disc that's already starting to degenerate, than one that is healthy, unless you specifically just do something crazy, or in the wrong position.

Q Do you have an opinion, with a reasonable degree of medical probability, as to whether or not Mr. Murphy would have needed this fusion surgery that you performed

were it not for the happening of the motor vehicle accident?

MR. SCAHILL: Objection, your Honor.

THE COURT: Overruled.

A Everybody has degenerative changes in their spine. So if I take a male who's 50-years old and do an MRI of their back, 100 percent certain I'm going to see disc bulges and disc degeneration. I'd be a very busy spine surgeon if I had operated on every male over the age of 50. Because literally, there's nobody with a spine at that age, of that sex, that's going to have a normal looking MRI. When I mean normal looking, compared to somebody who is younger. So, certain features are normal at different ages.

Q And you found that in Mr. Murphy's spine, that he had degenerative, right?

A Yes.

Q Was it normal degenerative? Was it abnormal degenerative?

A 5-1 was a little more advanced than I would expect, but not that out of the normal. The other levels were normal for age.

Q Okay. So, then, do you have an opinion, with a reasonable degree of medical probability, as to whether or not it was the trauma of the motor vehicle accident

that caused the herniations and the compression on the nerves that caused Mr. Murphy to have to undergo the surgery?

A Yes. I'm not an eyewitness to the account; I have to rely on the history. But he's telling me, you know, I had this back pain on and off, I had this accident on this date, my pain has been like this since. I've gone through this treatment under your direction, or my partner's direction, I'm not better. My alternatives are to live with it and do surgery. He chose surgery based on our discussions.

Q Okay. Let me ask you a few questions about biomechanics. You learned that this accident happened as a result of Mr. Murphy being in his vehicle stopped and getting hit in the rear, yes?

A Yes.

Q All right. Did you ever see the pictures from the motor vehicle accident?

A I may have. I don't recall. Sometimes they bring it on their cellphone or iPhone.

Q Okay. I want you to assume that Mr. Murphy was driving a truck, and at the time he was driving that truck, it was equipped with a trailer hitch. And I'm referring now to Plaintiff's 1 in evidence. (Showing.)

And this is the trailer hitch. I want you to

further assume that the impact between the Jeep Wrangler and Mr. Murphy's vehicle was on the trailer hitch. And I want you to further assume that this caused this dent in this steel trailer hitch there. Moreover, it caused the deformity of these areas here where the trailer hitch is bolted to the frame.

I want you to further assume that Mr. Murphy's vehicle required five hours on the stretcher, which pulls the frame back into its proper configuration. Moreover, I want you to assume that Mr. Adamo's vehicle, the person in the Jeep four by four required three hours on the stretcher pulling it back to its proper configuration. And finally, I want you to assume that Mr. Murphy's seat was broken.

Do you have an opinion with regard to the transfer of energy and the biomechanics of how this accident affected Mr. Murphy's body?

MR. SCAHILL: Objection, your Honor.

THE COURT: Sustained.

Q Do you have an opinion, within a reasonable degree of medical probability, as to how the accident that was just described to you in my hypothetical would have caused Mr. Murphy's problems?

MR. SCAHILL: Objection, your Honor.

THE COURT: Sustained.

Q Do you have an opinion, within a reasonable degree of medical probability, as to whether or not the accident that I've described for you, and the results with the two vehicles, would have affected Mr. Murphy's body?

MR. SCAHILL: Objection.

THE COURT: I'm going to sustain.

Q Do you have an opinion within -- well, let me ask you this: How does a motor vehicle accident cause a problem for someone sitting in a vehicle when they get rear-ended?

MR. SCAHILL: Objection, your Honor.

Talking the general population.

THE COURT: I'm sorry?

MR. SCAHILL: He asked him a question of how does it affect people. We're talking about the general population.

MR. BREEN: Well, you sustained my questions about Mr. Murphy specifically, so.

THE COURT: Well --

MR. BREEN: Withdrawn. Withdrawn.

THE COURT: I would sustain.

Q Include this in the hypothetical. I want you to further assume that Mr. Murphy is the person that we're talking to, Mr. Murphy, the person that you examined,

treated, got a history from, and eventually did surgery on, okay? Do you have an opinion, within a reasonable degree of medical probability, as to how Mr. Murphy's injury was caused?

MR. SCAHILL: Objection.

THE COURT: Well, I'm going to overrule and allow him to answer in this context.

Do you remember the question?

THE WITNESS: Yes.

THE COURT: Okay.

A The patient tells me what happens to them if you listen. And you try to analyze their presentation based on their history. He gives me a history of back problems intermittently treated in the past, and which is not uncommon for my patients. And then he gives me a specific injury where he has ongoing pain.

The mechanics of the injury that he described to me, including the fact that he was rear-ended and the seat broke, were sufficient enough forces, in my medical opinion, to create the diagnoses that I eventually gave him. And for the reason that he failed non-operative care, and he eventually underwent surgery for me.

The studies have been done extensively, going back to the time of the railroads, in terms of rear-end collisions, where they first came about and then adapted

to the cars. There's a lot of biomechanics we have to understand in terms of etiology, or the reasons why things happen. And when you're sitting in a car --

MR. SCAHILL: Judge, I'm going to object to this testimony and ask that it be stricken. He's not qualified to give an opinion.

THE COURT: That's kind of the area that I'm having some problem with.

I'll sustain the objection. I think he answered the question.

MR. BREEN: Okay.

I have no further questions.

Thank you, Dr. Dowling.

THE COURT: I think this is a good time to take a break. We'll take a ten-minute recess.

Let me remind the jurors and --

Doctor, you may step down.

THE WITNESS: Okay.

THE COURT: And we'll call you back.

Let me remind the jurors not to discuss the case among yourselves or with anybody else, and not to read up or do any independent research on any of the matters that have come up in the course of testimony.

Not to discuss or accept any payment or

benefit for supplying information to anybody about this case, and again to promptly report any incident of any impropriety, any attempt to improperly influence you or any other of your fellow jurors, okay?

Ten minutes.

COURT OFFICER: All rise. Jury exiting.

(Whereupon, a short recess was taken.)

(Back in open court, on the record as follows:)

COURT OFFICER: All rise. Jury entering.

All rise.

THE COURT: Please be seated.

Okay. Is Dr. Dowling in the courtroom?

(No answer.)

THE COURT: Is Dr. Dowling in the courtroom?

MR. BREEN: I guess he's in the hallway.

COURT OFFICER: I'll get him.

THE COURT: Okay. Thank you.

(Whereupon, the witness enters the courtroom.)

THE COURT: Okay. I ask Dr. Dowling to step forward.

THE WITNESS: Sorry.

COURT OFFICER: Please keep in mind you're still under oath.

THE WITNESS: Yes.

THE COURT: And also, if I could implore you to just speak a little more slowly for the sake our court stenographer's fingers.

Thank you.

THE WITNESS: Okay.

THE COURT: So, Mr. Breen, I believe you had some more direct.

MR. BREEN: No, I rested.

THE COURT: Oh. You completed? I thought you had --

Well, then, Mr. Scahill, you're up.

MR. SCAHILL: Thank you, your Honor.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. SCAHILL:

Q Good morning, Doctor.

A Good morning.

Q My name is Frank Scahill, and I represent the defendants in this case. Their names are Christopher and Sylvia Adamo.

Doctor, have you testified before in court?

A Yes.

Q And do you regularly testify for plaintiffs in personal injury cases?

A I testify for plaintiffs, personal injury cases, for workmen's comp. for defense.

Q Do you get referrals from personal injury plaintiff's lawyers?

A I'll get referrals from referral sources, including either a panel where you put your name up, or they'll send you cases to review and give and up or down as to whether you think the case has merit. Or sometimes a attorney will contact me directly about a case.

Q So, you're familiar with this type of a procedure, personal injury cases, personal injury lawyers, is that fair to say?

A Yes. I'm an expert witness for the medical malpractice, for the two medical malpractices of New York City, PRI and MLIC. I'm their spine expert, so I go to court for anybody who needs my expertise, yes.

Q How many times a year do you testify in court?

A Excluding the testimony by Workmen's Comp. Board (sic)?

Q How many times do you appear in this type of a setting?

A Two times a year. Three times a year, tops.

Q And you've done that over the course of your

career over the last 20 years?

A Probably at least 20 years, yes.

Q And you charge a fee for your appearance in court, I presume?

A For my time out of my practice, yes.

Q That fee is how much?

A I believe it's 7,500 for a half a day and 15,000 for a full day.

Q We're definitely going to get you out of here in a half day.

So you've been cross-examined before?

A Yes.

Q And you understand the rules of cross-examination, if I ask you a question that can be answered with a Yes or No answer, you'll answer it Yes or No. And if you can't, you'll tell me, I can't answer that Yes or No?

A Yes. I can do that.

Q Thank you, Doctor. Now, you opinion, if I'm correct, is that Mr. Murphy, but for that car accident, would not have needed this surgery. Is that the essence of your opinion?

A Yes.

Q And your opinion with respect to the injury that Mr. Murphy claims happened in the accident is based on

several factors, correct?

A Yes.

Q It's based on the history that Mr. Murphy provided to you? Is that fair to say?

A Yes.

Q And the history -- and it's also based on your diagnostic testing and your treatment of this plaintiff, correct?

A Those are several of the factors, yes.

Q The history that Mr. Murphy provided to you, we went through it in your direct testimony, but that history is a very important part of your diagnosis. Is that fair to say?

A Yes.

Q And you're taught in medical school the importance of taking a proper history, correct?

A Yes.

Q And you founded the practice Long Island Spine Specialist, and you have a number of physicians that are your co-workers; and you insist that each of your co-workers have the same level of medical excellence that you practice; and you insist that they take a proper history. Is that fair to say?

A Yes.

Q And the accuracy of that history has a direct

correlation to the accuracy of your diagnosis. Is that also a fair statement?

A Yes.

Q I'd like to review with you the history that was given to you, to your office, by a Mr. Murphy. And I'd ask you to refer to your chart.

You indicated that he first came to your practice on September 25, 2014; is that correct?

A Yes. I have to pull out the initial notice by Dr. Patel. So I have the presentation date by Dr. Patel of 9-25-14.

Q Okay. So, we're -- I have that up on the screen. I don't know if you can see it from there, but you have it in front of you, correct, Doctor?

A I have addendum.

Q Okay. So I'd ask you to look at the history that was given to Dr. Patel -- by the way, Dr. Patel is an associate of you?

A She's employed by me, yes.

Q And Dr. Patel saw Mr. Murphy from September of 2014, up until the time that you saw him first in January of 2015?

A Yes.

Q Correct? So, when we talk about history, a plaintiff, or a patient that comes to your office is

asked: Do you have a past medical history? Did you have this problem before? Correct?

A Correct.

Q And what did Mr. Murphy report with respect to his past medical history?

A It's entirety that he had a chronic history of back problems.

Q Let's talk about that first visit. And I'm reading, Past Medical History, from Dr. Patel's note.

And it indicates:

"System: Gastrointestinal condition, acid reflux."

Am I accurately reading your own office notes?

A That says acid reflux there, yes.

Q Okay. Is there any mention in Past Medical History when Mr. Murphy first came to your practice on September 25, 2014, that he had a history of back pain?

A In this note? She does not relay that, no.

Q Okay. So let me talk about that for a moment.

Mr. Murphy came to your office complaining of back pain, correct?

A Correct.

Q Would it be a logical question that you, or any physician employed by you or works with you, would ask, Did you ever have prior back pain? Would that be a

question that was asked of the plaintiff in this case?

A I don't know if it was asked by the plaintiff in this case.

Q Well, we just went through the level of excellence that you demand from your associates. You just told me as a Board certified orthopedic surgeon you would take a proper history. Can we assume, can we agree that Dr. Patel asked Mr. Murphy, Did you have any prior back pain, and he did not tell her about that. Can we assume that?

A I would not assume that because I'd be assuming about half the physicians I get referrals from don't give a proper history.

Q Well, Doctor --

A I don't know --

THE COURT: We have to have one person speak at that time or we won't have a proper record, so.

Q We're talking about your practice, Doctor.

Is it the practice of your office to inquire when a person comes in with a complaint of back pain, did they were have prior back pain? Is that a question that's asked by you and every one of the physicians that work with you?

A It's part of our medical intake form that the patient fills out prior to the visit. It should be a

part and practice of any physician, or PA in my office, that does it. Are there times when this is not done all the time? Yes, there are times like that.

Q Was there also an inquiry when Mr. Murphy first came to the office, whether or not he had any significant spinal or surgical procedural history? Was there an inquiry made as to that?

A There's an inquiry made as to past spinal procedures or past medical history, yes.

Q And did Mr. Murphy report any history of a prior spinal issue, or a prior surgical or procedural history to his spine?

A He did not report one.

Q Okay. So, do you know how many times, Dr. Faguna saw Mr. Murphy before you saw him?

A I think she saw him at least two or three times.

Q I'm going to put up the next visit that Mr. Murphy had with your office. It was on 10-2. There was also a notation with respect to past medical history. Do you have the 10-2 note in front of you, Doctor.

A I do.

Q And that's also in Dr. Faguna?

A That is correct.

Q Was there any mention by Mr. Murphy of a past medical history with respect to his lower back?

A He does not state anything in this note, or it's not recorded in this note.

Q The next time that Mr. Murphy came to your office was on October 29, 2014. There was also an inquiry as to his past medical history. Do you see the note from Dr. Faguna from 10-29-14?

A Yes, I have it.

Q Is there any mention by Mr. Murphy of a past medical history with respect to his lower back?

A He does not report anything in the history, or it's not recorded.

Q And the next time that he saw your office was on 12-2. That was also Dr. Faguna who saw him at that time?

A Dr. Faguna Patel, I'm sorry. I may have to read yours. I don't see --

Q It's up on the screen here, Doctor. Do you see the notation where it says Past Medical History? I highlighted it.

A Yes.

Q Do you see any mention of a prior back problem?

A Not in the past medical history, no.

Q Okay. Did you know at that point that the plaintiff was -- that the patient was a plaintiff in a personal injury lawsuit?

A I had never met the patient at that point.

Q Did your office -- was your office aware at that point that he was a plaintiff in a personal injury case?

A I don't believe so. But I'd have to look at the medical correspondence.

Q You just told me earlier when we talked about history, that the history that a patient gives to you has a direct correlation to the accuracy of the diagnosis. You also told me that you're basing your opinion that Mr. Murphy suffered a traumatic injury in the car accident, that ultimately led to the surgery that you performed in 2015, based on the history that was provided by Mr. Murphy; is that correct?

A The history provided to me is definitely correct, yes.

Q Okay. Now, is it true to say the history that was provided by Mr. Murphy for four months while he was under treatment with Dr. Patel in your office was inaccurate?

A You know, the record --

Q That's a yes or no, Doctor?

A I can't answer it yes or no.

Q Okay. Was the history correct as to a prior history of back pain?

A Based on the records reported?

Q Based on your own office notes --

A Just based on the office notes, that is correct. There was no history given on those office notes.

Q So, the history that was given to Dr. Patel in your office for the four months of treatment was totally inaccurate?

A The recorded notes are not accurate. I don't know the exact history that was given to Dr. Patel in the office with her.

Q Okay. Now, you talked about an MRI evaluation that was performed on the plaintiff in this case at Zwanger Pesiri Radiology after the accident of 2014, correct?

A Correct.

Q And that MRI evaluation showed disc herniations two levels, correct?

A Yes.

Q You also talked about and went over with Mr. Breen during his presentation a prior MRI that was done in 2003 at Stony Brook Medical Imaging, correct?

A Yes.

Q When were you made aware of the prior MRI that was done in 2003?

A I went over it on the pre-direct with Dr. Breen (sic). I don't know -- never seen the actual films.

MR. SCAHILL: He's actually a good guy, but

he's only a layer.

MR. BREEN: I am a doctor of -- law degree, Mr. Scahill.

A He knows a lot of medical stuff.

Q I'm sorry?

A He knows a lot of medical stuff.

Q Is it fair to say that you didn't learn about the prior MRI until your discussions with the plaintiff's lawyer prior to testifying here today?

A I never looked at anything that I can recall. I saw the actual MRI report, was prepping to go through my records today, last evening.

Q Okay. All right. So, you learned about it last night?

A No. A couple of days ago. And I reviewed the records again last night.

Q Okay. So, Mr. Murphy never reported to you that he had a prior MRI?

A I don't recall.

Q You never saw the films?

A The films were -- no, I never saw the films.

Q And to your knowledge, you never saw that report before from 2003?

A I do not recall seeing that report before.

Q You certainly didn't see it prior to your

surgery in 2015, correct?

A Correct.

Q And did you inquire of Mr. Murphy whether or not he had any prior diagnostic radiology studies when you first saw him in 2015?

A Yes. I would have inquired that.

Q And did he tell you that he had no prior MRI studies?

A I don't recall what his response is to that.

Q Certainly, it's fair to say that you, yourself, did not review these films and did not look at this report until you came to the realization that you were testifying in court about this case, correct?

A I reviewed this in preparation for the testimony solely, yes.

Q Okay. So, would you have wanted to review the prior MRI films prior to making -- giving this jury an opinion as to whether Mr. Murphy's problem with his back was caused by the car accident of 2014? That's a yes or no.

A Again, I couldn't answer that yes or no.

Q Okay. Would your opinion have been more accurate if you were given the MRI films of 2003 to look at and comment on?

A Would that be as to causation?

Q Would your opinion as to whether or not the problem that Mr. Murphy ultimately had surgery was caused by the car accident, would that opinion have been more accurate if you had saw the 2003 MRI?

A No.

Q It would not have been more accurate?

A No.

Q As an orthopedic spinal surgeon, would you want to compare before you treated a patient for a condition, would you want to review and compare the prior MRI studies to the present MRI studies?

A It may or may not have an impact on my decision. It would depend on the history and what the studies would show.

Q You felt strongly that the surgery that you ultimately performed on Mr. Murphy was due to the car accident because he had herniated discs at two levels shown on the MRI films? That's a yes or no.

A It can't be answered in a yes or no fashion.

Q Okay. Is it in fact true that he had a two-level disc herniation in 2003 based on the report of a Dr. Cole from Stony Brook Imaging?

A Again, I can't answer that yes or no. But the conclusion says two disc herniations, but the body of the report says one disc herniation. So, I don't know which

is true, the conclusion or the actual description that he describes in the several paragraphs above.

Q Certainly, the MRI report of 2003 describes pathology to the lower back that is abnormal. Is that fair to say?

A The pathology in certain degrees are normal for age, and in certain degrees show pathology as well.

Q The disc herniation at L5-S1, that's not a normal finding on a lumbar disc, correct? That's an abnormality to the disc. That is something that is not the normal anatomical position of the disc, correct?

A Correct.

Q And that's something that -- that disc herniation at L5-S1, as shown on the 2003 MRI, that can impress on a nerve exiting at that level, correct?

A Yes.

Q And that certainly can be the competent producing cause of pain, the nerve root compression at L5-S1 from this disc herniation, correct?

A Yes.

Q Also, the spinal stenosis, the spinal stenosis at L3-L4, that's not a normal variant, correct, that's an abnormal condition?

A Again, I'd have to qualify to answer yes or no based on the age of the patient, whether there's any

congenital findings. So, certain things become normal as we become older.

Q Okay. But in 2003, Mr. Murphy was in his late 30s. Is this an abnormal finding for a male in his late 30s?

A It's an unusual finding.

Q When we talk about an unusual finding, all the findings from the 2003 MRI could cause the same symptoms that Mr. Murphy came to you complaining about in 2015. And that's a yes or no.

A No.

Q Okay. The disc herniation at L5-S1, you just told us can cause impression upon a nerve root which can cause radiating pain, correct?

A Over a sciatic distribution; yes, it could.

Q The L3-L4 central right paracentral spondylitic changes, that can cause impression upon a nerve root at that level and cause radiating pain, correct?

A That can cause radiating pain as well.

Q So, in 2003, based on this MRI report, Mr. Murphy had significant degenerative disc disease to the lower spine. Is that a fair statement?

A He had -- at L5-S1, he had significant degenerative changes, yes. That's a fair statement.

Q Did Mr. Murphy tell you that he said -- when you

saw him in 2015, did he tell you that he had a 25-year history of back pain dating back to 1990?

A At what date did he tell me that?

Q When he first saw you in 2015, did he tell you that he had a 25-year history of back pain dating back to 2000 -- dating back to 1990?

A He told me he had back pain a long time. I don't think what date he told me how early it was at that point. But he said he had back pain for a number of years and last, of any significance, in 2007.

Q I'd ask you to look at your office note from April 6th of 2016. It's on the screen, if you can read it.

A I got it, too.

Q Okay.

A I have it.

Q I want to go over this with you, Doctor.

You just told the jury on direct examination that you felt the reason that you believe the car accident was the competent producing cause of the pain; and the reason for the subsequent surgery, because Mr. Murphy had herniated discs at two different levels that were found on MRI after the accident; and that's why you believe this was a traumatic condition. Am I stating that correctly?

A Can you repeat that question so I can answer it correctly?

Q You told the jury on direct examination the reason you believe that Mr. Murphy had a traumatic event in the car accident is because he had two herniated discs shown on MRI post motor vehicle accident, that you eventually performed surgery on.

A I can't answer that in yes or no, but I can answer it.

Q Okay. So let's go through your office note.

You're noting in your office note that Mr. Murphy had a recent IME. That's an independent medical examination, correct?

A Correct.

Q And that was done by another orthopedic surgeon, Dr. Toriello (ph)?

A Correct.

Q And Dr. Toriello indicated in his opinion that the --

MR. BREEN: Do we -- can I -- can we just have a quick sidebar?

(Whereupon, the conference was held between counsel and the Court at sidebar out of the hearing of the jury.)

Q So, Doctor, I'm just going to ask you about your

opinion.

In your office note of April 6, 2016, you indicated that males over 50, there will be universal findings of degenerative on an MRI of the lumbar spine. Is that an accurate statement?

A That is an accurate statement.

Q You indicated in your office note of April 6, 2016, the evidence of trauma in this case are the HNPs. HNPs are herniated nucleus pulposus. Is that what it's short for?

A Yes.

Q In other words, HNP is a herniated disc, correct?

A Correct.

Q And you said the evidence of trauma in this case was the herniated disc at two different levels. Is that fair to say?

A On the MRI, yes.

Q Okay. And you said that, My surgery was based on a failure of nonoperative care in a male over 50, who would have the disc degeneration based on age, but HNPs are as a result of the 9-13 motor vehicle accident.

A That's what is recorded, yes.

Q So, you felt and it's your opinion, as stated in your note, that the basis of surgery was those herniated

discs at two levels as shown on the MRI, correct?

A No.

Q When you had this -- when you made this note, when you said, My surgery was based on a failure of non-operative care in a male over 50, who would have disc degeneration based on age -- based on age, but HNPs, as a result of an MVA of 9-3-14, you did not have that benefit of that prior MRI of 2003, correct?

A I did not -- I don't know I had the benefit of that MRI from 2003. I don't know if I had ever heard of it or seen it at that point.

Q You just told us that you only saw it in preparation of this testimony?

A The only way I recall it. I can say I definitely recall seeing it because I read it at that point.

Q Is it also accurate that, in fact, Mr. Murphy had HNPs, herniated nucleus pulposus, disc herniation, at two different levels in 2003, as shown on the Stony Brook MRI?

A Again, I don't know if that's accurate because if there's inaccuracies in the report in two separate levels by the radiologist. In one area he says there's only one herniated disc, and in his conclusion he says there's two herniated discs.

Q Okay. Now that you know that there was a 2003 MRI that showed disc herniations at two levels, do you wish do change your opinion as to the issue of causation? That's a yes or no.

A I don't have an MRI that tells me that in 2003 that I could --

Q That's a yes or no, Doctor.

A I can't answer that yes or no.

Q Okay. Did you review any of the prior records of Mr. Murphy while you were treating him? Not in preparation for court, but while you were treating him.

A Prior records of my practice, or prior records outside my practice?

Q No. Of other doctors that saw him during his lifetime prior to you that treated him for back pain --

A He had had -- the last treatment he told me about was 2007. I don't recall seeing any records of age on him.

Q Okay. And Mr. Murphy also told you that he had occasional flare-ups of back pain, correct?

A He told me he had a long history of back pain with flare-ups, yes, usually lasting several weeks in duration.

Q Did you know, or did you speak to any of his treating physicians that saw him prior to you?

A I mean, I see some of these physicians because they're my colleagues, but I don't recall any specific conversations about Mr. Murphy on his condition, no.

Q Okay. Now, I'm going to show you Mr. Murphy's records from March of 2007, and this is from Dr. Mackey. There's a description of his pain in the lower back, which indicates that he had sharp pain, tingling and stiffness.

Are those symptoms compatible with degenerative disc disease to the lower back?

A Again, I can't answer that yes or no. But, you know, when we say degenerative disc disease, it's a misnomer because it's not really a disease. There are degenerative changes there that can lead to inflammation, or arthritic symptoms that can cause that pain. So in that context, yes.

Q Let me ask you a pain scale. Doctors use -- medical professionals use a pain scale from 1 to 10, correct? Or 0 to 10?

A 0 to 10 or 10-plus.

Q And 0 is no discomfort and 10 is the worse possible discomfort, the most excruciating pain?

A That's a typical scale, yes.

Q Did you know that Mr. Murphy reported to Dr. Mackey in March of 2007 that he had a pain of an 8 on a

scale of 0 to 10? Were you aware of that?

A I'm looking at it; yes.

Q Were you also aware that Mr. Murphy reported to Dr. Mackey back in 2007 that he had a 17-year history of back pain, and the symptoms began over time and have worsened. Were you aware of that?

A I knew he had a chronic history. I don't know what the report was to Dr. Mackey.

Q Were you aware in 2007 that he indicates to Dr. Mackey several things with respect to his pain. It comes and goes and it's very severe. His normal sleep is reduced by less than 50 percent. He cannot lift anything cause it causes extra pain. He gets pain upon -- he can only sit in his favorite chair. He cannot stand for more than a half-hour without increasing pain. He could not walk more than a mile. And his pain was gradually worsening.

Did he tell you any of that when he saw you in 2015? Did he report to you about his problems with his back dating back to 2007?

A Specifically, this visit?

Q Yes.

A No.

Q Did he tell you that he had problems with walking up and downstairs, walking, dressing, standing,

heavy lifting? Did he tell you anything about that?

A Regarding that visit? No.

Q Would any of that change your opinion as to whether or not Mr. Murphy's condition was a gradual progression of his degenerative disc disease?

A If I had a history showing over a timeline that there was onset and progression gradually, it would change my opinion.

Q But you were not afforded the opportunity to look at any of these records prior to your treatment and your diagnosis. Is that fair to say?

A The history given to me was that he had a chronic intermittent back problem dating back a number of years, with his last formal treatment around 2007. That was the history given to me from the patient, not on -- that I can recall any review of any of these records.

Q Would you have wanted to see these records before coming to court and giving an opinion to a jury that everything was caused by a car accident?

A I felt I had enough information to give my opinion based on my history taken from the patient, assuming that the patient wasn't lying to me.

Q That wasn't my question, Doctor. My question was: Would you have wanted to see these records before giving an opinion to a jury on the issue?

A Again, my medical opinion is based on my own evaluation of the patient, primarily based on the history given. In an ideal world, I'd love to see everything. Unfortunately, I don't have that ideal world in front of me.

Q You have a website for your practice, Long Island Spine Specialist, correct?

A Yes.

Q And part of that website details degenerative spinal conditions, correct?

A Correct.

Q In fact, you have a long recitation about lumbar degenerative disc disease. This is from your website. And it talks about the endplate changes and the lumbar degenerative disc disease. This is an illustration of those endplate changes that happen over time, correct?

A Correct.

Q And those are bony overgrowths, osteophyte formations, correct?

A Yes.

Q Because the disc can collapse. Is that fair to say?

A Well, the disc collapses is one part of that, yes.

Q Okay. In fact, you have an animation that you

show on what happens to the disc over time. This is on your website? (Indicating.)

A That is correct.

Q And that's what happens to the disc, it loses water content, it flattens, and it dries up, and the vertebral bodies collapse on each other.

A Correct.

Q Is that fair to say?

A Fair to say.

Q And then those bony outgrowths. And that's a degenerative condition. That's something that happens over a lifetime, or a period of time, correct?

A Over a period of time, yes.

Q And that's what happened with Mr. Murphy. He had degenerative disc disease that happened over his lifetime dating back to 1990. Is that fair to say?

A That's fair to say for everyone, yes, including him.

Q Well, we are here for Mr. Murphy's lawsuit. I'm asking you about Mr. Murphy.

Is it fair to say that he had degenerative disc disease that happened since at least 1990, since his first complaint, and it gradually progressed? Is that fair to say?

A He had back pain since 1990. I don't know when

his exact changes occurred, but he had back pain dating back to then.

Q Did you look at the hospital record from Stony Brook Hospital from the three days after the motor vehicle accident? Did you ever look at that hospital record?

A I don't know if I saw the ER record or just the films, or the report of the films.

Q Would it be important to you before you gave an opinion to the jury, that all of the -- all of his problems were as a result of a car accident, would it have been important to you to see the Stony Brook Hospital records?

A Again, it depends what those records incorporated, whether they're MRIs or CAT scans or X-rays or any imagining, it may have a bearing.

Q Do you know anything about the Stony Brook records?

A Other than he was evaluated three days after the accident, that he was given medication, that he had X-rays of his lower back at that time.

Q Do you know what the diagnosis was from Stony Brook Hospital three days after the accident?

A I don't recall what the diagnosis was, no.

Q Okay. I'm going to show you the Stony Brook

records, and I'd ask you to take a look at the diagnosis. Under "Impression and Plan," lumbar spine strain, left lumbosacral radiculopathy.

A strain is not a disc herniation, correct?

A By definition, a strain is a pull of a muscle.

Q Okay. So it's not a disc herniation, correct?

A It's not a disc herniation.

Q If an individual had -- well, when we talk about somebody has a lumbar spine sprain or strain, as it's described in the hospital record -- and by the way, a strain is different from a sprain, right?

A Again, depends who's using it.

Q Okay. Well, what's your definition of strain?

A A strain is typically a muscle pull, a sprain is a ligament injury. But they're used interchangeably by a lot of non-orthopedic physicians.

Q Okay. There's a muscular-skeletal evaluation that was done in the hospital three days after the accident. There's a notation that says, that says: Normal ROM. Does ROM stand for range of motion?

A Yes.

Q There's also, under the muscular-skeletal evaluation, it notes: Normal strength, no tenderness, no swelling. Is it fair to say that the muscular-skeletal evaluation that was done at Stony Brook three days after

the accident was normal, as far as the muscular skeletal evaluation?

A It's inconsistent with the level above it showing the muscular tenderness in the lumbar area. But it shows in the muscular-skeletal area that it's normal. So one level says no tenderness, and the level above says soft tissue tenderness.

Q When we talk about soft tissue tenderness, that's when you palpate the back, and the patient reports to you that they have some level of pain, correct?

A When you palpate any soft tissue, back or leg.

Q But I'm accurately describing that, when it says, Patient has left paraspinal lumbosacral soft tissue tenderness, that extends to just left of L5 midline vertebrae, negative straight leg raising bilaterally, that's a description of -- he was complaining that he had some pain in his lower back, correct?

A He complained that it was tender when they touched him, yes.

Q And when there's a straight leg raise bilaterally -- straight leg raise is a test to see if there's any nerve root involvement, correct?

A For the sciatic nerves, the L4-5 and 1 nerves, yes.

Q So, the physician from Stony Brook three days

after the accident gave that test, that straight leg raising, to see if there was any nerve root involvement for the lower spine, and there was none. Is that a fair statement?

A To the very lower parts of the spine, that's a fair statement, yes.

Q So is it accurate, Doctor, that three days after the accident when Mr. Murphy went to the emergency room at Stony Brook Hospital and he was evaluated there, the diagnosis was a lumbar spine strain? Is that fair to say?

A That's one or two diagnoses listed there, yes.

Q And that's far different from your opinion that he had a traumatic injury to the discs of the lower back which ultimately led to the surgery that you performed in May of 2015. That's dramatically different from what the hospital record shows, correct?

A My diagnosis don't include the sprain or the left lumbosacral radiculopathy at all. However, at the time of the presentation, he may have had a lumbar sprain because of the proximity of the timing of the accident to his presentation in the ER, I think that the muscles would have been tender if he had a sprain at that time or a strain.

Q Okay. I'd like to review with you again that

issue of whether or not he had a traumatic injury to the disc to his lower back which was caused by the accident. Obviously, that's the issue why we are here.

You performed surgery on Mr. Murphy on May 13, 2015, correct?

A Yes.

Q And as part of good and accepted medical practice, you're required to detail the surgery in an operative note that you include in the hospital record, correct?

A Correct.

Q Okay. I'd like to go over this operative note with you from the St. Catherine of Siena medical records. If you could pull out your operative note.

A I have it.

Q You list a preoperative diagnosis. The preoperative diagnosis that you listed in the hospital record was, Degenerative disc disease of the lumbar spine with associated disc herniation and spinal stenosis with discogenic back pain, L3-L4, L4-L5, and L5-S1. Is that accurate?

A Yes.

Q You put nothing in your preoperative diagnosis with respect to an acute trauma, correct? That's a yes or no.

A That's correct.

Q You put nothing in your preoperative diagnosis that Mr. Murphy was involved in a motor vehicle accident and suffered an acute herniation which ultimately led to your surgery, correct? That's a yes or no.

A Again, that's not in this note, no.

Q You also put in a post-operative diagnosis of degenerative disc disease of the lumbar spine. The same note that you had for preoperative diagnosis you put that in post-operative diagnosis. That's after the surgery was complete, you give your opinion as to the reason for the surgery, and you list that in the hospital record, correct?

A That was correct. That was my findings.

Q And nowhere in the post-operative or the preoperative diagnosis is there any mention of an acute disc herniation or a motor vehicle accident that Mr. Murphy was involved in. Is that fair to say?

A Yes.

Q Okay. I'd ask you about the surgery itself.

You detailed the procedures that you used to complete this operation, correct?

A Correct.

Q And you -- in some detail you go through every step of the surgery. Is that fair to say?

A Yes.

Q As you detail how the patient was set up in the operating room, what position you put him in, what devices you used, and you also talked about the incision and your findings when you open up the spine. Is that fair to say?

A Correct.

Q I'd like to refer you to the bottom of page 13 of the St. Catherine of Siena hospital record, where you detail your findings once the decompression was completed.

THE COURT: Excuse me, Mr. Scahill, would this be Exhibit J in evidence?

MR. SCAHILL: Yes, your Honor.

THE COURT: Okay. Thank you.

Q Do you see the notation that I highlighted? Once the decompression was done, we did not have to perform a discectomy based on no real tension on the nerves itself. We were able to decompress the lateral recesses. There was some hypertrophy ligament and some facet overgrowth leading to the stenosis at the several levels. (Reading.)

Is that an accurate reading of your own operative note?

A It is an accurate reading.

Q So, is it fair to say that the surgery that you performed addressed the bony overgrowth; is that true?

A Addressed the bony overgrowth?

Q Well, you cured, or when I say you "addressed," you did something surgically, you shaved down the bone at that level?

A I shaved down the bone at that level, yes.

Q Is it also true to say, the surgery addressed the spinal stenosis?

A Yes.

Q You opened up the neuro foramen, correct?

A Yes.

Q So, both of those findings that you had on the surgery in your operative report, those are findings that take years to develop. That was not caused by a motor vehicle accident correct?

A That is correct, yes.

Q So, the decompression that you did to the spine, to Mr. Murphy's spine, was due to bony overgrowth that happened over a long period of time. Is that fair to say?

A I decompressed the nerves of the spine, which part of that was due to that bony overgrowth and degeneration that did occur over time, yes.

Q The stenosis that you found during your surgery,

that happened over a long period of time, not something that happened from a car accident, that was a year prior?

A You're looking at a minimum of a year, yes.

Q I'm sorry?

A A minimum of a year, at least. Yes.

Q Okay. So, the stenosis that you find, you agree that that was not caused by a car accident, correct?

A Again, stenosis occurs two ways. Degenerative --

Q I'm talking about Mr. Murphy, now.

The stenosis that you found when you had that surgery, that was not in any way associated with the motor vehicle accident?

A Yes, it was.

Q Now --

MR. BREEN: What was that answer?

THE WITNESS: Yes, it was.

MR. BREEN: It was.

Q The decompression that you did, you didn't do any surgery, or you did not do a discectomy, you didn't remove those discs because you were able to open up the neurocanals by cutting bone and shaving bone. Is that fair to say?

A I was able to decompress his nerve by just removing the bone and ligament away in part of the joint,

yes.

Q Okay. And you would agree with me that that surgery addressed longstanding degenerative disc disease to the spine, not a traumatic incident that happened in September of 2014?

A It addressed both.

Q Okay. Now, how many of these surgeries do you perform in a year?

A A lot.

Q 100?

A A hundred easy. 75. Depending whether I'm co-surgery or assisting, or the primary surgeon, could be anywhere from 150 to 200 some years.

Q And are the majority of the males in their 50s?

A I'd say it runs the gamut. I'd say, you know, it's females, males, older people. Depends on the diagnosis. For this specific case, lumbar fusions and decompressions, probably more predominantly in girls for a different diagnosis.

Q I'd like you to assume for a moment that we're not in a courtroom nor the hospital, but in your office setting, and a colleague came to you and presented a case, and showed you the MRI report from 2003, showed you the treatment records from 2007, showed you the complaints that Mr. Murphy was making for the last

17 years over chronic lower back condition, showed you the MRI of 2014, is it fair to say that your opinion would be that that individual had longstanding degenerative disc disease, and the problems in his back were due to that degenerative disc disease that happened over a long period of time? Would that be fair to say?

A Again, I'm not examining the patient or taking his history. But the presentation would be that he had a back problem, and that back problem probably was related, to some degree, to those degenerative changes that were found during that period of time. I don't know if that's the sole cause.

Q In medicine you're required to develop a differential diagnosis, correct?

A It's always good to have an idea of what you think is going to be No. 1, 2 and 3, in terms of a differential. Not all the time do you always -- do you have a differential. Sometimes it's pretty --

Q But you're taught in medical school to develop a differential diagnosis as a proper treatment method, correct?

A Typically, yes.

Q And a differential diagnosis is a different cause of a symptom or a pathology that you find, correct?

A It can be multiple reasons for a presentation of

a symptom, yes, a differential diagnosis.

Q Did you develop a differential diagnosis in this case?

A Well, the diagnosis was that he had a back problem with a radiculopathy. The differential was that I didn't list it. Kidney stones can give back pain, aneurysms can give back pain, ulcers can give back pain, gall bladder disease can give you back pain. But his symptoms were consistent with other reasons for that differential. So even though I'm going through my mind as I'm asking him more questions, he's giving me answers that are eliminating these differentials immediately. So by the time I get to the end of my evaluation with him, he's got a back problem with a radiculopathy due to something going on in his spine. So, a list of differentials that can be 50 pages long is now down to a couple of lines or sentences. So, yes, I mean --

Q Let's talk about it in the context of this case, this lawsuit.

Isn't it, in fact, a differential diagnosis that Mr. Murphy's problems occurred over a 25-year period, as opposed to a car accident that happened in September of 2014?

A He had underlying problems of his back over a number of years. They're unrelated to the motor vehicle

accident, yes.

Q Okay. Are you also familiar with terminology in the medical field known as "secondary gain"?

A Yes.

Q Secondary gain is when someone, a patient of yours, is reporting to you something not based on his medical condition, but based on the fact that he has something else pending, such as a lawsuit for personal injury or a workers' compensation case, correct?

A There's some type of gain that the patient is being motivated for, whether it's through a divorce proceeding, he's not paying child support, a motor vehicle accident, the kind you get disability to get out of the Army. I mean, I can give you a list of reasons that I've heard for secondary gain, or seen personally.

Q But it's something that you are taught in medical school, and it's good practice to keep into account secondary gain when you're listening to a patient's report, correct?

A We actually, in spines specifically, not only do we listen to the history, there's a test called a Waddell Sign, that we always look for in all our back patients. After Dr. Waddell developed them for -- either looking for a secondary gain, or a magnification due to psychiatric illnesses related to presentation as back

problems.

Q Did Mr. Murphy ask you, and did you provide notes and letters to his workers' comp. carrier to allow him to continue to receive benefits? Did your office do that for him?

A I would assume he did if he required them, yes.

Q And all of your treatment was paid for by workers' comp, correct?

A I'd have to look at that. I'd assume that it was an injury on-the-job as he described it, yes.

Q Okay. He doesn't owe you anything?

A Everything is guided by New York State law with regard to workers' compensation.

Q So, everything was paid for by Comp?

A The carrier of that compensation case, yes. Or should have been unless the case was denied.

Q And Mr. Murphy was out of work for two years. And through September, I believe he said September 16, 2016, he was getting paid by workers' comp. I would like you to assume that was his testimony yesterday.

A Okay.

Q Did he report to you in September of 2016 that he drove, or prior to seeing you on September 7, 2016, that he drove to Florida?

A Yes. He had a stop in Virginia due to back

spasm.

Q Okay. And you were aware that he was on disability at that point while he was driving to Florida on vacation, you were aware that he was getting workers' comp. for disability?

A I don't think they paid for his vacation, but they were paying for him not to be in his job, yes.

Q But while he was driving to Florida, he was getting checks on the basis of his report that he was unable to work --

A Yeah. I didn't have a restriction on him driving, I had a restriction on his working.

Q Understood. So, did you take into account the issue of secondary gain with respect to the plaintiff in this case?

A I've known Mr. Murphy for a number of months to years, and there was no evidence that this patient had secondary gain based on his presentation to me.

Q Okay. Okay.

Thank you, Doctor.

MR. SCAHILL: Nothing further.

THE COURT: Any redirect, Mr. Breen?

MR. SCAHILL: Yes.

REDIRECT EXAMINATION

BY MR. BREEN:

Q Doctor, did you know that Mr. Murphy drove to Florida because his mother was sick, and she had lived in Florida, and he was going to visit her?

A I don't recall the reason why. I do know he went there.

Q And do you know he went a second time because unfortunately she died, and so he went to Florida --

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

MR. BREEN: Judge --

THE COURT: Excuse me.

I'm going to allow it.

MR. BREEN: Thank you.

Q Did you know that?

A I don't recall the timelines.

Q Okay. When you looked at that 2003 -- can you throw that up for me?

When you looked at that 2003 MRI that you read the report of, and that we couldn't, unfortunately, not get the films for, did that MRI report indicate that there was any kind of impact on the nerves or the spinal canal or the nerve roots?

A The only area that says anything about any significance is that -- you read the body of the report, okay, which is pretty much most of the yellow highlighted

area, except for the conclusion which, you know, is printed out, Conclusion.

So, you look at the conclusion. The conclusion says, two-level disc herniations, as described, with mild stenosis. But when you go to the "as described" section, he only describes the herniated disc at L5-S1. He calls L3-L4 a disc budge, which are normal variance, disc budge, I mean, that's what they do -- causing some mild stenosis. It does not make any comment about nerve root impingement.

At 5-1, he describes this advanced degenerative changes. He makes degenerative changes, mild stenosis, and mild to moderate exit foraminal encroachment. So, there's some narrowing of the nerve roots exits at L5-S1, where the herniation is and the advanced degenerative changes. So, 5-1 does show changes at both sides of the spine.

Q Okay. But when you look at the 2014 MRI that was done Zwanger Pesiri, you note that in that report, which was just after the accident, it shows, mass effect of the L3 and L5 nerve roots.

A Correct.

Q All right. And it also shows compression of the L5 nerve roots.

A Correct.

Q That's not anything that was reported back here, was it?

A No, it was not.

Q Okay. Now, when Mr. Murphy saw you for the first time, you took -- you had a history. And he told you about the '90 accident, you know, on-the-job, and the '94 accident, and all the way up to 2007.

A He told me he had a long history of pain up to his last documented treatment in 2007.

Q And then he told you he was six years without any treatment, or any kind of, you know, intervention from any health care professional, right?

A That he did not have to seek any type of treatment during that intervening time.

Q So, then, the motor vehicle accident happens, he winds up at Stony Brook three days later, and winds up going through intensive treatment at your office and back surgery. Is that a coincidence, Doctor?

MR. SCAHILL: Objection.

Q Or is that a result of the motor vehicle accident?

MR. SCAHILL: Objection, Judge. This is beyond the scope of redirect.

MR. BREEN: It's directly on --

THE COURT: I'm going to allow it.

You may answer.

Q Do you understand the question?

A I think so. The patient had a history of back pain on and off that required treatment for a period of time. And then he had back pain that last needed treatment, that we know of, in 2007, and is relatively symptomatic, functioning and working until the motor vehicle accident. He has increasing back pain, and now of a radicular pain, radiating pattern down the leg that now has had treatment directly under my office care, or my associates, that doesn't respond to care. The new MRIs are consistent with his presentation. He has failed on nonoperative care. And he was, in my opinion, appropriately indicated for surgery, if he was to pursue it, based on the level of his symptoms that were limiting his ongoing life. And he chose to do that. And that was a direct consequence of the motor vehicle accident history he gave me from September of 2014.

Q Thank you.

MR. BREEN: I have no further questions.

THE COURT: Is there any recross, Mr. Scahill?

MR. SCAHILL: Yes. Thanks.

RECROSS-EXAMINATION

BY MR. SCAHILL:

Q Doctor, one more thing. The MRI that was taken at your office's request in September of 2014, Mr. Breen was just asking you about a mass effect on the right L3-L4 nerve root. Do you have that report in front of you, by the way?

A I have the report, yes. I believe I have the report.

Q Yeah. Is there a quantifying word describing the mass effect that Mr. Breen just asked you about?

A If you pull it up for me, it will be quicker, I think. Let me just see if I have it in back. I believe it said mild, but I have to look at it.

Q That is correct, Doctor?

A I have it. I have it. Hold on. I can tell you exactly.

Q Okay. The findings -- all of findings on this MRI report point to --

A At L3-4, he described mild mass effect.

Q "Mild" was the word?

A And at L4-5, he doesn't quantify it mild or whatever. And at L5-S1, he describes the osteophytes without nerve root compression.

Q Now, those osteophytes that were described, we already talked about that, that's bony overgrowth that happens over a number of years, correct?

A Yes.

Q Okay. There was an impression on the MRI that was taken the same month as the automobile accident. The impression is, multilevel lumbar degenerative disc disease at various levels of the spine. Is that fair to say?

A The actual wording is, multiple level lumbar degenerative disc disease, most advanced at L5-S1. He doesn't detail the levels.

Q The disc herniations, the disc descriptions all found on this MRI that was taken in September of 2014, those same findings can be on a 53-year-old male with a history of back pain with or without a traumatic event. Is that fair to say?

A Those degenerative changes would be universal on the a 50-year-old male yes.

Q With or without a traumatic event.

So, everything that's written on this MRI can happen to a 53-year-old male with or without a motor vehicle accident. Is that fair to say?

A Yes.

MR. SCAHILL: Nothing further.

Thank you.

FURTHER REDIRECT EXAMINATION

BY MR. BREEN:

Q Would it be logical or would it be normal to find he only read the first -- of the impressions there.

THE COURT: I think we already had cross --

MR. BREEN: I'm sorry, Judge. May I?

THE COURT: Okay. Well, we'd --

MR. BREEN: I'm just going to --

THE COURT: -- have to give another bite at the apple to your adversary.

MR. BREEN: I'm just going to go over this same report.

Q Mr. Scahill read only the first part of the impression, which said, multilevel lumbar degenerative disc disease, most advanced at L5-S1, right? Yes?

A Yes.

Q But there are two others right below that, right?

A Correct.

Q Disc herniation at L3-4 with compression of the right L3 and L4 nerve roots.

Compression causes pain, right?

A It can, yes.

Q And it causes nerve damage?

A It can.

Q And then it says, disc herniation at L4-5 with compression of both the L5 nerve roots, right greater

than left. That's the full diagnosis, isn't it?

A Yes. I agreed to this diagnosis when I answered my question yes to him.

Q Okay. Thank you.

THE COURT: Mr. Scahill.

FURTHER CROSS-EXAMINATION

BY MR. SCAHILL:

Q I asked you, Doctor: Can all of those findings be with or without a traumatic event? And you said, yes. Is that accurate?

A Yes, that is accurate.

Q Okay.

MR. SCAHILL: Nothing further.

Thank you.

A No, there's a motor vehicle accident -- you said, could it be without a motor vehicle accident, is the question.

Q With or without a traumatic event, I said.

A Is that a new question or the question you asked me?

Q That's what I asked you before. All of the findings on this MRI report can happen with or without a traumatic event?

A I recall that you said with a motor vehicle accident.

Q With or without a motor vehicle accident, all of these findings can happen?

A Yes.

Q That's what I asked you.

MR. BREEN: One more.

THE COURT: I really think we're going to draw a close.

MR. BREEN: Okay.

THE COURT: Okay.

Doctor, are those your own copies of the papers that you have here? (Indicating.)

THE WITNESS: Those are what I brought in this morning.

THE COURT: So, you're going to take them with you, I take it.

THE WITNESS: Yes. Thank you.

THE COURT: So you may step down.

Thank you for your testimony.

I think we can close the item on the screen.

MR. SCAHILL: Yes.

Thank you.

THE COURT: So, okay. So, I think at this point we'll turn back -- are you ready to turn back -- well, I guess Mr. Scahill was on cross-examination

of the plaintiff, I believe. That's where we left off before we took the doctor out of order.

So, I'm going to ask Mr. Murphy to step forward. Mr. Murphy.

Thank you.

COURT CLERK: Please keep in mind you're still under oath, Mr. Murphy.

THE WITNESS: Yes.

CROSS-EXAMINATION

BY MR. SCAHILL:

Q Good afternoon, Mr. Murphy.

A Good afternoon.

Q When we left off yesterday, we were talking about Dr. Wani, Shafi Wani, in Stony Brook.

Did you treat with that doctor in 2003?

A I did.

Q And did you treat with Dr. Wani for problems that you had with your lower back?

A I did.

Q And did you report to Dr. Wani that you had not only back pain, but it was radiating into your left buttocks?

A I could have. I don't remember.

Q And did Dr. Wani send you for an MRI in 2003?

A He did.

Q And did you discuss with Dr. Wani the findings from the MRI of 2003?

A I did. I don't remember what.

Q Or were you aware -- we just went through this extensively with Dr. Dowling. Were you aware in 2003 that you were diagnosed with a two-level disc herniation to the lower back?

A Okay.

Q Were you aware of that in 2003, that Dr. Wani discussed that with you?

A It's Wani. Yes.

Q And now, did you ever tell Dr. Dowling's office that you had a prior MRI of 2003?

A I -- probably not.

Q Were you asked by any of the doctors in his practice whether or not you had prior diagnostic testing, such as an MRI?

A I could have been asked.

Q And did you report to them about this prior MRI?

A Probably not, because I probably wouldn't have remembered it.

Q Okay. And how about the treatment that you had with Dr. Mackey? Did you -- I'm going to go through some of her records. 2007 you went to Dr. Mackey. You complained of sharp pain and tingling in the lower back

that was 8 on a scale of 0 to 10, and that you had the condition for over eight -- over 17 years, and that it was a gradual progression of pain to the back. Is that all accurate?

A I'm sorry. Say that again?

Q In 2007, and this is a note from March 27, 2007, from Dr. Mackey. You went to her complaining of sharp pain, tingling and stiffness in your lower back.

A Yes.

Q And you report to her that on a scale of 0 to 10, you had 8 out of 10 pain in your lower back?

A Yes.

Q And you told her that those symptoms occurred over a period of 17 years, and that they gradually increased over that period of time, correct?

A I don't know if I told her that. Normally, if I would see a doctor, I would just say that I had prior back issues, so they knew about it. I don't -- I don't recall the verbiage.

Q The question was: Did the symptoms begin gradually over time, or suddenly? And you answered, over time. That's accurate?

A That's accurate. But I would also explain that if I went to a chiropractor, if I went to a physical therapist, those pains would go away.

Q Okay. When you saw her in March of 2007, you filled out a questionnaire as far as the intensity of the pain. You wrote, or you circled, the pain comes and goes and it's very severe. It interferes with your sleep. You can only stand for a half-hour without increasing pain. You cannot walk more than a mile, and that your pain is gradually worsening. Is that an accurate depiction of how you were in March of 2007?

A Yes, sir.

Q Is it also true that you went to Dr. Sterling, and you told Dr. Sterling that you had a history of chronic back pain? Is that also true?

A I told him I had a history of back pain, yes.

Q Of chronic back pain?

A I don't know if I would have said chronic, but I know I would have said I had a history of back pain.

Q Okay. And that resulted in frequent flare-ups?

A I wouldn't say frequent. I would say it flared up from time to time.

Q I want to show you your treatment record from that facility. Here's a treatment record from North Shore Sports Medicine and Rehabilitation. 47-year-old, YO, year old, long HX, history, LBP, is lower back pain, C, with a line over it, is Latin for "come," with frequent flare-ups.

Is that a fair -- and I'll give you the date of this. This is your treatment with a physical therapist Georgina Polimini (ph), at North Shore Sports Medicine and Rehab in 2007. Is that a fair description of what you told North Shore Sports Medicine and Rehabilitation in 2007?

A She could -- yeah -- I don't know if I would have said frequent. I mean, I would have explained it, it flared up if I did something to aggravate it.

Q You would agree with me that it says "frequent flare-up"?

A Yes, sir.

Q Okay. I also wanted to show you the records from Dr. Dowling's office. When you first went to Dr. Dowling, and you treated with Dr. Patel, the physiatrist that Dr. Dowling just described earlier, correct?

A Yes.

Q And when you went to Dr. Patel, were you asked, did you have a history of lower back pain? Were you asked that question?

A I don't recall.

Q Okay. Did you report to them a history of lower back pain?

A I would have, yes.

Q Okay. I went through this at length with Dr. Dowling, but every one of your visits --

A I heard.

Q Do you have any explanation for the lack of an accurate medical history in your own records from Dr. Dowling's office?

A I don't.

Q Okay. But you would agree that the history as recorded is completely inaccurate because at that time in 2014, you had a 24-year history of chronic back pain?

A Well, I wouldn't say that was all inaccurate.

Q Well, the history I'm talking about, when it doesn't say anything about your prior back pain.

A I don't know if I would consider that inaccurate if it just didn't say it.

Q Okay. There's a glaring omission. I'll use a different terminology.

A I would say omission. You know. I mean, I've -- whenever I saw a doctor, I would tell them I had --

Q -- a long history of lower back pain.

A -- a long history, yes.

Q Now, let me ask you a little bit about the accident. That Silverado truck, you would use that for work?

A Both.

Q Yeah. That was a leased vehicle out of your business?

A Not out of my business, no.

Q But you used it for business --

A I would use it to get back and forth to work.

Q Okay. This damage that's shown in the photograph to the bumper, that was repaired, correct?

A That's correct.

Q And you continued to use that vehicle after the accident, correct?

A That's correct.

Q The bumper was taken off and replaced, and that toe hitch was replaced. And that cost about $3,000 in damages, right?

A Plus the front grille, correct.

Q Okay. At the time of the accident, you're in a bucket seat, right, a cushioned bucket seat, not a bench?

A It's -- it was a bench seat.

Q It's a bench seat in the fronted of that Silverado, correct?

A Yes, correct.

Q You're wearing a seatbelt?

A I was.

Q It's going across your shoulder and across your lap?

A Yes, it did.
Q Did your seatbelt restrain you in this accident?
A Yes.
Q Did it hold you back?
A Yes.
Q It held you back into the seat?
A Yes.
Q The vehicle was equipped with air bags?
A Right.
Q The air bags did not go off?
A No.
Q We went through this, and Mr. Breen went through this. Police came to the scene, they asked you if you wanted an ambulance, and you said no. Is that fair to say?
A Yes.
Q Three days later you told us that you went to Stony Brook Hospital. Do you recall being told by the medical professionals at Stony Brook that you had a strain to your lower back?
A I really don't recall what they told me.
Q Okay. Is it fair to say, Mr. Murphy, that at this point you've gone back to full duty at work?
A No.
Q Prior to the accident, you worked four days a

week?

A Prior to the accident -- yeah, that was my schedule, but I could have worked more.

Q Do you work four days a week now?

A No.

Q How many days a week do you work now?

A Possibly two. Two, sometimes three.

Q Okay. And are there any restrictions on your driving at this point?

A No.

Q Are there any -- did any doctor tell you to stay out of work?

A As of when?

Q As of now.

A As of now? No.

Q You haven't seen Dr. Dowling, other than seeing him today in court, you haven't been back to his office in over a year?

A No. I just saw him -- I saw him within the last month.

Q Did he discharge you from treatment, told you don't come back to me unless you have any problems?

A No.

Q Okay. Are you taking any medication now for your back other than over-the-counter?

A I am.

Q As far as your activities of daily living, I know you said you can't do things that you used to do, boating, other activities. Other than those activities that you described earlier, you're back to the normal daily activities of your daily life, is that --

A No.

Q You're able to do things without restrictions?

A No.

Q Well, we saw the video of your working. You're able to perform at that level, correct?

A Well, I --

Q Is that fair?

A As what level is that? I don't understand --

Q As shown in the video.

A I just don't understand that question. I'm sorry.

MR. SCAHILL: Okay.

Nothing further.

Thank you.

THE COURT: Mr. Breen.

MR. BREEN: Yes. Thank you.

REDIRECT EXAMINATION

BY MR. BREEN:

Q Did you go to Florida twice during the time that

you were out of work?

A I did.

Q Why did you go there?

A Cause my mother was ill, and then she had passed away last November.

Q If your mother lived in Philadelphia, would you have gone to Philadelphia rather than Florida?

A Yes.

Q All right. How did you get to Florida the first time when your mother was ill?

A The first time I flew.

Q Okay. Now, the second time she died, unfortunately?

A Correct.

Q How did you get there that time?

A I drove.

Q Did you drive or did your wife drive?

A My wife drove.

Q Did you come back together?

A No.

Q How did you come back?

A She flew back; I drove back.

Q Did you drive back?

A I did. I drove to Orlando. And I ended up getting an Amtrak, which took me to Virginia, because the

trip there with my wife was -- I was just in a lot of pain.

Q Okay. You called the Stony Brook emergency room on 11-7, approximately two months after your accident, to ask them for a disability note from the 16th, when you went there, up until the 25th, when you eventually and finally went to Long Island Spine. Why did you do that?

A Because the adjuster -- I believe the adjuster might have been asking me for that note so they could pay me.

Q Did you ever get paid?

A I did.

Q Okay. Did you call them once, by the way, or did you call them more than once?

A I only called them once.

MR. BREEN: I'm not sure what number we're up to.

Officer, can you mark this document as Plaintiff's --

THE COURT: We up to 7.

COURT OFFICER: -- Plaintiff's 7.

MR. BREEN: Seven.

THE COURT: That would be for ID.

MR. BREEN: Yes.

Any objection, Frank?

MR. SCAHILL: No objection.

MR. BREEN: Okay. Right into evidence, please.

THE COURT: So, Mr. Scahill, you don't object to this coming into evidence?

MR. SCAHILL: No, your Honor.

THE COURT: Okay. Then, we'll mark it right in.

COURT OFFICER: Plaintiff's 7 in evidence.

(Plaintiff's Exhibit 7 was received in evidence.)

COURT OFFICER: Being shown to the witness.

(Handing.)

Q Mr. Murphy, have you ever seen this document before?

A Yes.

Q It's a case snapshot from workers' comp. of all the treatment that you received. Unfortunately, it only goes back to 1995, so it doesn't include your 1990, okay?

A Okay.

Q All right. But in 1995, when you had that second workers' comp. claim in February, it then tells or, gives a, as they call it, a snapshot of every time you went to see a doctor.

A Yes.

Q Now, for most of this time you were working, right?

A Yes.

MR. SCAHILL: I'd like to clarify, Judge. This isn't a list of his treatment dates, this is the decisions that were issued by the board with respect to specific things. This is not comprehensive with all of his treatment dates.

MR. BREEN: You can cross-examine.

MR. SCAHILL: Okay. Except to say the years that he had treatment.

THE COURT: Okay. Well, can you clear that up a little bit, perhaps, Mr. Breen?

Q So, looking at this document.

A Okay.

Q In 1995, it looks like you had treatment maybe once to twice a month with Dr. David Wallman. Is he a chiropractor?

A He is.

Q Now, I presume that when you first went to see him, you had sharp pains?

A Yes.

Q Like you saw with Dr. Mackey, that Mr. Kayhill -- Scahill showed you, also a chiropractor, right, Dr. Mackey?

A Correct.

Q And they had you fill out forms?

A Correct.

Q And in the beginning you mentioned that it was sharp pains. And then what happened?

A He would treat me.

Q And?

A And I'd get better.

Q Okay. In '96, it looks like you treated about -- well, some of them are just decisions. But do you know how many times you treated in 1996 with Dr. Wallman, W-a-l-l-m-a-n, chiropractor?

A Well, it's '96. I mean, it says here once.

Q Okay. And as we go through the years, it looks like some years you treated twice, three times in a year; is that accurate?

A Yeah.

Q Okay. And the last one being 2007, right? I'm sorry, 2008, Dr. Sterling, right?

A Okay.

Q Do you see that?

A Yes, yes.

Q And then it goes on to your newer treatment.

There's no question, and we're not hiding the fact that you had lower back pain starting in 1990,

right?

A Right.

Q Was it consistent? Was it gradual? Did it get worse, worse, worse, worse, worse, or did it get better? I mean, you tell us, what happened?

A I could do something; I would throw the back out. I go and I get adjusted, I go to a physical therapist, and I was fine. You know, it just -- it was the treatment, and then I was okay.

Q In '95, you were working for Smithtown Ford?

A Correct.

Q And you then went out on workers' comp. for how many months, do you remember? '95 accident.

A I'm trying to think. I -- I went out in February. I guess about five months.

Q Okay. And during that time, you were getting workers' compensation benefits?

A Correct.

Q What did you do next? You didn't go back to that job.

A I didn't.

Q So, what did you do?

A After I left Smithtown Ford, I ended up working for a bus company for a year.

Q And was that in 2000 --

A No.
Q No?
A 1996.
Q '96. You drove a bus?
A The '96, '97 season, yes.
Q And then what?
A Well, I had the carpet cleaning. So, I would drive the bus and, um, when I would drop the kids off, I would, if I had a job with the carpet cleaning -- I was trying to build up the carpet cleaning so I didn't have to drive a school bus.
Q Well, the carpet cleaning business, was that something that you walked into and there was a lot of work? Or --
A No. It's something that I had to build up. At first, I was doing friend's carpets. I did my mom's carpet. So, you know, so it was friends, family. You know. And I just -- I had to build it up. It's not something that I had gotten and I just had accounts.
Q Now, you were asked yesterday about the type of work that is. And you're working with a machine --
A Correct.
Q -- right? Is that a machine that you were able to handle yourself?
A Sure.

Q How long did you do that work for?

A I had -- I had that business till 2011, is when I ended that.

Q And that's when you opened the bagel shop --

A I opened the bagel shop in '09. So, I actually would still do carpets --

Q So, you were working both jobs?

A I was working both jobs, correct.

Q And we heard that you tried, or you did open a second bagel shop.

A Correct.

Q When was that initiated?

A Well, I started -- I started negotiations for the building probably in spring to -- spring, summer of, I forget the year that was.

Q Was it before or after the accident?

A It was before the accident.

Q Before the accident?

A Yeah, it was just before the accident. So --

Q So, spring and summer of --

A -- 2014.

THE WITNESS: Oh, I'm sorry.

THE COURT: Yes, we just need to have one at a time.

Q So, did you start that business before the

accident?

A Yes.

Q So, that was the spring of 2014?

A Correct.

Q And that's the business that you told us eventually you had to give up because you couldn't keep it up?

A Yes. But I didn't open the business until October. Or later. It might have been January. But I started negotiations, I started putting the money out before I got into the accident. So, the money was already set forward to, you know, start the business. I had, you know, my daughter and son-in-law were on board. I mean, I wasn't planning on getting into a motor vehicle accident.

Q Okay. There came a time before you went back to work that you joined a gym and started going back to the gym.

A Correct.

Q What gym and when did that start?

A It's a new gym. It's called Orange Theory, and I started that -- Dr. Dowling gave me the okay in September of -- the beginning of September 2016.

Q And you went to the gym how often?

A As often as I could.

Q Every day? Every other day? What?

A Well, I didn't go every day, and they had a, um, a weight loss challenge, so at that time I had gone every day because it was a six-week thing, and you had to go -- well, you had to go at least three to four times a week, anyway. But I pretty much went every day.

Q So, the video that we saw a little snippet of from the 28th of September 2016, was a couple of weeks after you had already started going back to the gym?

A That's correct.

Q And you were back at work?

A That's correct.

Q And how long was it after your surgery? The surgery was May of -- 2015?

A -- 2015. So, a little over a year.

Q A year and four months?

A A year and four months.

Q Okay. Thank you.

MR. SCAHILL: Nothing further, your Honor.

THE COURT: No recross? Okay, then.

Mr. Murphy, you may step down.

THE WITNESS: Thank you.

THE COURT: Okay. I think it's a good time to break for lunch, and we will come back at 2:15.

Let me give my usual reminders to the jury

about behavior during the break.

Not to discuss the case amongst yourselves or anyone else.

Not to do any independent research or look up anything about the case or the subject matters that we have heard about this morning, or any other time during the case.

Not to discuss or accept any payment or benefit for supplying information about the case, and to please promptly report any incident involving any attempt to improperly influence you.

So, we will regroup promptly at 2:15. We're adjourned.

COURT OFFICER: All rise. Jury exiting.

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