

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX : PART IA6

YDAIZA DECASTRO

Ind. No.
23683/05

Plaintiff,

-against-

ANDREWS PLAZA HOUSING ASSOCIATES, L.P., &
METRO MANAGEMENT & DEVELOPMENT, INC.
Defendants.

851 Grand Concourse
Bronx, New York 10451
June 9, 2009

BEFORE:

HON. EDGAR G. WALKER
Justice of the Supreme Court

CERTAIN & ZILBERG, PLLC
Attorney for Plaintiff
535 Fifth Avenue
New York, New York 10017
BY: GARY TODD CERTAIN, ESQ.,
BY: MICHAEL A. ZILBERG, ESQ.

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Attorney For Defendants
120 Broadway
New York, New York 10271
BY: MICHAEL R. JANES, ESQ.

LAURENCE S. WILLIAMS
Senior Court Reporter

1 THE COURT: Good morning folks, here I
2 am, and you know why. I don't want to prejudice
3 you with respect to the doctors' testimony, so I
4 won't say anything about believing doctors when
5 they say you'll be out by a certain time. In any
6 event, we do have Doctor Klein here to testify.
7 Now, what I'm about to read to you may make more
8 sense to you later than it does now, but the
9 lawyers wanted you to know that Doctor Jeff Klein
10 provided his June 1st 2009, narrative report to
11 Plaintiff's Counsel on June 5th, 2009. And the
12 same report was exchanged with defense Counsel on
13 the afternoon of that day, after proceedings in
14 court had been concluded. Okay. Keep that in the
15 back of your minds. And the reason for me reading
16 this to you will probably become clearer later.

17 Okay. Go ahead.

18 MR. ZILBERG: Plaintiff calls Doctor
19 Jeffrey Klein.

20 D-O-C-T-O-R J-E-F-F-R-E-Y K-L-E-I-N, having been
21 called as a witness by and on behalf of the Plaintiff,
22 having been first duly sworn by the Clerk of the Court,
23 testified as follows:

24 COURT CLERK: Please state your name and
25 business address for the record.

Dr. Klein - for Plf. - Direct 145

1 THE WITNESS: Jeffrey D. Klein, MD.

2 THE COURT: It's G?

3 THE WITNESS: J. The address is NYU
4 Hospital for Joint Diseases, 380 2nd Avenue, Suite
5 1001, New York, New York, 10010.

6 DIRECT EXAMINATION

7 BY MR. ZILBERG:

8 Q Good morning, Doctor Klein.

9 A Good morning.

10 Q Doctor Klein, are you a physician duly
11 licensed to practice medicine in the State of New York?

12 A Yes, sir.

13 Q And when were you so licensed?

14 A In 1994.

15 Q And could you please tell us about your
16 educational background?

17 A Sure. Public schools, New York City.
18 Undergraduate, Harvard University. Medical school at
19 Columbia University, College of Physicians and Surgeons
20 here in New York. That's college and medical school,
21 and then there is a lot of training after that. All of
22 my surgical training, general, surgical and orthopedic
23 surgical training is back at Harvard Medical School,
24 the Massachusetts General Hospital, and the Brigham and
25 Woman's Hospital. Residency is a period of time after

1 you graduate medical school and you pick a specialty,
2 you then train for quite a few years. And in surgical
3 subspecialties, the longest, to really focus on that
4 specialty. But, even after six years of orthopedic
5 surgery, when you want to do spine surgery which is
6 what I do, there is virtually always additional
7 training. So, I spent another six months doing
8 pediatric spine surgery fellowship at Children's
9 Hospital at Boston, Harvard Medical School and a year
10 of adult spine surgery fellow, University of
11 California, San Diego, in neuro sciences program.

12 Q What is neurosurgery?

13 A Neurosurgery is the branch of medicine and
14 surgery that is specifically devoted to treatment of
15 disorders of the central nervous system, the brain, the
16 spine. I was trained by both neurosurgeons and
17 orthopedic surgeons.

18 THE COURT: I'm an orthopedic surgeon in
19 terms of board certification, but really, the
20 specialty that I am in is spine surgery, which
21 includes both neurosurgeons and orthopedic
22 surgeons.

23 Q And, which field are you board certified in?

24 A Orthopedic surgery.

25 Q Can you please explain to the Jury what that

1 means?

2 A Board certification is a process that each
3 field has, in order to examine and assure that the
4 physicians in the United States have a certain level of
5 competence in their practice. Every discipline has
6 their own national board, and they go about it a little
7 differently. But in orthopedic surgery, it involves
8 both a written exam, as well as an oral examination
9 that you take. You actually, you can't be examined for
10 the oral exam until you've been in practice for two
11 years in one given location. That's just the rule in
12 orthopedic surgery.

13 Q And Doctor, do you currently have any
14 hospital affiliations?

15 A Yes, sure.

16 Q Any special appointments at these hospitals?

17 A I'm part of the full time faculty at NYU
18 hospital for Joint Diseases in New York. I'm one of
19 the full time members of the spine surgery service at
20 Hospital for Joint Diseases.

21 Q And, do you teach in that capacity?

22 A I teach regularly.

23 Q And, have you been published?

24 A I have, quite a few times. Original
25 articles for research as well as textbook chapters,

1 presentations at national, international meetings,
2 et.cetera, everything.

3 Q Have you received any significant awards for
4 your work in spinal surgery?

5 A Yes, quite a number.

6 Q And are you actively involved in the area of
7 spinal surgery?

8 A Completely so. My practice has been devoted
9 a hundred percent to spine surgery since my first day
10 in practice in New York in August of 1994.

11 Q And, how many days per year do you spend
12 carrying for patients?

13 A I would say three hundred and sixty-five,
14 because even when I'm away, which doesn't seem to be
15 that often, the cell phone is always on. I don't even
16 sign out when I go away, even though I have my
17 Associates in the department covering. I'm still
18 involved. But, basically full time.

19 Q How many spinal surgeries do you perform in
20 a month?

21 A You know it's variable. Because spine
22 surgery is not like knee arthroscopy, where you do six,
23 eight surgeries a day. My cases vary, from the
24 shortest surgery might be two to three hours, but the
25 average is probably five or six. So, we'll do one or

1 two cases on a given operative day. So, in a given
2 month, I might do, you know, eight cases one month and
3 sixteen cases the next month. It's variable, but I
4 generally average about a hundred to one hundred and
5 fifty cases a year.

6 Q And when did you do your last surgery?

7 A Yesterday.

8 Q And when is your next one scheduled?

9 A This coming Monday.

10 Q Doctor, are you being compensated for your
11 time here today?

12 A Yes.

13 Q At what rate?

14 A Well, for all of my time, not just the time
15 here, but time for preparation, time for discussion
16 with you, as well as half of this day, five thousand
17 dollars.

18 Q And if you were not here today, what would
19 you be doing?

20 A I would be in the office seeing patients.

21 Q Have you been called upon to testify in
22 court previously?

23 A I have, yes, though not by you.

24 Q Have you been accepted in court as a medical
25 expert previously?

1 A I have, yes.

2 Q Where?

3 A Certainly in this courthouse, Jamaica,
4 Manhattan. Nassau, those, I mean, probably, on the
5 average, I probably testify anywhere from three to five
6 times in a given year, typically for patients I cared
7 for, usually operated on. I might go in a year and
8 only have two or three, and might be in a year five or
9 six, any of the locations in the New York area.

10 Q Now, Doctor, in the course of your medical
11 practice, did you come to evaluate Ms. DeCastro?

12 A I did, yes.

13 Q And when was that?

14 A My first consultation with Ms. DeCastro was
15 on January 4th, 2007. I'm pretty familiar with her
16 case, but I did bring notes with me, so when you ask me
17 specific dates, because I'm a little neurotic, I'm
18 going to check down on those dates, if that's okay.

19 MR. ZILBERG: Judge, if he may.

20 THE COURT: Yes, he may.

21 MR. ZILBERG: Thank.

22 THE WITNESS: Thank you.

23 A January 4th, 2007.

24 Q Can you please explain what your first
25 examination of Ms. DeCastro revealed?

1 A Sure, that began with a history, which is
2 basically the story of the events leading up to and
3 involving whatever brings the patient to my office.
4 Something about their past medical history as well. In
5 her case, she was a 42-year old woman. She described
6 having a fall on September 11th, 2005. Of course
7 that's a day that rang and was easy to remember. She
8 described tripping in a space between the floor and the
9 elevator, in the gap. She described her foot or heel
10 getting caught in there and tripping and falling
11 afterward. She described to me that she injured her
12 lower back as well as her right knee. Her lower back
13 pain had continued and it also radiated to the
14 buttocks. It was worse with activity and she felt that
15 physical therapy and her non-operative treatment had
16 not helped that much. So, this is September 11th,
17 between September 11th, 2005, and the date of the
18 consultation which was January 4th, 2007. Her past
19 medical history and surgical history were otherwise
20 negative at that time, and I was examining her with the
21 benefit of an interpreter.

22 Q Okay. And can you please explain to the
23 Jury what your clinical examination consisted of?

24 A Sure. In spine surgery, though we are
25 looking at the musculoskeletal system, and looking at

1 how various areas move and other mechanical issues like
2 that, we're also interested in the neurological exam.
3 In her case, the neurological exam was really normal.
4 Her motor strength was normal, her reflexes were not
5 particular remarkable, nothing unusual about her
6 neurological exam. You have to understand when you
7 treat the spine, when abnormalities of the spine lead
8 to abnormalities of nerves. If the parts that are in
9 the spine, which we'll hear a little bit about are
10 protruding and press on those things. In her case, we
11 didn't identify that. But what we did identify was
12 that she had a loss of some motion in her lower back,
13 about twenty-five years less than normal for her age,
14 and that there was some spasm in the muscles in the
15 lower back, which is something we always note because
16 it is an involuntary finding. That's not a muscle that
17 you can voluntarily spasm like your arm. So, those are
18 really the only findings on her with my exam.

19 Q And could you please explain to the Jury
20 what the significance of spasm is and what spasm is,
21 Doctor?

22 A Well, as I was saying, the reason we look
23 for it and when I say spasm, what I mean specifically,
24 looking and placing my hand directly on the part that
25 I'm examining, which in my case is going to usually be

1 the neck or the lower back. But it's the muscles of
2 the lower back on either side of the spine tend to,
3 when they spasm, and they tend to be very hard and rock
4 firm, might even be a little tender. And, it's just
5 something that we note, it's typically a sign of
6 something that's hurting beneath. It's a reaction that
7 the body has to try to immobilize a part that hurts.
8 You naturally go into spasm and that spasm is typically
9 involuntary. So, it's not, in that part of the body,
10 it is involuntary, you can't really create that on your
11 own.

12 Q In discussing the spine and your findings,
13 would it be helpful to use a spinal model, Doctor?

14 A Sure. We can have a look at the spine
15 model.

16 MR. ZILBERG: Judge, may I.

17 THE COURT: Go ahead.

18 MR. ZILBERG: Thank you.

19 (Whereupon, the model of the spine is
20 displayed to the Jury)

21 Q Now, Doctor, let's put the model down for
22 one second. When was the next time that you saw Ms.
23 DeCastro?

24 A The next time I believe was August 21st.
25 Hold on, let me just check that. August 21st, 2008.

1 Q And can you please tell us what the
2 examination consisted of at that point in time?

3 A Again, the history was essentially the same
4 and her exam was really the same as well. Normal
5 neurological exam, she lacked some motion, about
6 twenty-five percent of motion in the lower back. Still
7 some spasm in the muscles of the lower back. And there
8 was really no, no change in terms of my evaluation.

9 Q And when is the next time that you saw her,
10 Ms. DeCastro?

11 A A few weeks later on September 10th, 2008.

12 Q Okay. Can you please tell us about that
13 examination?

14 A Yes, of course. Again, her lower back pain
15 continued radiating to the buttocks, and specifically
16 we had her come back for a certain type of X-ray, plain
17 X-rays to be done. When we look at MRIs and we're
18 going to hear about MRIs, MRIs are terrific and they
19 are an imaging study that we use to allow us to
20 actually see the disks, see the nerves. And it's
21 really a fabulous thing and it doesn't even involve
22 radiation. But you are lying still essentially and
23 it's like a picture post card in time. Exactly what
24 you see. There is no dynamic component to it. There
25 is no movement and who knows what exactly happens when

1 you are really up and about. Plain X-rays don't show
2 nearly that much detail. You can't see the nerves, you
3 can't really see the disks, you can just infer where
4 the disks are, because they are in bones. That's
5 really the main thing you see on an X-ray, are just
6 bones. But there are something that you can see on an
7 X-ray and I wanted to see her back on this day,
8 specifically for this. We'll do X-rays in the office
9 where we have the patient flex as far forward and back
10 as they can, so we add the element of motion to the
11 study. And we know what's normal. We, meaning, you
12 know, it's generally accepted facts of what's normal.
13 And so, we'll do X-rays of her lower back, looking at
14 them from the side, flexing all the way forward and
15 back to see if there is any abnormal motion at any
16 level in particular, because that would denote an
17 element of instability in the spine. And that's not
18 something that you could really gain from an MRI. And
19 it's something often times overlooked because there is
20 this feeling usually by, not by specialists but by
21 general practitioners or non-surgical physicians that
22 are non-surgeons in the spine, that the MRIs are going
23 to tell you everything. But, it really doesn't. You
24 have to do these flexion, extension X-rays and that is
25 the accepted normal in spine surgery. And in her

1 particular case, they were very revealing because --

2 MR. JANES: Objection.

3 THE COURT: Objection sustained.

4 Q Doctor, following your examination of Ms.
5 DeCastro on September 10th, '08, what diagnosis did you
6 come to?

7 A Based on the evaluations of September 10th,
8 our diagnosis, as it was before, central disk
9 herniation at L5/S1, but instability at the L4/5 level
10 and my primary concern was the instability at the L4/5
11 level.

12 Q And, can you use the spine model to please
13 explain to the Jury what instability is and how it
14 affects Ms. DeCastro?

15 A Sure. This is meant to be a model of the
16 spine, just to orient everybody. This is the pelvis,
17 the hips, this is the bottom of the skull. Okay. And
18 so, what the spine is, is a structure designed for
19 really two purposes. Number 1, movement, so it has to
20 allow movement, it has to have a certain flexibility.
21 It has to be able to handle impact, so it can't be a
22 solid piece of chalk, which would crack and fracture
23 with any slight force. And as important and more
24 important, it has to protect the very important
25 structures that run right down the middle of it which

1 is the spinal cord and all of the nerves. The way this
2 works is, you have a stack of bones separated by these
3 structures which are called disks, and the disks are
4 fibro cartilaginous type structures. They are pretty
5 well designed. They are pretty resilient. They are
6 not perfect. They have a soft inner core and a much
7 firmer outer shell. So, it functions like a bean bag
8 chair, except this bean bag chair, once you get up
9 automatically comes back to its normal state. In the
10 normal functioning disk, you know, in a younger person,
11 as you age and get older, disks undergo certain
12 changes. But that's the function of the disks, to
13 provide and allow for motion and flexibility so that
14 this spine can A, move, and B, not be in danger of
15 fracturing very commonly. Running down, and running
16 down the middle of the spinal column, so you have the
17 big bones in the front and you have other bones in the
18 back, leaving a circular space right down the middle.
19 And that's the spinal canal where the spinal cord runs.
20 The spinal cord runs and ends right about here. Okay.
21 And at about L1/2. And it's running inside a space,
22 between the bone and the front, and a bone in the back.
23 After L2, what you have is the spinal cord ends and a
24 whole series of nerves runs down the middle of the
25 spinal canal. But what you also see is that at every

1 level of the spine, starting at the very top, one nerve
2 exits on either side, at each level, and that continues
3 down here. And these openings that allow the nerves to
4 come out are called the neuroforamen, basically like a
5 nerve exit tunnel. Okay. But that's what the spinal,
6 the spine looks like, that's the function of the
7 various parts. The important thing that lie in there
8 also are the nerves and the spinal cord. And in order
9 for this to work, it has to stay stable and strong.
10 And to hold that together, in addition to the disks
11 which connect the bones, there is a whole series of
12 strong ligaments and muscles that provide a sort of,
13 not rigid but semi-rigid sort of stability to the
14 spine. And if you were to move back and forth and bend
15 back and forth, we have normal expectations of what
16 that would look like. Whether it be in real life or on
17 an X-ray. But the bottom line is when you bend back
18 and forth, these vertebrae are not normally supposed to
19 slide one on another, forward and backward. They
20 really stay pretty well aligned. They might move a
21 millimeter or two at most, but usually not even that.
22 But if there is one level that stands out like a sore
23 thumb, if none of these levels are moving and they are
24 quite stable, you do flexion extension X-rays, and one
25 level in particular moves three or four millimeters,

1 well, then that becomes an obvious difference. If
2 every level moved three or four millimeters, you might
3 say, well, that's just maybe an unusual person. But,
4 if none of the other levels move significantly and one
5 moves three or four, then that's a finding that we note
6 and that's important.

7 Q Now, Doctor, did you also review the MRIs
8 for Ms. DeCastro?

9 A Yes, we did.

10 Q And those are from December of '05?

11 A Correct.

12 MR. ZILBERG: Judge, do we have a light
13 box.

14 THE WITNESS: Right here.

15 THE COURT: Those have been previously
16 marked.

17 MR. ZILBERG: They have been premarked
18 as Plaintiff's 4, Judge.

19 THE WITNESS: Maybe I should actually
20 step down.

21 MR. ZILBERG: Can the Doctor step down.

22 MR. JANES: Your Honor, I'll step over
23 there.

24 (Whereupon, the Witness exits the Stand
25 and approaches the shadow box)

1 Q Now, Doctor, I would just like you to take a
2 look at the -- by the way, have you reviewed these
3 films previously?

4 A I have. Yes, in fact, at her very first
5 visit from the beginning.

6 Q Can you please show the Jury what they
7 demonstrate.

8 (Whereupon, a film was displayed on the
9 shadow box).

10 A Let me check the date. Okay. So, if you
11 look at this picture, this is a view of the spine from
12 the side, which doesn't look all that different from
13 this model, from the side. Okay. It's quite amazing
14 how much you can see. These are the disks, these are
15 the bones, this is the spinal canal. This dark stuff
16 in the middle of the spinal canal, this is the spinal
17 cord coming to an end, and these more vague gray
18 strands running down the middle are those nerves I told
19 you about. After the spinal cord ends around here, it
20 ends and then all the nerves that are left come off the
21 spinal cord, and run down the middle of the canal. And
22 that's right here and the rest of this white that you
23 see is just spinal fluid. Which bathes all those
24 structures. And, what we see here is really not a
25 problem. Okay. And that's reflected in the note even

1 when I saw her the first time. You know, she has, if
2 you look at this picture, the disks and the bones,
3 there is a line that runs down, you can imagine a line
4 running down the back -- let me say one other thing.
5 This is the front of the spine and this is the back.
6 Okay, this is the front, this is the back. There is a
7 line that runs down the back of the vertebral bodies,
8 the bones and also the back of the disks. It's
9 actually a real line. There is a ligament that runs
10 down there. One thing that you notice is, the disk
11 material really and the back of the vertebrae lineup
12 under normal circumstances, there is not material
13 protruding from the disk beyond that.

14 What you notice as you go down a bit
15 further, is these two areas here, and there is one
16 other thing I'm going to mention, because it confuses
17 everybody, including doctors that don't specialize.
18 When we say that somebody has a problem at the L4/5,
19 disk, that's one disk. It sounds like two but it's one
20 disk. The disks are named for the two bones that they
21 sit into, so the L4/5 disks is the disk between L4
22 vertebrae and L5 vertebrae. But, I get this all the
23 time in my office. I have two herniated disks, Doctor,
24 something like that. That's not the case, the L4/5
25 disk is one disk, the L5/S1 disk is another disk. Why

1 do we say L5/S1. Lumbar, the lower back is lumbar.
2 The very bottom of the spine, the part of the spine
3 that sits in the pelvis is called the sacrum. For
4 completeness, this is the cervical, this is the
5 thoracic, L for lumbar, S for sacrum. The last
6 vertebrae, the disk between the last lumbar and the
7 first sacral is L5/S1 disk. It's a simple thing. You
8 don't get that, it's pretty confusing. And what you
9 notice that these disks at these two lower levels,
10 especially L5/S1 are protruding somewhat backward,
11 posteriorly, into the space of the spinal canal. They
12 are not protruding a lot. But, they are protruding a
13 little bit. If you compare it to these other levels.
14 Okay. I noted it in time. They weren't, I didn't feel
15 that there was any significant neurological
16 compression, nerve compression because of it. It's not
17 normal, but, you know, it didn't catch my eye at that
18 time. There isn't enough to certainly recommend
19 anything surgical, and in fact, I recommended further
20 conservative treatment at that visit, whether it be
21 therapy or epidurals. There is epidural steroid
22 injections are type of cortisone injections that is
23 commonly done for patients with lower back problems.

24 The one other thing that was notable on
25 this study was that mechanically her spine looked

1 pretty good. She was a 42-year old. When we look at
2 disks, we look at a number of things and one of the
3 things that we look at, well, is the texture of the
4 disk, the composition of the stuff of the disk. And
5 that's reflected on these MRIs, depending on how they
6 are done by simply the color of a disk, and the height
7 of the disk, how big they are. Okay. When disks
8 become older and degenerated, they tend to lose water
9 and that causes their appearance on the MRI to become
10 darker. They get gray and then they get black. They
11 also tend to settle and lose height, as their
12 mechanical structure is fading. Okay. And I've got
13 bad news, if we take MRIs on all you folks, we would
14 see a lot of that. What you notice here is that these
15 disks had good height, they were rather plump, if
16 anything, and the color, they are really pretty normal
17 in color for her age. You know, if you stand across
18 the room, you would say, yeah, those disks look white,
19 okay. So, everybody has aging of their disks, and
20 there is a certain amount of degeneration that goes on.
21 But, this is not a picture where someone would say
22 there is any kind of significant or dramatic
23 degeneration. So, my findings were, you know, there
24 was a small central disk herniation at L5/S1, a smaller
25 bulge at L4/5, not enough to warrant my intervention

1 and I didn't recommend anything. I just recommended
2 further conservative treatment, not operative
3 treatment.

4 Q Thank you.

5 (Whereupon, the Witness resumes the
6 Witness stand)

7 A That was my interpretation at her first
8 visit.

9 Q And that opinion didn't at all change until
10 the September 10th, 2008 visit?

11 A Correct.

12 MR. JANES: I object.

13 Q How did it change then?

14 A On the September 10th visit, we determined
15 that in addition, she had an element of instability
16 that we described earlier at the L4/5 level, which for
17 the first time gave us something more significant and
18 more focal, in terms of what the source and generation
19 of her pain, what the source of her pain might be and
20 what might be the generator of her pain.

21 Q Now, Doctor, did you at some point come to
22 learn that Ms. DeCastro had a previous car accident in
23 April of 2003?

24 A I did. I wasn't aware of that on her first
25 visit, her initial few visits in fact. But,

1 subsequently, I became aware of that. Again, I saw her
2 in the presence of an interpreter. You know, I try my
3 best to ask the questions through an interpreter but I
4 did subsequently become aware of that event, yes.

5 Q And did you have occasion to talk to her
6 about it and to review records from that incident?

7 A I did. Yes.

8 Q And, can you please tell the Jury what you
9 found in regard to that incident?

10 A Sure. Basically, you know, she described
11 having an accident on the date that you said, April
12 23rd, 03. She had treatment at that time, she had an
13 MRI at that time, but her symptoms resolved. She felt,
14 rather quickly over a period of a couple of months and
15 reported to me that she had been doing well for a
16 little over two years, two to two and a half years,
17 prior to the time of the more recent incident. That
18 was really the extent of her history.

19 Q Okay. Now, based upon your review of the
20 records of the 2003 incident, the history that you
21 received from Ms. DeCastro, the diagnostics that were
22 done, and your evaluation of her, did you come to an
23 opinion to a reasonable degree of medical certainty as
24 to what, as to whether her current symptoms were
25 related to the September 11th, 2005 incident?

1 A I did, yes.

2 Q And what were those?

3 A With reasonable certainty, her current
4 clinical condition was causally related to the more
5 recent accident in 2005, specifically it was an
6 exacerbation of a previous condition. We know by
7 definition that she had some issue two and a half years
8 earlier. She had treatment, even for a short period of
9 time, so she, in terms of the 2005 accident, this
10 represented a causally related exacerbation of that
11 condition, and was the proximal cause, the current
12 cause of her current symptoms.

13 Q Okay. After the April, 2003 incident, did
14 you discover how long she had back pain before?

15 MR. JANES: Note my objection.

16 THE COURT: Objection sustained.

17 Q Did Ms. DeCastro ever tell you how long she
18 had back pain after the 2003 incident?

19 MR. JANES: Note my objection.

20 MR. ZILBERG: As part of her history.

21 THE COURT: What point?

22 MR. ZILBERG: When she told him.

23 THE COURT: I didn't even hear him say
24 when she told him.

25 MR. ZILBERG: I apologize.

1 Q Did Ms. DeCastro ever explain to you for how
2 long she had pain after the 2003 incident?

3 A Yes, she did. When I saw her on, and I want
4 to get the date, one moment, when I saw her on May
5 27th, '09, and she provided that history for me, she
6 told me, as I think I mentioned a moment ago, that her
7 pain at that time lasted for two to three months. She
8 was treating for about two months, and that she was
9 doing well subsequently for a little over two years,
10 until the accident in 2005.

11 Q And, from your treatment of Ms. DeCastro and
12 the history taken from Ms. DeCastro, how long has Ms.
13 DeCastro had the back pain since the accident or after
14 the accident, since September 11th, 2005?

15 A Ever since that time, according to her
16 history.

17 Q Almost four years now?

18 A Correct.

19 Q Taking that into consideration, can you
20 state within a reasonable degree of medical certainty
21 that the pain that she's been dealing with almost four
22 years now in her lower back is causally related to the
23 incidents of September 11th, 2005?

24 MR. JANES: Just note my objection.

25 THE COURT: Objection sustained. Asked

1 and answered.

2 MR. ZILBERG: Okay.

3 Q What is Ms. DeCastro's prognosis, Doctor?

4 A Well, historically speaking, her symptoms
5 have continued for the past four years. I can't, I
6 can't predict what will happen to her in the future.
7 Only a soothsayer can tell you that. We know from our
8 evaluation that she does have some instability in the
9 lower back. It would be unreasonable to think that
10 suddenly her symptoms are going to vanish, but I can't
11 tell you precisely what that means in the future, in
12 terms of what, how she will fare, because I don't know
13 what treatment she's going to have in the future, okay.

14 Q Considering the fact that Ms. DeCastro has
15 had back pain continuously from September 11th, 2005 to
16 present, would you be able to say whether her condition
17 is permanent?

18 MR. JANES: Just note my objection.

19 THE COURT: Objection is sustained. He
20 just said he can't say what's going to happen in
21 the future.

22 MR. ZILBERG: No further questions.

23 CROSS EXAMINATION

24 BY MR. JANES:

25 Q Good morning, Doctor Klein.

1 A Good morning.

2 Q This is not the first time that you have --

3 MR. JANES: I'm sorry, strike that.

4 Q The first time you treated the Plaintiff was
5 in January of 2007, correct?

6 A Yes, January 4th.

7 Q That was about a year and a half after her
8 accident?

9 A Approximately a year and a half, yes.

10 Q And are you aware the Plaintiff did not make
11 any complaints about lower back pain on the date of her
12 accident?

13 A I am not aware of exactly what day she
14 started complaining. She reported to me that she
15 started having back pain in the days that followed her
16 accident.

17 Q Do you know where the Plaintiff treated on
18 the day of her accident?

19 A I can pull those records up. I don't know
20 without looking at them, but I do happen to have them
21 here, do you want me to pull them up?

22 Q If you want to refresh your recollection?

23 A Okay. Would you like me to refer to any
24 specific records.

25 Q Did you review those records when you took

1 Plaintiff's history?

2 A I have, yes.

3 Q And are you aware those records make no
4 reference --

5 A I reviewed those records subsequently. I
6 did not review those records when I took the
7 Plaintiff's history. These were provided much later.

8 Q When?

9 A Over various points of time, between January
10 4th '09 and the current time.

11 Q January 4th '09?

12 A I'm just looking back at the date that I
13 prepared my original narrative.

14 Q So, you first saw those Bronx Lebanon
15 Hospital records on January 4th, 2009?

16 A Not on that particular date.

17 Q After that?

18 A Yes.

19 Q Two years after you started treating
20 Plaintiff?

21 A Correct.

22 Q Wouldn't you agree that if you are treating
23 the Plaintiff for an injury, you should review the
24 records where she treated on the date of that injury to
25 get a full picture of that injury?

1 A I do not agree.

2 Q If you don't agree, that is fine?

3 A Just doesn't help me.

4 Q Have you previously worked with the law firm
5 of Omrani and Taub?

6 A What do you mean by work by?

7 Q Have you testified for them in a prior
8 litigation?

9 A Actually, I testified for them recently. I
10 think that was the only other time that I testified for
11 Omrani and Taub.

12 Q Was the Plaintiff Tyler Oaks?

13 A Yes.

14 Q That was in Jamaica?

15 A It was recent.

16 Q How long ago?

17 A I think it was last week or the week before.

18 Q Okay. Have you ever testified prior to that
19 with the law firm of Omrani and Taub?

20 A I don't believe so, no.

21 Q And how many times have you testified in
22 court total, approximately?

23 A Actually, we just went over all of that, I
24 can't give you a number in total. I would say that on
25 the average, probably three to five times a year, but

1 that might mean, you know, two or three times in a
2 month and then nothing for a year. Or it might mean a
3 year where there was six or seven times and then
4 nothing the next year. It's very, it's very kind of
5 random in terms of times.

6 Q When you say in total, more than thirty?

7 A I would say it should be more than thirty,
8 definitely. Over fifteen years, sure.

9 Q And how many narrative reports over fifteen
10 years approximately have you provided for Plaintiff's
11 attorneys, in personal injury cases?

12 A Very difficult to estimate. I would guess,
13 not guess, in terms of trying to give you a best
14 estimate.

15 Q That's fine?

16 A Again, it would vary year to year but I
17 would assume it would be, you know, ten to fifteen a
18 year, it might be ten to twenty a year.

19 Q So, that's over a fifteen year period?

20 A Well, more so in the last ten years
21 probably.

22 Q So, well over a hundred?

23 A Oh, absolutely, I'm sure.

24 Q Over two hundred?

25 A I don't know.

1 Q And when you have testified in court, that
2 has been overwhelmingly for Plaintiffs, correct?

3 A Yes. Not completely, but mostly, because
4 they tend to be my patients.

5 Q Sure, how many times have you testified for
6 a defendant?

7 A Several.

8 Q If I told you that an IDEX search indicated
9 once, would that surprise you?

10 MR. ZILBERG: Objection.

11 THE COURT: As to the form.

12 Q If I told you that an IDEX search,
13 testimonial history, indicated that you testified for
14 the plaintiff thirty-six times and the defendant once,
15 would that be a surprise to you?

16 A No, when I said several, I was also
17 including a couple of depositions. I'm thinking of
18 that in terms of testifying as well. I'm agreeing with
19 you. You got it.

20 Q Thank you, Doctor. When you examined the
21 Plaintiff on January 4th, 2007, you found mild spasm,
22 correct?

23 A Well, let's get back to that. Correct.

24 Q And the leg, excuse me, the straight leg
25 raise test was negative for the Plaintiff, correct?

1 A Correct.

2 Q Would you agree that mild spasm in a
3 negative straight leg raise test is generally
4 indicative of there not being a radicular problem in
5 that patient?

6 A I don't believe there was a radicular
7 problem in that patient but that's not because the
8 straight leg raising test was negative and there was
9 mild spasm.

10 Q But, you do believe the Plaintiff had no
11 radicular problems on your examination of January 4th,
12 2007?

13 A I believe the patient had primarily
14 mechanical lower back problems, correct.

15 Q And your assessment and your examinations of
16 mild spasm and negative straight leg raise test
17 continued on August 21st, 2008 and September 10th, 2008
18 as well, correct, Doctor?

19 A Correct.

20 Q And, you indicated, and Plaintiff has not
21 had any surgery from you, correct, Doctor?

22 A No.

23 Q And there is no surgery that is scheduled
24 for the future for the Plaintiff, correct?

25 A Correct.

1 Q It is possible the Plaintiff may never have
2 any surgery, correct?

3 A It's possible.

4 Q Now, you reviewed the Plaintiff's lumbar
5 spine MRI studies from December 16th, 2005, previously.
6 You also saw them today and testified about them today,
7 correct, Doctor?

8 A Correct.

9 Q Did you notice any desiccation in those
10 studies of the spine?

11 A As we just went over --

12 Q Yes or no?

13 A As we just went over it, there was minimal
14 desiccation. Every spine from childhood on has some
15 element of desiccation, but there wasn't any dramatic.

16 Q But there was some desiccation in the study?

17 A Everybody in this room has desiccation.

18 This study showed minimal desiccation.

19 Q There was desiccation though?

20 A Right.

21 MR. ZILBERG: Objection.

22 THE COURT: Yes, sustained, move on.

23 Q Was there any end plate spurring?

24 A Not of great significance.

25 Q Was there osteophytes present?

1 A No, we reviewed everything that was on the
2 study.

3 Q Was there bone spurring present?

4 A No.

5 Q You would agree if a study showed end plate
6 spurring and osteophytes that would be indicative of
7 chronic damage?

8 A It certainly could be, but what this study
9 is about --

10 Q In general, an MRI study, end plate spurring
11 and osteophytes, that generally is indicative of
12 chronic degenerative disease?

13 A No, I don't agree. That those can be normal
14 findings in anybody in this room. That's part of the
15 aging process.

16 Q Did you notice if the MRI study of
17 Plaintiff's lumbar spine revealed ligamentum flavum?

18 A Did it reveal -- ligamentum flavum is a
19 normal part of the anatomy of the spine, so we didn't,
20 we didn't point it out when we looked at it, but
21 certainly there is ligamentum flavum in the spine.

22 Q Is there hypertrophy in that area?

23 A Not of any great significance, no.

24 Q And when would you agree that the studies of
25 Plaintiff's lumbar spine of December September 16th,

1 2005 did not reveal any compression of the nerve roots
2 or exiting nerves of the lumbar spine?

3 A We agreed, we actually stated that earlier
4 before you started.

5 Q You agree with that statement therefore?

6 A We do.

7 Q And, you are now aware Plaintiff suffered a
8 prior motor vehicle -- excuse me.

9 MR. JANES: Strike that.

10 Q You are now aware the Plaintiff was involved
11 in a prior motor vehicle, accident?

12 A Yes.

13 Q September of 2003?

14 A Correct.

15 Q When is the first time you were made aware
16 of that?

17 A Again, I don't know the precise date. I
18 know it was some time after I prepared my initial
19 report, requested to prepare a report. That report was
20 prepared in January of '09. Some time in the months
21 followed January '09, and now. Several months after.

22 Q Is it fair to say that you were first made
23 aware of that when you first treated the Plaintiff and
24 examined the Plaintiff on May 27th '09?

25 A By May 27th, I knew, yes.

1 Q Did you review --

2 MR. JANES: Strike that.

3 Q And you are aware that Plaintiff had
4 physical therapy back in '03 after her motor vehicle
5 accident, correct?

6 A Correct.

7 Q Did you review those physical therapy
8 records?

9 A I reviewed records from 03. I can --

10 Q Just a yes or no question you did review the
11 records?

12 A I reviewed her records generally. I don't
13 remember if she had separate physical therapy records
14 or if they were incorporated in something else. I'm
15 simply not sure. I want to make sure I answer you
16 accurately, that's all.

17 Q That's okay?

18 A I'm not disagreeing with you in any way.
19 The reason I stated it that way, I recalled that she
20 had been treating with a rehab physician and sometimes
21 they will do therapy in their office. Sometimes
22 they'll have separate therapy centers. So, I'm looking
23 right now at records from a Doctor Steven Klein for
24 example. Anyway, she underwent conservative treatment.

25 Q No relation?

1 A No, none whatsoever. If you have a specific
2 question, I can answer it.

3 Q I want to know if you reviewed the records
4 and you have?

5 A I did, yes.

6 Q Now, when you made your --

7 MR. JANES: Strike that.

8 Q When you prepared your narrative report of
9 January 4th, 2009, you weren't aware the Plaintiff had
10 a prior accident?

11 A I was not aware.

12 Q And when you made your initial
13 recommendation for surgery in September 10th, 2008, you
14 were not aware the Plaintiff had a prior accident
15 injuring her lower back?

16 A Correct.

17 Q Now, when you made your initial conclusion
18 of Ms. DeCastro's condition was related to the accident
19 of September 11th, 2005, you were also not aware that
20 Ms. DeCastro had a prior accident in April of 2003 to
21 her lower back?

22 A Correct, everything in that report, I was
23 unaware of, about her prior accident at that time.

24 Q Now, when you re-examined the Plaintiff on
25 May 27th, 2009 you also reviewed MRI studies of

1 Plaintiff's lower back that were taken in 2003,
2 correct?

3 A Correct.

4 Q And the MRI studies taken in 2003 were
5 basically the same as the MRI studies taken in December
6 of 2005, correct?

7 A Correct.

8 Q Wouldn't that mean, Doctor, that any
9 condition the Plaintiff had in the lower back as of
10 December 2005, also existed in 2003?

11 A No.

12 Q Did you do any study, X-ray, MRI that showed
13 a difference from Plaintiff's lower back in 2003 as
14 compared to after the accident in 2005?

15 A We did. And the studies that I'm referring
16 to are her plain X-rays, extension, reflex.

17 Q All right?

18 A They revealed an abnormality.

19 Q That's fine, that's all I wanted to get,
20 review a record. Did you review any records, flexion
21 X-rays from before September 11th, 2005?

22 A That was what I was going to say, I did not,
23 that would be helpful.

24 Q So, therefore, you can't tell whatever was
25 shown in that study may also have preexisted September

1 11th, 2005?

2 A I can't know the date, that's right.

3 Q So, therefore, the instability that you
4 mentioned regarding the L4/5 region, you don't know
5 whether that pre-existed the accident of September 11,
6 2005, or not?

7 A I do not know.

8 Q It may not have been caused by the accident
9 of September 11th, 2005?

10 A Correct.

11 Q And isn't it a fact is that since the MRI
12 studies of Plaintiff's lower back in 2003, 2005, are
13 the same, that most likely it did not, most likely was
14 not caused by the accident of September 11th, 2005?

15 A That you cannot say, no, that's incorrect.

16 Q And you can see, because you described the
17 patient's condition as an exacerbation, certainly not
18 initiated by the accident of September 11th, 2005?

19 A I agree.

20 Q Now, you indicated that Plaintiff will
21 likely have surgery, you don't know one hundred percent
22 that she will have surgery in the future?

23 A Correct.

24 Q And you are being compensated for your time
25 here today?

1 A I think we already discussed it.

2 Q How much?

3 A For today's time and all the time leading up
4 to it for preparation, discussion, phone conversations
5 or any meetings of that sort, a total of five thousand
6 dollars.

7 Q Does that include for your narrative
8 reports?

9 A No, the narrative report was, I believe
10 seven hundred and fifty dollars.

11 Q In addition?

12 A Right, and for the initial narrative report.

13 Q Okay. How about the other narrative
14 reports?

15 A No fee.

16 Q You are not a neurologist, correct, Doctor?

17 A I'm a spine surgeon.

18 Q Orthopedics is where you are board certified
19 in?

20 A Correct.

21 Q Who referred Ms. DeCastro to you initially?

22 A Either her rehab physician or it may have
23 been the office of Omrani and Taub. I don't recall
24 offhand. Either one of those two.

25 Q And the instability you mentioned in L4/5

1 region, you didn't notice that on the first time you
2 treated her, correct?

3 A Wouldn't have noticed it. You wouldn't be
4 able to see it unless you have flexion, extension
5 X-rays.

6 Q And that was the first time you treated her,
7 was about a year and a half after the accident,
8 correct?

9 A Approximately, yes.

10 Q Did you use an interpreter when you treated
11 the Plaintiff on those prior occasions in January?

12 A Yes.

13 Q Do you know what the nationality of the
14 interpreter was?

15 A Well, it was a Latin, an individual who was
16 Hispanic. I don't know exactly what nationality, there
17 is a lot of Latin countries.

18 MR. JANES: I have no further questions,
19 thank you, Doctor.

20 THE WITNESS: You are welcome, sir.

21 MR. ZILBERG: May I.

22 THE COURT: Go ahead.

23 MR. ZILBERG: Thank you, Judge.

24 REDIRECT EXAMINATION

25 BY MR. ZILBERG:

1 Q Doctor, Counselor asked you about whether
2 you had reviewed the initial hospital records from the
3 date of the accident when you initially evaluated Ms.
4 DeCastro. Can you please explain what the significance
5 of those would have been, if any?

6 MR. JANES: Note my objection.

7 MR. ZILBERG: I'll rephrase.

8 THE COURT: Thank you.

9 Q You had indicated to Defense Counsel on
10 cross-examination that it was in your opinion not
11 necessary to review the hospital records from the date
12 of the accident. Can you please elaborate for the Jury
13 as to why not?

14 A Sure. Every patient that I see in my office
15 is coming to my office because they are considering
16 having some sort of surgical intervention. I don't do
17 therapy. I'm not a non-operative physician. Whether
18 or not they are going to have surgery is going to
19 depend on what they look like at that moment. It's
20 going to depend on their physical examination, their
21 history, most importantly their pain and where it is.
22 The imaging studies that I have at that time, other
23 diagnostic tests that I may need. But, truthfully,
24 what happens, several years ago, two years ago, four
25 years ago, doesn't bear on my treatment of that patient

1 at that time. I'm really just seeing them because they
2 are wondering if I can make them better with surgery.

3 So, that information, in the setting of
4 my evaluation and consultation really doesn't factor
5 in. Nobody comes to my office because they've had pain
6 for a week or two or mild pain. They are there
7 considering surgery at some level. And, that's really
8 why the records don't matter. And for example, if a
9 patient had pain two years ago and feels fine now, they
10 are not a candidate for surgery in my office. I mean,
11 obviously, it's exactly how you are now and the months
12 leading up to that visit that's going to matter to your
13 health.

14 Q Would it be fair to say, for a patient to
15 come to your office in contemplation of perhaps
16 undergoing spinal surgery, they have been undergoing
17 spinal pain in their spine for a long period of time?

18 MR. JANES: Note my objection.

19 THE COURT: Sustained.

20 Q Doctor, when you initially began considering
21 the possibility of surgery with Ms. DeCastro in
22 September of 2008, what type of surgery were you
23 considering?

24 MR. JANES: Note my objection.

25 THE COURT: Sustained.

1 Q When you indicated in your report that there
2 is a likelihood of Ms. DeCastro undergoing spinal
3 surgery in the future, can you explain what type of
4 surgery you meant?

5 MR. JANES: Note my objection.

6 THE COURT: Sustained.

7 Q Can you explain to the Jury what is, I know
8 you touched on this before, but can you please
9 elaborate on what desiccation is?

10 A Sure. Desiccation, just as a word,
11 desiccation just means loss of water. And,
12 specifically, in terms of the spine and disks as we're
13 talking about here, it refers to the loss of water and
14 the appearance of that on an MRI, and the disk. So,
15 everybody slowly gradually loses water from their disks
16 as they age and that process starts really in childhood
17 and continues all the way up until the very end. In
18 terms of the MRI appearance, when a disk looks nice and
19 white, and it's safe to say it has not lost much water.
20 Okay. As water is lost over time, it may start looking
21 more gray and ultimately, really looks black, and some
22 people refer to this as black disk disease. I hate
23 using names like that. And, one of the main reasons is
24 that it may not be a disease at all. It's just a
25 picture. You could have a black disk and feel fine.

1 And in fact, we know from many studies if you take
2 people walking down the street who have never had back
3 pain and put them in an MRI scanner, we will see
4 evidence of abnormalities. But, the bottom line in our
5 particular case because we really had a nice white
6 looking disk.

7 MR. JANES: Note my objection.

8 THE COURT: The objection is sustained.

9 Q Doctor, what is, based upon your
10 examinations of Ms. DeCastro, review of diagnostics,
11 what is in your opinion the likelihood that Ms.
12 DeCastro will require further medical treatment with
13 regard to her back?

14 MR. JANES: Note my objection.

15 THE COURT: Sustained.

16 MR. ZILBERG: Nothing further.

17 THE COURT: Anything else?

18 MR. JANES: I have nothing further.

19 THE COURT: Thank you, Doctor.

20 (Whereupon, the Witness was excused
21 from the Witness Stand)

22 THE COURT: That's it for this morning.

23 MR. ZILBERG: Yes.

24 MR. JANES: Yes, your Honor.

25 THE COURT: Okay, folks, as it turns