problems with physicians it is as I have said before sometimes we will take a defense witness instead of the next Plaintiff's witness because we have problems and it works out that way.

Today we have that situation. Ms. Taylor who represents Lynne and Douglas Barasch has called today this morning Doctor David Fisher who will take the stand forthwith and he is a radiologist and he's testifying on behalf of the defense not the Plaintiff. All right.

As I understand it this afternoon we will have a physician who will be called by plaintiff Dr. Lee, is that correct?

MR. SIRIGNANO: That's correct, your Honor.

THE COURT: And he is the physician as I recall who did two surgeries on the Defendant --

MR. SIRIGNANO: On the Plaintiff.

THE COURT: And he will be called for the Plaintiff. All right. Let's get started. I ask Ms. Taylor to call her next witness.

MS. TAYLOR: Thank you, your Honor. I call David Fisher. Doctor?

D A V I D F I S H E R, called as a witness on behalf of the Defendant, having been duly sworn, testified as

follows:

THE COURT: Be seated and would you please give us your full name.

THE WITNESS: David Fisher, F I S H E R.

THE COURT: Your professional address?

THE WITNESS: 430 Chestnut Drive, Roslyn, State of New York, 11576.

THE COURT: Your witness, Ms. Taylor.

MS. TAYLOR: Thank you, your Honor.

DIRECT EXAMINATION

BY MS. TAYLOR:

Q Good morning, Dr. Fisher.

A Good morning.

Q Would you please tell the Court and the ladies and gentlemen of the jury your occupation?

A I'm a medical doctor and I specialize in radiology.

Q Please tell the Court what radiology entails?

A Should I go through my educational --

Q Lets start with radiology?

A Radiology is a branch of medicine that deals with picture images of the body such as x-rays, CAT scans, MRIs, ultra sounds. These are tests that are typically ordered by the treating physicians. They will refer the patients

to radiologists and we will perform or interpret these tests to help them with their diagnosis and their treatment planning.

Q If you would, doctor, give us your educational background, professional experience?

A I studied undergraduate at Boston University's College of the Engineering with a bachelor of science degree in biomedical engineering. I went to Eastern Virginia Medical School for four years earning my medical degree. Then I did an internship in the field of internal medicine at LIJ Medical Center in Lake Success, New York. And then I did four years of residency training in the field of radiology which I also completed at LIJ Medical Center.

After completing my residency I was then eligible to sit for a series of exams that's given by a branch of the government. There were ten subjects and I passed them all and became board certified or a diplomat in the field of diagnostic radiology.

I then went to the University of Pennsylvania and did a fellowship and served as a clinical instructor specializing further in CAT scans and MRIs. And then I went into private practice.

For seven years I was the director of a large

group called Prohealth. I ran the radiology division and we were the official medical providers for the New York Jets football team, the New York Islanders hockey team, U.S. Open Tennis championships, and many local colleges including St. John's University and Hofstra University.

As the director of radiology, I personally interpreted the majority of the x-rays and MRIs of the athletes as well as of the families. And I gave a weekly teaching conference that was attended by orthopedists and neurologists and athletic trainers and physical therapists.

So there was teaching involved as well. I have also been elected as the president of the Long Island Radiologic Society. I have represented Long Island on the state level as a delegate to the New York State Radiological Society and I represented New York on the national level as an alternate counselor to the American College of Radiology.

Q In your educational studies did you ever deal with the anatomy or the structure of the spine?

A Yes. Anatomy is really one of the most important subjects that we deal with in radiology because we are taking pictures or images of the body. So every review I do deals with understanding of the anatomy.

Q Do you have any distinguished awards or

recognition, doctor?

A Yes, I have also been asked to be a guest lecturer at many of the state societies including orthopedic societies, lecturing them on MRI imaging.

Q Where are you licensed, doctor?

A I have active current license in the states of New York and New Jersey.

Q How long have you been licensed in New York?

A I believe it was 1989. So that would be 24 years.

Q In that 24 years approximately how many CT scans have you observed or reviewed?

A I don't know the exact number, but I would say a typical year I might review up to 10,000 radiology studies. That's all types: X-rays, CAT scans and MRIs, and I have been doing it over 20 years.

So I have reviewed hundreds of thousands of studies.

Q Now, doctor, were you requested to review films for a patient by the name of Vincent Taurone?

A Yes, I was.

Q Can you tell us what films you reviewed concerning Mr. Taurone?

A I was originally asked to review these films over two years ago and I reviewed I will go through them

chronologically when the films were taken.

First was an MRI of the cervical spine or neck dated April 13, 2007. And then I reviewed x-rays of the cervical spine from St. John's Riverside dated October 26, 2009. Two CAT scans of the cervical spine that were performed just a week apart on November 10 of 2009 and November 18 of 2009.

Then there was a repeat MRI on December 15, 2009. And then lastly two follow-up x-ray studies dated January 6, 2010 and January 7, 2010.

Q Doctor, could you just explain to us what if any difference there is between a CT and a MRI?

A MRI stands for magnetic resonance imagining. It is basically a powerful magnet that takes pictures of the body and allows us to look in any projection or view that we would like and it also allows us to take thin slices.

And we can look from front to back or top to bottom. So we are not limited in evaluating any of the anatomy. We can also see all of the soft tissue structures. X-rays and CAT scans are best suited for seeing the bones, but we don't see the soft tissues, the skin, the nerves, the muscles as well.

So MRI is the test of choice when you want to look at the muscles, the disks; things other than just the

bones.

Q What would be the optimal tool for looking at bone or any type of fusion instrumentation?

A Well again x-ray is the most available test. But you are really limited in to just the single view from front to back. They put a plate behind the part of the body you want to image and we shoot a beam of x-rays through the patient and the film is then exposed.

CAT scan is a better test because there are a number of beams that spin around the body and take thin slices. So it stands for computerized axial tomography so it gives you much better detail than just x-rays.

Q Upon request of reviewing the films for Vincent Taurone, were you paid a fee by the defense for that?

A Yes, I was.

Q I'm just going to go through let's start with the MRI that you first reviewed for Mr. Taurone.

A Okay.

Q That was April 13, 2007?

A Yes. So this was performed approximately 2 1/2 years prior to the accident in question.

Q Doctor, when you reviewed that MRI, did you make any findings, any observations from that film?

A Yes, I did.

Q What were those?

A I found extensive degenerative change or arthritis throughout the neck and particularly at two levels of the neck. The neck is made up of seven different levels. And it is the cervical spine which is spelled with a C so the levels are just named based on that letter C.

So the top level would be C-1, C-2, all the way down to C-7. And the bones are separated by spacers or shock absorbers that we call disks. And the disks are just named for the bone above it and below it.

So for instance the disk between the C-5 bone and the C-6 bone is called the C5-6 disk. So I saw arthritis or degeneration throughout the neck. And I note that it was most pronounced or most severe at the C5-6 and the C6-7 levels which were the two lower levels of the neck.

Q Did you make any findings, doctor, regarding the spinal canal or the spinal column?

A Yes. I just mentioned what the bones are. But there are a number of other structures and the bones form a canal or a long tube our spinal cord passes through and because of the arthritis or degeneration, these bones have overgrown and they have developed bone spurs or osteophytes.

And those spurs have narrowed the canal

significantly to the point that they are causing spinal stenosis or compression of the spinal cord and of the nerve roots.

Q Compression in your opinion, doctor, to a reasonable degree of medical certainty, stenosis would that cause pain?

MR. SIRIGNANO: Objection, your Honor. This is a radiologist.

THE COURT: Well, I think he can answer that question because it is a fairly general question.

MR. SIRIGNANO: He's not a treating physician. He has never laid hands on the plaintiff.

THE COURT: Based on his experience does he know whether these osteophytes can cause pain?

MS. TAYLOR: Thank you, your Honor.

A So I will confirm as a radiologist again I do not examine the patients. I just review the films. So I have never examined this patient. But in general when you have these large osteophytes and they can rub up or compress against the nerves or the spinal cord, there is a strong association with pain, with tingling, with paresthesia or numbness, with loss of reflexes.

So there is a strong correlation with types of

nerve damage or symptoms based on the degree of stenosis.

Q Was there another film that you reviewed on October 26, 2009, Dr. Fisher?

A Yes. Those were just x-rays as opposed to an MRI study. And again at this time the patient had undergone surgery. So between that first MRI in 2007 and then these x-rays that were taken two weeks after the accident in October of 2009, I noted that there was a plate and screws in place and also bone graft material at those two levels that I had noted the most severe degeneration namely C5-6 and C6-7.

Q Now, doctor, were you aware that Mr. Taurone had surgery on October 12, 2009?

A I wasn't aware of the exact date, but I knew that there was some surgery in the interval. The only records I did review were MRI studies because again as a radiologist I don't examine the patient and review other medical records.

Q What if anything did you observe on the x-rays of October 26, 2009?

A That despite the evidence of the surgery and the presence of the plate and screws and disk grafting, I still saw large osteophytes. So these large bone spurs that were present two years earlier were not completely removed or

resected at the time of the surgery.

Q Did there come a time when you reviewed another film taken on November 10, 2009 at St. John's Riverside Hospital?

A Yes.

Q What was that film?

A That was a CAT scan study. In fact there were two CAT scan studies taken just a week apart, and they both show the exact thing so we can lump them together. That really showed in much better detail that the x-rays, the presence of the plate and the screws and the bone grafting material and particularly in my opinion -- and we have the films here so I will be able to point them out -- everything appears to be in satisfactory position.

There is no fracture or movement of the bones. The plate and screws have not shifted or displaced in any way. And again that CAT scan better shows the persistence of these large bone spurs or osteophytes.

Q Doctor, I ask you at this time if you could show the jury the April 13, 2007 MRI?

THE WITNESS: May I step down, your Honor?

THE COURT: Certainly.

April 13?

MS. TAYLOR: 2007.

THE WITNESS: They are in the manila envelope.

MS. TAYLOR: Okay.

MR. SIRIGNANO: Can we get them marked, your Honor?

MS. TAYLOR: Oh, yes, I'm sorry, counsel.

THE COURT: What will this be?

MR. SIRIGNANO: No objection.

THE COURT: F in evidence. How many films are in there, doctor, for the record?

THE WITNESS: There are four sheets of films.

THE COURT: Four sheets.

(Defendant's Exhibit F marked received in evidence.)

MR. SIRIGNANO: Your Honor, may I step over so I can see what's going on?

THE COURT: Of course.

THE WITNESS: I don't want to block anyone's view either. So let me stand to the side.

Okay, the first thing I look at when I review an MRI is what's called the demographics, this is the writing on the film. So before I even look at the pictures, each one of these postage stamps or images has writing and it identifies the patient.

It says Taurone, Vincent, 48 M. So it identifies the age of the patient. April 13, 2007. What else do we have? Upright Imaging of Westchester. So I'm confirming that we have the correct patient, the correct date and the correct facility or office where the test was taken.

When we read an MRI, we read it just like a book from left to right and top to bottom. So I mention that MRI let's us take pictures in any plane or projection that we tell it to. So this particular view is a sideways view through the neck; what we call a sagittal view, and if you look at the very first image, it is a reference or a slice and there are a number of thin vertical white lines and each one of those lines has a corresponding number and it corresponds to the slice so we can see a small number two, four, six, eight.

So it tells me that they have actually taken the slices from right to left. It looks like it is left to right, but it is like we are in a mirror and there is a small R that tells me this is the right side of the image.

So this would be slices through the right

side of the neck and as we work our way across and down, we get towards the left side of the neck. But for demonstration purposes, I'm going to focus on right in the middle, the slice right down the center of the neck because that shows the anatomy the clearest.

So the patient is actually facing towards the back corner. And we can see the bottom of the chin and the skin under the front of the neck. And this is the skin under the back of the neck. And MRI works on the principles of fluid or water in our body. Our bodies are mostly made up of water which is H2O. And if structures have a lot of hydrogen or water in them, they will appear brighter on this type of picture and if they have very little water, they will appear darker.

So for instance if we look under the skin it appears bright and that's the layer of fat or as opposed to tissue and fat is gelatinous so it has liquid content. That's why that appears white. We can also see bright white stripes down the central canal and that's called CSF or cerebral spinal fluid.

Our brain and our spinal cords are bathed in

fluid that acts as a protector. That's what water looks like, this brightness. In front of the spinal cord which is more on the left side of the images, we see a number of these building blocks that are stacked one on top of the other.

And those are the vertebral bodies and that's what our spine just like a sky scraper where one block sits on top of the other. I mentioned names so for instance this is the C2, C3, C4, C5, C6 and C7 as we count down. Now our spine continues.

The next building block is called T1 for our thoracic spine, that's our chest and T2 and T3 so we can continue down.

If we looked at our lower back, it would be the lumbar spine that's called L1, L2. So the numbers are actually very simple to understand when you know how it works.

If we look at this long gray tubular structure I'm pointing to, that's surrounded by the white that's the spinal cord. And it is a cord just like a long rope. Now the back margins of the bones if we look at the thoracic spine they look like perfect building blocks that sit straight on top one another and they are separated

by these disks, these spacers.

And so you can see norm -- what normal levels would look like. If we look at the cervical spine, the bones begin to jut out or flare out along the back where it is ungulating.

Particularly if we go off to the sides, we can see this little corner of bone that's pinching backwards. So what happens over time is these disks or shock absorbers in our body they have two main parts. They have a central part which is called the nucleus pulposis which is like a gel and the outer part is the anulus fibrosis that are rubber bands that hold them in place. Over time that gel can dry out. It is like a grape that will eventually shrivel up and turn into a raisin.

So if our disks begin to dry out, they become darker. They will lose that water or brightness. Each one of these disks have turned black and also become flatter, and then the bones begin to rub against each other because they don't have that spacer or the shock absorber any more.

When the bones rub, the body responds to that stress by trying to heal itself and build the bone thicker. And that's what causes these bone spurs.

They typically take years to develop. So it is a long standing or chronic condition that's usually progressive. It gets worse over time.

This is the main reason we get shorter as we get older is these disks all dry out. As they flatten, we lose a few millimeters of height. So we shrink a few inches over the course of our lifetime. It is not the bones or anything else. It is those disks, those grapes that are turning into raisins that are flattening.

In this case I see the bones the disks are dried out and flattened and these bone spurs are pushing backwards. And for instance at the thoracic level we can see the thoracic cord with the white fluid surrounding it or spacing it and it is floating right in the middle.

If we look at the level of C5-6 and C6-7, those bone spurs are pushing backwards and coming right into contact with the spinal cord. We can't see that white stripe any more. And in fact within this gray cord there is some brightness or whiteness right in the center. And that's called myelomalacia.

It tells me that there is a chronic

inflammation or irritation of that cord because it is being pinched for so long. That's definitely associated with numbness and tingling and pain and a number of symptoms. So again this study was 2 1/2 years before the accident in question.

So what I'm seeing is a chronic or long standing degeneration and it is worse at these two lower levels C5-6 and C6-7.

Q Doctor, I would also ask you to with the CT scan that was done on November 10, 2009, did you personally view that scan?

A I'm sorry, which date?

Q November 10, 2009?

A Yes.

Q After November 10, 2009 did you review any other films or scans of Mr. Taurone?

A Yes. Eight days later on November 18, 2009 they repeated the CAT scan. And again based on my report both CAT scans showed identical findings or similar findings.

Q When you say similar findings, what are you referring to?

A Whenever I have multiple studies I always compare them side by side. If there are different types of tests like an MRI on one side and a CAT scan, it is almost apples

to oranges because they are not the exact same test.

In this case they were both CAT scans, so I was comparing them one to the other. Sometimes the patient moves slightly and there is a little blurriness to it, but based on my review I saw no interval change or no significant difference between these two studies.

Q Those two studies just so we are clear was November 10 and November 18, 2009?

A Yes, just a few weeks after the accident in question.

Q Let's go back to the November 10, 2009 observation. Did you make any findings when you viewed that CT scan?

A Yes.

Q What were those findings?

A Compare it to the MRI that we just reviewed, the patient had subsequently undergone surgery, spinal surgery. There was removal of the disk material at those two lower levels C5-6 and C6-7 and placement of bone graft material and also the spine was stabilized with a plate that was held in place with screws at the top part and the bottom part. So it is what's called anterior spinal fusion and discectomy or ASFD.

Q What if anything did you observe on that November

10, 2009 scan regarding the positioning of the plate and the screws?

A Based on my review and I was able to look at it again today that the plate is in satisfactory position. There is no bend or crack in the metal plate that I could detect, that the screws have not backed out or moved in any way. And that there is no fracture or shift of the vertebral bodies.

Q Did you make any findings, doctor, about the osteophytes that you referred that you saw in the 2007 MRI?

A Yes. I noted that there are again despite the surgery I saw large osteophytes throughout the spine and I said particularly from the C3-4 level through the C6-7 level.

Q What if any affect did you see of those osteophytes on the spinal canal?

A I noted that they resulted in multi level spinal stenosis; that there was a narrowing of the spinal canal and the foramen which are the outlets where the nerves exit.

Q Doctor, did you see any swelling of the tissue or anything?

A No. I did not note a fracture and again I did not note any hematoma or swelling or any other evidence of

recent or acute trauma.

Q I direct your attention to the November 18, 2009 CT. I believe that is here in court on the computer?

A Yes.

MS. TAYLOR: Could I ask, your Honor, that he take the computer over?

THE WITNESS: Where is the best place for me to set it up?

MS. TAYLOR: Well it should have power I'm hoping. Your Honor, with the Court's permission, would the Court have a problem with the jury coming over here to view it?

THE COURT: Can you move it. If it is charged, it is all right.

MS. TAYLOR: Thank you, your Honor.

THE WITNESS: I just don't want it to fall or block anyone's view. So instead of having a sheet of films and a view box --

MR. SIRIGNANO: May I, your Honor?

THE COURT: Yes.

THE WITNESS: These films, many studies nowadays are stored digitally and they are just transmitted by discs. I will identify everything just like I did with the MRI. The first thing I

look at is the writing so we can identify that we have the correct patient.

Vincent Taurone. The date of the study November 18, 2009. So just a few weeks after the accident and this identifies that at CT of the cervical spine without contrast. So CAT scans again are best for looking at the bones and also in this case of any hardware, orthopedic hardware.

Metal structures in an MRI don't show up well because they cause an artifact or which blurs the image. This particular view that I have up here is that sagittal or sideways view. So this is a slice right through the middle of the neck just like I had shown you on the MRI.

And we can see the bottom of the chin and the front of the neck so the patient is facing sideways towards the back room. And this is the nape of the neck along the back, the back of the skull. These are the bones of the spine.

And air appears black. So bones appear very white or bright and air appears black. So this is actually the base of the tongue and this is called the pharynx and the trachea and the esophagus. So this is the airway in the front of the neck.

We can see the bones that are stacked one on top of the other. This gray space is the spinal canal, and between these bones the C-5 the C-6 and C-7 bones we can see a metal plate and that's what I'm pointing to right along the front part of the vertebral body.

And it is held in place by screws at each level. There are paired screws that screw it right into the bone. And let me see if I can do this. This let's me take pictures -- that didn't work. Bear with me one second, I'm sorry. It is not my computer, so this should go by slice.

There we go. Let me stand over here now. I can actually advance slices through the neck from side to side and I can come backwards. See as I come off towards the sides, let me come back one. The disk is spinning, so it is going to catch up with me.

Here we can see the white stacked bone. This would be the T1 bone. And if we look at these bones, we can see these black -- the white triangles, these are the bone spurs that are pointing backwards. So even though the plate was put here and the disk materials were put here, we

still have these bone spurs in the back part which is where the spinal canal and the spinal cord and the nerves live.

So there is persistent narrowing of the canal at these levels. I will show you a few more images just to be representative. Again we can see particularly at this level at C6-7 we can see these white bone spurs that are still growing backwards. So this was just two weeks after the accident.

The other thing we can identify is how the plate is positioned in contact with the front margins of the bones. So let me try and get to that. Here is the plate, the white plate and it sits snugly up against the front of the bones. It is not lifted or moved in any way.

And if it was to displace or back out, these screws would also have to back out. The screws are holding it flush. So I can see each one of these screws on every image is in perfect position. And the head of the screw hasn't backed out in any way. This is just the sagittal or sideways view.

But to confirm it I'm now going to show you

what are called axial views, slices from top to bottom. This is a cross section where the front or the head is on the top of the image and the back of the neck is on the bottom.

Then we have an R here for right side and this is left side. This is the spinal canal, this oval structure and the white is bones. And instead of normal smooth bones, they appear jagged and these are the bone spurs or the osteophytes.

And I want to try and show you the plate if I can. Now we are getting to the plate sitting in front and the screws and I can see on every slice the plate is sitting snugly right up against the surface of the bone. It is not lifted off or removed in any way.

And here the screw is flush dead into the center of the bone at each level. Here are two screws. And they are sitting flush in. So based on this, I can still see the degeneration or arthritis. I can see the evidence of the surgery, but the hardware all appears in satisfactory position.

Q Thank you, doctor.

THE COURT: I guess we are going to remove

that.

MS. TAYLOR: Yes, your Honor.

Q Dr. Fisher, based on your review of the November 18, 2009 CT scan, did you see any elevation of that plate?

A No, I did not.

Q Doctor, based on your review of that CT scans of November -- I'm sorry, April 2007, November 10, 2009 and November 18, 2009, did you make any -- withdrawn -- did you formulate any opinion as to the positioning of the plate and the screws?

A Yes, I did.

Q What was your opinion within a reasonable degree of medical certainty?

A That they appear to be adequately placed or positioned. They were flush up against the bone. The screws were not extending through the bone. There was no breaking of the plate or bending of the plate or screws. So everything appeared to be intact and as it was placed several weeks before.

Q Did you have occasion, doctor, to view an MRI on or about December 15, 2009?

A Yes, I did.

Q Did you make any findings upon viewing that MRI?

A Yes.

Q What were those findings?

A The MRI again it is a different modality but it showed similar findings to the CAT scans; namely, there was persistent extensive degeneration or bone spurring. I could still see the presence of the bone graft material and the plates and screws.

So I saw no evidence of hematoma or fracture, no new disk herniations, and no evidence of a recent traumatic injury.

Q Doctor, are you familiar with the term wedge fracture?

A Yes.

Q What is a wedge fracture?

A Typically the bones in our spine fracture differently than our extremity bones. Instead of snapping or breaking in half, they often collapse almost like an accordion, so they are called compression fractures. And if it compressed just straight on top of another it would be a straight compression fracture, but typically they might construct a fracture slightly more in the front or the back so that's often referred to as a wedge fracture or wedge compression fracture.

Q Did you see any evidence of any wedge or compression fracture in any of those films we just

discussed?

A None whatsoever. And MRI is very sensitive not only for showing fractures but even bone bruising or contusions. And the MRI did not show any evidence of bone marrow edema or bruise.

Q What if anything did you see in terms of bruising of the spinal canal?

A I did not see any evidence of acute trauma or recent bruising. On the MRI's both the one two years earlier and the repeat one done several weeks after the accident I did see that bright signal in the spinal cord which again I wouldn't describe as bruising. But it is a chronic change or alteration of the spinal cord itself from the long standing compression.

Q You used the term acute. What does that mean, doctor?

A Usually we will describe findings in medicine as either acute or chronic. Acute means recent. It usually means within a few days or even a few weeks. Chronic is usually several months to years.

There is a gray zone or a gray area when you are three weeks to two or three months, it is not really acute and it is not really chronic yet. So often we will call that subacute.

Q You also used the term traumatic. What does that mean?

A Traumatic refers to an injury, an acute injury. It is tough to describe a word that you would use to describe itself. But a fall, an automobile accident. If you are punched, those are all traumatic events. There are many. In dealing with my athletes, every time they a pitcher throws a pitch it is microtrauma if you will, it is a small injury and if it is repeated thousands of times, it can result in similar to a one more dramatic injury.

Q What was your opinion, doctor, regarding whether there was any traumatic injuries shown in any of the films that we have discussed so far?

A Based on all the films that I reviewed I did not see any evidence of a recent or acute traumatic injury.

Q Did there come a time also, doctor, that you reviewed an x-ray of the C spine dated January 6, 2010?

A Yes.

Q And can you tell us what if any findings regarding that scan, that x-ray?

A That x-ray was actually done it appeared to have been done in the operating room at the time of the second surgery. So it was performed portably on the table. And so it was a very limited study as a cross table view more

to guide the surgeon and to help them localize a level than for real diagnostic purposes.

Q Were you able to see any of the plates or the screws in that x-ray?

A You know I hadn't even really commented on it because it didn't really even show the lower levels. And I noted specifically that the bottom of C5 through C7 weren't even included on the film. It was really to localize or start to count the levels from the top down.

Q Did you review an x-ray dated January 7, 2010?

A Yes, I did.

Q And did you make any findings regarding your view of that x-ray?

A Yes.

Q What were those findings?

A On those repeat films the next day you can clearly see the spinal fusion plate and screws in place at the C5-6 and C6-7 levels and I noted that you could still see degenerative changes or bone spurs present.

Q Based on your review of all of these films including CT, x-ray and MRI, doctor, do you have an opinion regarding whether there was any causal injury from the November 9, 2009 motor vehicle accident on Mr. Taurone's cervical spine?

Fisher - Direct - Defendant

MR. SIRIGNANO: Objection, your Honor. May we have a side bar on this?

THE COURT: Yeah, read it back.

(Requested portion was read by reporter.)

MS. TAYLOR: I will withdraw the question, your Honor.

Q Doctor, I'm going rephrase that question. Based on your review of all of the films, did you see any evidence in any of these films dating back from the October -- the first October scan to January, 2010, did you see any evidence of any traumatic injury?

MR. SIRIGNANO: Objection.

THE COURT: Overruled. I mean --

MR. SIRIGNANO: Your Honor, the grounds are I'm holding the witness' report and there is no such mention in the report. It is outside of what has been disclosed.

MS. TAYLOR: Your Honor --

THE COURT: We will have to go to side bar.

(A sidebar conference is held with Court and counsel on the record:

THE COURT: Well I have to get my glasses I guess. All right, we are at side bar with both attorneys present. And Ms. Taylor is showing me

something from a 3101 D I assume.

MS. TAYLOR: Yes, your Honor.

THE COURT: Here it is.

MR. SIRIGNANO: Your Honor, my objection is this is the ultimate issue for the jury to decide, not for this expert witness to decide. It is a matter for the jury. I think it is up to the jury based upon his radiological findings.

THE COURT: The only problem that I know this but is as follows: It is my understanding which could be wrong that trauma can cause these osteophytes to spur the growth of these osteophytes. So that it can be one way or the other. It could be that the osteophytes, you know, in fact were causing the pain and indeed continued to grow or it could be and I think this is true like football players and so forth they get injured and their back develops degeneration.

MS. TAYLOR: I believe my doctor is going to say the osteophytes are not causally -- do not have a traumatic etiology, your Honor, and I can ask him that question.

MR. SIRIGNANO: The problem I have with this witness going the whole nine yards counsel wants

to take him is he's not a clinician. He's not a treating doctor. He's a radiologist. He's reviewing films. Now he's being asked to opine on the ultimate issue in this case. I think it is improper.

MS. TAYLOR: He can based on his experience, view of the films. This was disclosed in 3101 D. Counsel made no objection at the time, your Honor. It is certainly within the purview of his experience in seeing films.

THE COURT: It is in the 3101 D.

MR. SIRIGNANO: I don't dispute that, but my objection is that it doesn't make it admissible at trial. It is not otherwise admissible, it is not.

MS. TAYLOR: It does make it admissible. It is within his experience. He does this every day. He can certainly opine based on the films as to whether there was a trauma shown in the films or whether it was chronic.

THE COURT: From years of experience with back injury cases, I do note that trauma is usually diagnosed most properly with a clinician because they look at the tissues and they look at the whether there is any mild blood in the tissues

or they look at the tissues to see if there is a traumatic -- there is trauma.

But I'm not a doctor. So you know I'm sure that the proper thing to do is let her ask the question and you can cross-examine and use whatever expert you have to bring that out.

MS. TAYLOR: Thank you, your Honor.

MR. SIRIGNANO: Exception noted for the record.

THE COURT: Okay.

(Back in open court.)

MS. TAYLOR: Your Honor, can I have a read back of the question?

THE COURT: Yes, would you read back the last question.

(Requested portion was read by reporter.)

MR. SIRIGNANO: Objection noted.

THE COURT: Overruled.

A No, I did not. In fact when I first prepared this report back in January, 2011, 2 1/2 years ago, my very last line in my concluding line specifically states and I will read it --

THE COURT: I don't think we are going to do that.

THE WITNESS: But it states that --

MR. SIRIGNANO: Objection.

THE COURT: No, no.

THE WITNESS: I apologize.

THE COURT: Strike that.

MR. SIRIGNANO: I move to strike.

THE COURT: Strike that.

Q Now, doctor, you appeared in court today. Were you paid a fee to appear here today?

A I will be paid a fee, yes.

Q Okay?

A I hope.

Q All right I just wanted to ask also, doctor, have you ever testified in any court in the State of New York?

A Yes, I have.

Q Have you testified in this court before?

A Not this particular room, but this court house, yes.

Q And can you estimate for us the approximate number of cases you testified either for the plaintiff or the defendant?

A To date every time I have testified has been for the defendant, and I don't know the exact number, but typically once or twice a month. So perhaps 15 to 20 times

in the course of the year.

Q Your experience, doctor, have you ever testified for the plaintiff?

A Not to date, no. I have done reviews for the plaintiff, a number of reviews, but I have not testified.

MS. TAYLOR: I have nothing further. Thank you, Dr. Fisher.

THE WITNESS: You are welcome.

THE COURT: Thank you and now the counsel for the plaintiff will cross-examine, Mr. Sirignano.

MR. SIRIGNANO: I'm happy to start or is this a good time to take a break? I don't want to take a break in the middle of my cross.

THE COURT: Okay. I will take that suggestion and let's break for 15 minutes until 11:10.

(Jury exits courtroom.)

(Recess taken.)

COURT OFFICER: Come to order.

THE COURT: All right, let's get the jury. And the witness can take the stand.

(Jury enters courtroom.)

THE COURT: All right, good morning again. Be seated. We have a witness on the stand who's

testifying. Dr. Fisher, you are still under oath. Understood and agreed?

THE WITNESS: Yes, your Honor.

THE COURT: We will now I believe have cross-examination by Mr. Sirignano.

MR. SIRIGNANO: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. SIRIGNANO:

Q Dr. Fisher, are you currently at Prohealth Care Associates in Lake Success?

A No, sir.

Q Well the CV provided to me gives that as your employment from 1998 to the present. When did you leave there?

A I have a more current CV you may not have. I always bring one with me. So I don't know if you would like to see that.

Q All right.

A I'm not sure which copy you have.

(Handed.)

Q Well what is your -- I'm not clear what is your present employment?

A Metropolitan Diagnostic, and I have my own consulting company. So I do a number of reviews for other

radiology groups and orthopedists.

Q Okay. So in your own -- what is the name of your own consulting?

A It is my own name. It is David A. Fisher, MD, PLLC.

Q It is in that entity or that business that you provide today's testimony and between 15 to 20 such in court testimonies per year?

A Yes, sir.

Q How much are you being paid for today's testimony?

A $6,000 dollars.

Q And how much were you paid to prepare your report dated or served on me April 7th, 2011?

A I don't recall the exact amount, but typically I am paid in the neighborhood of $100 dollars per study. So it would depend on how many studies I reviewed. If there were six different examinations or studies, it would be $600. I'm not sure exactly how many there are here, but that's my compensation for my reviews and reports aside from testimony.

Q So $7,000 for today and $100 per film?

A Yes.

Q In addition to in court testimony do you do these -- do you give deposition testimony?

A Very rarely, but I have, yes.

Q How much do you charge for your deposition?

A Oh, I haven't done one in probably six years. And I believe it was $4,000 or $4500.

Q How is it that you have only testified on behalf of defendants and never once for a plaintiff?

A I have not been asked to testify.

Q Okay. So defense attorneys contact you and they retain your services, correct?

A Yes.

Q In this particular case you were retained by whom?

A The law office of Mary Bjork.

Q How is it that you came into possession of the films that you reviewed in this case?

A Again I don't have an independent recollection from 2 1/2 years ago, but typically the films are delivered to my office.

Q Okay.

A And then they are returned with the report within 24 hours. So I do not maintain any records in my office.

Q But they were delivered, the films that you reviewed were delivered by defense counsel, correct?

A Correct.

Q In addition to the films were you given any of Mr.

Taurone's treatment records in this case?

A No, sir, just the films.

Q So you didn't review any of his hospital records, any of his doctor, medical records whatsoever?

A No, I did not.

Q So you didn't even review the original readings of the very films that you testified to this jury about? You didn't read the original readings in the medical records?

A Not that I recall, no.

Q Doctor, isn't it important if you are going to give expert testimony to a jury that you have made yourself fully familiar with all of the relevant records?

A Well I'm giving testimony as to my opinions. So it is irrelevant what someone else looked at and what their opinion was.

Q Even the other board certified like yourself radiologists who read the very same films you read as part of Mr. Taurone's treatment plan?

A I don't know which radiologist you are referring to. It is irrelevant again to me what their opinion is. The jury might like to have them come in here and explain their opinion, but I'm here just to speak for myself.

Q I appreciate you speaking for the jury. Let's go to the 11, 10, 09 CT scan that was read by a Dr. Elizabeth

Dubovsky; do you know Dr. Dubovsky?

A No, sir.

Q Do you know anything about Dr. Dubovsky?

A No, sir.

Q Do you know whether or not she is board certified?

A I do not know.

Q Do you know whether she is a good radiologist?

MS. TAYLOR: Objection, your Honor.

THE COURT: Overruled.

A I do not know anything about her.

Q You have no interest whatsoever what Dr. Dubovsky wrote when she read the same film that you have now testified to the Court to?

MS. TAYLOR: Objection, asked and answered.

THE COURT: Overruled.

A No, sir.

Q Did you pick up the phone and call Dr. Dubovsky to compare notes?

A No.

Q Did you reach out to her to see why she may have seen something that you didn't see or vice versa on the same film?

A No. Again I wasn't reviewing this as a treating physician. I was reviewing this at the request of the

defense counsel.

Q All right. And in that regard you have never met Mr. Taurone before?

A Correct.

Q You have never seen Mr. Taurone before?

A Correct.

Q So when you were looking at films of Mr. Taurone's body, you weren't even aware of his physical size, were you?

A Only what might be printed on the films. Sometimes with an MRI they might list a height or a weight, but otherwise, no.

Q Were you aware of his age?

A Yes.

Q But you had no knowledge of his medical history?

A No, but again the age was printed on the films.

Q And you told the jury this morning on direct that you weren't aware of the date of the first surgery when you were reviewing these films, is that correct?

A I knew it was in the interval between the two studies, but I did not know the exact date, correct.

Q When these films were delivered to your office by defense counsel, what were you asked to do?

A To review and interpret the films.

Q Well, being only a defense expert and never having testified on behalf of plaintiff, am I correct that it was your understanding that it was your job to find normal studies in this case?

MS. TAYLOR: Objection, your Honor.

THE COURT: Read it back.

(Requested portion was read by reporter.)

THE COURT: To find normal studies?

Overruled. You can answer that.

A If that was my goal, I would have failed miserably because I did not find a single normal study in this case.

Q Was it your understanding that you were to conduct a truly independent review of these films?

A That is my goal, yes.

Q Even though you are paid by the defense firm and only by defense firms?

A I'm sworn here to tell the truth and that's my interpretation and how I view the films, yes.

Q Am I correct, doctor, that a radiologists job is to interpret films, is that right?

A Yes.

Q And one radiologist may interpret the same film differently than another radiologist; is that uncommon?

A No, that's possible, yes.

Q It is not only possible, it is quite common, isn't it?

A I don't know how you would quantify common, but it is not uncommon.

Q It is not uncommon for a surgeon, particularly a neurosurgeon to read the films him or herself?

A I don't know that.

Q You have never worked with neurosurgeons on an actual patient's case?

A I read number of studies for neurosurgeons and they ask me to read them for them.

Q And is it uncommon for a neurosurgeon in addition to reading your report to look at the films him or herself?

A Again, you would have to ask the neurosurgeons that.

Q Would you be surprised if a neurosurgeon read a film differently than you?

A No, that would not surprise me.

Q And isn't it true that in reading films and ultimately making a diagnosis for by the perspective of a treating doctor or neurosurgeon that the films are important but also clinical observations and findings are important?

MS. TAYLOR: Objection, your Honor. Witness

is not competent to testify as to what a neurosurgeon commonly does.

THE COURT: Overruled. Read it back, please.

(Requested portion was read by reporter.)

THE COURT: You can answer.

A Yes, I would agree with that.

Q Doctor, you have talked about CT scans, MRIs, x-rays and the benefits of these films of these diagnostic techniques for various different purposes. Am I correct that all of these films for different reasons are helpful for the treating physician, in this case the neurosurgeon, to be able to get a look inside Mr. Taurone's body without having to surgically open him up?

A Yes.

Q So they are non-invasive in the sense that they provide information in various degrees of relevance to a treating doctor concerning what's going on inside the patient's body?

A Yes.

Q Okay. Would you agree with me that as valuable as these studies can be that there is no better evidence of what's going on in a patient's body than what a surgeon observes with his trained eyes and his skilled hands when he actually opens the patient up and does surgery?

A No, I would disagree with that.

Q Do you think the surgeon gets a better view of whether a plate has been backed off and a screw or screws loose when he's actually got his fingers inside the patient's neck or the films that you have discussed?

A In this case if he were to say that they had backed off, I would disagree with that.

Q Is it your position -- are you telling this jury that Dr. Thomas Lee, a neurosurgeon who did surgery to remove a plate that wasn't backed off?

MS. TAYLOR: Objection, your Honor.

THE COURT: Read it back.

(Requested portion was read by reporter.)

THE COURT: Overruled. If you can answer it.

A Again, I have no knowledge of what surgery he did, what he will say he did. But based on my review of the films, I'm confident that the plate and screws have not backed off in any way.

Q Doctor, Dr. Lee -- and it is in evidence as Plaintiff's 6 in evidence. I will hand it to you if you would like.

MS. TAYLOR: Objection, your Honor.

THE COURT: Objection to Plaintiff's 6 in evidence?

MS. TAYLOR: The doctor is not competent to testify as to anything that Dr. Lee did and Dr. Lee has not testified to this Court.

THE COURT: All right. Let's strike that. Strike it. Come over here.

(A sidebar conference is held with Court and counsel on the record:)

THE COURT: All right your objection, please.

MS. TAYLOR: Yes, your Honor. First of all it is beyond the scope of the direct. I never elicited any testimony from Dr. Fisher about what Dr. Lee did or didn't do. Furthermore, Dr. Lee hasn't even testified. There is no evidence as to what his findings were.

Third of all, Dr. Fisher is not competent to talk about what a treating physician did or didn't do and his procedures. He's strictly a radiologist that reviews films. He made that very clear on direct.

MR. SIRIGNANO: First of all I'm not limited to her direct. This is cross-examination.

THE COURT: I thought you were.

MR. SIRIGNANO: To her direct? Why am I limited to her direct? I can cross-examine on any

subject whatsoever.

MS. TAYLOR: That's not what the Court's ruling was when I went beyond the scope of direct.

THE COURT: That's correct.

MR. SIRIGNANO: No, that was redirect. Secondly, this is a document that's already in evidence. I have a right to hand this document to the witness.

THE COURT: I don't think you have a right to go beyond the scope of the direct if the objection is made and it is correct. Do you? I don't think so.

MS. TAYLOR: No.

MR. SIRIGNANO: The objection is that I'm going beyond and I'm not limited to her direct testimony.

MS. TAYLOR: Of course, you are. That's basic rule of practice.

MR. SIRIGNANO: Your Honor, I have free hand to attack this witness on credibility.

THE COURT: On credibility.

MR. SIRIGNANO: On what knowledge he has, what preparation he's done, what documents he's reviewed. And if she hasn't given him the medical

records, that's not my problem. It is her problem.

MS. TAYLOR: I don't have to. I don't have the burden of proof, counsel. And this witness is only competent as to testify to the films he reviewed. You had an opportunity to ask him what films he reviewed.

THE COURT: Look, you cross-examined on the medical records him not reviewing it, all right. And that is a proper cross-examination as to his preparation for testifying today. What was your question here? Let's see if it fits in with that same type of question.

MR. SIRIGNANO: I didn't even ask a question yet; that's why it is bizarre.

MS. TAYLOR: Come on, Michael. Let's not do that, okay.

MR. SIRIGNANO: Not do what? I haven't asked a question.

THE COURT: It is very difficult for me to preside if you are going to both argue about this. I don't think he did ask a question. He wanted to show the doctor a medical record which was in evidence. What is your question?

MR. SIRIGNANO: I show him the surgical report that's in evidence and ask him about Dr. Lee's findings.

MS. TAYLOR: How is that impeaching to make him testify about Dr. Lees findings?

MR. SIRIGNANO: That doesn't mean -- I agree it is more competent, but --

THE COURT: You are both talking at one time. I think the question is, doctor -- something to the effect assuming that Dr. Lee, prepared records saying whatever they wrote, what is your reaction to that because there are records. You have cross-examined I think appropriately on the records in preparation.

MR. SIRIGNANO: Right.

THE COURT: All right and you can ask him that, but not -- she is right, I mean it is limited, okay.

MR. SIRIGNANO: Okay.

MS. TAYLOR: Thank you.

(Back in open court.)

THE COURT: Objection overruled.

Q Doctor, on Dr. Lee's surgical report on January 6, 2010 he writes because of recurrent symptoms as well as

failure of conservative treatment he has now, that is Vinnie, consented for re-operation to redo the decompression and fusion. On his imaging studies he was found to have slight back out of the plate at the C-6 and C-7 levels with partial collapse C-6 vertebrae.

Have you read that report before today?

A No, sir.

Q Were you aware that the actual neurosurgeon who twice performed surgery on Vinnie made that reading and findings concerning the diagnostic imaging studies?

A No.

Q You disagree with his opinion?

A Absolutely.

Q Did you see on any of the studies a partially collapsed C-6 vertebra?

A None whatsoever.

Q Now the studies that you did look at, doctor, after the October 12 surgery and before the January 6 surgery, would you tell the jury whether you found the first surgery performed by Dr. Lee to have placed the plate in good position?

A I don't know how you would define good, but it appears to be in satisfactory position.

Q What do you mean by satisfactory?

A The plate is flush against the front of the bones. It spans the correct levels that were identified and it is held in place by screws at three successive levels and each one of the screws is fully engaged.

It is not backed out in any way and it doesn't extend through the cortex or through the margin of the bone in any way.

Q Is that what you would expect to see after the kind of cervical surgery performed on October the 12, 2009?

A In regard to the placement of the plate and screws alone, yes.

Q So as far as your opinion as a radiologist, it appears that Dr. Lee properly affixed the plate and the screws?

A That portion of the surgery, yes.

Q On any of the diagnostic studies again for that same period between the first and the second surgeries did you observe the placement of any prosthetic devices where the disks once were?

A Yes.

Q The two relevant levels?

A Yes.

Q Did those prosthetic devices appear to be properly placed by Dr. Lee?

A Yes.

Q And the spacing between the vertebrae at those levels after Dr. Lee did this first surgery appears to be correct as well?

A Well the spacing is compromised by the extensive degeneration that pre-dated the surgery.

Q But do you have any criticism of Dr. Lee's first surgery?

A I see extensive osteophytes that are present after the surgery, and that's why I mentioned or separated the placement of the plate and screws and the prosthetic devices as one part of the surgery.

But prior to placing them an excision or resection is typically performed where bone spurs are resected to open the space. And it does not appear that there was adequate resection of the bone spurs.

THE COURT: Excuse me resection means they are?

THE WITNESS: Removed actually with a scalpel or a shaving device.

Q You haven't seen Dr. Lee's operative report?

A No, sir, just films.

Q So you don't know whether he removed any spurs?

A I just know what I see on the films.

Q Now let's go to the November 10, 2009 CT scan. In your report, doctor, without having reviewed Elizabeth Dubovsky, Dr. Elizabeth Dubovsky's reading of that film, you have stated there is no evidence of hardware or bone graft displacement, acute fracture or malalignment. Is that what you stated?

A Yes.

Q Isn't it true that Dr. Dubovsky makes no such findings in her report?

A I have no way of knowing because I did not review her report.

Q With respect to the 11, 18, 09 CT scan, that one was read by a Dr. Fred Vanatta. Do you know Dr. Fred Vanatta?

A No.

Q Do you know if he's a board certified radiologist?

A No.

Q Do you know if he's a good radiologist?

A No.

Q Do you know if he's a reliable radiologist?

A No.

Q Did you pick up the phone to talk to Dr. Vanatta?

A No, I did not.

Q Without seeing his report or consulting with him,

you write in your report again there is no evidence of hardware or bone graft displacement, acute fracture or malalignment. Am I correct that Dr. Vanatta who read the film initially made no such finding?

A I have no way of knowing what finding he made.

Q Well, doctor, am I correct that Dr. Lee and later Dr. Yassari reviewed and relied in part upon the original readings in Mr. Taurone's medical chart?

MS. TAYLOR: Objection.

THE COURT: Sustained.

Q With respect to the last film taken before Dr. Lee had to remove all of the hardware on January 6 that he had put in less than ninety days earlier, the last study we have is a chest x-ray on January the 6, correct?

A Actually there was an MRI of the cervical spine on December 15.

Q All right. I'm talking about the last?

A The last was actually in the operating room before the surgery on January 6 of the cervical spine.

THE COURT: This is 2010? Please give us the dates.

Q January 6, 2010?

A January 6, 2010. The last that I reviewed prior to the surgery was actually in the operating room at the

time of surgery.

Q That was an extremely limited study and really not particularly helpful for the issues in this case?

A That's correct.

Q Doctor, you have not reviewed any of the films of Mr. Taurone after January -- after the January 6 surgery --

MR. SIRIGNANO: Withdrawn. Let me rephrase that.

Q You have not read any films after January 7, 2010, correct?

A Correct.

Q So you have no knowledge about Mr. Taurone's condition of his cervical spine in 2011, correct?

A No.

Q Or August of 2012 when Dr. Yassari did a third surgery on his cervical spine? You have no knowledge of that?

A No, I do not.

Q You haven't seen any studies either before or after Dr. Yassari's surgery?

A No.

Q Doctor, am I correct to assume that between yesterday afternoon when Dr. Yassari testified and this morning before you took the stand, defense counsel advised

you about Dr. Yassari's testimony insofar as he testified about his reading of that November 18, 2009 CT scan?

A No, sir.

Q You were unaware that Dr. Yassari yesterday not only told this jury but showed this jury where he saw the plate backed out and a screw loose?

A I was not here so I don't know what he told them and what he showed them.

Q Defense counsel didn't tell you that between yesterday and this morning?

A No, sir.

Q It is the first you are hearing about it?

A I was asked questions to comment on it, but I was not told what any other doctors or experts had spoken to.

Q What do you mean you were asked questions by whom?

A By the defense attorney when I was on the direct examination. I was asked specifically to comment on the plate and the positioning of the plate.

Q No. I'm asking you about Dr. Yassari's testimony yesterday when he showed this jury the same film that you showed this jury and he pointed to where the plate had been backed off?

MS. TAYLOR: Objection, your Honor.

Q Are you aware of that?

Fisher - Cross - Plaintiff

THE COURT: You can ask were you aware of that?

A Again I wasn't here. I don't know what he pointed to. So no, I was not aware.

Q Doctor, am I correct that the CT scan of November the 18, 2009 was not just one or ten or 15 images that you showed the jury, but it was a total of 209 images taken?

A No, I showed a number of them. But yes -- I don't know the exact number, but there were a number of images, but not different images. For instance, I believe there were 71 images that were filmed in a bone technique and a soft tissue technique. So they were repeated. So it wasn't 142 different images, they were the identical images that were just shown in two different windows or levels.

Q Well why is that done that way, sir?

A By darkening or lightening the films, it will show the conspicuousness of certain structures.

Q So all of the 209 images are important for a radiologist and ultimately a surgeon to know about?

A I can't speak for a surgeon, but I can tell you as a radiologist I reviewed every single image that was provided to me.

Q You focused on certain of the 209 images, is that correct?

A For time constraints and for demonstration purposes, I picked selected images that I thought best showed the details that I wanted to articulate.

Q And can you say sitting here today that you reviewed the very same images that Dr. Lee viewed out of those 209 when he showed this jury the plate backed off and a loose screw?

MS. TAYLOR: Objection, your Honor.

THE COURT: Overruled.

A Again, I can't tell you what he pointed to, but I can tell you that I viewed every single image. So if it was from the same study, I viewed all the images that he pointed to.

Q Now the MRI that you reviewed of 12, 15, 09, you again in your report unequivocally state there is no evidence of fracture, bone marrow edema or disk herniation, is that correct?

A Yes.

Q The actual reading by the radiologist of that MRI as part of the treatment and care of Mr. Taurone makes no such claim. Are you aware of that?

A Does he state that there is a fracture or bone marrow edema or disk herniation?

Q Doctor, here is the thing, and it may not be fair,

but I get to ask the questions and you get to give the answers.

MS. TAYLOR: Objection. The witness has not been shown the document. How can he testify?

THE COURT: We are not going to argue here. Let's just ask a question and you can answer.

MR. SIRIGNANO: Can we read back my question?

THE COURT: Yes.

(Requested portion was read by reporter.)

A No, I would be happy to review the document. I have not seen it.

Q Are you aware that Dr. Lee on December 22, 2009 found that the MRI that we are talking about demonstrates probable recurrent disk herniation at C-5 C-6 and C-6, C-7? Given the radiographic and clinical findings I feel, that is Dr. Lee feels, he's a candidate to undergo redo decompression and fusion the C5-6 and the C6-7 levels.

Are you aware of Dr. Lee's findings in that regard?

A No, and it makes no sense at all.

Q You are questioning the neurosurgeon who twice performed surgery on Mr. Taurone?

A Absolutely.

Q Okay. Doctor, I believe I wrote your words down

exactly as I heard them when you were describing the 11, 10, 09 CT scan. You said, quote, "no bend or crack in the plate". Did I get that right?

A Yes.

Q Well are you aware that we are making any allegation about the plate having been bent or cracked?

A No. I don't read this in regard to a specific case or testimony. When I'm asked to comment on someone whose had any surgery, I usually tell the orthopedist or surgeon the integrity of the material that's been placed. So that's something I would normally comment on anybody who has a plate or screws in their body. I let them know that they haven't broken.

Q All right. So when you are not wearing your consulting hat making seven grand 15 to 20 times a month by coming to court like today --

A A year.

Q Excuse me, but you are wearing your radiologist's hat?

A And it is 6,000 if you want to be accurate.

THE COURT: You know, let's not interrupt because the reporter has to get down every word and it becomes very difficult.

Q And you are wearing your radiologist hat where a

treating doctor is asking for your reading of a film, does the treating doctor give you some instructions about why it is he's ordering the film and what he's trying to find out or rule out?

Isn't that typically what a treating doctor does?

A Sometimes we are given specific questions, but I read every film the same way and I look at all of the anatomy on the films the same way.

Q Well isn't it helpful as the radiologist who's about to read a film to know what it is the treating doctor is treating for or trying to rule out?

A If you are thorough. I answer every possible question.

Q Doctor, my question is pretty simple. Isn't it common that the treating doctor will request a particular study and tell you why?

A If you are talking about what's common, a treating doctor will say the patient is having pain, neck pain in a case like this. Nothing more. And so we have to be thorough and explain every possible cause or explanation for the patient's symptoms.

Q So it isn't helpful to you as a radiologist when you are acting in that mode to know what it is the treating doctor is trying to diagnose, true?

A Again I answered the question the best I could. I read them all regardless of what information I'm provided.

Q Getting back to that 11, 10, 09 CT scan, I think I got your words right. You will tell me if I didn't. You said no fracture in the vertebral bodies. I'm not asking what you wrote in your report, doctor, I'm asking what you told the jury?

A I don't have an independent recollection, but I did say that there was no fracture, yes.

Q Were you told by defense counsel that we are alleging a fracture?

A No. Again I'm being thorough and I'm identifying all of the structures on the study that I have reviewed.

Q You also said that that CT scan of November the 10 showed no swelling. Well isn't it true that the CT scan is the least effective study for swelling?

A I'm not sure where you are referring to in my report. Are you referring to --

Q No. You told this jury your reading of the 11, 10, 09 CT scan showed no swelling as a direct response to defense counsel's question about swelling?

A Yes, it is less sensitive than MRI, but you can still identify if there is significant swelling within the muscles or surrounding soft tissues.

Q So now you are qualifying it from no swelling to no significant swelling?

MS. TAYLOR: Objection, your Honor. Argumentative.

THE COURT: Overruled.

A I see no swelling whatsoever, but I would qualify it and say that CT is less sensitive for identifying it than other modalities such as MRI.

Q I believe you told this jury on direct that the plate as you see it in the studies was adequately or satisfactorily placed?

A Yes.

Q What does that mean?

A Again we went through this entire question, but it appears to be flush with the front of the vertebral body. The screws have not backed out in any way and they are all satisfactorily positioned within the vertebral bodies at each of the three levels. So all six screws.

Q Doctor, you were asked about the difference between traumatic injuries and chronic injuries and you said there is a gray area. A gray area between the two, correct?

A Yes.

Q That gray area is because a traumatic injury is

really fact based, correct?

A I'm sorry?

Q A traumatic injury is based on particular facts of the trauma whether it is a minor fender bender or whether it is a violent rear end collision that propels a car 38 feet?

A If you are talking specifically about a car accident as the mechanism, yes.

Q Well that's what we are talking about in this case.

A Well I didn't know if you were asking a general question or specific.

Q Were you even aware this was a car accident case, doctor?

A Yes.

Q And who told you that?

A The defense attorney.

Q And what else did the defense attorney tell you?

MS. TAYLOR: Objection, your Honor.

THE COURT: Sustained.

Q Were you given any of the pleadings in this case?

A No, sir.

Q You didn't see my bill of particulars where I lay out the whole array of injuries that I'm alleging and

proving in this case?

A No, again I answered, no.

Q Did you read the complaint in this case?

A Just the films, no records whatsoever.

Q And what defense counsel told you?

MS. TAYLOR: Objection, your Honor.

THE COURT: Sustained.

Q Doctor the pre November 9, 2009 studies that you reviewed, that's the date of this motor vehicle rear end accident. Of all those pre accident studies would you agree with me that the condition of Vinnie's spine was particularly susceptible to either reinjury or exacerbation?

A It was a compromised spine, yes.

Q And when you say compromised, meaning it wasn't as strong as a healthy person's spine?

A Yes.

Q And because it was compromised, it was more susceptible to an injury or exacerbation?

A Possibly.

Q Aggravation?

A Possibly, yes.

Q You understand the term exacerbation, correct?

A Yes.

Q Tell the jury what you understand it to mean?

A It is a worsening of a pre-existing condition or an aggravation of one.

Q So the same impact that might have produced only a minor injury on a healthy spine could produce a much more severe injury or reinjury or exacerbation on a compromised spine; fair enough?

A Hypothetically, yes.

Q And hypothetically given Mr. Taurone's age, you said you were given his age, right, you knew you that, and you had a variety of pre-accident studies; can you quantify how compromised his spine was at the moment when he got rear ended and propelled 38 feet?

MS. TAYLOR: Objection, your Honor.

THE COURT: Read it back.

(Requested portion was read by reporter.)

THE COURT: Overruled.

A Based on the films and the information I got, he had a severely compromised spine and he had a symptomatic spine even before the accident because he went for x-rays just two weeks before.

Q Doctor, how much on a percentage basis of your annual income is attributable to your work for the defense bar?

A I don't have an exact percentage, but more than half.

Q And in terms of your hours, days of the week, how much on a percentage basis do you devote to your work for the defense bar?

A Again I still do not have an exact percent, but currently I'm doing more and more of this and less of the clinical, so more than half.

Q Doctor, through your practice have you or through this defense bar work that you do more than half the time, have you seen more than once trauma cause injuries following a motor vehicle accident to the cervical spine?

A Yes.

Q How many times have you seen such injury to the cervical spine arising out of a car accident?

A Numerous times, countless times.

Q Countless, right? And are you --

MR. SIRIGNANO: Withdrawn.

Q Does the nature of the accident whether it is rear ending or a T bone sideswipe or other type of collision make any difference in your diagnostic review of a case?

A Me personally, no. I review the films irrespective of that, but it would have an impact on the susceptibility to injury.

Q In what respect is a rear end accident particularly dangerous to cervical spine, particularly at the lowest levels?

A There are a number of factors. It would depend on the velocity of the impact and how well restrained the patient is. Are they harnessed. Is there a head support or rest. So there are a number of factors again I'm not privy to. I just know what I see on the films.

Q And the levels the C5-6, 6-7 levels that were injured in this accident, they are at the lower end of the cervical spine, correct?

A Yes.

Q And they are carrying the full weight of the rest of the cervical spine, the head, correct?

A The weight of everything above them they are carrying.

Q And are they particularly in terms of flexion and extension, are they the most affected pivot point of the neck in a rear end collision?

A Well irrespective of the collision, it is the level of our neck that carries the most vector forces or weight. And from the MRI two years earlier it was the area that was most diseased.

Q Following the October 12, 2009 surgery, you

reviewed the November 10, 09 CT scan which is just about a month after the first surgery, correct?

A Yes.

Q And does that CT scan tell you whether there was any bony fusion process as of that time?

A Just that bone grafts had been placed.

Q But you didn't see any fusion yet?

A No.

Q Would you expect to see fusion only 28 days after a surgery?

A You might never see fusion. We have a plate and screws that are holding it in place. So often you never see bony fusion.

Q But that wasn't my question, doctor. I appreciate the unresponsive answer, but did you see bony fusion?

A No, I already answered that and then you asked a repeat question.

Q Were you surprised not to see bony fusion at such an early post surgical period?

A No. And again my answer is not only wasn't I surprised, but I frequently never see it.

Q And in the absence of bony fusion which you confirm wasn't there at the time of the accident, what was holding Vinnie's C-5, C-6, C6-7 vertebrae together?

A Again there was a plate and screws holding it in place and there are bone grafts that are holding it in place as spacers. There are surrounding ligaments and muscles. So there are a number of supporting structures holding it in place.

Q Have you viewed films in other cases either for the defense bar or for your private practice where six months out, a year out from this same type of surgery you see the bony fusion having occurred?

A Occasionally I see bone fusion and more often than not we do not see bony fusion.

Q When you see bony fusion six months, a year, two years out, do you have an opinion whether the cervical spine is stronger and sturdier, more stable because of the bony fusion?

A No, you can argue that it might be less stable because it restricts the motion, the flexion and extension.

Q Well if the patient has been advised that one of the down sides of this surgery is that he's going to lose some motion, flexion extension motion and he accepts that as a trade off to get rid of pain and other problems, would that change your thinking on that answer?

A Not at all, no.

Q Because you don't get involved in patient care,

correct?

MS. TAYLOR: Objection, your Honor.

Q Doctor, do you have patients that --

A After --

Q Let me finish the question. Do you have patients that come to you and ask you to perform radio graphic study?

A Yes.

Q They are not sent there by a treating physician?

A Oh, I have a number of patients that will tell their physicians they would like to come to me.

Q And when they come to you and -- have you had that instance where it is a motor vehicle accident with the cervical injury similar to Mr. Taurone's?

A Just this week.

Q And how was that a surgical case with fusion?

A It has not been surgical yet.

Q Then we are not going to waste time on it. By the way have you spoken with Dr. Thomas Lee before taking the stand today?

A No, sir.

Q Have you spoken with Dr. Reza Yassari before taking the stand today?

A No.

Q Last question. On the 11, 18, 09 CT scan, did you see any bony fusion?

A No.

Q On the December MRI, December 15 of 09 MRI, did you see any bony fusion?

A No.

MR. SIRIGNANO: I have nothing further. Thank you.

THE WITNESS: You are welcome.

MS. TAYLOR: Redirect, your Honor?

THE COURT: Yes. Ms. Taylor will have a redirect examination.

REDIRECT EXAMINATION

BY MS. TAYLOR:

Q Dr. Fisher, as part of your review of the radiologic review did you reduce your findings to a report?

A Yes, I did.

Q Did you certify that report in any way?

A Yes.

MR. SIRIGNANO: Objection, your Honor.

THE COURT: I suspect I know where you are going, Ms. Taylor, and I am going to sustain the objection.

MS. TAYLOR: Okay.

Fisher - Redirect - Defendant

Q Dr. Fisher, as part of your licensing as a New York doctor, is there any code of ethics that a radiologist would be aware of?

MR. SIRIGNANO: Objection, Judge.

THE COURT: Sustained. Beyond the scope.

Q Doctor, do you have any reason to --

MS. TAYLOR: Withdrawn.

Q The report that you produced as a result of reading Mr. Taurone's films, do you have any as you sit here today, any reservations about any of your findings in that report?

MR. SIRIGNANO: Objection, Judge.

MS. TAYLOR: Goes to his credibility, your Honor.

THE COURT: Well no, it is beyond the cross-examination. Sustained.

Q Doctor, your reviewing you said over 50 percent of your reviews are for the defense. Does that in any way affect what findings you render in a case?

MR. SIRIGNANO: Objection.

THE COURT: Reading, sustained.

Q What if any affect does the fact that you are retained by defense counsel have on your findings in any particular case?

MR. SIRIGNANO: Objection.

THE COURT: Same objection, sustained.

Q Were there any other considerations in your findings on the matter of Vincent Taurone other than review of the radiological studies?

A None whatsoever.

Q Now counsel asked you whether you had any criticism of Dr. Lee's surgery and you talked about the bone spurs. Is that the same as the osteophyte?

A Yes.

Q Is an osteophyte an arthritic condition?

A Yes, it is an overgrowth of the bone that it is typically a result of a long standing degeneration.

Q Doctor, would you consider --

MS. TAYLOR: Withdrawn.

Q You used the terms acute and traumatic before when I asked you about that?

A Acute and chronic.

Q Acute and chronic. I also asked you about the term traumatic?

A Yes.

Q Would a fall on a person's back be considered traumatic?

MR. SIRIGNANO: Objection, Judge. This is

clearly outside my cross.

MS. TAYLOR: No, it is not, your Honor. He talked about worsening and a trauma.

THE COURT: I'm going to sustain that as it is beyond the scope. There was no question to the doctor about that.

Q Doctor, you testified on cross-examination about a worsening or aggravation of Mr. Taurone's spine. Do you remember that when Mr. Sirignano asked you about that?

A Yes.

Q Could a fall on the back worsen or aggravate a cervical spine condition of spondylosis?

MR. SIRIGNANO: Objection. This wasn't brought out on her direct and I certainly didn't bring it out on my cross.

MS. TAYLOR: If we had a read back, counsel did talk about worsening and aggravation of Mr. Taurone's spine.

MR. SIRIGNANO: Arising out of the automobile accident of November the 9.

MS. TAYLOR: And he also asked about trauma, your Honor, and motor vehicle accident and there has been evidence in this case.

THE COURT: Well you know you are having a

talking objection.

MS. TAYLOR: I'm sorry.

MR. SIRIGNANO: There is nothing in the expert's report that was served on me in the 3101 D --

THE COURT: Listen I really think that that question knowing that he didn't read any of the medical records is probably not proper at this time. Sustained.

MS. TAYLOR: Your Honor, may have the November 18 hospital record for Mr. Taurone? (Handed.)

MS. TAYLOR: Your Honor, I'm asking that Plaintiff's 5 - I don't know if that is an I or a 1 be shown to the witness. It is the report counsel referred to of Dr. Elizabeth Dubovsky. It is in evidence.

MR. SIRIGNANO: It is a one, small one.

Q Would you take a look at that report, Dr. Fisher. Is that a report from Dr. Dubovsky?

A Yes, Elizabeth Dubovsky.

Q Do you see the findings on the bottom of that report?

A Yes, I do.

Fisher - Redirect - Defendant

MR. SIRIGNANO: The witness has said numerous times that he has never seen this report or any other original report.

THE COURT: The problem is that 3101 D does not state that he is reviewing and commenting on other medical reports and he has told us that himself. So to now analyze someone else's report I think it is beyond what he was brought here to testify to.

MS. TAYLOR: Your Honor, may have a side bar, please?

THE COURT: No. I have made my ruling.

MS. TAYLOR: Exception.

Q Doctor, I will take that report. Would you agree or disagree with a finding that as of November 10, 2009 the C4 to C6 hardware was retained? Would you agree with that?

A Yes.

Q Would you also agree with a finding as of November 10, 2009 that there was no evidence of fracture or subluxation of the CT cervical spine?

A Yes, that's consistent with my report as well.

THE COURT: And your source is?

MS. TAYLOR: The evidence, your Honor.

THE COURT: Well, yes, but your source is a

physician?

MS. TAYLOR: Yes, Dr. Dubovsky.

Q Would you also agree with a finding, doctor, of diffuse spondylosis with multiple level moderate canal and foraminal stenosis as of November 10, 2009?

A Yes, that's consistent with my report as well.

MS. TAYLOR: I have nothing further. Thank you.

MR. SIRIGNANO: Nothing, your Honor. Thank you.

THE WITNESS: Thank you, your Honor.

(Witness excused.)

THE COURT: All right I just want to see the attorneys about scheduling for a moment, please.

(A sidebar conference was held with Court and counsel off the record.)

THE COURT: All right we are going to have somewhat of a long lunch hour. 2:00 o'clock. We will see you at two. Thank you.

(Jury exits courtroom.)

THE COURT: Anything before we go to lunch?

MR. SIRIGNANO: No, your Honor.

THE COURT: All right.

MS. TAYLOR: I'm sorry, your Honor?

THE COURT: Anything before we go to lunch?

MS. TAYLOR: No, sorry.

(Luncheon recess taken.)