

witness?

THE COURT: Yes.

BY MR. BARNES:

Q. Let me show you what we've marked just for identification, Doctor. It's plaintiff's 30. Take a moment and look at that document.

A. Yes.

Q. Is that the life care plan for Denise Keels?

A. Yes, I've seen this.

Q. I'm not going to ask you to read from it, it's not in evidence. But you're familiar with this document?

A. Yes.

Q. You participated in the creation of this document?

A. Yes, I went over that with Mr. Winship.

Q. And the recommendations in this are yours?

A. Yes.

Q. And is it your opinion, Doctor, within a reasonable degree of medical certainty that the recommendation you made in here for Denise Keels' future care are fair and reasonable given her condition, given her history, given the treatment she's received up to this point?

A. Yes, sir.

Q. Doctor, you've been treating her for a long time, you told us a lot. Do you have a prognosis for Denise in

terms of how the future looks for her?

A. Yes.

Q. From a medical standpoint?

A. On a medical standpoint she is going to require another surgery at L4-5. The options would be for another fusion or an artificial disc replacement.

Q. Why is that?

A. L4-5 is going on to some wear and tear changes that are painful for her. The x-rays show that L4 is sliding back on L5. And there are some changes in her joints there. So the option is to do another fusion for an artificial disc replacement.

MR. GOMEZ: Your Honor, I'm going to object.

And can we approach?

THE COURT: Yes.

(Bench conference. Mr. Barnes and Mr. Gomez present.)

(Proceedings continued in open court.)

MR. GOMEZ: Your Honor, with that I would move to strike the last answer.

THE COURT: Sustained. The testimony about the future surgeries is to be disregarded entirely.

BY MR. BARNES:

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2 Q. Doctor, let me ask you this: She's on pain
3 medication now, is that right?

4 A. Yes.

5 Q. And what type of pain medication is that?

6 A. She's still taking the Norco pain medicine. It's a
7 hydrocodone. It's a narcotic.

8 Q. And do you have an opinion with reasonable medical
9 certainty as to whether or not she's going to have to
10 continue on pain medication for the rest of her life to some
11 degree?

12 A. No, it won't be to some degree. She will be on
13 narcotic pain medication for the rest of her life.

14 Q. Doctor, your experience patients, you have many
15 patients, I take it, that utilize pain medication, correct?

16 A. Yes.

17 Q. And from a medical standpoint, what, in addition to
18 treating the pain, what are the effects of the pain
19 medication like this?

20 A. Well, pain medications, narcotic pain medications
21 are depressants. They're central nervous system depressants.
22 They cause drowsiness, lethargy, dry mouth, they cause
23 constipation. And people, people will have a difficult time
24 concentrating on them. So they're not what we would prefer
25 to keep patients on. However, there are patients that their

1 pain levels are significant enough that non-narcotic
2 medications won't work, so basically be bedridden. And so
3 the only way we can keep them somewhat mobile in the
4 community is to give them a narcotic so they can at least get
5 out of the house and move about a bit.

7 Q. And they have to deal with those effects?

8 A. Yes.

9 Q. That you talked about?

10 A. Yes.

11 Q. As a tradeoff for the pain, really?

12 A. Correct -- well, they don't get full pain relief.
13 It basically dulls the pain. Narcotics tend to work -- the
14 way narcotics work is they kind of make you not care about
15 the pain, not that the pain goes away. It's just like it
16 changes your mindset on it, that it's not as pressing to you,
17 or you just kind of don't care. That's how narcotics tend to
18 work. They change your perception.

19 Q. Now, Doctor, you told us during your testimony that
20 during your various examinations, both before and after
21 surgery about, you know, observing Denise during your
22 examinations and her ability to sit and to get out of a chair
23 and to stand, what, if any, opinion do you have about her
24 situation for now in the future in terms of her ability to
25 sit for any prolonged period of time?

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2 A. Well, I've been kind of -- I wasn't looking at
3 Denise specifically, but I seen her get up a couple times
4 today. And probably I think that's accurate. I don't think
5 she's faking it. I don't think she's exaggerating. I don't
6 think she's malingering. This is the way it is. This is
7 just the hard reality of having a real bad backache, having
8 surgery, having it at the level t next to it start to
9 deteriorate and needing to have another surgery.

10 MR. GOMEZ: Objection, your Honor.

11 THE COURT: Jury, disregard about needing
12 another operation.

13 BY MR. BARNES:

14 Q. Go ahead.

15 A. And having ongoing pain. Sitting puts one and a
16 half times our body weight on our bottom two discs. So if --
17 I weigh about 200 pounds. When I sit I have 300 pounds per
18 square inch on my discs. If I've got a sore back, you know,
19 like I got a hundred-pound barbell on my shoulder squashing
20 down my disc. It's going to make my disc hurt more. If I
21 stand on a flat floor, just standing there -- and you can
22 talk to a barber or a beautician or somebody just stands in
23 one position pretty much all day, they will -- and pretty
24 much most of them will also tell you that their back is stiff
25 and sore after a couple hours. If you had a disc herniation

1 or a spinal fusion, after you stand for about 10 or 15
2 minutes your back is going to hurt a lot. That's my clinical
3 experience with this problem. So it's one of the reasons
4 that you go into a restaurant or a tavern, there's a brass
5 rail. There's a brass rail at the bar. That's not for
6 looks. That's to put your foot up on so that you put your
7 weight through your hip and get your weight off your back and
8 you can stay at the bar and have a couple more cocktails.
9 That's what that brass bar is there for. It's not there for
10 looks, it's to take your backache away. They knew what they
11 were doing. So to ask somebody, it's extremely difficult.
12 They can't sit for very long. They can't stand for very
13 long. They've got to constantly move about. That's just the
14 nature of this problem. They sit in one position for a few
15 minutes and then they got to change positions. Even if
16 they're laying down, they can lay for a few minutes and then
17 they got to move positions again. That's the nature of this
18 problem.
19

20 Q. Do you have an opinion that those circumstances
21 that Denise has to deal with is likely to change at all in
22 her lifetime?

23 A. Yes, it's going to get worse.

24 Q. Why is that?

25 A. For the reasons that I -- her -- the adjacent

1
2 segment problem has become a fulminant problem at L4-5. This
3 is what her problem is right now. And the fusion healed, but
4 that level right above it is deteriorating. And that's
5 related to the fusion.

6 Q. Just one last question for you, Doctor, and I will
7 sit down. Based on all your years of experience in this
8 field and your care and treatment of Denise Keels since you
9 began to do it, do you feel in any way that this young woman
10 has duped you, any medical --

11 MR. GOMEZ: Objection, your Honor.

12 MR. BARNES: He said that in opening, your
13 Honor. Have you been duped?

14 MR. GOMEZ: I'm going to object. This
15 witness isn't here to testify to the credibility.
16 It's the jury has to judge the credibility of the
17 plaintiff.

18 MR. BARNES: Then, your Honor, I ask in
19 cross-examination that there be no questions about
20 the correct history she's given I'm asking the
21 Doctor. He's the one that said it. I feel it's a
22 fair question.

23 THE COURT: I'll sustain the objection. Move
24 on. Cross.

25 MR. GOMEZ: Yes, your Honor.

CROSS-EXAMINATION

BY MR. GOMEZ:

Q. Good afternoon, Dr. Capicotto.

A. Good afternoon.

Q. You and I have never met?

A. I don't believe we have.

Q. My name is Rafael Gomez. I represent the defendant in this lawsuit. And you understand you're here today testifying on behalf of your patient who is the patient in the lawsuit, correct?

A. Yes.

Q. And during the course of this cross-examination if I ask you a question and you don't understand the question I'm asking, let me know and I'll ask it again, okay?

A. Sure.

Q. Now, when she first comes to you, September 1st of 2004, correct?

A. Yes.

Q. Please feel free to refer to your file if you need to. On that day she comes and she tells you she was involved in a car accident, right?

A. Yes, sir.

Q. And specifically tells you she was involved in an accident that was a rear-ender by an SUV, correct?

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A. Yes.

Q. And so she told you on that day she got hit by an SUV, correct?

A. Yes.

Q. And you put that in your report, right?

A. Yes.

Q. Did you know that she was in the SUV and that she was actually hit by a car?

A. I know that she was in an SUV. And she was in a 1997 Ford Explorer, I believe she was in.

Q. But that's not what you testified to earlier. You said that she was rear ended by a SUV?

A. Right.

Q. Do you recall that?

A. Yes, I do.

Q. And your report -- I just want to be accurate -- states she was in a Ford Explorer and she was hit by a SUV?

A. Yes, I agree.

Q. So you don't know actually what kind of car ran into hers, correct?

A. No, I don't.

Q. Okay. Now, on the same day, on September 1st of 2004, she comes to you and she denies any history of spinal pain prior to December 3rd of 2003, correct?

1
2 A. You're correct.

3 Q. Now, I want to go through and talk just generally
4 about the treatment, so, please, like I said, feel free to
5 refer back to your records. She's referred to you by Dr.
6 Ward, correct?

7 A. Yes.

8 Q. And you understand him to be a chiropractor,
9 correct?

10 A. Yes.

11 Q. And he's referred other patients to you in the
12 past, correct?

13 A. Yes.

14 Q. Now, when she comes to you she tells you that she's
15 had chiropractic treatment from the date of this accident up
16 through when she saw you, correct?

17 A. From about -- yes, I don't know if it's the exact
18 date, but from about that time.

19 Q. Actually in your report it states she told you that
20 she followed up with Dr. Ward a short time later, correct?

21 A. Correct.

22 Q. Were you aware that she didn't see Dr. Ward for
23 over three months after the accident occurred?

24 A. That's a short time.

25 Q. In your opinion a quarter of a year is a short

1 time?

2 A. Sure.

3 Q. Okay. Now, are you aware of an incident that she
4 had between when she first started treating with Dr. Ward and
5 when she came to see you where she had to go to the emergency
6 room?

7 A. No.

8 Q. Now, after this first initial visit to you on
9 September 1st, she comes to you two more times before she has
10 surgery, correct?

11 A. Yes.

12 Q. And you eventually order that second MRI, March
13 15th of 2005, right?

14 A. Yes, sir.

15 Q. Now when she came to you the very first time did
16 she bring the MRI's that had been done at Greater Amherst
17 Imaging?

18 A. I believe she did.

19 Q. Did she bring them on CD or were there actual
20 films?

21 A. I don't recall.

22 Q. And you had the opportunity to see the report that
23 was generated by the radiologist at Greater Amherst Imaging,
24 correct?

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2 A. I don't know if I saw -- I don't say in my letter
3 that I saw the report. What I do state --

4 Q. I just want to know if you saw the report.

5 A. I don't know. I'm telling you -- I read -- what I
6 testified to before was --

7 Q. Doctor --

8 A. -- my interpretation.

9 Q. Right. I just want to know about the report. This
10 is very simple. I'll try to ask questions that will be yes
11 or no, or if you can't answer it that way let me know and
12 I'll try to ask it another way. But they're pretty specific
13 questions. I'm going to show you -- may I approach?

14 THE COURT: Yes.

15 BY MR. GOMEZ:

16 Q. What I've had marked as Plaintiff's Exhibit 17.
17 And this is the MRI report done by Greater Amherst Imaging
18 relative to the lumbar spine MRI of April 5th, 2004, correct?

19 A. Yes.

20 Q. Do you have that in your file?

21 A. Yes, I do.

22 Q. So you have seen this before today, at least?

23 A. You're correct.

24 Q. Do you know when you came in possession of this
25 report?

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2 A. I was just looking at it. Look, it was faxed to my
3 office on September 1st, 2004.

4 Q. All right. So when she first came to you you also
5 had the reports faxed over to you so you could see what the
6 radiologist interpreted relative to that film, correct?

7 A. That I don't know. I don't know if I -- I don't
8 mention the report specifically. Many times if I have the
9 report and my assessment is different than the radiologist, I
10 will explain why. So I kind of think that I didn't have the
11 report because I would have contrasted my opinion with the
12 radiologist's opinion.

13 Q. We're going to get to that. But let's talk about
14 the treatment. You do the surgery June 13th of 2005,
15 correct?

16 A. Right.

17 Q. And there weren't any complications with the
18 surgery, correct?

19 A. You're correct.

20 Q. And the surgery was done under general anesthesia,
21 correct?

22 A. Yes.

23 Q. So she was out while all of this surgery was going
24 on and all the illustrations you showed you of what you did,
25 she wasn't awake?

1 A. You're correct.

2 Q. Now, after the surgery there's a follow-up visit
3 you indicated in September of 2005 that she didn't keep,
4 correct?
5

6 A. She rescheduled, yes. It just says -- my secretary
7 wrote rescheduled.

8 Q. So then she eventually comes to see you November
9 22nd of 2005, correct?

10 A. Yes.

11 Q. Now, at that time when she comes to see you you
12 made some notations relative to her having a fall two weeks
13 prior, correct?

14 A. Yes.

15 Q. And you told the jury about that and how it was in
16 your report, correct?

17 A. Yes, it was.

18 Q. Now, you also referred her to pool therapy after
19 the surgery, correct?

20 A. Yes.

21 Q. And pool therapy actually is sometimes considered
22 to be an important part of the rehab because it allows for
23 the weight to be taken off and more motion, correct?

24 A. Yes.

25 Q. All right. And that helps because the patient who

1
2 is, let's say, is using two canes and can barely walk because
3 of the surgery, can go into the pool and actually have more
4 movement, correct?

5 A. That's the premise, you're correct.

6 Q. And she attended pool therapy on two occasions, but
7 then never went back, correct?

8 A. Right.

9 Q. And in your report on November 22nd of 2005, you
10 advised her to see if she could get transportation to pool
11 therapy because you thought it would help increase her range
12 of motion, correct?

13 A. Yes.

14 Q. And she never followed up with that pool therapy,
15 at least from what your records say, correct?

16 A. Yes.

17 Q. Now, after the surgery you also prescribed for her
18 a back brace, correct?

19 A. Yes.

20 Q. And was that something she was to use immediately
21 from release from the hospital?

22 A. She wore it in the hospital also.

23 Q. All right. And how long was she supposed to use
24 the back brace for?

25 A. You mean month wise?

1 Q. Yes.

2 A. Three to six months.

3 Q. All right. And when she came to see you on
4 November 22nd after the surgery she wasn't wearing her back
5 brace, correct?
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7 A. She did not bring it with her on the visit.

8 Q. And she wasn't wearing it on the visit, correct?

9 A. Correct.

10 Q. And you advised her that she should be wearing her
11 back brace as well as her bone stimulator, correct?

12 A. Yes.

13 Q. And these are things that you obviously recommended
14 because you were trying to help her get some of the motion
15 back in her lower back, correct?

16 A. The brace is not to increase motion. The brace is
17 to increase the probability that the fusion will heal.

18 Q. To help keep the lower back stable to allow the
19 bone time to heal, is that fair to say?

20 A. Not stable. Just -- studies have shown that
21 patients that tend to wear their brace will have a bit of a
22 higher fusion rate than patients that don't wear their brace.
23 So it doesn't mean that if you don't wear your brace it's not
24 going to heal. It's just one of those kind of you play the
25 percentages, you're more likely to heal if you wear your

1
2 brace.

3 Q. Right. And obviously you want to try everything
4 you can to try to get as much better as you possibly can
5 after the surgery, is that fair to say?

6 A. Yes.

7 Q. Now I want to go back. The date of this accident
8 is December 3rd of 2003. Did you ever obtain the emergency
9 room records from ECMC relative to her visit?

10 A. No.

11 Q. Did you ever review the x-ray films from the
12 emergency room on that day that were taken of her neck or
13 back?

14 A. No.

15 Q. Did anyone ever provide you with a report of those
16 x-rays?

17 A. No, I don't think I have them.

18 Q. Now, you were aware at the time of her first visit
19 to you that she was treating with Dr. Ward, correct?

20 A. Yes.

21 Q. Did you ever obtain Dr. Ward's records from when he
22 started treating her up until she came to you to see what her
23 complaints were?

24 A. No.

25 Q. So you trusted what she was telling you about the

1 history of her complaints from the date of the accident up
2 through when she came to see you?

3 A. Well, between her and Dr. Ward, yes.

4 Q. And did you ever have a conversation with Dr. Ward
5 about his treatment in that timeframe, from when he first
6 started to see her up till when she came to see you for the
7 first time?

8 A. I don't have any -- not -- it's rare that we have a
9 specific discussion about a specific patient. But I would
10 talk to him every couple weeks and we would go over a couple
11 patients about how so and so is doing and things of that
12 nature.

13 Q. So you don't have a specific recollection as you
14 sit here of talking to him about Denise Keels, right?

15 A. Not a specific recollection, no.

16 Q. How many patients do you generally see in a week?

17 A. It varies.

18 Q. All right. There's some prior testimony that
19 you've given in other lawsuits that you see maybe about 400
20 patients a year. Is that fair?

21 A. I think it's a little on the low side, but --

22 Q. Could be more?

23 A. 400 -- 400 -- yeah.

24 Q. I'm just trying to get a good estimate.

1
2 A. Yeah, it's hard for me to say. I don't know if I
3 can give you a number. I think that in my practice I think
4 that we have over the 10 years -- or 12 years of the location
5 that I'm at, I think we have about 11,000 or 12,000 patients
6 that have been treated there. So maybe a thousand patients a
7 year. I have to go back and look. It's not something that I
8 kind of keep a score on.

9 Q. I'm not trying to hold you on the score card. I'm
10 trying to get a ballpark idea. Obviously you have a lot of
11 patients so you don't remember every detail about every
12 patient, is that fair to say?

13 A. Correct.

14 Q. And that's why you keep records, correct?

15 A. Yes.

16 Q. And that's one of the reasons why you keep
17 treatment records so you can document what happens on the
18 occasions you see the patients and for other reasons,
19 correct?

20 A. Yes.

21 Q. And nowhere in your file does it indicate any
22 conversations between you and Dr. Ward about his care of
23 Denise Keels, correct?

24 A. You're correct.

25 Q. Did Ms. Keels ever tell you when she started

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Q. So it's also fair to say you haven't received any record relative to what happened on that day?

A. You're correct.

Q. I want to talk, Doctor, generally about spine anatomy. And we've had some testimony already so I'm not going to get too deep into it. But backaches, they can be considered one of the second highest causes of people missing work, would you agree with that?

A. In the United States, that's correct.

Q. And that's like the common cold is the No. 1 reason, correct?

A. Yes.

Q. Now, it's not uncommon for someone to have a backache and not to have a herniated disc, would you agree with that?

A. I think that's more the rule.

Q. All right. So would you also agree that you can have a herniated disc and not have a backache?

A. It depends on the context you're using it, it is possible.

Q. And you would agree that some people can have disc herniations in their spine and they might not even know it?

A. Possible, right.

Q. Now, we talked briefly about the degenerative

process. When a disc starts to degenerate, it starts to collapse, correct?

A. At some point it does.

Q. One of the symptoms of degeneration in a disc would be loss of the water content, correct?

A. Yes.

Q. Because a disc starts to dry out, correct?

A. Yes.

Q. And as that disc starts to dry out, it starts losing some of its stability, correct?

A. Okay.

Q. It also starts to lose some of its flexibility, correct?

A. It may become more flexible.

Q. May become more flexible. And as it does it becomes more susceptible to injury, correct?

A. That's true.

Q. And you would agree that people in occupations that require lifting and bending are sometimes more susceptible to herniated discs than someone with a sedentary job?

A. I'd say that is for the most part true.

Q. Because a herniated disc can happen, not only because of a car accident, but it can happen just trying to turn and twist to grab something, would you agree with that?

1 A. It's possible.

2 Q. Now as we all get older -- I think Dr. Ward
3 yesterday used the jury as an example, that probably
4 everybody here has some level of degenerative disc disease.
5 Would you agree with that?
6

7 A. Probably.

8 Q. Because, obviously, as we all start to get older
9 our spines start to get older and the discs start to
10 degenerate, correct?

11 A. Well, they undergo age-related changes. The word
12 -- the term degenerative makes it sound like it's bad or -- I
13 feel more comfortable saying that there are age-related
14 changes in that the disc in a two-year-old is going to be
15 different than a disc in a 12-year-old and a 22-year-old and
16 a 32-year-old and 42 and on and on and on. So there are
17 age-related changes. These are normal changes. And I'm not
18 putting the term degenerative on them. Makes it sound -- at
19 least to me, makes it sound like it's something bad is going
20 on. These are normal changes. Same thing with our knee
21 joints, our hip joints, our skin; they change with age.

22 Q. And you would agree then, I guess -- well,
23 degenerative disc disease is something that can be caused by
24 just the natural aging process?

25 A. I have specific troubles with your saying disease.

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2 Because, once again --

3 Q. I'll rephrase the question. You would agree that
4 degenerative changes can be found in the spine just as a part
5 of the natural aging process?

6 A. No, I would agree that there could be age-related
7 changes. I am not so certain -- I don't feel comfortable and
8 I don't think there's any authoritative that says this is
9 degenerative. I do not subscribe to that. I think there are
10 age-related changes that occur throughout. But I think to
11 put the tag degenerative on it is not -- I find that highly
12 inappropriate.

13 Q. Okay. One of -- well, is an osteophyte evidence of
14 degenerative changes occurring?

15 A. An osteophyte is evidence of some form of trauma
16 that occurred, whether it's a solitary trauma or accumulative
17 trauma. And it's usually indicative of some excess motion
18 where the bone tries to stabilize it and you get an
19 osteophyte or a bone spur.

20 Q. And osteophytes don't grow overnight, you'd agree
21 with that?

22 A. You're correct.

23 Q. I mean, it's a process. It shows that the bone,
24 the vertebra is trying to stabilize itself because of some
25 problem with the disc?

1 A. I think you're correct to a degree.

2 Q. Okay. Now, the discs themselves, you've talked
3 about them being shock absorbers. Is that a fair
4 description?
5

6 A. That's one of their functions, yeah.

7 Q. And, in fact, I think you've testified before that
8 as we stand up, and as I'm standing here, probably most of
9 the discs in my spine right now are bulging to some level,
10 would you agree with that?

11 A. I think that's accurate.

12 Q. And you would also agree that there are many causes
13 for disc bulges or disc protrusions in the spine?

14 A. I wouldn't argue with you.

15 Q. Okay. And, Doctor, is smoking -- cigarette smoking
16 a risk factor for degenerative disc disease?

17 A. There is an association with smoking and so-called
18 degenerative changes in the discs. There's not -- there's
19 not a causal relationship. There's many, many reasons for --

20 Q. I just want is it a risk factor? That's all I want
21 to know. Is it one of the risk factors?

22 A. It is a factor, but not the factor.

23 Q. Okay. Now, are you familiar with the term
24 degenerative cascade?

25 A. Yes.

1
2 Q. And what is that?

3 A. Well, it depends if you're talking about a
4 biochemical degenerative cascade that they talk about where
5 the collagen changes. I think that's what I'm most familiar
6 with it, where the collagen changes from -- I have to go back
7 and think -- from chondroitin to carotin sulfate. There's a
8 number of chemical changes that occur in the disc and the
9 peptides and polyproteins change, and as they call it a
10 degenerative cascade.

11 Q. And that's a condition that can occur in the spine,
12 correct?

13 A. It occurs in all ligaments and also in the spine.

14 Q. And the spine, as we talk about it, we've
15 referenced it in different parts: lumbar, thoracic and
16 cervical, those are the three main parts of the spine that
17 you deal with, correct?

18 A. Yes.

19 Q. And if someone has degenerative changes in one part
20 of the spine, it's something that you can expect to continue
21 to see along the rest of the spine at some point, do you
22 agree with that?

23 A. I think that's fair to say.

24 Q. I want you to turn in your file, and I want to
25 discuss the cervical spine MRI that was done on March 26th of

1
2 2004. Let me know when you're there.

3 A. I don't know if I have that.

4 Q. Well, if you turn to your report of September 1,
5 '04, you do reference having seen the cervical spine MRI?

6 A. That I know, yes. I agree. I don't know if I have
7 the report.

8 Q. Okay. And you did see it -- you at least saw the
9 film from Greater Amherst Imaging from March 26th of 2004?

10 A. Yes.

11 Q. And you can't find the report itself in your file?

12 A. Correct. I have a thoracic spine MRI from that
13 date, but not the -- and I have the lumbar, but not the
14 cervical.

15 Q. Okay.

16 (Defendant's Exhibit I marked for
17 identification.)

18 BY MR. GOMEZ:

19 Q. Doctor, I'm going to show you what we've had marked
20 as Defendant's Exhibit I. This is the MRI report from
21 Greater Amherst Imaging relative to Denise Keels on March
22 26th, 2004 of her cervical spine. You didn't have that in
23 your file, but you have it now. Do you know if you ever
24 reviewed it?

25 A. I don't know.

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Q. Okay. In your report you indicate that after looking at the cervical spine films on September 1st of 2004, you believe it showed a kyphosis at C4-5 and C5-6 with herniated discs at those levels, correct?

A. Yes.

Q. And in your report relative to your review of that film, you made no indication that there were any degenerative changes found anywhere in the cervical spine, correct?

A. You're correct.

Q. And you made no indication that that film showed disc space narrowing, correct?

A. I didn't, you're correct.

Q. Your report made no indication that there was disc desiccation shown in the cervical spine, correct?

A. Correct.

Q. And your report made -- didn't reference that MRI as showing disc bulges, instead you said it was a herniation in your opinion, correct?

A. Yes.

Q. And there's a difference between a disc bulge and a disc herniation, correct?

A. Well, I think on a clinical basis there is, yes.

Q. You make no reference in your report that there were osteophytes found -- you make no indication in your

1
2 report after looking at the cervical spine MRI that there
3 were any osteophytes found in the cervical spine, correct?

4 A. Right.

5 Q. And if there were osteophytes found in the cervical
6 spine, those would be evidence of the degenerative process
7 already taking place in the cervical spine, correct?

8 A. If there were.

9 Q. Okay. And you didn't note any, correct?

10 A. Correct.

11 Q. All right. But the radiologist from Greater
12 Amherst who did review that film and wrote a report, did find
13 osteophytes, correct?

14 A. That's what he said.

15 Q. And you disagree with that, correct?

16 A. I don't know, I'd have to see it again. I didn't
17 -- when I reviewed the MRI I did not see any evidence of
18 degeneration. I saw evidence of herniation.

19 Q. And the radiologist actually read that same exact
20 film that you did and only found disc bulges at C4-5 and
21 C5-6, correct?

22 A. Correct.

23 Q. So you disagree with the radiologist's
24 interpretation of that film, is that fair?

25 A. I do.

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Q. Now, in this lawsuit Ms. Keels is making a claim in her Bill of Particulars that she suffered disc herniations at C4-5 and C5-6 as a result of the car accident, and that's consistent with what you wrote in your report, correct?

A. Yes, sir.

Q. But that is completely contrary to what the radiologist wrote in his, correct?

A. Correct.

Q. Now I'd like to turn to the lumbar spine MRI. And you do have that one in your file?

A. Yes.

Q. And it was your testimony to the jury that upon your review of that film -- actually you put it up on the projector, that the April 5th, 2004 MRI of the lumbar spine, that there was a herniation at L5-S1, correct?

A. Yes.

Q. And you put that in your report that it shows a central herniation with annular tear at L5-S1, correct?

A. It did, you're correct.

Q. In your opinion there can't be a herniation without an annular tear, correct?

A. If you have an annular tear that doesn't heal it will eventually result in a herniation.

Q. If you have a herniation, there has to be an

1 annular tear, would you agree with that?

2 A. Yes.

3 Q. And in your report of September 1st, 2004, you make
4 no mention of the fact that there's disc space narrowing at
5 L5-S1, correct?

6 A. No, there wasn't.

7 Q. You disagree with then --

8 A. We saw on the MRI, there's no narrowing.

9 Q. So the radiologist from Greater Amherst Imaging who
10 reviewed that film did find disc space narrowing, correct?

11 A. That's what he says.

12 Q. And you disagree with that?

13 A. Yes.

14 Q. And that radiologist also found disc desiccation at
15 L5-S1 and you did not note that in your report, correct?
16 Just in the report, that's it?

17 A. I would say you're correct.

18 Q. And in your opinion did you find evidence of disc
19 desiccation at L5-S1 on that film?

20 A. As we were looking at the MRI, what I said it was
21 losing some of its water content. Now, the MRI was taken six
22 months after the accident. So what I said there was loss of
23 signal there because of loss of the jelly which had the water
24 in it. That is the same as saying disc desiccation. But my
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response is that that's not degenerative, that's traumatic.

Q. And that's your opinion based on the history that there was no prior problems before the car accident, correct?

A. Correct.

Q. Now, the radiologist also noted significant posterior hypertrophic changes in his report, correct?

A. Yes.

Q. Showing you the model of the spine that you guys had marked earlier, Plaintiff's Exhibit 25.

MR. GOMEZ: If I can approach?

THE COURT: Sure.

BY MR. GOMEZ:

Q. What's he referring to? Can you point that out to the jury when he says significant posterior hypertrophic changes?

A. That I don't know.

Q. You have no idea when he puts that in the report?

A. No, you're correct. I --

Q. Okay, that's fine. Would you agree that hypertrophic changes could be considered evidence of degeneration?

A. They're associated with it. That can be associated with it, you're correct.

Q. And in your report of September 1, 2004, you never

1
2 note the fact that there's hypertrophic changes at L5-S1,
3 correct?

4 A. Yeah, that's because there were none.

5 Q. So in your opinion there weren't any, based on your
6 review of the film?

7 A. Based on my review of the film --

8 Q. Doctor, you can explain --

9 MR. BARNES: Your Honor, he has a right to
10 answer the question. I haven't objected. I'm
11 objecting now.

12 THE COURT: Complete your answer, Doctor.

13 THE WITNESS: I disagree with Dr. Ludwig's
14 report.

15 MR. GOMEZ: Judge, I have not asked for an
16 explanation. All I asked is if he agrees or
17 disagrees. He's answered that question, I'd like
18 to move on.

19 THE COURT: All right, fine, move on.

20 MR. GOMEZ: Thank you.

21 BY MR. GOMEZ:

22 Q. Now, the radiologist from Greater Amherst Imaging
23 was David Ludwig. Are you familiar with Dr. Ludwig?

24 A. I don't know him, but I'm familiar with his
25 reports.

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Q. And Dr. Ludwig's sole job as a radiologist is to review films such as MRI's, correct?

A. Right.

Q. And you disagree with that radiologist's opinion in this case that that film of April 5, 2004 only showed an annular tear at L5-S1, correct?

A. Could you repeat that?

MR. GOMEZ: Could you read that back, please?

(Record read.)

THE WITNESS: You know, I'm sorry, can you repeat that again? I apologize. I'm thinking about my answer and I'm not listening to you. I apologize.

(Record read.)

THE WITNESS: I agree with Dr. Ludwig that there is an annular tear. I disagree with Dr. Ludwig that there is no hypertrophic changes. There's no arthritis, there's no degeneration. However, there is a herniated disc there. And I would be willing -- as I looked at that MRI over there, there's no disc space narrowing.

MR. GOMEZ: Your Honor, I'll object. His answer is not responsive. It's just a yes or no. Does he agree or does he disagree.

THE COURT: The answer will stand. Move on.

MR. GOMEZ: Thank you.

BY MR. GOMEZ:

Q. Doctor, in the past you've come to court and testified on behalf of your patients, correct?

A. Yes, sir.

Q. And this isn't your first time in the courtroom at all?

A. Oh, you're correct, yeah.

Q. Have you testified at all this year in 2008?

A. Yes.

Q. How many times?

A. Twice before.

Q. And at least back in I think 2005, you were testifying on average about five or six times a year. Do you recall testifying to that in the past?

A. I wouldn't -- I don't keep track.

Q. Do you know how many times you testified in 2007?

A. No.

Q. And when you do come to court and testify, you do it on behalf of your patients, correct?

A. Yes.

Q. And your patients who have brought claims against somebody, for whatever reason, and they're plaintiffs,

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correct?

A. Yes.

Q. You don't do independent medical exams, do you?

A. No.

Q. And you never have?

A. I think I have done like one in the past, many years ago.

Q. You've testified on behalf of clients of the law firm of Cellino & Barnes in the past, correct?

A. I testified for my patients that were represented by Cellino & Barnes.

Q. So those would be Cellino & Barnes' clients?

A. Yes, they would.

Q. Patients of yours, but Cellino & Barnes' clients. And you come to court and testified on their behalf before juries, correct?

A. On behalf of my patients, you're correct.

Q. Now, in this specific lawsuit, in addition to testifying here, you've also submitted an affidavit relative to your care and treatment of Denise Keels, correct?

A. Yes, I did.

MR. GOMEZ: If I could have this marked, please?

(Defendant's Exhibit J marked for

identification.)

BY MR. GOMEZ:

Q. Showing you what we've had marked as Defendant's Exhibit J. Take a look at it and tell me if you recognize this document.

A. It's my signature. I don't recognize it, but it was signed in May of 2005, so.

Q. The affidavit or affirmation, actually, has an exhibit attached to it, correct?

A. Yes.

Q. And one of those exhibits would be your surgery report relative to your surgery of Denise Keels, correct?

A. Yes.

Q. So the date -- or the signature date of May 2005 is probably inaccurate since you didn't do the surgery until June?

A. That's correct.

Q. And, in fact, in your affidavit or affirmation you go through and discuss your treatment and care of Ms. Keels, correct?

A. Yes.

Q. And you reference visits in 2007 in your affidavit, correct? I'll direct you to paragraph 46.

A. That's correct.

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Q. So the date May 2nd, 2005 is probably one in error.
It was probably May 2nd, 2007 that you did the affirmation?

A. It may have been.

Q. And at the time that you did this affirmation you
understood that it was under the penalty of perjury, correct?

A. Correct.

Q. And obviously you were attesting to the truth of
the matter as you understood them relative to your care and
treatment of Denise Keels, correct?

A. Right.

Q. And in paragraph No. 6, about four lines down, you
indicate Ms. Keels denied having any neck or low back pain
prior to the MVA. That's what the affidavit says?

A. It does.

Q. And that's consistent with the history which you
had and which you recorded in your treatment records,
correct?

A. Yes.

Q. Now, you're being compensated for testifying today,
correct?

A. No.

Q. You're not being paid at all?

A. I am being compensated for my time away from my
practice, but I'm not being compensated for my testimony.

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Q. They're not paying you for your testimony, they're just paying you for your time, correct?

A. Yes, that's correct.

Q. You're being paid \$9,000 for your time here testifying?

A. Yes.

Q. And obviously I would assume that payment has nothing to do with the outcome of the case or your opinion?

A. You're correct.

Q. And when you did this affirmation, at the top it actually was put on Cellino & Barnes' letterhead cover, correct?

A. You're talking about the blue right here?

Q. Yeah, the blue.

A. Yes.

Q. When you signed this you understood it to be a document submitted to the Court relative to your treatment of Ms. Keels, correct?

A. Yes, sir.

Q. Who drafted that affirmation, you or the attorneys?

A. The attorneys.

Q. And they gave it to you for your review and your consideration and any changes if you felt necessary, correct?

A. Yes.

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2 Q. Do you know if you signed it the way they gave it
3 to you or if you made changes to it?

4 A. I don't recall.

5 Q. And did you charge them for the time it took to
6 review the affirmation and to sign it?

7 A. No.

8 Q. In addition to coming and testifying today, did you
9 actually meet with Ms. Keels' attorneys as well?

10 A. Yes.

11 Q. How many times?

12 A. I met with them two weeks ago for about an hour.

13 Q. And you discussed your records and your treatment
14 of her, is that fair?

15 A. Yes.

16 Q. And your anticipated testimony here? What
17 questions they'd be asking you and --

18 A. Yeah, my -- yes.

19 Q. And obviously they must have shown you the
20 illustrations because you saw them before today?

21 A. Correct. I had seen them, yes.

22 Q. Now, Doctor, when you come to court in lawsuits,
23 all right, this one, this specific case isn't the first time
24 that you've rendered an opinion contrary to what the reading
25 radiologist has said, would you agree with that? I'll ask it

1
2 again.

3 A. Yeah, please.

4 Q. Today you're here and you're testifying -- and I'm
5 going to deal strictly with the lumbar spine first. It's
6 your belief that the April 5th, 2004 MRI showed a herniation
7 with annular tear at L5-S1, correct?

8 A. I am certain of it.

9 Q. The radiologist only read it to show an annular
10 tear, correct?

11 A. You're correct.

12 Q. So you disagree with the radiologist, correct?

13 A. Partially.

14 Q. And a herniation, all right, is worse than just an
15 annular tear, you'd agree to that?

16 A. Yes.

17 Q. This lawsuit, all right, and that opinion that you
18 just gave, isn't the first time that you've disagreed on
19 behalf of one of your patients who is a plaintiff, all right
20 -- I'm sorry, I'll ask this question a different way. Do you
21 remember treating Jessica Jacobi?

22 A. I remember the name. I don't remember her exactly.

23 Q. And you recall she had a lawsuit for a car
24 accident, correct?

25 A. Can I talk about my other patients, is that --

MR. GOMEZ: This is public record, your Honor.

MR. BARNES: Your Honor, I think that is objectionable. I don't know whoever this woman is has given anyone permission to talk about her injuries. There are HIPAA laws involved here. That's objectionable.

MR. GOMEZ: Your Honor, that is a matter of public record, and I will follow all of this up.

THE COURT: As long as it occurred in court.

MR. GOMEZ: It did.

BY MR. GOMEZ:

Q. You testified on behalf of Ms. Jacobi, correct?

A. I don't recall her, but I did.

Q. Do you recall in that case that the radiologist found her lumbar spine MRI to be normal, but you read it to show herniation at L4-5 and an annular tear at L5-S1?

A. I don't recall specifically.

MR. GOMEZ: Can I have this marked?

(Defendant's Exhibit K marked for identification.)

BY MR. GOMEZ:

Q. Doctor, I'm going to approach. I'll show you what

1
2 I've marked as Defendant's Exhibit K. I have a copy, so I'm
3 going to follow along. This is a transcript of testimony
4 which you gave on behalf of Jessica Jacobi on September 12th
5 of 2007, correct?

6 A. Yes, sir.

7 Q. All right. So not that long ago, right?

8 A. Correct.

9 Q. And it was relative to her lawsuit and claims for
10 injuries as a result of a car accident, correct?

11 A. Yes.

12 Q. And if I could direct your attention to page 75.
13 And if you can read -- starting at line 18, just read it to
14 yourself and then let me know when you're done. From line 18
15 through page 77.

16 A. Okay.

17 Q. And if you could read at page 79.

18 A. I did.

19 Q. Okay. Does this refresh your recollection of this
20 case?

21 A. Not specifically.

22 Q. You gave testimony in that lawsuit that it was your
23 opinion the plaintiff had foraminal herniations at L4-5 and
24 an annular tear at L5-S1, correct?

25 A. Yes.

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Q. The radiologist who reviewed that same very film,
read it and said it was normal, correct?

A. Yes.

Q. Now, do you recall testifying back in 2005 on
behalf of a patient of yours by the name of Phelinger,
P-H-E-L-I-N-G-E-R, Holly Phelinger?

A. No.

MR. GOMEZ: Can I have this marked?

(Defendant's Exhibit L marked for
identification.)

BY MR. GOMEZ:

Q. I'm going to show you what we've had marked as
Defendant's Exhibit L. And the caption of this indicates
that the plaintiff is Holly Phelinger and Scott Phelinger
against some defendant. And it's testimony that you gave on
a November 3rd of 2005, correct?

A. Yes.

Q. And I'll direct you to page 381 to 383. Read that
to refresh your recollection for me. Let me know when you're
done.

A. 381?

Q. 381.

A. Okay. 381 through 383?

Q. Yes. You've had a chance to read those?

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2 A. Yes.

3 Q. And that refreshes your recollection relative to
4 the testimony you gave back then?

5 A. I don't remember the testimony, but I read it and
6 it's there.

7 Q. Then I'll ask the question like this: In that case
8 you were testifying on behalf of a plaintiff, correct?

9 A. On behalf of a patient.

10 Q. A patient who was a plaintiff?

11 A. Correct.

12 Q. In a car accident, correct?

13 A. Yes.

14 Q. And who was suing somebody for the car accident,
15 correct?

16 A. Okay.

17 Q. And in that case you testified that you read the
18 MRI to show a herniation at L5-S1, correct?

19 A. Yes, I did.

20 Q. And that was different than what the radiologist
21 read on the film, correct?

22 A. Yes.

23 Q. If I can have those transcripts, please? So,
24 Doctor, you'd agree with me it's not uncommon for you to come
25 to court and tell a jury that one of your patients, who is a

1
2 plaintiff, has some kind of herniation, when the radiologist
3 reads the film otherwise?

4 A. I don't think that's unusual.

5 Q. Now, you talked about Ms. Keels going to see Dr.
6 Bansal, correct? Do you recall her going to see Dr. Bansal?

7 A. Dr. Bansal?

8 Q. Bansal?

9 A. Bansal. Not particularly. I know who Dr. Bansal
10 is. I don't recall it, but --

11 Q. You don't know if she ever treated with Dr. Bansal?

12 A. I can't recall.

13 Q. When you take a history from a patient, Doctor, you
14 trust that the patient's going to be honest with you, is that
15 fair to say?

16 A. Yes.

17 Q. And typically when you're treating your patients,
18 the purpose of the treatment isn't to try to figure out if
19 some event caused whatever injury that they're there to see
20 you for, but instead to give them treatment, correct?

21 A. Correct.

22 Q. One of the things when you are considering whether
23 an event caused something, one of the important things is to
24 know whether or not that individual had any problems before
25 the event, would you agree with that?

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A. It may be important.

Q. Because, obviously, if you're going to testify that a specific event caused something, you want to know exactly when those symptoms started, is that fair to say?

A. Yes.

Q. In this specific case you've told the jury that it's your opinion that the car accident is what led to her suffering the symptoms in her low back, correct?

A. Yes.

Q. Were you ever made aware that prior to December 3rd of 2003 she had treated for back pain?

A. I'm not aware of that.

MR. BARNES: Objection, your Honor. Back pain where? Here, there? I object to the form of the question. Is it low back pain, upper back pain?

MR. GOMEZ: I'll ask it more specifically.

BY MR. GOMEZ:

Q. Were you aware that prior to December 3rd of 2003 Ms. Keels treated for low back pain?

A. No, I'm not what aware of her treating for low back pain.

Q. How many times have you had contact with Ms. Keels' attorneys relative to this lawsuit?

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A. Just two weeks ago and then today.

Q. And at some point, obviously, they had to come get the affirmation from you -- or did you mail it?

A. That just probably it was dropped off and I reviewed and signed and sent back.

Q. When they talked to you two weeks ago, did they show you any of the records of her treatment before the car accident of December 3rd, 2003?

A. Yes, I had seen a few documents.

Q. What documents did you see?

A. They were -- I think they were from -- I don't know exactly the name of the health clinic. I think Community Health Clinic.

Q. When were they from?

MR. BARNES: Your Honor, I can save some time. I forgot, I was going use it in direct. I marked as Exhibit 23 the records that I showed to Dr. Capicotto when we met with him two weeks ago. He's free to use them. I'll stipulate them in evidence.

THE WITNESS: One was August 6th, 2002, and then there was another 2003 date.

MR. GOMEZ: Your Honor, if I could just have a moment to speak to counsel. Your Honor, I'd

like to mark some things. Could we take a quick break so the jury is not sitting here during this?

THE COURT: Ladies and gentlemen, we'll take a 15 minute break and come back and go until 5:00.

(Court recessed.)

(Proceedings continued as follows. All jurors and counsel present.)

(Defendant's Exhibits M, M-1, N, O, O-1, P, P-1, Q, Q-1 and R marked for identification.)

THE COURT: Mr. Gomez.

MR. GOMEZ: Thank you, your Honor.

CROSS-EXAMINATION (Continued)

BY MR. GOMEZ:

Q. Dr. Capicotto, when we left off we were discussing records that were provided to you by Ms. Keels' counsel at your recent meeting.

MR. GOMEZ: If I can approach?

THE COURT: Go ahead.

MR. GOMEZ: Thank you, your Honor.

BY MR. GOMEZ:

Q. I'm going to show you what's been marked as Plaintiff's Exhibit 23. And is this the packet of information provided to you?

A. I don't know if I've seen all of these. I know I

1 have seen this page. I saw this page.

2 Q. Let's identify for the record. Hold on for a
3 second. We'll start with the first page of this packet that
4 you saw, was actually page No. 1. And it's the adult master
5 problem list, correct?
6

7 A. Yes.

8 Q. And it references what appears to be an August '02
9 back pain secondary to fall at home, correct?

10 A. Yes.

11 Q. And the next page that you indicated that you do
12 believe you saw?

13 A. I recall seeing this page here. I don't know if I
14 saw those other pages. I remember this page right here.

15 Q. And this references specifically August 6th, 2002?

16 A. Yes.

17 Q. And it's a progress note from Community Health
18 Center, Buffalo, correct?

19 A. Yes, initial progress note/physical exam.

20 Q. We'll go into details about this in a second.
21 Let's just identify what else you recall seeing recently.

22 A. I saw this page also, which I believe is a second
23 page of what we were just talking about, August 6th, 2002,
24 adult progress note.

25 Q. And it just references under cc, which is chief

1 complaint and there's a note written in there, correct?

2 A. Well, I don't know if that's cc. I don't know what
3 that is.
4

5 Q. This right here?

6 A. Yes. Seen in the ER. Yes, that's correct. I'm
7 not certain that I saw this page here of 9-17-02.

8 Q. Okay.

9 A. I can't recall. I don't -- that doesn't strike me.
10 I don't believe I saw this page, 10-29-02. I did not see
11 adult progress note date 12-5-03, I'm pretty certain. Or the
12 subsequent page, 12-5-03. I don't recall seeing -- I believe
13 that's 1-27-03. I don't recall seeing that.

14 Q. Okay.

15 A. I do recall seeing this of May 6th, 2003. I do
16 recall seeing that note.

17 Q. Okay. Thank you. These are records, the ones that
18 you did indicate that you saw, that you were just shown two
19 weeks ago, right?

20 A. Yes.

21 Q. And you were shown them by her attorneys?

22 A. Yes.

23 Q. And prior to that you didn't know about the
24 existence of those records, is that fair to say?

25 A. You're correct.

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Q. I want to talk about real briefly her complaints to you when she was treating with you after September 1 of 2004. She obviously had complaints about her low back, correct?

A. Yes.

Q. And she also made complaints about pain going down into her legs, correct?

A. Primarily her right leg, but, yes.

Q. On occasion there was left leg symptoms, but primarily her symptoms were on the right side, correct?

A. Yes.

Q. What in your opinion was causing those symptoms after the car accident?

A. My impression is they were coming from her lumbar spine.

Q. And the symptoms were traveling, I guess, what would be called a dermatome path, is that fair to say?

A. A radicular path, a dermatome path, that's fair to say.

Q. Can you tell the jury what radiculopathy is?

A. Radiculopathy means a combination of pain, numbness and weakness of a nerve root, or in the distribution of a nerve root. So if somebody has an L5 radiculopathy, means the fifth lumbar nerve root. They'll have pain in their buttock, down the back of their thigh, into the side of their

1 calf and down on the top of their foot. It will be hard for
2 them to point their toes to the ceiling, particularly their
3 big toe. May have a little bit of weakness, maybe a little
4 bit of a foot drag when they walk. That would be a L5
5 radiculopathy.
6

7 Q. And radiculopathy is something that can happen
8 when, let's say, a herniation is pushing on a nerve root or
9 the spinal canal, correct?

10 A. Yes.

11 Q. And radiculopathy can also happen if someone has
12 degenerative changes and, let's say, perhaps has an
13 osteophyte pushing on a nerve root, correct?

14 A. Yes, there are a number of reasons that you can
15 have a radiculopathy.

16 Q. Now, Doctor, if somebody has degenerative changes
17 in their spine in Year 1 and we were to follow up with them
18 in Year 3, you're going to see that progress at different
19 rates for different people, correct?

20 A. Yes.

21 Q. However, the process continues between Year 1 and
22 Year 3, and either stays at the same level or gets worse,
23 correct?

24 A. Yes.

25 Q. Because the degenerative process can't get stopped

1
2 and reversed?

3 A. Correct.

4 Q. Okay. I've had some of the records from
5 Plaintiff's Exhibit 23 which you saw individually marked.
6 I'm going to start with the first one, which is Defendant's
7 Exhibit M --

8 MR. GOMEZ: Actually, your Honor, we've had a
9 stipulation to move these into evidence, so I
10 should do that now.

11 MR. BARNES: No objection.

12 MR. GOMEZ: Defendant's Exhibit M, O, N, P
13 and Q.

14 THE COURT: Are received in evidence.

15 MR. GOMEZ: Thank you, your Honor.

16 (Defendant's Exhibits M, N, O, P and Q marked
17 in evidence.)

18 MR. GOMEZ: And, your Honor, we've had
19 subexhibits made of several of these. Counsel has
20 no objection to me putting them up so the jury can
21 see what we're referring to.

22 THE COURT: All right.

23 BY MR. GOMEZ:

24 Q. I'm going to approach and show you what's been
25 marked as Defendant's Exhibit M. This is the August 6th,

2002 note which you were just recently provided, correct?

A. Uh-huh.

Q. You have to say "yes" for the record.

A. Yes.

Q. And for the purpose of illustrating it to the jury, I'm going to show them what we've had marked as Defendant's Exhibit M-1. This is a progress note from her primary care physician who is Dr. Pavan, correct?

A. Yes, sir.

Q. And it indicates at cc, back pain, correct?

A. It does.

Q. And cc in this note, the preprinted form, represents chief complaint, correct?

A. Yes.

Q. So when she appeared at the clinic that day, someone would have taken a history from her about why she was there, correct?

A. Yes.

Q. And the indication was back pain, correct?

A. Correct.

Q. I'm going to highlight that. And there appears to be HPI. What does that mean?

A. History of present illness.

Q. And it reflects what appears to be 37 AAF. So

1 African-American female, correct?

2 A. Yes.

3 Q. Healthy? I can't make that out. We'll skip this.

4 Assaulted by her boyfriend during argument on Thursday,

5 8-1-02. There's a word -- can you make that out? That's all

6 right. We'll skip the word. We'll say what appears to be

7 her -- from neck and she was thrown on the floor Saturday.

8 Felt pain on her back and shoulder. All right? Is that a

9 fair representation of what that says?

10 A. Yes.

11 Q. All right. And this is a reference to an incident

12 occurring before the car accident that up until two weeks ago

13 you never knew about?

14 A. You're correct.

15 Q. And, Doctor, on other occasions that you've come to

16 court to testify, you've been presented with prior problems

17 that one of your patients had never told you about, correct?

18 A. I've seen that before.

19 Q. And you were aware that that's a possibility,

20 especially in cases that are involved in litigation, correct?

21 A. I think it's just normal patients forget, whether

22 it has anything to do with litigation. They may forget a

23 previous episode.

24 Q. Okay. And your affidavit, what's the exhibit

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number on that?

A. J.

Q. Exhibit J. When you drafted your affidavit you
opined that her injuries to her neck and back happen because
of the December 3rd, 2003 accident, correct?

A. I did, correct.

Q. And part of that opinion was based on the fact that
she was telling you she was asymptomatic before the car
accident, correct?

A. Yes.

Q. Without any symptoms in her neck and back, correct?

A. You're correct.

Q. Now, we have a record here from August 6th of 2002,
obviously showing that she did receive treatment for her back
pain, correct?

A. Well --

MR. BARNES: Objection, your Honor.

Objection. Again, the form of the question. The
medical testimony here is that the back runs from
the base of the neck to the bottom of the spine.
He keeps referring to the back. There's very
specific language in this exhibit that talks about
what part of the back it is and he's ignoring it.
I object to the question.

THE COURT: You can ask on redirect.

Overruled.

MR. GOMEZ: I'll move on to the next.

THE COURT: Was that question answered?

MR. GOMEZ: No, your Honor, I'll move on.

I've got plenty of other things to talk about.

BY MR. GOMEZ:

Q. I'm going to show you what's been marked as Defendant's Exhibit O, October 29, 2002 report. And I'm going to show the jury Defendant's Exhibit O-1. This was a report that you just indicated that you didn't recall looking at, correct?

A. Yes, you are correct.

Q. And this would be a visit several months after that initial incident on August 6th of 2002; correct?

A. Yes.

Q. I'm going to direct you to the middle right side of the page. Do you see where I'm pointing to?

A. Yes.

Q. On the sheet. Okay. Can you read to the jury what this description states?

A. Tender left lower quadrant. Is that what we're talking about?

Q. Yes.

A. Tender left lower quadrant palpation. This is in the abdomen. It's part of the abdominal exam, actually. No CVA tenderness. And then the line below it is MS, musculoskeletal.

Q. Hold on, Doctor, let me catch up, because I think

--

A. You see, it's a whole line.

Q. I just want to go with the handwritten portion here. Can you see where I'm pointing to?

A. Right. The problem is it doesn't make sense when you read it that way.

Q. Then you know what, I'll have you read the whole thing then.

A. MS stands for musculoskeletal. That's on the left side. Checks F ROM, full range of motion. Next check is without clubbing cyanosis or edema, meaning that there's no blood vessels or blood clots. And then as we proceed to the right, it says left subscapular tenderness. So that means tenderness right under the left shoulder blade or the chicken wing bone. And then -- first it was right, an R with a circle around it, and crossed out in error and then left, subscapular tenderness. The next line says patient complains of LBP, meaning --

Q. Let me stop you there. LBP means low back pain?

1 A. Yes, sir.

2 Q. Okay, continue.

3 A. Work -- the next line down, work equals home health
4 aides, involves lifting patients. Complains of increased low
5 back pain after lifting.
6

7 Q. This is a record you don't recall having seen two
8 weeks ago, correct?

9 A. Yes, sir, that's correct.

10 Q. So when they brought you the record, they showed
11 you the August 6th, '02 record, but they didn't point this
12 one out to you, correct?

13 A. I didn't see this record.

14 Q. So in October of 2002 she's complaining about low
15 back pain to her doctor and you were aware of that, correct?

16 A. Well, she was complaining of headaches and
17 vomiting, that's why -- that's what the chief complaint was.
18 There is a notation that she did have pain in her low back.
19 That wasn't her chief complaint.

20 Q. But it was one of her complaints?

21 A. Yes.

22 Q. And it's something she never told you, correct?

23 A. Correct.

24 Q. All right. I'm going to show you what's been
25 marked as Defendant's Exhibit P. And I believe that you did

1
2 indicate that you did see this report?

3 A. I have seen this, you're correct.

4 Q. All right. And I will put up for the jury Exhibit
5 P-1. This is a visit from May 6th of 2003, correct?

6 A. Yes.

7 Q. And at that time she had chief complaints of
8 bilateral leg pain, correct?

9 A. Yes.

10 Q. And under the history it states that she presents
11 bilateral leg pain began last year intermittent, worsening
12 over past couple of weeks. Did I read that correctly?

13 A. Yes.

14 Q. Pain in knee radiates down foot to toes, correct?

15 A. Yes.

16 Q. And she rated it 10 out of 10, correct?

17 A. You're correct.

18 Q. And on direct you talked to the jury about how, you
19 know, doctors and hospitals have the charts. When they say
20 10 out of 10, that's the most severe?

21 A. That's right.

22 Q. And that's how she was relating it?

23 A. She actually said it felt like being stabbed with a
24 knife.

25 Q. And that's the next line?

1 A. Yes.

2 Q. And under it it says associated with paresthesias?

3 A. Right.

4 Q. Or actually before that, correct?

5 A. Yes.

6 Q. What are paresthesias?

7 A. Numbness and tingling.

8 Q. And paresthesias are similar symptoms to what you
9 find in a radicular condition, in the lower extremities,
10 correct?
11

12 A. It can be associated with it, that's correct.

13 Q. And it indicates under the plan it states back
14 x-rays. So it looks like she was referred out to go get a
15 back x-ray, correct, under plan?

16 A. Well, there are a number of things, but that was
17 one of them. They're checking laboratories and a back x-ray.

18 Q. You did not have that information before you when
19 you did your affidavit and rendered opinions about what
20 caused her neck and back problems, correct?

21 A. You're correct.

22 Q. And were these all the records that Ms. Keels'
23 lawyer showed you relative to any prior neck or back
24 problems?

25 A. Yes.

1 Q. They didn't show you any more?

2 A. Correct.

3 Q. After you learned that there was a history, all
4 right, of some prior back pain, low back pain, to be
5 specific, did you discuss that with Ms. Keels?
6

7 A. No.

8 Q. And you had a recent visit by Ms. Keels to your
9 office, correct?

10 A. Last week.

11 Q. And was that visit to your office before or after
12 you met with the lawyers?

13 A. Can't remember.

14 Q. When she came in what was the date? Can you tell
15 me?

16 A. April 15th.

17 Q. When she came in on April 15th, did you have a
18 discussion with her about why she gave you an inaccurate
19 history?

20 A. No.

21 Q. About her prior problem?

22 A. No.

23 Q. Did you have any discussion with her if she had had
24 any symptoms other than the ones that you were just recently
25 told about before that?

1
2 A. No.

3 Q. Were you made aware that back in January of 2000
4 she had medical treatment relative to some complaints of low
5 back pain?

6 A. I'm sorry, could you repeat that?

7 Q. Were you aware that back in January of 2000 Ms.
8 Keels had medical treatment relative to low back pain?

9 A. I wasn't aware of that. Just to answer your other
10 question, I met with Mr. Barnes and Mr. Sheehan on April
11 16th, the day after she was in my office.

12 Q. So when she was in your office you didn't have
13 reason to believe that her history was inaccurate at that
14 point?

15 MR. BARNES: I'll object to the
16 characterization, your Honor. He can ask him what
17 he knew and what he didn't. His question was
18 improper.

19 MR. GOMEZ: I'll withdraw the question.

20 Let me show you what we've had marked for
21 identification as Defendant's Exhibit R after I
22 show it to counsel.

23 MR. BARNES: Thank you. That's fine.

24 BY MR. GOMEZ:

25 Q. Doctor, can you look at Defendant's Exhibit R,

1 two-page document, and tell me if you've ever seen it before.

2 A. Okay.

3 Q. Have you ever seen that document before?

4 A. No, sir.

5 Q. So in your meeting with the lawyers for Ms. Keels
6 they never showed you that?

7 A. You're correct.

8 Q. And this reference is her seeking medical treatment
9 for neck and back complaints back in January of 2000,
10 correct?

11 A. Well, neck and flank pain. But they do use the
12 word back there here. But if you read it it says flank.

13 Q. It actually states complains of right-sided back
14 pain from neck down, if you look under nurse?

15 A. Yes. Right, Joyce Quarles, who is the
16 administrative secretary, took that down.

17 Q. And this is Buffalo General Hospital. And it's
18 actually where you do your surgery?

19 A. Oh, yeah, right. That's why I'm just saying --

20 Q. That's the history she reports in the record,
21 correct?

22 A. Right. But that's a clerical entry. It's not a
23 medical provider entry. It's entered as complains of -- this
24 is the clerk's entry. Complains of right-sided back pain in
25

1 from neck down times three weeks. But the actual doctor's
2 note says there's right-sided flank and neck pain, and then
3 goes through discussing that. It's not -- he notes that
4 there's normal range of motion of the lumbar spine, normal
5 neurologic exam, normal range of motion of the neck, and that
6 there was some tenderness in the paraspinal muscles in the
7 neck. The lumbar spine was not tender. So I think there are
8 two different things going on. There's the clerical entry
9 and then there's the physician's entry, which are different.

10 Q. All right, well, let's deal with it this way. Ms.
11 Keels is saying she has a neck injury because of this car
12 accident, and you are going along with that opinion in your
13 affidavit, right?

14 A. Yes.

15 Q. Okay. She never told you she had prior neck
16 problems, right?

17 A. You're correct.

18 Q. And here's a record from January 25th of 2000 where
19 she sought treatment because she was having neck pain,
20 correct?

21 A. Correct.

22 Q. And, in fact, on the second page of the document,
23 they actually document that she has muscle spasms, correct?

24 A. Right.

1
2 Q. And muscle spasms are indicative of some type of
3 trauma, correct?

4 A. Well, what they're saying is muscle spasm likely
5 secondary job related resolved. So it went away.

6 Q. So she had muscle spasms?

7 A. Right. She had had advised Motrin, which is an
8 anti-inflammatory, and avoid lifting heavy objects.

9 Q. And you were aware that she worked as a health care
10 aide, I believe it is?

11 A. Yeah.

12 Q. And her job involves, obviously, lifting and moving
13 people around?

14 A. It does, yes.

15 Q. In fact, I think there's part of the history for
16 this visit references that part of her job involved moving
17 people around that are 300 pounds and more, correct?

18 A. It does.

19 Q. And she went back to work after this, correct?

20 A. She did.

21 Q. And earlier today when you talked about how
22 sometimes people in occupations that require lifting and
23 bending can actually suffer injuries to their spine. You
24 recall testifying to that, correct?

25 A. Not specifically, but --

1 Q. The record will speak for itself.

2 A. Okay.

3 Q. We'll move on then. Were you aware that in
4 February of 1999 she had complaints of some back pain?

5 A. Not aware of it.

6 Q. Never saw a record relative to that?

7 A. No.

8 Q. And you were never provided that, is that fair to
9 say?

10 A. Correct.

11 Q. Now, when you did speak to the lawyers and you were
12 made aware that she had had some prior treatment relative to
13 some complaints in her legs and her back, did you ask them to
14 go get the rest of her prior records so that when you came to
15 court you would have a full and accurate file?

16 A. No.

17 Q. Were you aware that in the year 2000 she was having
18 problems of leg weakness and leg giving out?

19 A. No.

20 Q. And one of the effects of, let's say, radicular
21 type symptoms into the legs, could be a sensation of weakness
22 and the legs giving out, correct?

23 A. It is possible.

24 Q. And in your file that you brought with you here
25

today, you didn't have any of those prior records, did you?

A. You're correct.

Q. So they showed them to you and took them, and you didn't keep them and make them part of your file?

A. No, I did not.

Q. And in your affidavit where you rendered all your opinions relative to Ms. Keels' condition, you never made any reference to any of her prior problems or treatment, correct?

A. Correct.

MR. GOMEZ: Thank you, Doctor.

MR. BARNES: I have a little bit, Judge.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. BARNES:

Q. Doctor, let's start with Defendant's P?

THE COURT: What did you say?

MR. BARNES: Defendant's P, your Honor, which is a report from the Community Health Center of Buffalo, dated May 6th, '03, correct?

THE WITNESS: Yes, it is.

BY MR. BARNES:

Q. By the way, do you know what type of a medical facility that is?

A. It's a clinic. Associated with the Erie County

1 Medical Center, I believe, yeah.

2 Q. Where they -- people go get treated for all kinds
3 of --

4 A. It's a community clinic. They do a good job, they
5 do.

6 Q. And you were asked some questions about the entries
7 on here?

8 A. Uh-huh.

9 Q. And you had a chance to read it as a whole, is that
10 correct?

11 A. Yes.

12 Q. And it's in evidence. Does that document and your
13 reading of it in any way change your opinion or your
14 diagnosis that you gave in this courtroom under oath?

15 A. Absolutely not.

16 Q. Why not?

17 A. There's nothing here about her lumbar spine or
18 about her neck. The musculoskeletal -- she's complaining on
19 this date of bilateral lower leg pain; that at the time she
20 was taking an antibiotic and she had -- and her
21 musculoskeletal, meaning her spine and her joints, she had a
22 full range of motion, she had no swelling of her limbs or any
23 other problems. And the doctor there, Dr. Drummond who I
24 went to medical school with, who happens to be a very good
25

1 doctor, writes bilateral leg pain, neuropathic pain, could be
2 secondary to this antibiotic that she was taking. And so she
3 ordered a bunch of tests. But musculoskeletal, full range of
4 motion, there's nothing here that says that she has a
5 backache or spine pain, nothing whatsoever regarding her
6 spine.
7

8 Q. Thank you, Doctor. And now I'll refer you to
9 Defendant's R in evidence. Again, you were asked some
10 questions about some of the entries in here. But you've had
11 a chance to read this document in its entirety, correct?

12 A. Yes.

13 Q. And having done that, does this document or
14 anything in it change the opinion that you rendered under
15 oath in this courtroom about the cause of her injury?

16 A. No, it does not.

17 Q. And why not?

18 A. They're talking about flank pain, which is more
19 related to flank, to the kidney. Presents with right flank
20 and left-sided neck pain. The pain doesn't radiate. It got
21 better with Motrin. Her -- she had some tenderness on the
22 muscles on the side of her neck, on the left side of her
23 neck. Her spine was not tender. She had a full range of
24 motion of her neck and her low back. The range of motion
25 normal, lumbosacral spine and neck. I mean, they made a

specific entry. Normal. Range of motion normal.
Lumbosacral, spine and neck. CNS, central nervous system.
That's your nerve exam, all right? And oriented times three.
Power, meaning the strength, 5 out of 5 in all extremities.
So that's not a radiculopathy. Everything's working. So she
had some right-sided flank pain, kind of in the kidney area,
which is part of the back. It's right there. It's not her
spine. And she has some pain on the left side of her neck.
But she had a full range of motion and a normal neurologic
exam. Different than what she presented after the car
accident, at least in my office, in September of '04.

Q. Okay. I'll show you Defendant's N. Again, you
were asked questions by Mr. Gomez about, which is the report
dated 8-26-02 from the same health clinic, correct?

A. Yes.

Q. And you were asked some questions with some parts
of it. You've had a chance to read it entirely, correct?

A. Yes.

Q. Does this document in any way change the opinion
you gave under oath about the cause of Denise Keels' injury?

A. No.

Q. Why is that?

A. It says full range of motion. No tenderness.
Whatever she was complaining of went away and she went back

1
2 to work.

3 Q. I'm going to ask you that same question about
4 Defendant's O. Taken in it's entirety, where you've had a
5 chance to read the whole thing, does it any way change your
6 opinion?

7 A. See, the chief complaint, first of all, is very
8 important: headaches and vomiting for three days. That's
9 what she went to the clinic for. She's got some pain in her
10 left shoulder blade area and some pain in her left lower
11 quadrant.

12 Q. How do you know it's the shoulder blade, Doctor?

13 A. They say the subscapular area. The scapula is the
14 chicken wing, the shoulder blade area.

15 Q. In the back.

16 A. They mention that she complains of back pain when
17 lifting. However, she's been vomiting for three days. She's
18 got a little back pain from vomiting. But they're not
19 specifically focusing on that. Musculoskeletal, full range
20 of motion. There's no swelling of her legs. Her neurologic
21 exam is normal. They come up with the -- I'm sorry, they
22 conclude she has a viral infection and an enlarged thyroid
23 and they did a pregnancy test on her. They did not mention
24 anything that she had a herniated disc or radiculopathy or
25 there was a specific spinal problem.

1
2 Q. All right. Same question about Defendant's M,
3 Doctor.

4 A. Yes.

5 Q. Again, in it's entirety, you've had a chance to
6 read it. Does it in any way change your opinion?

7 A. No. This is one of the best clinic notes that I've
8 seen. In regards to being a spine surgeon in my 22 years of
9 practice, this is one of the best clinic notes that I have
10 ever seen.

11 Q. Why is that?

12 A. And it is so simple. Diffuse -- this is
13 musculoskeletal. Diffuse muscular tenderness on the left
14 scapular side. Once again we're talking about the left
15 shoulder blade. Left scapular. Here it is, no spinal
16 tenderness, no leg weakness and no hand weakness. That's it.

17 Q. Why is that so significant?

18 A. They're spine troubles. So, you know, if somebody
19 comes in complaining of back pain -- this is my whole back.
20 This is my whole back. But this is my spine. She's having
21 trouble over here, so she says my back hurts. But she's not
22 a doctor or she doesn't come in and say my scapula is
23 hurting.

24 Q. Last one, as far as the documents, Doctor. Q,
25 which is that one day, the 12-18-03. In it's entirety you

read it. Does that in any way change your opinion?

A. No.

Q. Why not, Doctor?

A. It's more of the same. It's actually they're complaining of shoulder pain. And on the diagram that they have the areas of tenderness are around the scapula again.

Q. I'm just going to ask you a few more follow-up questions on questions that you were asked by --

MR. GOMEZ: Mr. Barnes, I don't mean to interrupt. What exhibit were you just referencing?

THE COURT: Q.

BY MR. BARNES:

Q. Doctor, with regard to your disagreement, if I can call it that, with the radiologist, all right?

A. Yeah.

Q. You've been in practice for a long time now?

A. Yes.

Q. You deal with radiologists' interpretations of film all the time, right?

A. Every day.

Q. Now, radiologists in particular, Dr. Ludwig, who you know of --

A. I don't know him personally. I'm familiar with

1
2 many of his reports.

3 Q. They don't see patients, right?

4 A. No.

5 Q. They don't do examinations on patients?

6 A. No.

7 Q. They don't do surgery on patients?

8 A. You're correct.

9 Q. They look -- they're in an office looking at films
10 on a computer pretty much, right?

11 A. Yes.

12 Q. Have you had the experience where you do disagree
13 with their interpretation of films?

14 A. Yes, frequently.

15 Q. Does that happen?

16 A. Frequently, yeah.

17 Q. In this case you actually opened up Denise's back
18 and looked inside?

19 A. Right.

20 Q. I take it Dr. Ludwig wasn't there for the surgery?

21 A. No.

22 Q. The information that you used and referenced you
23 used, do you when a patient comes in with the kind of
24 complaints that Denise Keels had, do you require that patient
25 to go out and come back to you with a lifetime of medical

treatment they received since the time they were born?

A. Absolutely not.

Q. Is that important to you based on the history you took and the findings you made and the MRI films and the surgery? Would that have been important to you?

A. I don't believe it has any effect on her problem.

Q. Now, she's a home care aide, you talked about that with Mr. Gomez, you talked about it with me earlier. Do you treat patients that have had a severe back trauma like this woman who in the past have had aches and pains as a consequence of work?

A. Yes.

Q. And has it been your experience that those things resolve and they go back to work?

A. You're correct.

Q. Do you see anything in the records Mr. Gomez showed you that Denise didn't go back to work?

A. No, she returned to work. She returned to her work every time other than after the car accident.

Q. She wanted to return to work since she was treating with you?

A. Right. Yes.

MR. BARNES: That's all I have, thank you.

RE CROSS-EXAMINATION

BY MR. GOMEZ:

Q. You made a reference to Exhibit Q. Can I see which one that is? This is from December 18 of 2003, right?

A. Yes.

Q. After the car accident, right?

A. Yes.

Q. And we've had this blown up for the jury, Exhibit Q-1. This is a report after the accident that you didn't see, right?

A. Yes.

Q. And you told the jury that when she went to the hospital -- or to the clinic on that day, she actually made no complaints about her low back; she was talking about the upper scapular region, correct?

A. Correct.

Q. And in fact it says still complains -- it's UBP. That means upper back pain, correct?

A. Correct

Q. And that's the over region that you were referencing to the jury, right?

A. Right. That's the picture with the X's, right.

Q. Right. So one of the things in the medical field generally, if someone makes a complaint, you should document it in the record, correct?

1
2 A. Yes.

3 Q. And there's an assumption, obviously, if it's not
4 in the record, that the complaint wasn't made?

5 A. Well, that's your assumption. It can happen -- it
6 can happen that a patient may complain and something may not
7 be written down or may be recorded inaccurately. We're all
8 human.

9 Q. And in this case, though, all of the complaints she
10 was making just about two weeks after the accident were
11 related to the neck and the upper back, correct?

12 A. Yes.

13 Q. Now, there was another report, if I can approach
14 again. The May 6th, 2003. You made a reference to the jury
15 that she was taking some kind of antibiotic and that that
16 might have been one of the issues with why she was having
17 that leg pain, correct?

18 A. Yeah, this was the doctor's assessment.

19 Q. Okay. And --

20 THE COURT: What number is that?

21 MR. GOMEZ: Oh, this is Exhibit P.

22 THE COURT: P, all right.

23 BY MR. GOMEZ:

24 Q. And in fact, sometimes when medications are
25 prescribed for patients there are side effects that could

1
2 bother them, correct?

3 A. Yes.

4 Q. And one of the side effects of this antibiotic she
5 was taking could have potentially been this neuropathic pain
6 she was experiencing?

7 A. Yes.

8 Q. Were you aware that she had been taking that kind
9 of medication for at least four years before the date of this
10 report without ever having any symptoms in her legs?

11 A. I was not aware of that.

12 Q. Now, you disagree with the radiologist about that
13 first MRI, and we've obviously talked about that. When that
14 film was done and you saw that the radiologist read it
15 differently than you, you didn't send her for another MRI at
16 that point, did you?

17 A. No.

18 Q. And you didn't have another radiologist review it
19 just to, you know, make sure that what you're seeing was
20 accurate, correct?

21 A. No, I did not.

22 MR. GOMEZ: Thank you.

23 MR. BARNES: Nothing further, your Honor.

24 THE COURT: All right. Doctor, you can step
25 down.

(Witness excused.)

THE COURT: Will the lawyers come up, please?

(Bench conference. All counsel present.)

(Proceedings continued in open court.)

THE COURT: We're done for the day, ladies and gentlemen. We'll meet tomorrow at 9:30. And we'll probably hear testimony I think all day. All right. Have a good day, night and see you at 9:30.

(Court recessed.)

C E R T I F I C A T I O N

I hereby certify that the foregoing is a transcript of the official stenographer's minutes of the testimony and proceedings in the above matter taken on April 22, 2008.



MICHAEL MARTIN
Official Court Reporter