

2 witness?

3 THE COURT: Yes.

4 BY MR. BARNES:

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

8 A. Yes.

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

10 A. Yes, I've seen this.

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

13 A. Yes.

14 Q. You participated in the creation of this document?

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

16 Q. And the recommendations in this are yours?

17 A. Yes.

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

23 A. Yes, sir.

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

2 terms of how the future looks for her?

3 A. Yes.

4 Q. From a medical standpoint?

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

8 Q. Why is that?

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

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

15 And can we approach?

16 THE COURT: Yes.

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

19 (Proceedings continued in open court.)

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

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

25 BY MR. BARNES:

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

2 pain levels are significant enough that non-narcotic  
3 medications won't work, so basically be bedridden. And so  
4 the only way we can keep them somewhat mobile in the  
5 community is to give them a narcotic so they can at least get  
6 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?

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

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

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

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.

25 MR. GOMEZ: Yes, your Honor.

## 2 CROSS-EXAMINATION

3 BY MR. GOMEZ:

4 Q. Good afternoon, Dr. Capicotto.

5 A. Good afternoon.

6 Q. You and I have never met?

7 A. I don't believe we have.

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

12 A. Yes.

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

16 A. Sure.

17 Q. Now, when she first comes to you, September 1st of  
18 2004, correct?

19 A. Yes.

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

23 A. Yes, sir.

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

1                   A.     Yes.

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

4                   A.     Yes.

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

6                   A.     Yes.

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

9                   A.     I know that she was in an SUV. And she was in a  
10                  1997 Ford Explorer, I believe she was in.

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

13                  A.     Right.

14                  Q.     Do you recall that?

15                  A.     Yes, I do.

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

18                  A.     Yes, I agree.

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

21                  A.     No, I don't.

22                  Q.     Okay. Now, on the same day, on September 1st of  
23                  2004, she comes to you and she denies any history of spinal  
24                  pain prior to December 3rd of 2003, correct?

1                   A.     You're correct.

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

6                   A.     Yes.

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

9                   A.     Yes.

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

12                  A.     Yes.

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

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

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

20                  A.     Correct.

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

23                  A.     That's a short time.

24                  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?

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?

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?

2 A. You're correct.

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

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

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 were 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?

6                   A.     She did not bring it with her on the visit.

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

8                   A.     Correct.

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

11                  A.     Yes.

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

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

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

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

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

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

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

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

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

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

16 A. Not a specific recollection, no.

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

18 A. It varies.

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

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

23 Q. Could be more?

24 A. 400 -- 400 -- yeah.

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

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

2      treating with Dr. Ward after the accident?

3           A.     I don't have a specific recollection regarding  
4           that.

5 Q. Were you aware that she was seen by her primary  
6 care physician in the first handful of weeks after the  
7 accident?

8 A. Dr. Pavan. I was aware of that, yes.

9 Q. And Dr. Pavan works out of Community Health Center,  
10 correct?

11 A. Yes.

12 Q. And did you ever obtain Dr. Pavan's records  
13 relative to his treatment of her after the accident?

14 A. No.

15 Q. Now, there was an incident on May 3rd of 2004 where  
16 Ms. Keels was taken to the emergency room. Did she ever tell  
17 you about that?

18 A. Not that I recall.

19 Q. And obviously that would be before she came to you  
20 for the first time, correct?

21 A. Yes.

22 Q. And on the initial visit to you on your report of  
23 9-1-04, you make no reference to any incidents happening back  
24 in May of 2004 where she went to the emergency room, correct?

25 A. You're correct.

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

4 A. You're correct.

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

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

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

13 A. Yes.

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

17 A. I think that's more the rule.

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

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

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

24 A. Possible, right.

25 Q. Now, we talked briefly about the degenerative

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

3 A. At some point it does.

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

6 A. Yes.

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

8 A. Yes.

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

11 A. Okay.

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

14 A. It may become more flexible.

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

17 A. That's true.

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

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

22 Q. Because a herniated disc can happen, not only  
23 because of a car accident, but it can happen just trying to  
24 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  
6                   Would you agree with that?

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.

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?

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

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

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.

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

2004. Let me know when you're there.

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

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

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

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

A. Yes.

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

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

Q. Okay.

(Defendant's Exhibit I marked for identification.)

BY MR. GOMEZ:

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

A. I don't know.

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

6 A. Yes.

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

10 A. You're correct.

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

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

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

16 A. Correct.

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

20 A. Yes.

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

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

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

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

3 A. Right.

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

7 A. If there were.

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

9 A. Correct.

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

13 A. That's what he said.

14 Q. And you disagree with that, correct?

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

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

21 A. Correct.

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

24 A. I do.

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

6           A.     Yes, sir.

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

9           A.     Correct.

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

12          A.     Yes.

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

17          A.     Yes.

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

20          A.     It did, you're correct.

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

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

25          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

1 response is that that's not degenerative, that's traumatic.

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

4 A. Correct.

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

7 A. Yes.

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

10 MR. GOMEZ: If I can approach?

11 THE COURT: Sure.

12 BY MR. GOMEZ:

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

16 A. That I don't know.

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

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

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

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

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

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

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

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

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

7 Q. Doctor, you can explain --

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

11 THE COURT: Complete your answer, Doctor.

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

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

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

19 MR. GOMEZ: Thank you.

20 BY MR. GOMEZ:

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

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

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

4 A. Right.

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

8 A. Could you repeat that?

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

10 (Record read.)

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

15 (Record read.)

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

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

2

THE COURT: The answer will stand. Move on.

3

MR. GOMEZ: Thank you.

4

BY MR. GOMEZ:

5

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

7

A. Yes, sir.

8

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

10

A. Oh, you're correct, yeah.

11

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

12

A. Yes.

13

Q. How many times?

14

A. Twice before.

15

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?

18

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

19

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

20

A. No.

21

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

23

A. Yes.

24

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

2 correct?

3 A. Yes.

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

5 A. No.

6 Q. And you never have?

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

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

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

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

14 A. Yes, they would.

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

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

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

22 A. Yes, I did.

25 (Defendant's Exhibit J marked for

2 identification.)

3 BY MR. GOMEZ:

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

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

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

11 A. Yes.

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

14 A. Yes.

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

18 A. That's correct.

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

22 A. Yes.

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

25 A. That's correct.

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

4 A. It may have been.

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

7 A. Correct.

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

11 A. Right.

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

15 A. It does.

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

19 A. Yes.

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

22 A. No.

23 Q. You're not being paid at all?

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

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

4 A. Yes, that's correct.

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

7 A. Yes.

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

10 A. You're correct.

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

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

15 Q. Yeah, the blue.

16 A. Yes.

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

20 A. Yes, sir.

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

22 A. The attorneys.

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

25 A. Yes.

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 again.

2 A. Yeah, please.

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

7 A. I am certain of it.

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

10 A. You're correct.

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

12 A. Partially.

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

15 A. Yes.

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

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

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

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

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

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

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

11 THE COURT: As long as it occurred in court.

12 MR. GOMEZ: It did.

13

14 BY MR. GOMEZ:

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

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

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

20 A. I don't recall specifically.

21 MR. GOMEZ: Can I have this marked?

22 (Defendant's Exhibit K marked for  
23 identification.)

24 BY MR. GOMEZ:

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

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.

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

4 A. Yes.

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

8 A. No.

9 MR. GOMEZ: Can I have this marked?

10 (Defendant's Exhibit L marked for  
11 identification.)

12 BY MR. GOMEZ:

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

18 A. Yes.

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

22 A. 381?

23 Q. 381.

24 A. Okay. 381 through 383?

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

1                   A.     Yes.

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

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

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

8                   A.     On behalf of a patient.

9                   Q.     A patient who was a plaintiff?

10                  A.     Correct.

11                  Q.     In a car accident, correct?

12                  A.     Yes.

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

15                  A.     Okay.

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

18                  A.     Yes, I did.

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

21                  A.     Yes.

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

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

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

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

6 A. Dr. Bansal?

7 Q. Bansal?

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

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

11 A. I can't recall.

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

15 A. Yes.

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

20 A. Correct.

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

1                   A. It may be important.

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

5                   A. Yes.

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

9                   A. Yes.

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

12                  A. I'm not aware of that.

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

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

18                  BY MR. GOMEZ:

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

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

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

1                   A.     Just two weeks ago and then today.

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

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

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

9                   A.     Yes, I had seen a few documents.

10                  Q.     What documents did you see?

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

14                  Q.     When were they from?

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

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

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

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

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

6 (Court recessed.)

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

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

11 THE COURT: Mr. Gomez.

12 MR. GOMEZ: Thank you, your Honor.

13 CROSS-EXAMINATION (Continued)

14 BY MR. GOMEZ:

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

18 MR. GOMEZ: If I can approach?

19 THE COURT: Go ahead.

20 MR. GOMEZ: Thank you, your Honor.

21 BY MR. GOMEZ:

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

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

2 have seen this page. I saw this page.

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

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

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

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

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.

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

5 A. Yes.

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

8 A. Primarily her right leg, but, yes.

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

11 A. Yes.

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

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

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

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

20 Q. Can you tell the jury what radiculopathy is?

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

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

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 and reversed?

2 A. Correct.

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

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

10 MR. BARNES: No objection.

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

13 THE COURT: Are received in evidence.

14 MR. GOMEZ: Thank you, your Honor.

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

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

21 THE COURT: All right.

22 BY MR. GOMEZ:

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

2 2002 note which you were just recently provided, correct?

3 A. Uh-huh.

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

5 A. Yes.

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

10 A. Yes, sir.

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

12 A. It does.

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

15 A. Yes.

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

19 A. Yes.

20 Q. And the indication was back pain, correct?

21 A. Correct.

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

24 A. History of present illness.

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

2 African-American female, correct?

3 A. Yes.

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

5      Assaulted by her boyfriend during argument on Thursday,

6 8-1-02. There's a word -- can you make that out? That's all  
7 right. We'll skip the word. We'll say what appears to be  
8 her -- from neck and she was thrown on the floor Saturday.  
9 Felt pain on her back and shoulder. All right? Is that a  
0 fair representation of what that says?

11 A. Yes.

12 Q. All right. And this is a reference to an incident  
13 occurring before the car accident that up until two weeks ago  
14 you never knew about?

15 A. You're correct.

16 Q. And, Doctor, on other occasions that you've come to  
17 court to testify, you've been presented with prior problems  
18 that one of your patients had never told you about, correct?

19 A. I've seen that before.

20 Q. And you were aware that that's a possibility,  
21 especially in cases that are involved in litigation, correct?

22           A.     I think it's just normal patients forget, whether  
23     it has anything to do with litigation.  They may forget a  
24     previous episode.

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

2 number on that?

3 A. J.

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

7 A. I did, correct.

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

11 A. Yes.

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

13 A. You're correct.

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

17 A Well -

18 MR. BARNES: Objection, your Honor.

19 Objection. Again, the form of the question. The  
20 medical testimony here is that the back runs from  
21 the base of the neck to the bottom of the spine.

22 He keeps referring to the back. There's very  
23 specific language in this exhibit that talks about  
24 what part of the back it is and he's ignoring it

25 I object to the question.

2

THE COURT: You can ask on redirect.

3

Overruled.

4

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

5

THE COURT: Was that question answered?

6

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

7

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

8

BY MR. GOMEZ:

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

14 A. Yes, you are correct.

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

17 A. Yes.

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

20 A. Yes.

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

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

25 Q. Yes.

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

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

7        --

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

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

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

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

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

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

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

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

12                   A.     I didn't see this record.

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

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

19                   Q.     But it was one of her complaints?

20                   A.     Yes.

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

22                   A.     Correct.

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

1 indicate that you did see this report?

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

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

5 A. Yes.

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

8 A. Yes.

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

12 A. Yes.

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

14 A. Yes.

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

16 A. You're correct.

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

20 A. That's right.

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

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

24 Q. And that's the next line?

2 A. Yes.

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

4 A. Right.

5 Q. Or actually before that, correct?

6 A. Yes.

7 Q. What are paresthesias?

8 A. Numbness and tingling.

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

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                   A.     No.

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

9                   A.     Last week.

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

12                  A.     Can't remember.

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

15                  A.     April 15th.

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

19                  A.     No.

20                  Q.     About her prior problem?

21                  A.     No.

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

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

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

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

15 A. Yes.

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

18 A. You're correct.

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

22 A. Correct.

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

25 A. Right.

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 --

2 Q. The record will speak for itself.

3 A. Okay.

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

6 A. Not aware of it.

7 Q. Never saw a record relative to that?

8 A. No.

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

11 A. Correct.

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

17 A. No.

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

20 A. NO.

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

24 A. It is possible.

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

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

3 A. You're correct.

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

6 A. No, I did not.

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

10 A. Correct.

11 MR. GOMEZ: Thank you, Doctor.

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

13 THE COURT: Redirect.

14 REDIRECT EXAMINATION

15 BY MR. BARNES:

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

17 THE COURT: What did you say?

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

21 THE WITNESS: Yes, it is.

22 BY MR. BARNES:

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

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

2 Medical Center, I believe, yeah.

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

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

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

9 A. Uh-huh.

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

12 A. Yes.

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

16 A. Absolutely not.

17 Q. Why not?

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

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

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

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

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

16 A. Yes.

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

19 A. Yes.

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

22 A. No.

23 Q. Why is that?

24 A. It says full range of motion. No tenderness.

25 Whatever she was complaining of went away and she went back

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.

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

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

3 A. No.

4 Q. Why not, Doctor?

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

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

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

13 THE COURT: Q.

14 BY MR. BARNES:

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

17 A. Yeah.

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

19 A. Yes.

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

22 A. Every day.

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

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

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

1 treatment they received since the time they were born?

2 A. Absolutely not.

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

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

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

12 A. Yes.

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

15 A. You're correct.

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

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

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

22 A. Right. Yes.

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

24  
25 RECROSS-EXAMINATION

2 BY MR. GOMEZ:

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

5 A. Yes.

6 Q. After the car accident, right?

7 A. Yes.

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

11 A. Yes.

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

16 A. Correct.

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

19 A. Correct

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

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

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

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

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.

2 (Witness excused.)

3 THE COURT: Will the lawyers come up, please?

4 (Bench conference. All counsel present.)

5 (Proceedings continued in open court.)

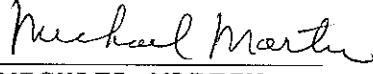
6 THE COURT: We're done for the day, ladies  
7 and gentlemen. We'll meet tomorrow at 9:30. And  
8 we'll probably hear testimony I think all day.

9 All right. Have a good day, night and see you at  
10 9:30.

11 (Court recessed.)

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

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

17  
18   
19 MICHAEL MARTIN  
20 Official Court Reporter  
21  
22  
23  
24  
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