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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : CIVIL TERM : PART 12
-----X

KEUMOK HAN,

Plaintiff,

-against-

Index No. 707898/17

SPYRIDON SPETSIERIS and ZOE SPETSIERIS,

DAMAGES TRIAL

Defendants.

-----X

Supreme Courthouse
88-11 Sutphin Boulevard
Jamaica, New York 11435
October 17, 2019

B E F O R E :

THE HONORABLE DENIS J. BUTLER,
J U S T I C E

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

BURNS & HARRIS
Attorney for the Plaintiff
233 Broadway, Suite 900
New York, New York 10279
BY: JOHNSON L. ATKINSON, ESQ.

PICCIANO & SCAHILL, P.C.
Attorney for the Defendants
1065 Stewart Avenue, Suite 210
Bethpage, New York 11714
BY: CHARLES S. MAILLOUX, ESQ.

AMY BOHLEBER
Senior Court Reporter

PROCEEDINGS

1 THE CLERK: This is a continued trial, Index
2 Number 70789/2017, Keumok Han against Spyridon Spetsieris
3 and Zoe Spetsieris. Appearances, please.

4 MR. ATKINSON: For Plaintiff, Burns and Harris by
5 Johnson Atkinson.

6 MR. MAILLOUX: For the Defendants, the Law Firm of
7 Picciano and Scahill by Charles Mailloux.

8 THE COURT: Good morning, gentlemen.

9 MR. ATKINSON: Good morning, your Honor.

10 MR. MAILLOUX: Good morning, your Honor.

11 THE COURT: As we had left off, the Dr. Wert was
12 coming in this morning.

13 MR. ATKINSON: Yes, and he is here, your Honor, he
14 just stepped out to use the bathroom.

15 THE COURT: Very fine. Anything we need to
16 address on the record at this point?

17 MR. ATKINSON: I don't believe so.

18 MR. MAILLOUX: No.

19 THE COURT: Off the record.

20 (A discussion was held off the record.)

21 THE COURT: On the record, gentlemen, we have all
22 the jurors. We did talk about potential jurors' concerns
23 and you're both cognizant of those, and I know the doctor
24 is -- we're trying to be considerate of the doctor's
25 schedule as well. All the ladies and gentlemen of the jury

PROCEEDINGS

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are here, are we ready to bring them down?

MR. ATKINSON: Yes, your Honor. I just need to step out one second.

THE COURT: Very fine. We'll get the ladies and gentlemen of the jury up in the jury room and we'll bring them down.

MR. MAILLOUX: Yes, your Honor.

MR. ATKINSON: Yes.

(Whereupon further proceedings were held but not transcribed.)

COURT OFFICER: All rise, jury entering.

(Whereupon the jury entered the courtroom.)

THE CLERK: Counselors, do you stipulate to the presence and proper seating of the jurors?

MR. MAILLOUX: Yes, your Honor.

MR. ATKINSON: Yes.

THE CLERK: Thank you.

THE COURT: Ladies and gentlemen, thank you very much, please be seated. Again, I want to thank you for your patience, your attentiveness. As we had left off, the Plaintiff, Ms. Han, had completed her testimony on the issue of damages. Mr. Atkinson indicated that he had additional -- an additional witness, and at this time, Mr. Atkinson, are you ready to call a witness to the stand?

MR. ATKINSON: Yes, your Honor.

PROCEEDINGS

1 THE COURT: Please.

2 MR. ATKINSON: I'd now like to call Dr. Sanford
3 Wert to the stand.

4 (Whereupon Dr. Wert is now present on the witness
5 stand.)

6 THE CLERK: Do you solemnly swear or affirm that
7 the testimony you will give shall be the truth and nothing
8 but the truth?

9 THE WITNESS: I do so swear.

10 THE CLERK: Please be seated. State your name.

11 THE WITNESS: Sanford R. Wert, W-E-R-T.

12 THE CLERK: I'm sorry, Sanford?

13 THE WITNESS: Sanford, S-A-N-F-O-R-D.

14 THE CLERK: Last name?

15 THE WITNESS: W-E-R-T.

16 THE CLERK: And what is your professional address,
17 Doctor?

18 THE WITNESS: 3423 Guider Avenue, Brooklyn, 11235.

19 THE CLERK: Thank you.

20 THE COURT: And Doctor, the respective attorneys
21 are going to ask you certain questions. If you don't
22 understand a question, please inform me of that. Counsel,
23 again, I'm going to ask you to just please ask the
24 questions, speak in a loud enough manner so that the ladies
25 and gentlemen of the jury, including those on the

PLAINTIFF - DR. S. WERT - DIRECT EXAMINATION

1 respective far ends can hear you in addition to the witness
2 and the Court. Thank you very much. So at this time,
3 ladies and gentlemen, we're going to hear from Counsel for
4 Plaintiff, Mr. Atkinson. Counsel?

5 DIRECT EXAMINATION BY

6 MR. ATKINSON:

7 Q Good morning, Dr. Wert.

8 A Good morning, sir.

9 Q Can you tell the jury a little bit about your
10 educational background and qualifications?

11 A Sure. I'm an orthopedic surgeon. That's a specialty
12 inside of medicine, that's a surgical specialty. It deals with
13 injuries to the bones, ligaments, muscles, tendons, joints.
14 It's a surgical specialty, so we not only treat patients, we do
15 surgery on them. That is a fellow -- I did it in a residency, a
16 residency is after medical school. I went to medical school in
17 Spain and Mexico. When I finished I did an internship at -- a
18 subinternship at Maimonides, internship at Beth Israel Hospital
19 in Manhattan, and an orthopedic residency at Long Island Jewish
20 Hospital. Since then, I finished my residency, I worked three
21 years for a hospital teaching residents and doing surgery with
22 them. In 1982 I opened my own practice in Brooklyn, and since
23 that time I've been there and I'm still working in orthopedic
24 surgery. I'm also board certified, which means I pass an
25 examination, a national examination of orthopedists making me a

PLAINTIFF - DR. S. WERT - DIRECT EXAMINATION

1 specialist inside of orthopedics.

2 Q Now, Dr. Wert, what is your relationship to the
3 plaintiff in this case, Keumok Han?

4 A She was my patient.

5 Q And do you -- so you see patients in connection with
6 your work as an orthopedic surgeon, correct?

7 A Yes.

8 Q In addition to that, do you do any other work regarding
9 court appearances or things of that nature?

10 A I very rarely testify in court. What I do, a small
11 percentage of my practice is what's called IME's, which is
12 examining people who were in accidents. I do mostly
13 compensation. Actually all in that aspect, only compensation.
14 I evaluate patients. They're referred to me and I evaluate
15 them, whether they can return to work, stay out of work, whether
16 they need more treatment or don't, and I write a report.

17 Q When you say compensation, you're referring to workers'
18 compensation?

19 A People that are injured on the job, workers'
20 compensation, yes.

21 Q Dr. Wert, about how much of your time in regards to,
22 you know, apart from treating patients do you spend working for
23 plaintiffs or defendants?

24 A Well, I would say working for I do more patients for
25 plaintiffs than defendants. When I come to court, it's probably

PLAINTIFF - DR. S. WERT - DIRECT EXAMINATION

1 equal.

2 Q Got it. So you treat a lot of patients and you
3 consider that working for plaintiffs, but when you come to court
4 you equally divide your time between plaintiffs and defendants
5 work?

6 A That's correct.

7 Q Dr. Wert, are you -- have you been paid for your time
8 today?

9 A Yes.

10 Q And what is your fee?

11 A 7,500 dollars.

12 Q Now, Dr. Wert, talk to me about your treatment of Ms.
13 Han. When did you first see her?

14 A I first saw her on 9/28/16.

15 Q And when you first saw her, what did you evaluate her
16 for?

17 A What did I?

18 Q What did you evaluate her for?

19 A She was injured in a motor vehicle accident. She had
20 multiple injuries. I examined her for her left knee and right
21 shoulder.

22 Q And based on your examination of Ms. Han, did you make
23 any recommendations?

24 A Yes, I recommended conservative treatment in the form
25 of continuing physical therapy and to return to my office in a

PLAINTIFF - DR. S. WERT - DIRECT EXAMINATION

1 month.

2 Q Now, did you base that recommendation on anything?
3 Apart from your examination, was there anything else that you
4 relied upon?

5 A Sure. Firstly, I believe I saw her a month after the
6 accident. Also the MRI had some positive findings. There was
7 nothing obviously ripped or torn according to the MRI report
8 that would warrant immediate surgery, so I recommended
9 conservative treatment.

10 Q Now, Doctor, ultimately you performed a surgery on my
11 client, on Ms. Han, correct?

12 A Yes.

13 Q Now, between the time that you performed surgery and --
14 well, Doctor, I want you to assume that my client testified here
15 yesterday, she testified that between the time that she first
16 met you and the time that you performed surgery she had some
17 concerns about the surgery, she spoke to people about it, and
18 she ultimately decided to go with the surgery and informed --
19 because of continued complaints of pain that she had, and she
20 informed the folks at the New York Plain Clinic that she would
21 like you to perform that surgery and they communicated that
22 information to you. Now, under those facts, would you perform
23 surgery?

24 A Yes.

25 Q And why would you perform surgery under those facts

PLAINTIFF - DR. S. WERT - DIRECT EXAMINATION

1 after initially recommending conservative treatment?

2 A If the patient stated that she was unhappy with the
3 therapy, that it was not helping her, that she had spoken to
4 other people and was now very anxious to have the surgery, the
5 arthroscopic surgery, I would do that.

6 Q And are there any other complaints that Ms. Han had
7 that gave you the sense that surgery could be a good option in
8 this case?

9 A Well, I believe she complained of buckling in the knee,
10 which is a sign of internal damage of the knee where something
11 gets caught in the knee and it causes intense pain, your knee
12 lets go, and it buckles, it collapses. So that's one of the
13 hallmark symptoms, she did complain of that. So along with
14 that, plus the positive MRI, plus her decision to want surgery I
15 did the surgery.

16 Q Now, when you went in and -- do you recall the date
17 that you performed that surgery, Doctor?

18 A 10/24/16.

19 Q And when you went in and you performed surgery, can you
20 describe the procedure for the jury, please?

21 A Sure. I performed a kind of surgery called
22 arthroscopic surgery, which is basically a minimal invasive
23 surgery. You make two very small holes, you put an instrument
24 in the knee which is attached to a fiberoptic cable, which
25 projects the interior of the knee on a television. We watch the

PLAINTIFF - DR. S. WERT - DIRECT EXAMINATION

1 television. The other hole is for instruments to go in, little
2 various instruments that you need, some may be to cut something,
3 some may be to clean up something. There are different types.
4 We also blow up the knee with water so we're able to see the
5 interior of the knee. And basically when we do that we look for
6 whatever findings are present in the knee and we try to correct
7 them.

8 Q And when you went into the knee and observed it through
9 the instrumentation you just described, what did you find?

10 A Inside the knee we found synovitis, which is
11 inflammation. Itis means inflammation, anything that is itis is
12 inflammation. So we found inflammation of the synovia. The
13 synovia the sin is the covering of the knee joint. That's
14 really not specific, that just implies that there was injury and
15 aggravation to the knee joint. Secondly, I found tears of the
16 medial meniscus and lateral meniscus. There were tears on the
17 edge of the meniscus, they were seen and they were treated.
18 They're treated by removing the part that's torn. I also saw
19 probably the most significant part was a significant damage to
20 the lateral -- lateral means the outside of the knee -- the
21 lateral femoral condyle. The femur is the top bone -- the knee
22 has two bones, the tibia and the femur. This is the top bone of
23 the knee and it's on the outside. There was damage to the
24 cartilage, it was full thickness. In other words, inside the
25 knee there's a white covering of the bone called articular

PLAINTIFF - DR. S. WERT - DIRECT EXAMINATION

1 cartilage. That was damaged so that the white covering was
2 gone. What we did in that case was to take something called an
3 abrader and we smooth it out and clean it. And that's basically
4 all you can do to that. Those were the findings. There was
5 also a loose body inside the knee, which means a piece of
6 cartilage came off and was inside the knee.

7 Q Now, the findings that you observed when you went into
8 my client's knee, were those consistent with my client's
9 complaints?

10 A Yes.

11 Q Now, Doctor, did you take photos -- you indicated
12 earlier there was visual instrumentation so you could see inside
13 the knee. Did you take any photos of what you saw in there?

14 A Yes. Throughout the case there is a camera and we take
15 photos.

16 Q Okay.

17 MR. ATKINSON: May I hand something up to the
18 witness?

19 THE COURT: Would you like something published to
20 the witness?

21 MR. ATKINSON: Yes.

22 THE COURT: Is it in evidence?

23 MR. ATKINSON: It is not yet in evidence.

24 MR. MAILLOUX: Request that it be marked.

25 MR. ATKINSON: Mark it for ID as Plaintiff's 2.

PLAINTIFF - DR. S. WERT - DIRECT EXAMINATION

1 THE COURT: We'll mark that Plaintiff's 2 for
2 identification.

3 (Plaintiff's Exhibit 2, PHOTOS, was marked for
4 identification.)

5 COURT OFFICER: Plaintiff's Exhibit 2 was marked
6 for identification.

7 THE COURT: That's been marked as Plaintiff's 2.
8 Counsel, you'd like that published to the witness, correct?

9 MR. ATKINSON: Yes, your Honor.

10 THE COURT: Any objection, Counsel?

11 MR. MAILLOUX: No objection, your Honor.

12 THE COURT: We'll publish that to the doctor.

13 Q Doctor, you've been shown what's been marked as
14 Plaintiff's Exhibit 2 for identification. Can you tell me what
15 those are?

16 A These are the interoperative photos of Ms. Han, Keumok.

17 Q These are the photos that you took on the day that you
18 conducted that surgery?

19 A Yes.

20 Q And these are a fair and accurate representation of
21 what you were able to observe inside of Ms. Han's knee?

22 A Yes.

23 MR. ATKINSON: Your Honor, I'd like to move
24 Plaintiff's Exhibit 2 for identification into evidence as
25 Plaintiff's Exhibit 2.

PLAINTIFF - DR. S. WERT - VOIR DIRE by MR. MAILLOUX

1 MR. MAILLOUX: May I just inquire, your Honor?

2 THE COURT: Yes.

3 VOIR DIRE BY

4 MR. MAILLOUX:

5 Q Good morning, Doctor.

6 A Good morning, sir.

7 Q Is it your standard business practice to take
8 interoperative photos when performing a surgery on a patient?

9 A On arthroscopic surgery, yes, sir.

10 Q And are these -- did you take photos with regard to Ms.
11 Han?

12 A Yes.

13 Q And are these photos the photos that you took in
14 connection with your normal business practices?

15 A Yes.

16 MR. MAILLOUX: No objection, your Honor.

17 THE COURT: On consent it will be marked as
18 Plaintiff's 2 in evidence.

19 (Plaintiff's Exhibit 2, PHOTOS, was marked into
20 evidence.)

21 COURT OFFICER: Plaintiff's Exhibit 2 has been
22 marked into evidence.

23 THE COURT: That's been marked in evidence as
24 Plaintiff's 2. Counsel?

25 MR. ATKINSON: Your Honor, I have enlarged

PROCEEDINGS

1 versions of the same photos that I'd like to use for
2 demonstrative purposes to publish to the jury.

3 MR. MAILLOUX: I would ask that they also be
4 marked, your Honor.

5 THE COURT: Could we please approach?

6 (Whereupon a discussion was held at the bench.)

7 THE COURT: We'll pre-mark these as Plaintiff's 3,
8 4, and 5 for identification purposes.

9 (Plaintiff's Exhibits 3-5, BLOW UPS OF PHOTOS, were
10 marked for identification.)

11 COURT OFFICER: Plaintiff's Exhibit 3, 4, and 5
12 have been marked for identification.

13 THE COURT: Defense Counsel had an opportunity?

14 MR. MAILLOUX: Yes, your Honor. I have no
15 objection to them going into evidence.

16 THE COURT: Oh, in evidence, not just for ID?

17 MR. MAILLOUX: Yes.

18 THE COURT: Very fine. Rather than for ID, 3, 4,
19 and 5 will be marked in evidence.

20 (Plaintiff's Exhibit 3-5, BLOW UPS OF PHOTOS, were
21 marked into evidence.)

22 COURT OFFICER: Plaintiff's Exhibits 3, 4, and 5
23 were marked into evidence.

24 THE COURT: Counsel, you need those published as
25 well?

PROCEEDINGS

1 MR. ATKINSON: I do not need those published to
2 the witness, I will have those published to the jury.

3 THE COURT: Very fine. Next question, please.
4 They're marked, but we're not publishing them to the
5 witness.

6 COURT OFFICER: Would you like me to publish them
7 to the jury?

8 MR. ATKINSON: Yes, your Honor, I request they be
9 published to the jury.

10 THE COURT: He's asking they be published to the
11 jury.

12 MR. MAILLOUX: I have no objection.

13 THE COURT: Okay.

14 MR. ATKINSON: Via the easel, if possible.

15 THE COURT: No, this is the way it's published to
16 the jury. In other words, do it the right way.

17 COURT OFFICER: Plaintiff's Exhibits 3, 4, and 5
18 have been published today the jury.

19 THE COURT: Next question, please.

20 MR. ATKINSON: Your Honor, may I have the 3, 4,
21 and 5 placed on the easel for use by Dr. Wert in his
22 testimony as a demonstrative?

23 THE COURT: If you have a question, yes. Which
24 one are you asking?

25 CONTINUED DIRECT EXAMINATION BY

PLAINTIFF - DR. S. WERT - DIRECT EXAMINATION

1 MR. ATKINSON:

2 Q Dr. Wert, I'd like you to explain to the jury the
3 photos that have been marked into evidence as 3, 4, and 5 that
4 you also have in front of you as Plaintiff's Exhibit 2, I'd like
5 you to show the jury what those photos demonstrate?

6 MR. ATKINSON: Your Honor, may the witness --

7 THE COURT: Just one minute. Come up. Let's go
8 in the back.

9 (Whereupon a discussion was held off the record in
10 chambers.)

11 THE CLERK: Remain seated, come to order.

12 THE COURT: Mr. Atkinson, is there a specific
13 visual aid you want published for the doctor and/or the
14 jury's benefit?

15 Q Dr. Wert, on which page -- of the three pages that are
16 in front of you, on which page are the photos that you would
17 like to explain to the jury?

18 A Two.

19 MR. ATKINSON: Okay. Can we show just Exhibit 4,
20 please?

21 THE COURT: That matches up with that, Doctor,
22 right?

23 THE WITNESS: Yes, it does.

24 THE COURT: Very fine. Ladies and gentlemen of
25 the jury, the doctor is holding another copy of this, this

PLAINTIFF - DR. S. WERT - DIRECT EXAMINATION

1 is a blow up for your benefit. It's on an easel adjacent
2 to the jury, can everybody see that?

3 THE JURY: Yes.

4 THE COURT: And Defense Counsel, if you cannot see
5 that and you need to resituate yourself, by all means,
6 please do so.

7 MR. MAILLOUX: Thank you, your Honor.

8 THE COURT: Mr. Atkinson, would you like to
9 inquire, please?

10 MR. ATKINSON: With the Court's permission --
11 well, let me ask the question.

12 Q Dr. Wert, can you please demonstrate for the jury what
13 you found or what is revealed on these interoperative photos?

14 THE COURT: Just one moment. I believe
15 Plaintiff's 4 is on the easel.

16 MR. ATKINSON: It is, your Honor.

17 THE COURT: And the doctor is reviewing the
18 corresponding Plaintiff's 2?

19 MR. ATKINSON: Correct, the corresponding page.

20 Q Dr. Wert, could you please use the photos on Exhibit 4
21 to demonstrate what you found during your procedure?

22 THE WITNESS: Should I go there, sir?

23 THE COURT: Whatever your pleasure. Any objection
24 to the doctor getting up?

25 MR. MAILLOUX: No, your Honor.

PLAINTIFF - DR. S. WERT - DIRECT EXAMINATION

1 A These are interoperative photos taken during the
2 operation. The first one, the upper left-hand side, we're on
3 the medial side of the knee, so this side. This is a water
4 bubble here, that means nothing. This is the femur above, this
5 bone, and the tibia below. This is the medial meniscus, the
6 inner border of the medial meniscus is torn, you can see a tear
7 going in there, another tear there, some damage there. It
8 should be real smooth like this piece, but it's all torn through
9 there. So this is consistent with a medial meniscus tear. Also
10 I found a loose body, which was a piece of cartilage, which came
11 off in the knee. That's me pointing to it right there with a
12 little hook. This bright white thing is a loose body.

13 MR. MAILLOUX: Your Honor, just for the record,
14 that is the second photo on the left, Doctor?

15 THE WITNESS: Yes, sir, the second photo from the
16 top left.

17 THE COURT: The loose body is the second photo,
18 correct, Doctor?

19 THE WITNESS: Yes, your Honor.

20 THE COURT: Please proceed.

21 A Third photo is the lateral side of the knee here.

22 THE COURT: Indicating the outside of the knee.

23 A This is the inner border of the meniscus, this is the
24 femur above and the tibia below. This is the lateral meniscus.
25 So the inner border, you see a tear right in there with a piece

PLAINTIFF - DR. S. WERT - DIRECT EXAMINATION

1 coming off here. Also significant is that the inner border is
2 thickened here because it was roughed up. That's part of the
3 tear too. The most significant finding is on the lateral
4 femoral condyle right here.

5 THE COURT: Indicating the outside top right-hand
6 side of the knee?

7 THE WITNESS: Correct.

8 A There are two pictures showing that. The third one
9 down shows a fresh crack right in the cartilage. This should be
10 smooth like it is here, it should be smooth all the way, there's
11 a crack right through there. That's what we called
12 chondromalacia, bad cartilage.

13 THE COURT: That's the seventh photo, correct,
14 Doctor?

15 THE WITNESS: Correct.

16 A Another view of that, you can see this area here, the
17 cartilage is smooth, this area here, the white cartilage is
18 disappeared right in here and you have a defect. That's the
19 same injury as this looked at at a different level. This is
20 looking at it from below inside the knee, this is looking at it
21 right on on the femur.

22 THE COURT: Indicating the fourth and seventh
23 photos respectively?

24 THE WITNESS: Correct.

25 A And that's pretty much it.

PLAINTIFF - DR. S. WERT - DIRECT EXAMINATION

1 THE COURT: And just one caveat, when the doctor
2 demonstrated on the knee he was pointing to his right knee.
3 This is the left knee.

4 THE WITNESS: Absolutely. Thank you.

5 Q Thank you, Doctor, you can be seated. Now, how would
6 you compare the effectiveness of the photos that you are showing
7 here and an MRI when it comes to determining what's going on
8 inside a person's body?

9 A The photos, interoperative photos are much more
10 effective because you're looking at it. An MRI is using
11 magnetic waves, it's a determination of diagnosing tears and
12 injuries. But of the two, the interoperative photos is much
13 more accurate.

14 Q Did you form an opinion, Doctor, with regard to what
15 caused the injury that you just demonstrated to the jury?

16 A Yes.

17 Q What was that opinion?

18 A That they were from an automobile accident. She
19 described a history, a month before she had an automobile
20 accident injuring her left knee. She offered no significant
21 past history of problems before. She had a history of buckling.
22 These findings inside the knee were found a month after the
23 accident, and I believe they were caused by the accident.

24 Q Is there anything about the way these body parts looked
25 when you observed them interoperatively that contributed to your

PLAINTIFF - DR. S. WERT - DIRECT EXAMINATION

1 impression that it was caused by this accident?

2 A Yes. Specifically chondromalacia, which I found on the
3 lateral femoral condyle on the left side, that can also be
4 present from degeneration, but this has a completely different
5 look. It has sharp lines, it shows decoloration and very sharp
6 margins, which means that it happened recently whereas
7 chondromalacia from arthritis, wear and tear develops over years
8 and has a completely different look.

9 Q And based on the findings that you made, Doctor, what
10 would you anticipate a person's complaints would be relative to
11 those conditions?

12 A Pain, difficulty doing certain activities, buckling in
13 the knee due to pain inside the knee. Those are some of the
14 symptoms that she developed or had.

15 Q Doctor, I want you to assume that my client testified
16 earlier here yesterday and testified that before this accident
17 she played golf frequently, she hiked frequently, and she did so
18 without pain. Would you anticipate that someone with these
19 conditions would be able to engage in those activities pain
20 free?

21 A No.

22 Q Doctor, after your operation on my client, you saw her
23 again, right?

24 A Yes.

25 Q When was the next time you saw her?

PLAINTIFF - DR. S. WERT - DIRECT EXAMINATION

1 A I saw her two weeks after, the date was 11/10. So the
2 surgery was 10/24, I saw her 11/10/16, 2016.

3 Q And did it seem that she was progressing after the
4 surgery?

5 A Yes.

6 Q But she still had complaints; is that right?

7 A Yes.

8 Q And then after that, did you see her again?

9 A I didn't see her again until April 8, 2019.

10 MR. MAILLOUX: Judge, may we approach?

11 THE COURT: Yes, please.

12 (Whereupon a discussion was held at the bench.)

13 THE COURT: Ladies and gentlemen of the jury,
14 we're just going to take a few minutes so you can stretch
15 your legs. Again, please do not commence discussing the
16 case amongst yourselves. Do not deliberate. Just take a
17 few moments recess.

18 COURT OFFICER: All rise, jury exiting.

19 (Whereupon the jury exited the courtroom.)

20 THE COURT: On the record, at side bar Defense
21 Counsel had a concern?

22 MR. MAILLOUX: Yes, your Honor. I was unaware --
23 none of the records that were exchanged with us relate to
24 an examination of April 2019. I may have missed it, but I
25 did check the subpoenaed records, and I did not see any

PLAINTIFF - DR. S. WERT - DIRECT EXAMINATION

1 report from April of 2019 in the subpoenaed records. I'd
2 be happy to look at them again. So this is the first that
3 we've been made aware of this recent examination, so I
4 would object on that basis.

5 MR. ATKINSON: I would like the opportunity to
6 review the subpoenaed records.

7 THE COURT: Gentlemen, I know the doctor has a
8 schedule, we're trying to be sensitive to that. We have
9 multiple jurors with issues, one who has a wake of a family
10 member, so we'll give you a moment to review that.

11 MR. ATKINSON: Thank you, your Honor.

12 MR. MAILLOUX: Your Honor, normally when the
13 Plaintiff finishes with the witness I would ask for a brief
14 recess to review the doctor's file. Maybe if I reviewed it
15 now in the interest of the jury, I might be able to work
16 with Plaintiff on it, but I haven't seen it.

17 THE COURT: That's why we sent them up. What do
18 we have? Do you have a report?

19 MR. ATKINSON: Yes, his file is --

20 MR. MAILLOUX: May I review the doctor's file?

21 THE COURT: Off the record.

22 (A discussion was held off the record.)

23 THE COURT: On the record, gentlemen, there had
24 been an objection by Defense Counsel at side bar. There
25 was a level of concern that the report from April 8, 2019

PLAINTIFF - DR. S. WERT - DIRECT EXAMINATION

1 was never exchanged. Gentlemen, the Court wanted to give
2 you an opportunity outside the presence of the jury to go
3 through the subpoenaed records, and what was found out?

4 MR. MAILLOUX: I was able to go through, I saw the
5 report, I was able to take pictures of it so I have my own
6 copy of them that I can follow along with, so I'll withdraw
7 the objection.

8 THE COURT: With that being said, it was not in
9 the subpoenaed records, however, off the record, Counsel
10 for Plaintiff consented to give you a copy of the report,
11 and again, he could have done that after direct and prior
12 to cross, but I think you preferred to see it the first
13 time practical, which is forthwith, so Plaintiff's Counsel
14 consented. Dr. Wert showed you the memorialization of the
15 April 8th visit; is that correct?

16 MR. MAILLOUX: Yes, your Honor.

17 THE COURT: Based on that, do you have any
18 objection to the line of inquiry?

19 MR. MAILLOUX: No.

20 THE COURT: Okay. So we'll bring the jury down.
21 Mr. Atkinson, on your last question -- can we have that
22 read back, please?

23 (Whereupon the requested testimony was read back.)

24 THE COURT: That's where we're going to pick up?

25 MR. MAILLOUX: Yes, your Honor.

PLAINTIFF - DR. S. WERT - DIRECT EXAMINATION

1 MR. ATKINSON: Yes, your Honor.

2 THE COURT: Okay. Very fine. We'll bring the
3 jury back.

4 COURT OFFICER: All rise, jury entering.

5 (Whereupon the jury entered the courtroom.)

6 THE COURT: Please be seated, ladies and
7 gentlemen. Again, ladies and gentlemen, there are times
8 during the trial that things occur outside the presence of
9 the jury. We try to be considerate of your needs and if
10 you need to take a restroom break, we do that. With that
11 being said, Mr. Atkinson, would you like to ask your next
12 question, sir?

13 MR. ATKINSON: I would, your Honor.

14 CONTINUED DIRECT EXAMINATION BY

15 MR. ATKINSON:

16 Q So Dr. Wert, you indicated that you saw my client on
17 April 8, 2019. Can you tell me what you observed in Ms. Han on
18 that day?

19 A Sure. On that day Ms. Han returned, she complained of
20 left knee pain, 3 out of 4 over 10. She related it, of course,
21 to the accident. This was two years after I had last seen her.
22 I examined the left knee. Positive findings were tenderness
23 over the medial joint line and a new finding of grittiness.
24 Grittiness is when you move the knee you hear, like, a rubbing
25 inside, and that was on stress to the knee, valgus stress. I'm

PLAINTIFF - DR. S. WERT - DIRECT EXAMINATION

1 sorry, that was on flexion when I bent the knee. Also when we
2 did valgus stress, which was opening the knee and pushing the
3 knee sideways so the joint opens that way.

4 Q Doctor, do you find it -- is it significant that my
5 client continued to have complaints of pain in the knee more
6 than three years -- almost three years after her accident?

7 A Yes, it is significant.

8 Q What does that indicate to you?

9 A Indicates that she still has some pain and also that
10 the injury -- and in spite of the treatment, she was still
11 progressing somewhat.

12 Q And the fact, Doctor, that you found new findings, the
13 grittiness that you indicated, what does that indicate to you
14 about the progression of her condition?

15 A That the interarticular -- the problems of the inside
16 of the knee are becoming chronic. It means that they're there
17 for a long period of time, that they didn't go away completely
18 with the surgery, and that now she's developing more
19 degenerative type of problems, which is not uncommon in an
20 injury to the knee.

21 Q And Doctor, do you have an opinion as to whether these
22 degenerative type problems that you described -- that you
23 observed in the April 8, 2019 visit, whether those were caused
24 by the accident in this case?

25 A Yes, they're progression of the initial injury, yes.

PLAINTIFF - DR. S. WERT - DIRECT EXAMINATION

1 Q And Doctor, based on your findings more than two years
2 after the accident and after your surgery, do you have any
3 opinion as to whether or not Ms. Han is likely to regain
4 pre-accident functioning or her left knee?

5 A Basically she still has findings and complaints three
6 years following the accident, it's unlikely that she will become
7 100 percent the way she was prior to the accident.

8 Q Furthermore, you noted pain, is it likely also that
9 that pain is going to continue?

10 A Yes.

11 Q And Doctor, did you develop an opinion as to whether or
12 not these conditions are permanent?

13 A Yes, the fact that they're still there at three years
14 implies permanency.

15 Q Now, Doctor, we didn't talk much about my client's
16 right shoulder, but you did examine my client's right shoulder
17 in the initial exam, correct?

18 A Yes.

19 Q And you found significant limitations in that; is that
20 right?

21 A Yes.

22 Q Can you tell the jury about what you found in terms of
23 my client's right shoulder?

24 A I examined her on my initial visit on 9/8/16. The
25 right shoulder range of motion -- there's four ranges that I

PLAINTIFF - DR. S. WERT - DIRECT EXAMINATION

1 examined. The first one is flexion, which is a half a circle,
2 that's 180 is normal.

3 THE COURT: Indicating raising his right hand
4 above his head.

5 A And that was 160 in this patient, in Ms. Han. Next is
6 abduction when you raise your arm to the side and up. Normal is
7 also 180, she registered 110, which is a significant loss. Also
8 we do rotation, external rotation was 80 degrees, which is
9 pretty 10 degrees short of normal. This would be 90 degrees, a
10 quarter of a circle. However, the internal rotation was only 20
11 degrees where normal is 90, and that was -- the internal
12 rotation and the abduction was significant losses in motion.

13 Q And are there any things that you would expect a person
14 with these sorts of limitations to struggle with or have pain
15 with?

16 A Sure. Performing sports with that shoulder, lifting
17 heavy objects, lifting overhead particularly. Internal
18 rotation, scratching your back, she wouldn't be able to do that.

19 Q Dr. Wert, I want you to again assume that my client
20 stated that before this accident she played golf without pain.
21 Is that something that you think somebody could do with the
22 types of limitations you observed?

23 A No.

24 Q So, Doctor, you saw my client over the course of
25 several years and you noted that even as recently as April of

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 this year she still has pain. Doctor, in your opinion, is the
2 limitation that she had as a result of this accident, are they
3 significant limitations in her ability to use both her right
4 shoulder and her left knee?

5 A Yes.

6 Q And further, Doctor, is it your opinion that her
7 ability to use her left knee and specifically her ability to
8 have normal functioning of her left knee is permanently limited
9 as a result of this accident?

10 A As well as permanent, yes.

11 MR. ATKINSON: Thank you, Doctor.

12 MR. MAILLOUX: May I inquire?

13 THE COURT: Please.

14 CROSS EXAMINATION BY

15 MR. MAILLOUX:

16 Q Good morning, Dr. Wert.

17 A Good morning, sir.

18 Q I'm going to be asking you some follow-up questions
19 about your treatment of Ms. Han.

20 A Sure.

21 Q You've testified in court before?

22 A Yes.

23 Q And so the questions that I'm going to be asking you
24 are questions that I'm going to ask that you respond to with a
25 yes or no. If you can't do that, if you could just let me know

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 that you can't do that.

2 A Sure.

3 Q And you first examined Ms. Han on September 28, 2016;
4 is that correct?

5 A Yes.

6 Q And how was Ms. Han referred to you?

7 A She was referred by a clinic called New York Pain
8 Clinic.

9 Q And when a new patient comes to you, do you have any
10 standard procedures with regard to the intake of a new patient?

11 A Yes.

12 Q What are those procedures?

13 A I take a history of whether it's an accident or an
14 injury. I review any records that are present that are
15 significant and I do a physical exam.

16 Q And Doctor, you brought your file with you today
17 regarding the Plaintiff?

18 A Yes.

19 Q And that file contains the contents relative to the
20 totality of your treatment of Ms. Han?

21 A Yes.

22 Q And you mentioned a history, could you describe for the
23 jury what a history is?

24 A A patient is coming to you for a reason, for example,
25 in this case left knee pain, right shoulder pain. A history

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 would be how did you injure it, when did you injure it, what
2 were you doing? That would be the history.

3 Q Would you say that taking a history is something
4 important?

5 A Yes.

6 Q Over the course of your practice as a doctor, have you
7 had instances where patients have come to you and not given you
8 all the information or have been untruthful in giving you a
9 history?

10 A Sometimes, yes.

11 Q And is that something you're aware of?

12 A I'm not sure of that question.

13 Q Well, if a new patient is coming to you, you want to
14 make sure that you get an accurate history; is that fair to say?

15 A Yes.

16 Q And if you don't have an accurate history, your
17 conclusions may not be accurate; is that fair to say?

18 A Yes, that's correct.

19 Q Now, in the process of taking a history, do you give an
20 intake form to the patient, is there a digital form that they
21 fill out, something along those lines?

22 A No. In this case it's -- I have a form that
23 corresponds to the typed report, and I fill out the form myself
24 by asking them questions. The report is typed the same day
25 right from those written comments by me, and then we generate a

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 report the same day.

2 Q So there's no intake sheet that you give to a patient?

3 A No. Not for this case, no.

4 Q And the report -- the sheet that you filled out in your
5 own handwriting where you took the history, do you have that
6 with you here today?

7 A No.

8 Q Do you know where that is?

9 A It's discarded because the typed report is done the
10 same day so it becomes unnecessary.

11 Q When you take the history, what questions do you ask
12 the patient?

13 A Do you have pain? What level is your pain? How did
14 you injure yourself? What were you doing? Whether you have
15 prior medical conditions, whether you have a social history,
16 whether you drink alcohol, smoke cigarettes, take medicine,
17 whether you're working, not working, whether you have allergies,
18 prior car accidents in this case.

19 Q Would it be fair to say that it could potentially
20 effect the treatment that you render to a patient whether or not
21 an injury is acute or chronic -- I'm sorry, acute or chronic,
22 correct?

23 A Yes.

24 Q So it's important to know that?

25 A Yes.

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 Q Did you ask Ms. Han about her history?

2 A Yes.

3 Q And what did she tell you?

4 A Prior medical conditions, hypertension and diabetes.

5 Prior surgical history, denies surgery in the past.

6 Q And did you ever ask her whether or not she had prior
7 pain with regard to her left knee?

8 A It would be -- a medical condition is anything, any
9 area, particularly those areas that were under scrutiny, the
10 knee and the shoulder, part of the history would be did you have
11 prior problems with the knee.

12 Q Doctor, are you using your report from September 28th
13 to help refresh your recollection?

14 A Yes, sir.

15 Q Doctor, could you look at page two of your report?
16 Does that refresh your recollection whether or not the Plaintiff
17 was asked whether or not she had prior pain in her left knee?

18 A Yes, it specifically says she denies -- it doesn't say
19 left knee, it denies any similar symptoms prior to the accident.

20 Q That would incorporate both left knee and the right
21 shoulder?

22 A Yes.

23 Q Now, there was testimony before, we talked about it
24 before, you performed surgery on Ms. Han in October of 2016,
25 correct?

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 A Yes.

2 Q Doctor, are you familiar with the term indications for
3 surgery?

4 A Yes.

5 Q And what are the indications for surgery?

6 A Indications for surgery are a patient is in pain,
7 suffering, patient would desire surgery, this type of surgery,
8 that the patient would desire it because of her symptoms. Also
9 that there was an MRI which suggested some abnormalities. Of
10 course, the MRI and the operation often are different, but a
11 positive MRI is an indication for surgery.

12 Q Would it be fair to say that the three indications for
13 surgery are a complaint of pain, a positive diagnostic finding,
14 and a failure of conservative treatment?

15 A Yes, that's reasonable.

16 Q So looking back to the Plaintiff's visit on September
17 28, 2016 when you're evaluating her, you're evaluating her with
18 those things in mind, correct?

19 A Yes.

20 Q You're a surgeon, correct?

21 A Yes.

22 Q So you're looking to see whether or not she would
23 qualify as a patient for surgery, correct?

24 A Correct.

25 Q Okay. Now, in terms of treatment, where did the

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 Plaintiff go for her treatment?

2 A She was going to the New York Pain Clinic.

3 Q Okay. And did you review the records from New York
4 Pain Clinic?

5 A I may have. I don't recall.

6 Q Would it be fair to say that you didn't because they're
7 not a part of your file?

8 A Well, I may not have incorporated them in my file. I
9 may have reviewed their file. Of course, that's four years ago
10 or three years ago. I wouldn't know. It's possible I did.

11 Q You testified earlier that the file you brought with
12 you contains the totality of everything related to your
13 treatment with Ms. Han, correct?

14 A This is my treatment. It's possible I may look at a
15 record of another doctor without copying it and putting it in my
16 file.

17 Q Are the New York Pain Clinic records in your file
18 today?

19 A No.

20 Q Is your report -- you generated a report from the
21 September 28, 2016 evaluation of the Plaintiff, correct?

22 A Yes.

23 Q Does that report contain any reference that you
24 reviewed the physical therapy records related to Plaintiff's
25 therapy?

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 A No.

2 Q Wouldn't it be important to review the therapy records
3 to determine how the Plaintiff was responding to physical
4 therapy?

5 A I don't think that's -- I mean, that's something to
6 review. I think that patient's complaints would show how
7 they're responding to physical therapy.

8 Q Doctor, wouldn't your opinion be better informed had
9 you reviewed the New York Pain Clinic physical therapy records?

10 A I don't think so.

11 Q Now, do you know what the range of motion of
12 Plaintiff's left knee was immediately after the accident?

13 A No.

14 Q Would records -- in your medical experience, would
15 physical therapy records contain that information?

16 A The day after the accident if they saw a physical
17 therapist, sure, that's one thing they would have.

18 Q I want you to assume that the accident happened on
19 August 24, 2016 and that the Plaintiff went to New York Pain
20 Clinic on August 29, 2016, and I want you to further assume that
21 she began a plan of treatment at New York Pain Clinic on that
22 date. With those assumptions in mind, would it make sense to
23 you that New York Pain Clinic would have taken a range of motion
24 of the left knee?

25 A Yes.

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 Q Would it be important to compare that range of motion
2 from August 29, 2016 with your range of motion findings that you
3 took on September 28, 2016 in order to determine whether or not
4 the condition was responding to conservative treatment?

5 A Well, actually I did find a range of motion in the knee
6 on that day that was 125 out of 130, so the range of motion part
7 of my exam was fairly satisfactory. So whether it was 110 three
8 weeks ago doesn't really matter at that time.

9 Q Well, I just want you to assume that range of motion
10 testing was done in August on that first visit, August 29th,
11 would that help you determine whether or not she was responding
12 to physical therapy to compare that range of motion from the
13 range of motion you took?

14 A Again, with a relatively -- with a range of motion of
15 125 out of 30 it's relatively okay, so it doesn't matter to me
16 at that time what it was three weeks ago.

17 Q Now, when the Plaintiff appeared before you for that
18 first visit, you did a thorough examination?

19 A I did.

20 Q Is it important to look for something like swelling on
21 examination?

22 A Yes.

23 Q Reviewing your report, could you describe what your
24 findings were with regard to swelling?

25 A No mention of swelling, just range of motion and

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 certain tests.

2 Q So your report does not mention swelling at all in any
3 of the four pages, correct?

4 A Correct.

5 Q What about testing? You performed specific tests on
6 the Plaintiff's left knee?

7 A Yes.

8 Q And one of those tests that you did was a McMurray's
9 test?

10 A Yes.

11 Q And a McMurray's test, correct me if I'm wrong, Doctor,
12 is a test that can be used to identify a tear in an individual's
13 meniscus; is that correct?

14 A Yes.

15 Q And what were your findings for your McMurray's test
16 performed on the Plaintiff on September 28, 2016?

17 A Negative.

18 Q You also performed an anterior draw test; is that
19 correct?

20 A Yes.

21 Q Could you describe for the jury what that test was?

22 A Anterior draw is a test where you flex the knee to 90
23 degrees and try to pull the lower leg forward.

24 Q And what were your findings on that exam?

25 A That was negative.

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 Q You also did a Lachman's test on the Plaintiff's left
2 knee that day?

3 A Yes.

4 Q What were your findings on that test?

5 A That was negative.

6 Q What does Lachman's test test?

7 A ACL, anterior cruciate ligament.

8 Q You also did a valgus instability test?

9 A Yes.

10 Q And a varus instability test, correct?

11 A Yes.

12 Q What do those tests look for?

13 A They were negative.

14 Q But what are you using that test for?

15 A Ligaments. Medial and lateral collateral ligaments.

16 Q So those tests that you did, would it be fair to say
17 that they were aimed at looking into every part of the
18 Plaintiff's knee in order to see if something was going on
19 clinically?

20 A Yes.

21 Q And you didn't have any findings, any positive findings
22 at all upon your examination of the Plaintiff's knee when she
23 first saw you, correct?

24 A Correct.

25 Q Did the Plaintiff go for medical treatment at any other

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 facilities?

2 A Not that I know.

3 Q Did the Plaintiff tell you that she went to treatment
4 at Danada Clinic?

5 A I don't recall.

6 Q Would it have benefited you to be able to review
7 records from Danada Clinic in order to form your opinion?

8 A It might be helpful, yes.

9 Q Would it be fair to say that if the Plaintiff was
10 responding well to conservative treatment that she would not be
11 a candidate for surgery; is that correct?

12 A Yes.

13 Q Now, did you ask Ms. Han whether or not the range of
14 motion in her knee was getting better from when the date of the
15 accident happened up until when you examined her?

16 A I don't recall.

17 MR. MAILLOUX: May I have these marked for
18 identification?

19 THE COURT: Plaintiff's Counsel is reviewing them.
20 You're agreeing they go in for ID?

21 MR. ATKINSON: Yes, your Honor.

22 THE COURT: I believe that would be M as in Mary.

23 MR. MAILLOUX: Yes, your Honor.

24 MR. ATKINSON: Correct.

25 THE COURT: Can we mark those?

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 (Defendant's Exhibit M, NEW YORK PAIN CLINIC
2 RECORDS, was marked for identification.)

3 COURT OFFICER: Defendant's Exhibit M has been
4 marked for identification.

5 MR. MAILLOUX: Can you show it to the witness?

6 COURT OFFICER: Sure.

7 Q Doctor, you indicated before that you weren't sure
8 whether or not you reviewed the New York Pain Clinic records.
9 I'm going to ask that you take a look at what was marked as
10 Defendant's Exhibit M and see if that refreshes your
11 recollection as to whether or not you were able to review those
12 records?

13 A If I reviewed them it was around the time of the
14 accident, and I don't recall. So it doesn't help me refresh it.
15 I know I haven't reviewed them recently.

16 Q You said you have not reviewed them recently?

17 A Correct.

18 Q Doctor, would you be able to review the examination
19 from August, 29, 2016, that date, in the records?

20 MR. MAILLOUX: Judge, I can help the witness, I
21 can show him what page to look for.

22 A Which date is that.

23 Q August 29, 2016.

24 A Okay. I have that.

25 Q Okay. And looking at that page, does that refresh your

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 recollection as to whether or not you reviewed that record?

2 A No.

3 Q Reviewing that record, was there a range of motion test
4 that was done on the Plaintiff contemporaneous to that date?

5 MR. ATKINSON: Objection, your Honor. May we
6 approach?

7 THE COURT: Please approach.

8 (Whereupon a discussion was held at the bench.)

9 THE COURT: Based on the side bar, is there any
10 objection, Counsel?

11 MR. ATKINSON: No, your Honor.

12 Q Doctor, was the range of motion testing done on August
13 29, 2016 for the Plaintiff's left knee?

14 A 105.

15 Q So it was 105 degrees of flexion?

16 A Flexion.

17 Q Doctor --

18 MR. MAILLOUX: Judge, may I ask your permission,
19 if the doctor feels comfortable coming off the stand or
20 however he's comfortable --

21 Q Could you demonstrate for the jury what 105 degrees of
22 flexion is?

23 THE COURT: You're talking about which body part?

24 MR. MAILLOUX: On the left knee.

25 THE COURT: Doctor, are you able to?

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 THE WITNESS: Yes, your Honor.

2 THE COURT: Let the record reflect the doctor will
3 be demonstrating physically.

4 THE WITNESS: This would be the left, so this is
5 straight, zero. So when you start to bend it, that would
6 be about 10, 90 degrees would be about that, and 105 would
7 be about that.

8 Q Doctor, you testified earlier that -- I'm sorry, that
9 when you examined the Plaintiff she was 125 out of 130?

10 A Yes.

11 Q Could you demonstrate for the jury 125 degrees and 130
12 degrees?

13 A That would be 125.

14 Q And then 130?

15 A That would be a little more.

16 Q Thank you, Doctor. So Doctor, would it be fair to say
17 that Ms. Han's range of motion in her left knee improved from
18 August 29, 2016 to when you examined her on September 28, 2016?

19 A Yes.

20 Q So therapy was helping her?

21 A Well, I would say five days after the accident I would
22 expect her not to bend the knee very much. Probably the day of
23 the accident she had no motion, so take a test five days after,
24 sure.

25 Q Would it be fair to say therapy was helping?

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 A May have been therapy or may have just been time, but
2 certainly it wasn't making it worse.

3 Q Now, when you examined her on September 28, 2016, her
4 left knee range of motion was practically normal; is that
5 correct?

6 A Yes.

7 Q Now, when you diagnosed the Plaintiff upon your initial
8 examination, you did not diagnose her with a meniscal tear,
9 correct?

10 A Actually the second diagnosis I left out the word tear,
11 but it's left knee posterior horn medial meniscus, it's a
12 beginning of a sentence.

13 Q When you indicated left knee posterior horn medial
14 meniscus, which is the marking in your report, you meant to
15 include the word tear with that?

16 A Yeah, that's an incomplete sentence. In other words, a
17 diagnosis of left knee posterior horn medial meniscus means that
18 the medial meniscus -- it just says medial meniscus, so it's a
19 tear of this. That was based primarily on the MRI.

20 Q And you did not review the MRI itself, correct?

21 A Correct.

22 Q You just reviewed the reports?

23 A I believe I just reviewed the reports.

24 Q You, in fact, relied on those reports when you compiled
25 your own report, correct?

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 A Yes.

2 Q Would it be fair to say that you adapted the
3 conclusions in the MRI report from the MRI facility Plaintiff
4 went to in your summary of the diagnostic tests?

5 A Yes.

6 Q And the MRIs that you reviewed were not positive for
7 trauma; is that correct?

8 A I wouldn't say that, no. They could be trauma, they
9 could be something else.

10 Q Do you have the actual report that you reviewed?

11 A For the MRI?

12 Q For the MRI of the left knee?

13 A No.

14 Q You don't have that report?

15 A No.

16 Q Do you have the MRI report for the MRI of Plaintiff's
17 right shoulder?

18 A Yes.

19 Q And you used the MRI report of the left knee in coming
20 to your conclusions, correct?

21 A Yes.

22 Q But it's not here with you today?

23 A Correct.

24 Q And you told us that your folder was the totality of
25 your entire treatment of Ms. Han, correct?

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 A Correct.

2 Q So you did not bring a complete record to court today,
3 correct?

4 A Well, again, I reviewed it from somewhere else and it
5 didn't incorporate in my notes.

6 Q Well, you did incorporate it in your notes?

7 A Well, I incorporated the results, but not the actual
8 report.

9 Q You're aware that Ms. Han had myxoid degeneration in
10 her left knee?

11 A Yes.

12 Q And you're aware that she had myxoid degeneration
13 regarding her meniscus and myxoid degeneration regarding her
14 ACL, correct?

15 A I'm not aware of that, no.

16 Q You don't recall a finding of myxoid degeneration of
17 Plaintiff's ACL?

18 A I don't recall offhand, no.

19 MR. MAILLOUX: Judge, if I may mark this for
20 identification?

21 THE COURT: Please show it to Plaintiff's Counsel
22 first.

23 (Defendant's Exhibit N, LEFT KNEE MRI REPORT, was
24 marked for identification.)

25 COURT OFFICER: Defendant's Exhibit N has been

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 marked for identification.

2 MR. MAILLOUX: Show it to the witness, please.

3 THE COURT: We'll publish that to the witness.

4 Q Doctor, if you could review Defendant's Exhibit N and
5 then look up. Does that refresh your recollection as to whether
6 or not there's a finding of myxoid degeneration in the
7 Plaintiff's ACL?

8 A Yes.

9 Q That what you're looking at, Defendant's Exhibit N, is
10 a copy of the MRI report that you reviewed when you first saw
11 Ms. Han in September of 2016, correct?

12 A Yes.

13 Q That's the report you relied on in making your
14 determination?

15 A Yes.

16 MR. MAILLOUX: Your Honor, I'd like to move that
17 report into evidence.

18 MR. ATKINSON: I have no objection.

19 THE COURT: On consent Defendant's N as in Nancy
20 will be marked in evidence.

21 (Defendant's Exhibit N, LEFT KNEE MRI REPORT, was
22 marked into evidence.)

23 COURT OFFICER: Defendant's Exhibit N has been
24 marked into evidence.

25 Q Doctor, taking a look at Defendant's Exhibit N, I'd

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 like you to look at the impression of the report. Would it be
2 fair to say that there were no fractures found in the
3 Plaintiff's left knee?

4 A Correct.

5 Q And that there was a tear on the medial meniscus that
6 was found?

7 A Yes.

8 Q And that tear was found in connection with a benign
9 variant myxoid degeneration?

10 A There was myxoid degeneration and an intrasubstance
11 tear.

12 Q In connection with myxoid degeneration?

13 A Yes. If you had myxoid degeneration, you can get a
14 tear.

15 Q Could you describe for the jury what myxoid
16 degeneration is?

17 A It's a thinning of the cartilage due to degeneration,
18 rubbing of the meniscus against the bone over time.

19 Q And as the cartilage and as the meniscus, as they all
20 thin with myxoid degeneration, there's a mucoid substance that
21 takes its place; is that fair to say?

22 A Yes.

23 Q And that takes time to do, correct?

24 A That part, yes.

25 Q And there is also myxoid degeneration found regarding

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 the Plaintiff's ACL, correct?

2 A Yes.

3 Q And degenerative changes were noted?

4 A Yes.

5 Q And there was also a finding of grade 3 chondromalacia,
6 correct?

7 A Yes.

8 Q Chondromalacia of the patella deals with the under
9 surface of the kneecap; is that fair to say?

10 A Yes.

11 Q And the chondromalacia means that the cartilage under
12 the kneecap would be softening; is that correct?

13 A Yes.

14 Q And there are different grades of chondromalacia,
15 correct?

16 A Yes.

17 Q Okay. And you actually found grade 4 chondromalacia
18 when you performed the surgery; is that correct?

19 A Yes, but that was not the patella, that was the lateral
20 femoral condyle.

21 Q You found grade 4 chondromalacia, correct?

22 A Yes.

23 Q Grade 4 is the most severe chondromalacia?

24 A Yes.

25 Q It's also most associated with degeneration, correct?

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 A I wouldn't say that.

2 Q It's associated with bone on bone activity?

3 A Well, again, chondromalacia can be traumatic or it can
4 be degenerative.

5 Q Grade 4 chondromalacia is associated most closely with
6 the wearing away of the cartilage to the extent where there's
7 bone on bone, correct?

8 MR. ATKINSON: Objection, asked and answered.

9 THE COURT: Sustained as to form.

10 Q Doctor, could you describe for the jury the setting of
11 chondromalacia with regard to degeneration in a knee?

12 A Okay. In those people that have degenerative
13 chondromalacia it's a wearing away of the cartilage from rubbing
14 one bone against the other over time. There is also
15 chondromalacia when the knee bent, hits the dashboard, and you
16 damage the cartilage that way. If it's full thickness it can be
17 a grade 4 as trauma.

18 Q And degeneration can be a grade 4 chondromalacia as
19 well?

20 A Yes.

21 Q Now, in terms of the review of the knee, if you could
22 turn your attention to page one of the report, Defendant's
23 Exhibit N?

24 A Which?

25 Q Defendant's Exhibit N, Sky Radiology. They do a

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 paragraph about the meniscus that was reviewed, do you see that
2 paragraph?

3 A Yes.

4 Q And that refers to the intrasubstance tear and the tear
5 in the medial meniscus with a benign variant myxoid
6 degeneration, do you see that sentence?

7 A Yes.

8 Q And that's what we talked about before, correct?

9 A Yes.

10 Q The tear was seen in the setting of the myxoid
11 degeneration, fair to say?

12 A Yes.

13 Q And the report comments on the rest of Plaintiff's
14 meniscus, correct?

15 A Yes.

16 Q And how does it comment?

17 A The rest of both menisci demonstrate normal signal.

18 Q So the only positive findings in the MRI report with
19 regard to the meniscus were relative to degeneration; is that
20 correct?

21 A No. Again, there is myxoid degeneration, but there's
22 also an intrasubstance tear.

23 Q But the intrasubstance tear is noted in the setting of
24 the myxoid degeneration, correct?

25 A Yes. In other words, someone who is of advanced age

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 has myxoid degeneration and they tear their meniscus. So the
2 tear is in the same setting as the myxoid degeneration.

3 Q And the intrasubstance tear is mentioned in relation to
4 that myxoid degeneration?

5 A Yes.

6 Q The rest of the meniscus is noted to have a normal
7 signal, correct?

8 A Yes.

9 Q When reviewing an MRI, signal is what a radiologist or
10 orthopedic surgeon will look for in order to determine what the
11 findings are in examination, correct?

12 A Yes.

13 Q So when they say that there's a normal signal, that
14 means that the rest of the meniscus was normal, correct?

15 A Correct.

16 Q So would it be fair to say -- and this was the report
17 that didn't bring with you today, correct?

18 A Correct.

19 Q Now, would it be fair to say when we look at the
20 indications of surgery on September 28, 2016, Ms. Han was not a
21 candidate for surgery to her left knee?

22 A Correct.

23 Q And it would be fair to say that you did not recommend
24 surgery on that date?

25 A Correct.

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 Q And at some point in time she had surgery, fair to say?

2 A Yes.

3 Q What records did you bring with you reflecting the
4 conversation that was had between you and the patient about her
5 decision to have surgery?

6 A I didn't have records.

7 Q She did not come in for further evaluation?

8 A No.

9 Q So the Plaintiff on September 28, 2016 was not a
10 candidate for surgery, and then you performed surgery without
11 even a further evaluation, correct?

12 A Correct.

13 Q And you performed that surgery without requesting your
14 own MRI study to be done, correct?

15 A Correct.

16 Q In fact, in the setting of orthopedic surgery it would
17 be fair to say that it would be within the acceptable standards
18 of medical practice to order your own diagnostic test, correct?

19 A Generally that's not done. She had an MRI, the report
20 was there, and generally one MRI is done.

21 Q But the MRI did not have any findings of trauma,
22 correct?

23 A It had a tear.

24 Q In the setting of degeneration?

25 A Again, it had a tear and chondromalacia, which

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 certainly could be associated with trauma.

2 Q And do you know how it came about that you decided to
3 do the surgery?

4 A No.

5 Q Would your treatment of Ms. Han have been better --
6 your plan of treatment -- had you reviewed the actual MRI films?

7 A No.

8 Q Would your opinion here today be more informed had you
9 looked at the MRI films and compared them with your findings in
10 the interoperative photos?

11 A Well, I don't think -- once you have interoperative
12 photos, the MRI is not important.

13 Q Well, your testimony before was that this auto accident
14 caused the Plaintiff's complaints, correct?

15 A Yes.

16 Q Wouldn't reviewing the MRI films give you a better
17 informed opinion as to what caused her condition?

18 A You mean, as opposed to relying on someone else's
19 radiology report? Is that the question?

20 Q The question is wouldn't you have a better informed
21 opinion on the issue of causation had you reviewed the actual
22 MRI films?

23 A No.

24 Q You know the Plaintiff went to New York Presbyterian
25 Hospital on the date of the accident, correct?

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 A No. Not that I know of, no.

2 Q Did you ask the Plaintiff if she went to the hospital
3 as a result of the accident?

4 A Yes, we always ask for that.

5 Q How did she respond?

6 THE COURT: One moment, Counsel. Please allow the
7 witness to finish his answer.

8 MR. MAILLOUX: I apologize, your Honor.

9 A That is something that is always asked.

10 Q That's a part of the standard practices to ask if
11 someone went to the hospital, correct?

12 A Sure.

13 Q And the fact that you don't have any notations
14 indicating that the Plaintiff did go to the hospital, what does
15 that indicate to you?

16 A That I was not informed. If there is evidence that she
17 went to the hospital, it was not told to me.

18 Q Would it be fair to say she denied going to the
19 hospital?

20 A Yes.

21 Q If she had told you she went to the hospital, that
22 would be in your report, correct?

23 A Yes, yes.

24 MR. MAILLOUX: Your Honor, I'd like to have these
25 marked as Defendant Exhibit's O.

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 THE COURT: Is that for ID or evidence?

2 MR. MAILLOUX: I'm going to move this one into
3 evidence because of the certification of the hospital
4 record.

5 MR. ATKINSON: No objection, your Honor.

6 THE COURT: On consent, Defendant's O as in oxygen
7 in evidence.

8 (Defendant's Exhibit O, NEW YORK PRESBYTERIAN
9 HOSPITAL RECORDS, was marked into evidence.)

10 COURT OFFICER: Defendant's Exhibit O has been
11 marked into evidence.

12 MR. MAILLOUX: If you could show the witness.
13 Actually, Judge, in the interest of time, could I just pick
14 out the pages to show the witness?

15 THE COURT: Mr. Atkinson, any objection?

16 MR. ATKINSON: No objection.

17 Q So Doctor, would it be fair to say you've never seen
18 those hospital records before today's date; is that correct?

19 A Correct.

20 Q And if you take a look at the records, if you go to the
21 next page of the one you're looking at, in the upper left-hand
22 corner there are page numbers noted, this way we can go through
23 it quicker, do you see that?

24 A Yes.

25 Q Could you turn your attention to page four? And page

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 four relates to triage information; is that correct?

2 A Yes.

3 Q And could you explain for the jury what triage is?

4 A Triage is when you arrive in the emergency room there's
5 a nurse there generally who tries to get a quick history and
6 sort of shunt you into the right direction. In other words, if
7 it's an emergency, you go one way. If it's something that can
8 be dealt with later, it goes somewhere else.

9 Q And in terms of the triage assessment, did it note how
10 the Plaintiff arrived at the emergency room that day?

11 A I don't see it. The only thing I see is patient was
12 brought WR.

13 Q Do you see on the left side it says quick triage and
14 then arrival info on the left side of the page?

15 A I don't see that.

16 Q You're on page four?

17 A Oh, right. Ambulatory.

18 Q What does the term ambulatory mean?

19 A That she came by herself.

20 Q What does it also mean with regard to how she was
21 maneuvering?

22 A She was walking.

23 Q And does it indicate how she communicated in the
24 emergency room with the medical officials?

25 A Preferred language, English.

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 Q Does it note whether or not an interpreter was required
2 to take her complaints?

3 A It doesn't say that.

4 Q In fact, is there a specific notation about interpreter
5 services being required?

6 A No.

7 Q The answer is no?

8 A Not required.

9 Q Doctor, if you could turn to page seven? Taking a look
10 at page seven, if you go down to the middle it indicates a
11 history of present illness?

12 A Yes.

13 Q The Plaintiff had a chief complaint when she arrived at
14 the hospital?

15 A Yes.

16 Q What was that?

17 A Hypertension, diabetes, HLD, whatever that is, left
18 chronic knee pain, complaining of posterior neck pain, left
19 sided knee pain, status post MVA, motor vehicle accident, where
20 she was the driver, restrained, no air bag. She was T-boned by
21 another driver.

22 Q Doctor, that portion notes that when she arrived at the
23 hospital she told them that she had a history of chronic pain in
24 the left knee, correct?

25 A That's what this would imply.

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 Q And you've never seen that before today's date?

2 A No.

3 Q Plaintiff never told you about that when she appeared
4 before you?

5 A No.

6 Q Would your opinion on causation have been better
7 informed had you been aware of that statement in the Plaintiff's
8 hospital record?

9 A Well, in general, yes, but it depends what chronic knee
10 pain. Did she have pain ten years ago and it went away, or was
11 she treated right before this, or did she have pain --

12 Q Doctor, your opinion would be better informed, correct?

13 A Yes, in general, yes.

14 Q Now, would it be fair to say that Ms. Han gave you an
15 inaccurate history when she appeared before you?

16 A Certain aspects of it were incomplete, yes.

17 MR. MAILLOUX: Do you have Defendant's Exhibit L?

18 Can we show the witness what's been marked in evidence as
19 Defendant's Exhibit L?

20 Q Doctor, I'm showing you what's been marked as
21 Defendant's Exhibit L in evidence. This is an affidavit from
22 the Plaintiff. Does that affidavit indicate that Plaintiff had
23 prior acupuncture treatment to her left knee?

24 A Yes.

25 Q And were you made aware of her prior acupuncture

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 treatment when she appeared before you on September 28, 2016?

2 A No.

3 Q Doctor, what would the indication for acupuncture
4 treatment be?

5 A Probably pain.

6 Q Complaint of pain, correct?

7 A Yes.

8 Q So that would indicate that before this accident Ms.
9 Han was having problems of pain in her left knee?

10 A At some time, yes.

11 Q Now, Doctor, you did a follow-up evaluation in November
12 and then you did another one this past April, correct?

13 A Yes.

14 Q And in April you did a range of motion examination on
15 the Plaintiff, correct?

16 A Yes.

17 Q You did other tests as well, correct?

18 A Yes.

19 Q And the tests that you did regarding the Plaintiff's
20 left knee were the same ones that you did when you first
21 examined her in September of 2016, correct?

22 A Yes.

23 Q And what was the result of the McMurray's test that you
24 did in April of 2019?

25 A It was negative.

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 Q And what was the result of the anterior draw test that
2 you did in April of 2019?

3 A That was negative.

4 Q What about the valgus and varus testing?

5 A Those were negative.

6 Q You also did a patella grind test as well, correct?

7 A Yes.

8 Q What is the patella grind test testing for?

9 A Chondromalacia of the patella.

10 Q What was the result?

11 A At this time it was negative.

12 Q How do you test that?

13 A The patient lies straight, you push the kneecap into
14 the leg and rotate your hand.

15 Q So Ms. Han was laying down, you pushed down on the
16 whole knee at the point of the kneecap and moved it around and
17 she did not tell you she had pain when you did that; is that
18 correct?

19 A Yes, sir.

20 Q You also did a test for mechanical clicking?

21 A Yes.

22 Q And that was negative?

23 A Yes.

24 Q So when you were performing these tests, you were
25 listening to hear if you heard abnormal sounds in her knee?

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 A Well, I did -- on that specific test it was negative,
2 so I didn't hear it on that test.

3 Q And you also performed a Lachman's test?

4 A Yes.

5 Q And the Lachman's test was negative as well?

6 A Yes.

7 Q Now, when the Plaintiff appeared and you performed a
8 range of motion test on her left knee, what was your range of
9 motion finding?

10 A 135, 0 to 135.

11 Q So she actually had better than normal range of motion
12 when she appeared before you in April of 2019, correct?

13 A Yes.

14 Q Doctor, did you undertake any efforts to get records of
15 Plaintiff's prior treatment?

16 A No.

17 Q Were you made aware --

18 MR. MAILLOUX: Withdrawn.

19 Q I want you to assume that there's been testimony by the
20 Plaintiff that immediately after the accident she went to an
21 acupuncturist who she had been seeing prior to this accident.
22 Did she give you any information about seeing an acupuncturist?

23 A No.

24 Q Now, when you prepared an operative report you put all
25 the details leading up to the surgery or a summary of them and

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 then the surgical findings as well, correct?

2 A Yes.

3 Q And in this operative report, did you indicate -- make
4 any indications about whether or not she failed conservative
5 treatment?

6 A Yes.

7 Q And what did you indicate?

8 A After failing a course of nonoperative therapy she
9 decided to undergo arthroscopy.

10 Q Doctor, that would be an incorrect notation based on
11 what we know now about her range of motion increasing; is that
12 fair to say?

13 A Well, if the range of motion was the only guide, yes,
14 but that's not the only guide.

15 Q Well, one of the guides that you would use, it would be
16 fair to say, would be a complaint from an individual; is that
17 correct?

18 A Yes.

19 Q And a complaint from an individual would be something
20 that we would call a subjective complaint, correct?

21 A Yes.

22 Q So a patient comes in, they tell you they're in pain,
23 correct?

24 A Yes.

25 Q And then you look for objective findings to corroborate

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 that complaint?

2 A Yes.

3 Q So in the instance where if an individual is telling
4 you they have pain, and if a certain course of treatment is
5 based just on those statements, that treatment is being done to
6 address a subjective complaint, fair to say?

7 A Yes.

8 Q And in this case, from what we know, her range of
9 motion was improving from immediately after the accident up
10 until when you first saw her before the surgery, correct?

11 A Yes.

12 Q Now, the surgery itself, do you know how long that
13 surgery took?

14 A I'm not sure specifically.

15 Q Fair to say about fourteen minutes?

16 A Probably a little more I would think.

17 MR. MAILLOUX: May we mark this for
18 identification, Judge? Defendant's Exhibit P.

19 (Defendant's Exhibit P, SURGERY CENTER RECORDS, was
20 marked for identification.)

21 COURT OFFICER: Defendant's Exhibit P has been
22 marked for identification.

23 MR. MAILLOUX: Show it to the witness.

24 Q Doctor, reviewing Defendant's Exhibit P, does that
25 refresh your recollection as to the length of the surgery from

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 the time of the incision to the time that you closed the
2 Plaintiff up?

3 A (No verbal response given.)

4 Q Doctor, if I was to suggest that it was about 8:50 a.m.
5 to about 9:03 or 9:04 a.m., would that sound fair to you?

6 A It's a little fast. Usually 20 minutes is not unusual.
7 It's a little fast.

8 Q There are records from the facility where the surgery
9 is done, correct?

10 A Yes.

11 Q Those records are not part of the file you brought here
12 today?

13 A Correct.

14 Q Now, Doctor, when you perform the surgery, would it be
15 fair to say that your goal is to help the Plaintiff get better?

16 A Yes.

17 Q And you want the Plaintiff to make a good recovery; is
18 that correct?

19 A Yes.

20 Q When you perform that surgical procedure you want to go
21 in there, fix everything that needs to be fixed so the
22 individual can get on with their life; is that fair to say?

23 A Hopefully, yes.

24 Q You're an experienced surgeon?

25 A Yes.

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 Q However, in this case, you did not address the
2 pathology regarding Plaintiff's ACL, correct?

3 A I did.

4 Q Could you tell me where in your operative report you
5 referred to the ACL?

6 A The way I dictated the operative report is the positive
7 findings. The ACL, there was no treatment given to it, it
8 wasn't necessary.

9 Q The operative report, fair to say, doesn't even mention
10 examining the ACL, correct?

11 A Correct. The way I dictated it, it mentions the
12 abnormal findings and what I did to them.

13 Q Since you reviewed the MRI report, you would have known
14 to inspect the ACL upon the surgery, correct?

15 A Yes.

16 Q And the acceptable medical practice for performing a
17 surgery would be to note everything that you inspected, even if
18 there wasn't a pathology, correct?

19 A Yes.

20 Q And, in fact, it would be important to do that in this
21 case because there's a pathology referenced to the ACL in the
22 MRI report, correct?

23 A Yes.

24 Q But that's missing from your report?

25 A It's not specifically documented, yes.

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 Q Now, turning our attention briefly to the Plaintiff's
2 right shoulder, you reviewed the MRI of Plaintiff's right
3 shoulder?

4 A Yes.

5 Q It was the same thing as the knee, you didn't look at
6 the films, you just looked at the report?

7 A Yes.

8 Q Do you have that report in your file?

9 A Yes.

10 Q You brought that report, but not the left knee MRI
11 report?

12 A Yes.

13 MR. MAILLOUX: I'd like to mark this as
14 Defendant's Exhibit Q, and if Counsel has no objection, I'd
15 like to move that into evidence as well.

16 MR. ATKINSON: No objection.

17 THE COURT: On consent, Defendant's Q is in
18 evidence.

19 (Defendant's Exhibit Q, SHOULDER MRI REPORT, was
20 marked into evidence.)

21 COURT OFFICER: Defendant's Exhibit Q has been
22 marked into evidence.

23 MR. MAILLOUX: Show the witness, please.

24 Q Doctor, that Exhibit Q is the report that you reviewed
25 when Plaintiff came to you and a copy of it is in your folder

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 for today, correct?

2 A Yes.

3 Q And that's with regard to an MRI of Plaintiff's right
4 shoulder that was conducted on September 7, 2016, correct?

5 A Yes.

6 Q And in that MRI report it references that the Plaintiff
7 has a type 2 acromion, correct?

8 A Yes.

9 Q And that would indicate the positioning or the
10 structure of the bone, the acromion bone in the Plaintiff's
11 shoulder; is that fair to say?

12 A Yes.

13 Q And that indicates that there's a little less space in
14 the shoulder based on the structure of the acromion; is that
15 fair to say?

16 A Yes.

17 Q And the presence of a type 2 acromion could indicate
18 that the individual would be a candidate for impingement in the
19 shoulder on the basis of the structure of the bone, correct?

20 A Yes.

21 Q And on that MRI report there was findings of
22 degenerative changes in the Plaintiff's right shoulder; is that
23 fair to say?

24 A Yes. You left out mild, but yes, mild degenerative
25 changes.

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 Q So mild degenerative changes at the acromial clavicular
2 joint was a finding; is that correct?

3 A Yes.

4 Q And mild degenerative changes also at the glenohumeral
5 joint, correct?

6 A Yes.

7 Q Is that correct?

8 A Yes.

9 Q Now, from a date of accident August 24th to September
10 7th, given that timeframe, the findings of degeneration would
11 have -- would predate the accident date; is that fair to say?

12 A Yes.

13 Q They would take a period of time to develop in the
14 Plaintiff's shoulder, correct?

15 A Yes.

16 Q And you never recommended the Plaintiff for shoulder
17 surgery, correct?

18 A Correct.

19 Q And you haven't performed any surgery on the
20 Plaintiff's shoulder?

21 A Correct.

22 Q When you examined the Plaintiff in April of this year,
23 you didn't even examine the shoulder; is that fair to say?

24 A Yes.

25 Q Now, Doctor, the last thing, as you sit here --

PLAINTIFF - DR. S. WERT - CROSS EXAMINATION

1 MR. MAILLOUX: Withdrawn.

2 Q Two last things. You're not currently seeing the
3 Plaintiff, correct?

4 A Correct.

5 Q And the only times that you've seen her, September
6 28th, the date of the surgery, November 10th, and April of this
7 year, correct?

8 A Correct.

9 Q How did the visit in April come about?

10 A She was referred and I examined her.

11 Q Did she call you up, did the attorney call you up, did
12 someone else call you up?

13 A I don't know.

14 Q Have attorneys scheduled appointments for their clients
15 with you in the past?

16 A Sometimes, yes.

17 Q Do you know whether or not with regard to Ms. Han it
18 was her or her attorney's office that reached out to you for an
19 examination in April?

20 MR. ATKINSON: Objection, asked and answered.

21 THE COURT: Sustained as to form. Please
22 rephrase.

23 Q Fair to say you don't know who reached out to you?

24 A I don't know who referred her. I go to the office, see
25 the patient. I don't know who sends them.

PLAINTIFF - DR. S. WERT - REDIRECT EXAMINATION

1 Q You don't have any appointments scheduled with her in
2 the future?

3 A Not to my knowledge, no.

4 Q And you never called up the radiologist who did those
5 two MRIs to discuss their findings?

6 A No.

7 Q And would it be fair to say that you don't know what
8 Plaintiff's condition was, what the condition of her health, her
9 body, her joints were on the day before this accident, correct?

10 A Correct.

11 Q You never examined her before this accident?

12 A That is correct.

13 MR. MAILLOUX: No further questions, your Honor.

14 MR. ATKINSON: Thank you, your Honor.

15 REDIRECT EXAMINATION BY

16 MR. ATKINSON:

17 Q Dr. Wert, there was some discussion regarding the
18 history that my client provided to you when she came and saw
19 you. Would it be important to note that a patient had pain a
20 long time ago in the body part that subsequently went away and
21 that she hadn't had that for years before the accident, would
22 that be important for you in making your diagnosis and
23 prescribing treatment?

24 A Well, if the patient had -- didn't have pain for a few
25 years, or five years, six years, and had it before and it got

PLAINTIFF - DR. S. WERT - REDIRECT EXAMINATION

1 better it wouldn't be crucial and they may not remember it even.

2 Q And Doctor, would it be critical for you, would it
3 substantially effect your diagnosis if a patient went to an
4 acupuncturist once or twice?

5 A No.

6 Q Now, you mentioned earlier that range of motion testing
7 isn't the only thing that you look for. You said that, you
8 know, if the range of motion was the only thing you looked for
9 then the surgery wouldn't have been indicated. So what are
10 these other things that you look for?

11 A Again, complaints of the patient, relatively positive
12 findings on the MRI, and mainly the complaints. If someone is
13 going to therapy and they've had it for a month, two months, and
14 they're not happy, they feel that they're not improving, that's
15 significant.

16 Q Fair to say, Doctor, that what you care about is the
17 patient's pain and trying to alleviate that pain; is that fair
18 to say?

19 A That's the whole ball game.

20 Q Now, Doctor, how did you communicate with Ms. Han? Did
21 you communicate with Ms. Han directly?

22 A No, I believe I had an interpreter.

23 Q And why was that?

24 A Because I don't speak Korean.

25 Q Now, Doctor, you were also asked about prior

PLAINTIFF - DR. S. WERT - REDIRECT EXAMINATION

1 acupuncture treatment, would you need to know about acupuncture
2 treatment that immediately preceded the accident, and I believe
3 you said yeah, that would be interesting to know, correct?

4 A Yes.

5 Q But would acupuncture treatment to a body part which
6 you're not treating, which you're not examining, would that be
7 critical?

8 A Specifically acupuncture, no. I would think perhaps
9 physical therapy would be more important.

10 Q If my client had acupuncture on her ankle prior to this
11 accident, would that be something that you need to know in order
12 to make your diagnosis?

13 A No.

14 Q Now, you were asked also about the ACL that you that
15 was referenced in the MRIs that you didn't reference in your
16 operative report, correct; do you recall that?

17 A Yes.

18 Q Now, you did, in fact, examine the ACL; is that right?

19 A When?

20 Q During the operation?

21 A Well, the ACL is in the middle of the knee. Once the
22 scope is in the knee, you can't miss it. It's right there.

23 Q In fact, you also took a photo of the ACL, correct?

24 A Yes.

25 Q And that's contained in the photos that we reviewed

PLAINTIFF - DR. S. WERT - REDIRECT EXAMINATION

1 earlier?

2 A Yes.

3 Q What was your finding with respect to the ACL?

4 A It was intact. The ACL is either torn, or intact, or
5 it has a little degeneration. If it has a little degeneration,
6 you clean it. If it's intact, you leave it alone. If it's torn
7 even at over 60 you tend not to repair it because it's more
8 associated with sports activities.

9 THE COURT: I'm sorry, Doctor, when you say 60?

10 THE WITNESS: 60 years of age.

11 A Sometimes you do it, there are some people over 60 that
12 are extremely active, but generally 50 years is the age of
13 whether to repair an ACL.

14 MR. ATKINSON: With the Court's permission, I'd
15 like to ask Dr. Wert to show the jury on Exhibits 3, 4, and
16 5 or one of those the pages the photo that you took of my
17 client's ACL.

18 THE COURT: He has his photos, but the others are
19 on the easel now.

20 MR. ATKINSON: Yes, so I believe he's going to
21 reference his photos in order to demonstrate to the jury.

22 THE COURT: Any concern, Counsel?

23 MR. MAILLOUX: No, your Honor.

24 THE COURT: Give the doctor a moment to review his
25 photos. While he's doing that, give me just one moment.

PLAINTIFF - DR. S. WERT - REDIRECT EXAMINATION

1 Please, Doctor, yes.

2 A That's the ACL.

3 Q The photo at the bottom left corner of Exhibit 5 is the
4 ACL?

5 A Yes.

6 Q Okay. And you said that you examined that and that
7 there was no problem with it and that's why you didn't put it in
8 your report; is that right?

9 A That is correct.

10 Q Thank you, Doctor, you can be seated. Now, a lot has
11 been made of the MRI reports that were shown to you a little
12 while ago. As you sit here today, do you agree with the
13 findings that the radiologist made in those MRI reports?

14 A Well, the shoulder I can't disagree, but the knee there
15 is some disagreement, yes.

16 Q And that disagreement is based on what, Doctor?

17 A Well --

18 Q What --

19 MR. ATKINSON: Withdrawn.

20 Q What did you do with respect to Ms. Han that gives you
21 a basis to disagree with those MRI reports?

22 MR. MAILLOUX: Objection.

23 THE COURT: Sustained.

24 Q Doctor, what is the basis of your disagreement with
25 those MRI reports?

PLAINTIFF - DR. S. WERT - RECROSS EXAMINATION

1 A Well, number one, my major disagreement is that there
2 was indeed a medial meniscus tear and a smaller lateral meniscal
3 tear, which weren't obvious on films, on the pictures. And most
4 important is that the major finding was lateral femoral
5 chondromalacia, which wasn't mentioned on the MRI report.

6 Q And Doctor, irrespective of what those MRI reports say,
7 are you -- do you continue to rely on those MRI reports, or are
8 you now relying on something else to form your opinion in regard
9 to my client?

10 A The interoperative photos, they trump the MRI once you
11 operate.

12 Q And what did you find interoperatively in regards to
13 the cause of my client's injuries?

14 A Tears of the meniscus, medial and lateral,
15 chondromalacia, and a loose body, chondromalacia lateral
16 femoral.

17 Q And what were those conditions caused by?

18 A MVA, motor vehicle accident.

19 MR. ATKINSON: Thank you. No further questions.

20 MR. MAILLOUX: Your Honor, brief recross?

21 RECROSS EXAMINATION BY

22 MR. MAILLOUX:

23 Q Doctor, you were asked about the surgery on redirect.
24 You prepared a report in connection with the surgery?

25 A Operative report, yes.

PLAINTIFF - DR. S. WERT - RECROSS EXAMINATION

1 Q That's in the course of your normal business?

2 A Yes.

3 Q And you have that with you?

4 A Yes.

5 Q It's a three page report?

6 A Yes.

7 MR. MAILLOUX: Can we get that marked, the
8 doctor's operative report as Defendant's Exhibit R, and I
9 would move it into evidence if Counsel doesn't have any
10 objection.

11 MR. ATKINSON: May we approach, your Honor, very
12 briefly?

13 THE COURT: Come up, gentlemen.

14 (Whereupon a discussion was held at the bench.)

15 THE COURT: Gentlemen, pursuant to the side bar
16 discussion Defendant is offering Dr. Wert's operative
17 report from what date?

18 MR. MAILLOUX: October 24, 2016.

19 THE COURT: October 24, 2016. Is that for
20 identification or in evidence, Mr. Atkinson?

21 MR. ATKINSON: That's in evidence.

22 THE COURT: So on consent it's going to be marked
23 in evidence as Defendant's R as in Robert.

24 MR. MAILLOUX: Yes, your Honor.

25 THE COURT: Is that your only copy of that report?

PLAINTIFF - DR. S. WERT - RECROSS EXAMINATION

1 THE WITNESS: It's in my computer.

2 MR. MAILLOUX: We can use this copy. Counsel and
3 I have agreed, it's the same report.

4 THE COURT: Come up for a moment.

5 (Whereupon a discussion was held at the bench.)

6 (Defendant's Exhibit R, OPERATIVE REPORT, was
7 marked into evidence.)

8 COURT OFFICER: Defendant's Exhibit R has been
9 marked into evidence.

10 MR. MAILLOUX: I just need it in evidence, I'm not
11 going to ask the witness anything.

12 Q Doctor, you were asked about acupuncture treatment for
13 the Plaintiff prior to the accident?

14 A Yes.

15 Q You indicated that it would not matter to you if it was
16 acupuncture on an ankle, was that your testimony?

17 A I think the question was with me operating on the knee
18 and treating the knee, whether the patient had acupuncture on
19 the ankle, and I didn't think that had anything to do with it.

20 Q What about regarding finding the cause of the
21 pathology, wouldn't it be relevant to that?

22 A Pathology of the ankle?

23 Q Of the knee?

24 A As I sit here I don't know what acupuncture to the
25 ankle has to do with diagnosing a knee problem.

PLAINTIFF - DR. S. WERT - RECROSS EXAMINATION

1 Q Well, Doctor, you'd agree with me, we don't know what
2 the records are, we don't know what was done in the acupuncture,
3 correct?

4 A I agree.

5 Q So what was done could have been relevant to your
6 treatment with regard to the knee, correct?

7 A I can't say that acupuncture to the ankle is going to
8 effect the knee.

9 Q Doctor, I want you to assume hypothetically that a
10 patient has a pathology in the ankle, pain or some other
11 pathology, would it be fair to say that would effect the
12 individual's gait?

13 A It may, yes.

14 Q And that would be the individual's ability to walk,
15 correct?

16 A Yes.

17 Q And if a person has a pathology in an ankle and it
18 effects their ability to walk over a long time, that could cause
19 problems in the knees, the hips, or other parts of the body
20 relative to walking mechanisms, correct?

21 A Theoretically, yes.

22 Q That's why individuals, if they have shoes that lose
23 their strength or have problems with the shoes, doctors say to
24 get new shoes because it could effect your knees, your back,
25 other parts of your body, correct?

PLAINTIFF - DR. S. WERT - RECROSS EXAMINATION

1 A Yes.

2 Q So it would be fair to say that acupuncture to an ankle
3 could have had an effect on the Plaintiff depending on what the
4 actual records showed, correct?

5 A The process of acupuncture or the fact why it was done?

6 Q Well, the records might give us an indication into
7 causality of the complaints in this instance, correct?

8 A It's possible.

9 Q We don't have those records, correct?

10 A I never saw them, no.

11 Q We have no idea what's in those records, correct?

12 A Correct.

13 MR. MAILLOUX: No further questions.

14 MR. ATKINSON: Nothing further, your Honor.

15 THE COURT: Thank you very much, Doctor, you're
16 excused. Stay here momentarily. Ladies and gentlemen of
17 the jury, we're going to take a break for your purposes so
18 that you can use the restroom. We're going to call you
19 down in a few moments. There are some other things we have
20 to handle with you, but we're accommodating -- there are a
21 couple of concerns from a few jurors, so to accommodate
22 that we're going to be letting you go for the afternoon
23 shortly. But with that being said, please do not discuss
24 the case amongst yourselves or with anyone else. We're
25 going to take a few minutes and then bring you back down.

PROCEEDINGS

1 I appreciate and thank you all for getting here in a prompt
2 manner. I think tomorrow we anticipate the same type of
3 schedule due to concerns of some of the people involved
4 that we're factoring in. We'll take a few moments, we'll
5 call you down momentarily. Thank you.

6 COURT OFFICER: All rise, jury exiting.

7 (Whereupon the jury exited the courtroom.)

8 THE COURT: On the record, gentlemen, at side bar
9 on an unrelated matter that was resolved at the side bar we
10 agreed to give the jurors a few moments. We have the one
11 juror who has a death in the family, needs to get to
12 Connecticut, and the other juror who has the child care
13 issue. We are done with Dr. Wert. Doctor, we thank you
14 for coming in.

15 THE WITNESS: You're welcome.

16 THE COURT: Gentlemen, there are some documents
17 that may have been taken from Dr. Wert's report and some of
18 them you want to just -- you have an agreement to agree on
19 whether some are going to be marked -- there's one item
20 that was for ID. I'm going to give you a moment to do
21 that. Off the record.

22 (A discussion was held off the record.)

23 THE COURT: On the record, Dr. Wert is ready to
24 go. Do we have any of his originals reports that we need
25 to return to him before he leaves?

PROCEEDINGS

1 MR. MAILLOUX: I believe he has everything because
2 we used copies of what we used from his file, so I think he
3 has everything.

4 MR. ATKINSON: Correct.

5 THE COURT: Doctor, we thank you very much.

6 THE WITNESS: Thank you.

7 THE COURT: Counsel, come up for one minute,
8 please.

9 (Whereupon a discussion was held at the bench.)

10 THE COURT: Gentlemen, we did go in the back when
11 we were doing Defendant's M. It was formally marked for
12 identification purposes. There was an engagement by
13 Counsel and there was an agreement to agree, we'd like to
14 memorialize that on the record; is that correct?

15 MR. MAILLOUX: Yes, your Honor.

16 THE COURT: What was the agreement with that?

17 MR. MAILLOUX: We have agreed to put Defendant's
18 Exhibit M in evidence. Between Counsel we have worked out
19 the portions of the record that came in the subpoenaed
20 record room. What is marked as Defendant's Exhibit M in
21 evidence are the records that we're putting into evidence.
22 The pages that we took out from what came in in the mailing
23 we've marked as an alternative M-1 for identification only
24 just so can keep track of the pages that were removed.

25 THE COURT: Mr. Atkinson, is that your agreement?

PROCEEDINGS

1 MR. ATKINSON: Yes, your Honor.

2 THE COURT: Very fine. So we're now going to take
3 those pages that are redacted and mark those as Defendant's
4 M-1 for ID, and what was previously marked Defendant's M
5 for ID we're going to mark that as Defendant's M in
6 evidence, correct, gentlemen?

7 MR. MAILLOUX: Correct.

8 MR. ATKINSON: Correct.

9 (Defendant's Exhibit M, NEW YORK PAIN CLINIC
10 RECORDS, was marked into evidence.)

11 (Defendant's Exhibit M-1, REDACTIONS FROM EXHIBIT
12 M, was marked for identification.)

13 THE COURT: Bring the jury down.

14 COURT OFFICER: All rise, jury entering.

15 (Whereupon the jury entered the courtroom.)

16 THE COURT: Please be seated, ladies and
17 gentlemen. Again, good afternoon. That completes
18 Mr. Atkinson's second witness, Dr. Wert. Mr. Atkinson, do
19 you have anything further for us on your case in chief?

20 MR. ATKINSON: Nothing further, your Honor.
21 Plaintiff does rest.

22 THE COURT: Ladies and gentlemen, Plaintiff rests
23 on the issue of damages. So again, just like in liability,
24 Defendant will have not an obligation but an opportunity to
25 present certain witnesses. There will be one or more than

PROCEEDINGS

1 one medical expert. We're going to take the first one
2 tomorrow, but again, we have certain concerns by the jurors
3 so we're working within that framework. Just like
4 tomorrow, we're going to ask you to be here promptly at
5 9:15 so we could start at 9:30 and with the same type of
6 schedule tomorrow, and then tomorrow we'll give you an
7 update on what, if anything, further. So again, I want to
8 thank each and every one of you, and I know you have things
9 going on, the Court is trying to incorporate your concerns
10 with what we're doing here. So please have a terrific
11 evening. Do not discuss the case amongst yourselves. Have
12 a terrific evening and we'll see you tomorrow morning
13 promptly at 9:15. Thank you very much.

14 COURT OFFICER: All rise, jury exiting.

15 (Whereupon the jury exited the courtroom.)

16 THE COURT: On the record, gentlemen, Plaintiff
17 has rested on damages. Anything you need to address
18 formally or informally?

19 MR. MAILLOUX: Defendant has a motion now that
20 Plaintiff has rested. Actually we may have two motions
21 depending.

22 THE COURT: One second. Go ahead, Defense
23 Counsel.

24 MR. MAILLOUX: Okay. Defendant would move to
25 dismiss Plaintiff's case. As a predecessor to that,

PROCEEDINGS

1 Defendant would move to strike the conclusions or testimony
2 of Dr. Wert. There is a case in the Second Department
3 called Narducci against Mcrae, N-A-R-D-U-C-C-I, v.
4 M-C-R-A-E, I have a copy for the Court and a copy for
5 Counsel as well, which indicates that in a similar instance
6 the Plaintiff's expert did not address the prior condition
7 that came to light in the midst of litigation and deemed
8 that the conclusion that the claims were related to the
9 accident could be speculative because the expert was unable
10 -- did not have any records, did not even address what had
11 come to light, which was testimony by the Plaintiff in that
12 case of the prior condition. Similarly, here, Dr. Wert was
13 even unaware that the Plaintiff told the hospital that she
14 had a prior left knee condition. His first notice of that
15 was today on the stand. He was unaware of any records
16 regarding prior acupuncture treatment. He indicated that
17 the Plaintiff denied to him in the history that he took
18 that she had any prior treatment or prior histories of
19 pain, therefore I think his conclusions are speculative and
20 I believe all the conclusions in Dr. Wert's testimony and
21 reports should be stricken. And if Dr. Wert's testimony is
22 stricken, I do believe that would warrant a verdict in
23 favor of the Defendant as the Plaintiff did not proffer any
24 objective proof of causally related injury in connection
25 with the subject accident.

PROCEEDINGS

1 MR. ATKINSON: Respectfully, your Honor, Plaintiff
2 opposes Defendant's motion. Dr. Wert incorporated the
3 supposed testimony or assumed testimony regarding
4 Plaintiff's complaints of prior knee pain many years before
5 this accident and has indicated that for him that would not
6 change his opinion. I do not believe that it is a
7 uncontroverted fact in this case that my client had
8 longstanding knee pain immediately prior to this accident.
9 There is disputed testimony as to that point. But
10 certainly if the question is whether or not Dr. Wert's
11 opinion is based on or takes into consideration the, you
12 know, alleged prior knee pain that predated this accident,
13 he did take that into account on the stand and indicated
14 that would not effect his opinion. I think Defendant's
15 case is therefore inadequate and not applicable to this
16 case.

17 THE COURT: Two separate motions, one to dismiss,
18 one to strike, correct?

19 MR. MAILLOUX: Correct, your Honor.

20 THE COURT: The Court will reserve on those
21 motions.

22 MR. MAILLOUX: One other thing to address, your
23 Honor. I don't know if -- I can make it by way of motion,
24 Plaintiff may agree, I don't know. Throughout the course
25 of --

PROCEEDINGS

1 THE COURT: Just one minute. On this issue, do
2 you have anything in writing or no?

3 MR. MAILLOUX: I submitted a copy of the
4 decision --

5 THE COURT: Do you have a written motion?

6 MR. MAILLOUX: I did not write the motion.

7 THE COURT: It's an oral motion?

8 MR. MAILLOUX: It's an oral motion, your Honor.

9 THE COURT: If you want to give us something in
10 writing tomorrow, we'll give you both an opportunity to do
11 that.

12 MR. MAILLOUX: Very good.

13 THE COURT: With that being said, there's another
14 matter you wish to address?

15 MR. MAILLOUX: The other matter is that over the
16 course of the testimony of both the Plaintiff and Dr. Wert
17 there was no testimony regarding the neck or back claims
18 from a medical perspective. Obviously those films are not
19 present. I don't think the facility ever sent them, we
20 don't have them in evidence. I don't know Plaintiff is
21 just going to agree to discontinue the neck and back claims
22 or if I have to make a formal motion to dismiss them. So
23 for the interest of the record, I would make a formal
24 motion to dismiss any claims of neck or back pain as
25 relating to this accident on the basis that there was no

PROCEEDINGS

1 evidence of a medical degree that was proffered on
2 Plaintiff's case in chief causally relating neck or back
3 claims to the subject accident.

4 MR. ATKINSON: So there are records in evidence in
5 Exhibit M both from Danada Clinic and New York Pain Clinic
6 showing restrictions in range of motion that were causally
7 related to this accident. Although there was no testimony
8 as to those points, I believe that it would not be proper
9 at this stage to dismiss those claims from this case.

10 THE COURT: Come up.

11 (Whereupon a discussion was held at the bench.)

12 THE COURT: Counsel for Plaintiff, Defense wants
13 to dismiss the neck and back and the strains and sprains
14 portion of the case. What say you?

15 MR. ATKINSON: We are in opposition to that
16 motion, your Honor.

17 THE COURT: In other words, the doctor was on the
18 stand for two hours and eighteen minutes for a fourteen
19 minute surgery today. I'm presuming the reason for the
20 motion is how in detail does he need to go with the doctor
21 tomorrow. So there's a practical in addition to a legal.
22 So we've been going since -- taking testimony since 9:30
23 straight without a break. I'm going to give the two of you
24 an opportunity to speak about it. I'm going to reserve
25 formally on the record, and you can address this first

PROCEEDINGS

1 thing tomorrow morning. Fair enough, gentlemen?

2 MR. MAILLOUX: Thank you, your Honor.

3 MR. ATKINSON: Yes, your Honor.

4 THE COURT: Now, tomorrow's doctor, any exhibits,
5 any photos premarked before 9:30. If there's an issue, you
6 let me know at 9:30, we'll rule, and we'll bring the doctor
7 down. Things like your client walking, leaving, we're
8 waiting -- in other words, one afternoon she never came
9 back, we're done with her. She wants to be here, she's
10 invited. The door is open. She wants to leave when the
11 jury is here, we can't have you leaving. Please. You're
12 cooperative, but she's less than cooperative, we'll phrase
13 it that way. Please instruct her on judicial economy.
14 Fair enough, gentlemen?

15 MR. ATKINSON: Yes, your Honor.

16 MR. MAILLOUX: Yes, your Honor.

17 THE COURT: Reserve on that motion. See you first
18 thing tomorrow morning. Thank you.

19 * * * * *
20 REPORTER'S CERTIFICATION

21 Certified to be a true and accurate transcript of the original
22 stenographic notes.

23 _____
24 Amy Bohleber
25 Official Court Reporter

0	43:18 29th [1] - 37:10	A	79:2, 79:7, 80:2, 80:5, 85:16	appearances [2] - 2:3, 6:9
0 [1] - 62:10	3	a.m [2] - 65:4, 65:5	acupuncturist [3] - 62:21, 62:22, 72:4	appeared [6] - 37:17, 59:3, 59:15, 60:1, 62:7, 62:12
1	3 [10] - 14:7, 14:11, 14:18, 14:22, 15:17, 15:20, 16:3, 25:20, 49:5, 74:15 3-5 [2] - 14:9, 14:20 30 [1] - 37:15 3423 [1] - 4:18	abduction [2] - 28:6, 28:12	acute [2] - 32:21	applicable [1] - 86:15
10 [3] - 25:20, 28:9, 43:6 10/24 [1] - 22:2 10/24/16 [1] - 9:18 100 [1] - 27:7 10279 [1] - 1:16 105 [4] - 42:14, 42:15, 42:21, 43:6 1065 [1] - 1:19 10th [1] - 70:6 11/10 [1] - 22:1 11/10/16 [1] - 22:2 110 [2] - 28:7, 37:7 11235 [1] - 4:18 11435 [1] - 1:9 11714 [1] - 1:20 12 [1] - 1:1 125 [5] - 37:6, 37:15, 43:9, 43:11, 43:13 130 [4] - 37:6, 43:9, 43:11, 43:14 135 [2] - 62:10 160 [1] - 28:5 17 [1] - 1:9 180 [2] - 28:2, 28:7 1982 [1] - 5:22	4	ability [5] - 29:3, 29:7, 79:14, 79:18 able [11] - 10:4, 12:21, 21:19, 23:15, 24:4, 24:5, 28:18, 40:6, 41:11, 41:18, 42:25 abnormal [2] - 61:25, 66:12 abnormalities [1] - 34:9 abrader [1] - 11:3 absolutely [1] - 20:4 acceptable [2] - 53:17, 66:16 accident [52] - 7:19, 8:6, 20:18, 20:20, 20:23, 21:1, 21:16, 25:21, 26:6, 26:24, 27:2, 27:4, 27:6, 27:7, 28:20, 29:2, 29:9, 30:13, 33:19, 36:12, 36:16, 36:18, 40:15, 41:14, 43:21, 43:23, 54:13, 54:25, 55:3, 58:19, 60:8, 62:20, 62:21, 64:9, 69:9, 69:11, 71:9, 71:11, 71:21, 73:2, 73:11, 76:18, 78:13, 85:9, 85:25, 86:5, 86:8, 86:12, 87:25, 88:3, 88:7 accidents [2] - 6:12, 32:18 accommodate [1] - 80:21 accommodating [1] - 80:20 accounting [1] - 8:7 account [1] - 86:13 accurate [6] - 12:20, 20:13, 31:14, 31:16, 31:17, 89:20 ACL [21] - 39:7, 46:14, 46:17, 47:7, 49:1, 66:2, 66:5, 66:7, 66:10, 66:14, 66:21, 73:14, 73:18, 73:21, 73:23, 74:3, 74:4, 74:13, 74:17, 75:2, 75:4 acromial [1] - 69:1 acromion [4] - 68:7, 68:10, 68:14, 68:17 active [1] - 74:12 activities [3] - 21:12, 21:19, 74:8 activity [1] - 50:2 actual [5] - 45:10, 46:7, 54:6, 54:21, 80:4 acupuncture [17] - 59:23, 59:25, 60:3, 73:1, 73:5, 73:8, 73:10, 78:12, 78:16, 78:18, 78:24,	address [10] - 2:16, 4:16, 64:6, 66:1, 84:17, 85:6, 85:10, 86:22, 87:14, 88:25 adjacent [1] - 17:1 advanced [1] - 51:25 affidavit [2] - 59:21, 59:22 affirm [1] - 4:6 afternoon [3] - 80:22, 83:17, 89:8 age [3] - 51:25, 74:10, 74:12 aggravation [1] - 10:15 ago [7] - 35:9, 35:10, 37:8, 37:16, 59:10, 71:20, 75:12 agree [7] - 75:12, 79:1, 79:4, 81:18, 82:13, 86:24, 87:21 agreed [3] - 78:3, 81:10, 82:17 agreeing [1] - 40:20 agreement [4] - 81:18, 82:13, 82:16, 82:25 ahead [1] - 84:22 aid [1] - 16:13 aimed [1] - 39:17 air [1] - 58:20 alcohol [1] - 32:16 alleged [1] - 86:12 allergies [1] - 32:17 alleviate [1] - 72:17 allow [1] - 55:6 almost [1] - 26:6 alone [1] - 74:6 alternative [1] - 82:23 ambulatory [2] - 57:17, 57:18 AMY [1] - 1:23 Amy [1] - 89:23 ankle [9] - 73:10, 78:16, 78:19, 78:22, 78:25, 79:7, 79:10, 79:17, 80:2 answer [2] - 55:7, 58:7 answered [2] - 50:8, 70:20 anterior [4] - 38:18, 38:22, 39:7, 61:1 anticipate [3] - 21:10, 21:18, 81:2 anxious [1] - 9:4 apart [2] - 6:22, 8:3 apologize [1] - 55:8	appearances [2] - 2:3, 6:9 appeared [6] - 37:17, 59:3, 59:15, 60:1, 62:7, 62:12 applicable [1] - 86:15 appointments [2] - 70:14, 71:1 appreciate [1] - 81:1 approach [5] - 14:5, 22:10, 42:6, 42:7, 77:11 April [17] - 22:9, 22:24, 23:1, 23:25, 24:15, 25:17, 26:23, 28:25, 60:12, 60:14, 60:24, 61:2, 62:12, 69:22, 70:6, 70:9, 70:19 area [3] - 19:16, 19:17, 33:9 areas [1] - 33:9 arm [1] - 28:6 arrival [1] - 57:14 arrive [1] - 57:4 arrived [3] - 57:10, 58:13, 58:22 arthritis [1] - 21:7 arthroscopic [3] - 9:5, 9:22, 13:9 arthroscopy [1] - 63:9 articular [1] - 10:25 aspect [1] - 6:13 aspects [1] - 59:16 assessment [1] - 57:9 associated [5] - 49:25, 50:2, 50:5, 54:1, 74:8 assume [8] - 8:14, 21:15, 28:19, 36:18, 36:20, 37:9, 62:19, 79:9 assumed [1] - 86:3 assumptions [1] - 36:22 Atkinson [12] - 2:5, 3:22, 3:24, 5:4, 16:12, 17:8, 24:21, 25:11, 56:15, 77:20, 82:25, 83:18 ATKINSON [63] - 1:17, 2:4, 2:9, 2:13, 2:17, 3:2, 3:8, 3:16, 3:25, 4:2, 5:6, 11:17, 11:21, 11:23, 11:25, 12:9, 12:23, 13:25, 15:1, 15:8, 15:14, 15:20, 16:1, 16:6, 16:19, 17:10, 17:16, 17:19, 23:5, 23:11, 23:19, 25:1, 25:13, 25:15, 29:11, 40:21, 40:24, 42:5, 42:11, 47:18, 50:8, 56:5, 56:16, 67:16, 70:20, 71:14, 71:16, 74:14, 74:20, 75:19, 76:19, 77:11, 77:21, 80:14, 82:4, 83:1, 83:8, 83:20, 86:1,
2	5	abnormalities [1] - 34:9 abrader [1] - 11:3 absolutely [1] - 20:4 acceptable [2] - 53:17, 66:16 accident [52] - 7:19, 8:6, 20:18, 20:20, 20:23, 21:1, 21:16, 25:21, 26:6, 26:24, 27:2, 27:4, 27:6, 27:7, 28:20, 29:2, 29:9, 30:13, 33:19, 36:12, 36:16, 36:18, 40:15, 41:14, 43:21, 43:23, 54:13, 54:25, 55:3, 58:19, 60:8, 62:20, 62:21, 64:9, 69:9, 69:11, 71:9, 71:11, 71:21, 73:2, 73:11, 76:18, 78:13, 85:9, 85:25, 86:5, 86:8, 86:12, 87:25, 88:3, 88:7 accidents [2] - 6:12, 32:18 accommodate [1] - 80:21 accommodating [1] - 80:20 accounting [1] - 8:7 account [1] - 86:13 accurate [6] - 12:20, 20:13, 31:14, 31:16, 31:17, 89:20 ACL [21] - 39:7, 46:14, 46:17, 47:7, 49:1, 66:2, 66:5, 66:7, 66:10, 66:14, 66:21, 73:14, 73:18, 73:21, 73:23, 74:3, 74:4, 74:13, 74:17, 75:2, 75:4 acromial [1] - 69:1 acromion [4] - 68:7, 68:10, 68:14, 68:17 active [1] - 74:12 activities [3] - 21:12, 21:19, 74:8 activity [1] - 50:2 actual [5] - 45:10, 46:7, 54:6, 54:21, 80:4 acupuncture [17] - 59:23, 59:25, 60:3, 73:1, 73:5, 73:8, 73:10, 78:12, 78:16, 78:18, 78:24,	aggravation [1] - 10:15 ago [7] - 35:9, 35:10, 37:8, 37:16, 59:10, 71:20, 75:12 agree [7] - 75:12, 79:1, 79:4, 81:18, 82:13, 86:24, 87:21 agreed [3] - 78:3, 81:10, 82:17 agreeing [1] - 40:20 agreement [4] - 81:18, 82:13, 82:16, 82:25 ahead [1] - 84:22 aid [1] - 16:13 aimed [1] - 39:17 air [1] - 58:20 alcohol [1] - 32:16 alleged [1] - 86:12 allergies [1] - 32:17 alleviate [1] - 72:17 allow [1] - 55:6 almost [1] - 26:6 alone [1] - 74:6 alternative [1] - 82:23 ambulatory [2] - 57:17, 57:18 AMY [1] - 1:23 Amy [1] - 89:23 ankle [9] - 73:10, 78:16, 78:19, 78:22, 78:25, 79:7, 79:10, 79:17, 80:2 answer [2] - 55:7, 58:7 answered [2] - 50:8, 70:20 anterior [4] - 38:18, 38:22, 39:7, 61:1 anticipate [3] - 21:10, 21:18, 81:2 anxious [1] - 9:4 apart [2] - 6:22, 8:3 apologize [1] - 55:8	appearances [2] - 2:3, 6:9 appeared [6] - 37:17, 59:3, 59:15, 60:1, 62:7, 62:12 applicable [1] - 86:15 appointments [2] - 70:14, 71:1 appreciate [1] - 81:1 approach [5] - 14:5, 22:10, 42:6, 42:7, 77:11 April [17] - 22:9, 22:24, 23:1, 23:25, 24:15, 25:17, 26:23, 28:25, 60:12, 60:14, 60:24, 61:2, 62:12, 69:22, 70:6, 70:9, 70:19 area [3] - 19:16, 19:17, 33:9 areas [1] - 33:9 arm [1] - 28:6 arrival [1] - 57:14 arrive [1] - 57:4 arrived [3] - 57:10, 58:13, 58:22 arthritis [1] - 21:7 arthroscopic [3] - 9:5, 9:22, 13:9 arthroscopy [1] - 63:9 articular [1] - 10:25 aspect [1] - 6:13 aspects [1] - 59:16 assessment [1] - 57:9 associated [5] - 49:25, 50:2, 50:5, 54:1, 74:8 assume [8] - 8:14, 21:15, 28:19, 36:18, 36:20, 37:9, 62:19, 79:9 assumed [1] - 86:3 assumptions [1] - 36:22 Atkinson [12] - 2:5, 3:22, 3:24, 5:4, 16:12, 17:8, 24:21, 25:11, 56:15, 77:20, 82:25, 83:18 ATKINSON [63] - 1:17, 2:4, 2:9, 2:13, 2:17, 3:2, 3:8, 3:16, 3:25, 4:2, 5:6, 11:17, 11:21, 11:23, 11:25, 12:9, 12:23, 13:25, 15:1, 15:8, 15:14, 15:20, 16:1, 16:6, 16:19, 17:10, 17:16, 17:19, 23:5, 23:11, 23:19, 25:1, 25:13, 25:15, 29:11, 40:21, 40:24, 42:5, 42:11, 47:18, 50:8, 56:5, 56:16, 67:16, 70:20, 71:14, 71:16, 74:14, 74:20, 75:19, 76:19, 77:11, 77:21, 80:14, 82:4, 83:1, 83:8, 83:20, 86:1,
2 [16] - 11:25, 12:1, 12:3, 12:5, 12:7, 12:14, 12:24, 12:25, 13:18, 13:19, 13:21, 13:24, 16:4, 17:18, 68:7, 68:17 20 [2] - 28:10, 65:6 2016 [24] - 22:2, 30:3, 33:24, 34:17, 35:21, 36:19, 36:20, 37:2, 37:3, 38:16, 41:19, 41:23, 42:13, 43:18, 44:3, 47:11, 52:20, 53:9, 60:1, 60:21, 68:4, 77:18, 77:19 2019 [10] - 1:9, 22:9, 22:24, 23:1, 23:25, 25:17, 26:23, 60:24, 61:2, 62:12 210 [1] - 1:19 233 [1] - 1:16 24 [3] - 36:19, 77:18, 77:19 24th [1] - 69:9 28 [10] - 30:3, 34:17, 35:21, 37:3, 38:16, 43:18, 44:3, 52:20, 53:9, 60:1 28th [2] - 33:12, 70:6 29 [6] - 36:20, 37:2, 41:19, 41:23, 42:13,	6	abnormalities [1] - 34:9 abrader [1] - 11:3 absolutely [1] - 20:4 acceptable [2] - 53:17, 66:16 accident [52] - 7:19, 8:6, 20:18, 20:20, 20:23, 21:1, 21:16, 25:21, 26:6, 26:24, 27:2, 27:4, 27:6, 27:7, 28:20, 29:2, 29:9, 30:13, 33:19, 36:12, 36:16, 36:18, 40:15, 41:14, 43:21, 43:23, 54:13, 54:25, 55:3, 58:19, 60:8, 62:20, 62:21, 64:9, 69:9, 69:11, 71:9, 71:11, 71:21, 73:2, 73:11, 76:18, 78:13, 85:9, 85:25, 86:5, 86:8, 86:12, 87:25, 88:3, 88:7 accidents [2] - 6:12, 32:18 accommodate [1] - 80:21 accommodating [1] - 80:20 accounting [1] - 8:7 account [1] - 86:13 accurate [6] - 12:20, 20:13, 31:14, 31:16, 31:17, 89:20 ACL [21] - 39:7, 46:14, 46:17, 47:7, 49:1, 66:2, 66:5, 66:7, 66:10, 66:14, 66:21, 73:14, 73:18, 73:21, 73:23, 74:3, 74:4, 74:13, 74:17, 75:2, 75:4 acromial [1] - 69:1 acromion [4] - 68:7, 68:10, 68:14, 68:17 active [1] - 74:12 activities [3] - 21:12, 21:19, 74:8 activity [1] - 50:2 actual [5] - 45:10, 46:7, 54:6, 54:21, 80:4 acupuncture [17] - 59:23, 59:25, 60:3, 73:1, 73:5, 73:8, 73:10, 78:12, 78:16, 78:18, 78:24,	aggravation [1] - 10:15 ago [7] - 35:9, 35:10, 37:8, 37:16, 59:10, 71:20, 75:12 agree [7] - 75:12, 79:1, 79:4, 81:18, 82:13, 86:24, 87:21 agreed [3] - 78:3, 81:10, 82:17 agreeing [1] - 40:20 agreement [4] - 81:18, 82:13, 82:16, 82:25 ahead [1] - 84:22 aid [1] - 16:13 aimed [1] - 39:17 air [1] - 58:20 alcohol [1] - 32:16 alleged [1] - 86:12 allergies [1] - 32:17 alleviate [1] - 72:17 allow [1] - 55:6 almost [1] - 26:6 alone [1] - 74:6 alternative [1] - 82:23 ambulatory [2] - 57:17, 57:18 AMY [1] - 1:23 Amy [1] - 89:23 ankle [9] - 73:10, 78:16, 78:19, 78:22, 78:25, 79:7, 79:10, 79:17, 80:2 answer [2] - 55:7, 58:7 answered [2] - 50:8, 70:20 anterior [4] - 38:18, 38:22, 39:7, 61:1 anticipate [3] - 21:10, 21:18, 81:2 anxious [1] - 9:4 apart [2] - 6:22, 8:3 apologize [1] - 55:8	appearances [2] - 2:3, 6:9 appeared [6] - 37:17, 59:3, 59:15, 60:1, 62:7, 62:12 applicable [1] - 86:15 appointments [2] - 70:14, 71:1 appreciate [1] - 81:1 approach [5] - 14:5, 22:10, 42:6, 42:7, 77:11 April [17] - 22:9, 22:24, 23:1, 23:25, 24:15, 25:17, 26:23, 28:25, 60:12, 60:14, 60:24, 61:2, 62:12, 69:22, 70:6, 70:9, 70:19 area [3] - 19:16, 19:17, 33:9 areas [1] - 33:9 arm [1] - 28:6 arrival [1] - 57:14 arrive [1] - 57:4 arrived [3] - 57:10, 58:13, 58:22 arthritis [1] - 21:7 arthroscopic [3] - 9:5, 9:22, 13:9 arthroscopy [1] - 63:9 articular [1] - 10:25 aspect [1] - 6:13 aspects [1] - 59:16 assessment [1] - 57:9 associated [5] - 49:25, 50:2, 50:5, 54:1, 74:8 assume [8] - 8:14, 21:15, 28:19, 36:18, 36:20, 37:9, 62:19, 79:9 assumed [1] - 86:3 assumptions [1] - 36:22 Atkinson [12] - 2:5, 3:22, 3:24, 5:4, 16:12, 17:8, 24:21, 25:11, 56:15, 77:20, 82:25, 83:18 ATKINSON [63] - 1:17, 2:4, 2:9, 2:13, 2:17, 3:2, 3:8, 3:16, 3:25, 4:2, 5:6, 11:17, 11:21, 11:23, 11:25, 12:9, 12:23, 13:25, 15:1, 15:8, 15:14, 15:20, 16:1, 16:6, 16:19, 17:10, 17:16, 17:19, 23:5, 23:11, 23:19, 25:1, 25:13, 25:15, 29:11, 40:21, 40:24, 42:5, 42:11, 47:18, 50:8, 56:5, 56:16, 67:16, 70:20, 71:14, 71:16, 74:14, 74:20, 75:19, 76:19, 77:11, 77:21, 80:14, 82:4, 83:1, 83:8, 83:20, 86:1,
2 [16] - 11:25, 12:1, 12:3, 12:5, 12:7, 12:14, 12:24, 12:25, 13:18, 13:19, 13:21, 13:24, 16:4, 17:18, 68:7, 68:17 20 [2] - 28:10, 65:6 2016 [24] - 22:2, 30:3, 33:24, 34:17, 35:21, 36:19, 36:20, 37:2, 37:3, 38:16, 41:19, 41:23, 42:13, 43:18, 44:3, 47:11, 52:20, 53:9, 60:1, 60:21, 68:4, 77:18, 77:19 2019 [10] - 1:9, 22:9, 22:24, 23:1, 23:25, 25:17, 26:23, 60:24, 61:2, 62:12 210 [1] - 1:19 233 [1] - 1:16 24 [3] - 36:19, 77:18, 77:19 24th [1] - 69:9 28 [10] - 30:3, 34:17, 35:21, 37:3, 38:16, 43:18, 44:3, 52:20, 53:9, 60:1 28th [2] - 33:12, 70:6 29 [6] - 36:20, 37:2, 41:19, 41:23, 42:13,	7	abnormalities [1] - 34:9 abrader [1] - 11:3 absolutely [1] - 20:4 acceptable [2] - 53:17, 66:16 accident [52] - 7:19, 8:6, 20:18, 20:20, 20:23, 21:1, 21:16, 25:21, 26:6, 26:24, 27:2, 27:4, 27:6, 27:7, 28:20, 29:2, 29:9, 30:13, 33:19, 36:12, 36:16, 36:18, 40:15, 41:14, 43:21, 43:23, 54:13, 54:25, 55:3, 58:19, 60:8, 62:20, 62:21, 64:9, 69:9, 69:11, 71:9, 71:11, 71:21, 73:2, 73:11, 76:18, 78:13, 85:9, 85:25, 86:5, 86:8, 86:12, 87:25, 88:3, 88:7 accidents [2] - 6:12, 32:18 accommodate [1] - 80:21 accommodating [1] - 80:20 accounting [1] - 8:7 account [1] - 86:13 accurate [6] - 12:20, 20:13, 31:14, 31:16, 31:17, 89:20 ACL [21] -		

<p>88:4, 88:15, 89:3, 89:15 Atkinson's [1] - 83:18 attached [1] - 9:24 attention [3] - 50:22, 56:25, 67:1 attentiveness [1] - 3:20 Attorney [2] - 1:15, 1:19 attorney [1] - 70:11 attorney's [1] - 70:18 attorneys [2] - 4:20, 70:14 August [10] - 36:19, 36:20, 37:2, 37:10, 41:19, 41:23, 42:12, 43:18, 69:9 auto [1] - 54:13 automobile [2] - 20:18, 20:19 Avenue [2] - 1:19, 4:18 aware [8] - 23:3, 31:11, 46:9, 46:12, 46:15, 59:7, 59:25, 62:17</p>	<p>BLOW [2] - 14:9, 14:20 blow [2] - 10:4, 17:1 board [1] - 5:24 body [13] - 11:5, 18:10, 18:12, 18:17, 20:8, 20:24, 42:23, 71:9, 71:20, 73:5, 76:15, 79:19, 79:25 BOHLEBER [1] - 1:23 Bohleber [1] - 89:23 bone [13] - 10:21, 10:22, 10:25, 18:5, 48:18, 50:2, 50:7, 50:14, 68:10, 68:19 boned [1] - 58:20 bones [2] - 5:13, 10:22 border [4] - 18:6, 18:23, 18:25, 19:1 bottom [1] - 75:3 Boulevard [1] - 1:8 break [3] - 25:10, 80:17, 88:23 brief [2] - 23:13, 76:20 briefly [2] - 67:1, 77:12 bright [1] - 18:12 bring [10] - 3:1, 3:5, 24:20, 25:2, 46:2, 52:17, 53:3, 80:25, 83:13, 89:6 Broadway [1] - 1:16 Brooklyn [2] - 4:18, 5:22 brought [5] - 30:16, 35:11, 57:12, 65:11, 67:10 bubble [1] - 18:4 buckles [1] - 9:12 buckling [3] - 9:9, 20:21, 21:12 BURNS [1] - 1:15 Burns [1] - 2:4 business [3] - 13:7, 13:14, 77:1 BUTLER [1] - 1:12 BY [9] - 1:17, 1:20, 5:5, 13:3, 15:25, 25:14, 29:14, 71:15, 76:21</p>	<p>30:25, 31:22, 32:3, 32:18, 64:8, 66:1, 66:21, 80:24, 83:19, 84:11, 84:25, 85:2, 85:12, 86:7, 86:15, 86:16, 88:2, 88:9, 88:14 caught [1] - 9:11 causality [1] - 80:7 causally [3] - 85:24, 88:2, 88:6 causation [2] - 54:21, 59:6 caused [7] - 20:15, 20:23, 21:1, 26:23, 54:14, 54:17, 76:17 causes [1] - 9:11 caveat [1] - 20:1 CENTER [1] - 64:19 certain [7] - 4:21, 21:12, 38:1, 59:16, 64:4, 83:25, 84:2 certainly [3] - 44:2, 54:1, 86:10 CERTIFICATION [1] - 89:19 certification [1] - 56:3 certified [1] - 5:24 Certified [1] - 89:20 chambers [1] - 16:10 change [1] - 86:6 changes [5] - 49:3, 68:22, 68:25, 69:1, 69:4 CHARLES [1] - 1:20 Charles [1] - 2:7 check [1] - 22:25 chief [3] - 58:13, 83:19, 88:2 child [1] - 81:12 chondromalacia [20] - 19:12, 21:2, 21:7, 49:5, 49:11, 49:14, 49:17, 49:21, 49:23, 50:3, 50:5, 50:11, 50:13, 50:15, 50:18, 53:25, 61:9, 76:5, 76:15 Chondromalacia [1] - 49:8 chronic [6] - 26:16, 32:21, 58:18, 58:23, 59:9 cigarettes [1] - 32:16 circle [2] - 28:1, 28:10 CIVIL [1] - 1:1 claims [6] - 85:8, 87:17, 87:21, 87:24, 88:3, 88:9 clavicular [1] - 69:1 clean [3] - 10:3, 11:3, 74:6 CLERK [10] - 2:1, 3:13, 3:17, 4:6, 4:10, 4:12, 4:14, 4:16, 4:19, 16:11 clicking [1] - 61:20 client [13] - 8:11, 8:14,</p>	<p>21:15, 21:22, 25:16, 26:5, 28:19, 28:24, 71:18, 73:10, 76:9, 86:7, 89:7 client's [7] - 11:8, 27:15, 27:16, 27:23, 74:17, 76:13 clients [1] - 70:14 clinic [1] - 30:7 CLINIC [2] - 41:1, 83:9 Clinic [14] - 8:20, 30:8, 35:2, 35:4, 35:17, 36:9, 36:20, 36:21, 36:23, 40:4, 40:7, 41:8, 88:5 clinically [1] - 39:19 closed [1] - 65:1 closely [1] - 50:5 cognizant [1] - 2:23 collapses [1] - 9:12 collateral [1] - 39:15 comfortable [2] - 42:19, 42:20 coming [7] - 2:12, 19:1, 30:24, 31:13, 42:19, 45:19, 81:14 commence [1] - 22:15 comment [1] - 51:16 comments [2] - 31:25, 51:13 communicate [2] - 72:20, 72:21 communicated [2] - 8:21, 57:23 compare [3] - 20:6, 37:1, 37:12 compared [1] - 54:9 compensation [5] - 6:13, 6:17, 6:18, 6:20 compiled [1] - 44:24 complain [1] - 9:13 complained [2] - 9:9, 25:19 complaining [1] - 58:18 complaint [8] - 34:13, 58:13, 60:6, 63:16, 63:19, 63:20, 64:1, 64:6 complaints [14] - 8:19, 9:6, 11:9, 21:10, 22:6, 26:5, 27:5, 36:6, 54:14, 58:2, 72:11, 72:12, 80:7, 86:4 complete [1] - 46:2 completed [1] - 3:21 completely [3] - 21:4, 21:8, 26:17 completes [1] - 83:17 computer [1] - 78:1 concern [3] - 22:21, 23:25, 74:22 concerns [6] - 2:22, 8:17, 80:21, 81:3, 84:2, 84:9 conclusion [1] - 85:8 conclusions [6] - 31:17,</p>	<p>45:3, 45:20, 85:1, 85:19, 85:20 condition [9] - 26:14, 33:8, 37:4, 54:17, 71:8, 85:6, 85:12, 85:14 conditions [6] - 21:11, 21:19, 27:12, 32:15, 33:4, 76:17 conducted [2] - 12:18, 68:4 condyle [4] - 10:21, 19:4, 21:3, 49:20 Connecticut [1] - 81:12 connection [6] - 6:5, 13:14, 48:8, 48:12, 76:24, 85:24 consent [5] - 13:17, 47:19, 56:6, 67:17, 77:22 consented [2] - 24:10, 24:14 conservative [7] - 7:24, 8:9, 9:1, 34:14, 37:4, 40:10, 63:4 consider [1] - 7:3 considerate [2] - 2:24, 25:9 consideration [1] - 86:11 consistent [2] - 11:8, 18:9 contain [2] - 35:23, 36:15 contained [1] - 73:25 contains [2] - 30:19, 35:12 contemporaneous [1] - 42:4 contents [1] - 30:19 continue [2] - 27:9, 76:7 CONTINUED [2] - 15:25, 25:14 continued [3] - 2:1, 8:19, 26:5 continuing [1] - 7:25 contributed [1] - 20:25 conversation [1] - 53:4 cooperative [2] - 89:12 copies [1] - 82:2 copy [10] - 16:25, 24:6, 24:10, 47:10, 67:25, 77:25, 78:2, 85:4, 87:3 copying [1] - 35:15 corner [2] - 56:22, 75:3 correct [145] - 6:6, 7:6, 8:11, 10:6, 12:8, 17:19, 18:18, 19:7, 19:13, 19:15, 19:24, 24:15, 27:17, 30:4, 31:18, 32:22, 33:25, 34:18, 34:20, 34:23, 34:24, 35:13, 35:21, 38:3, 38:4, 38:11, 38:13, 38:19, 39:10, 39:23, 39:24, 40:11, 40:24,</p>
B				
<p>background [1] - 5:10 bad [1] - 19:12 bag [1] - 58:20 ball [1] - 72:19 bar [6] - 22:20, 23:24, 42:9, 77:15, 81:8, 81:9 base [1] - 8:2 based [11] - 7:22, 21:9, 24:17, 27:1, 42:9, 44:19, 63:10, 64:5, 68:14, 75:16, 86:11 basis [5] - 23:4, 68:19, 75:21, 75:24, 87:25 bathroom [1] - 2:14 become [1] - 27:6 becomes [1] - 32:10 becoming [1] - 26:16 began [1] - 36:21 beginning [1] - 44:12 below [3] - 18:5, 18:24, 19:20 bench [7] - 14:6, 22:12, 42:8, 77:14, 78:5, 82:9, 88:11 bend [2] - 43:5, 43:22 benefit [2] - 16:14, 17:1 benefited [1] - 40:6 benign [2] - 48:8, 51:5 bent [2] - 26:1, 50:15 Beth [1] - 5:18 Bethpage [1] - 1:20 better [10] - 36:8, 40:14, 54:5, 54:16, 54:20, 59:6, 59:12, 62:11, 65:15, 72:1 between [5] - 7:4, 8:13, 8:15, 53:4, 82:18 bit [1] - 5:9</p>	<p>background [1] - 5:10 bad [1] - 19:12 bag [1] - 58:20 ball [1] - 72:19 bar [6] - 22:20, 23:24, 42:9, 77:15, 81:8, 81:9 base [1] - 8:2 based [11] - 7:22, 21:9, 24:17, 27:1, 42:9, 44:19, 63:10, 64:5, 68:14, 75:16, 86:11 basis [5] - 23:4, 68:19, 75:21, 75:24, 87:25 bathroom [1] - 2:14 become [1] - 27:6 becomes [1] - 32:10 becoming [1] - 26:16 began [1] - 36:21 beginning [1] - 44:12 below [3] - 18:5, 18:24, 19:20 bench [7] - 14:6, 22:12, 42:8, 77:14, 78:5, 82:9, 88:11 bend [2] - 43:5, 43:22 benefit [2] - 16:14, 17:1 benefited [1] - 40:6 benign [2] - 48:8, 51:5 bent [2] - 26:1, 50:15 Beth [1] - 5:18 Bethpage [1] - 1:20 better [10] - 36:8, 40:14, 54:5, 54:16, 54:20, 59:6, 59:12, 62:11, 65:15, 72:1 between [5] - 7:4, 8:13, 8:15, 53:4, 82:18 bit [1] - 5:9</p>	<p>30:25, 31:22, 32:3, 32:18, 64:8, 66:1, 66:21, 80:24, 83:19, 84:11, 84:25, 85:2, 85:12, 86:7, 86:15, 86:16, 88:2, 88:9, 88:14 caught [1] - 9:11 causality [1] - 80:7 causally [3] - 85:24, 88:2, 88:6 causation [2] - 54:21, 59:6 caused [7] - 20:15, 20:23, 21:1, 26:23, 54:14, 54:17, 76:17 causes [1] - 9:11 caveat [1] - 20:1 CENTER [1] - 64:19 certain [7] - 4:21, 21:12, 38:1, 59:16, 64:4, 83:25, 84:2 certainly [3] - 44:2, 54:1, 86:10 CERTIFICATION [1] - 89:19 certification [1] - 56:3 certified [1] - 5:24 Certified [1] - 89:20 chambers [1] - 16:10 change [1] - 86:6 changes [5] - 49:3, 68:22, 68:25, 69:1, 69:4 CHARLES [1] - 1:20 Charles [1] - 2:7 check [1] - 22:25 chief [3] - 58:13, 83:19, 88:2 child [1] - 81:12 chondromalacia [20] - 19:12, 21:2, 21:7, 49:5, 49:11, 49:14, 49:17, 49:21, 49:23, 50:3, 50:5, 50:11, 50:13, 50:15, 50:18, 53:25, 61:9, 76:5, 76:15 Chondromalacia [1] - 49:8 chronic [6] - 26:16, 32:21, 58:18, 58:23, 59:9 cigarettes [1] - 32:16 circle [2] - 28:1, 28:10 CIVIL [1] - 1:1 claims [6] - 85:8, 87:17, 87:21, 87:24, 88:3, 88:9 clavicular [1] - 69:1 clean [3] - 10:3, 11:3, 74:6 CLERK [10] - 2:1, 3:13, 3:17, 4:6, 4:10, 4:12, 4:14, 4:16, 4:19, 16:11 clicking [1] - 61:20 client [13] - 8:11, 8:14,</p>	<p>21:15, 21:22, 25:16, 26:5, 28:19, 28:24, 71:18, 73:10, 76:9, 86:7, 89:7 client's [7] - 11:8, 27:15, 27:16, 27:23, 74:17, 76:13 clients [1] - 70:14 clinic [1] - 30:7 CLINIC [2] - 41:1, 83:9 Clinic [14] - 8:20, 30:8, 35:2, 35:4, 35:17, 36:9, 36:20, 36:21, 36:23, 40:4, 40:7, 41:8, 88:5 clinically [1] - 39:19 closed [1] - 65:1 closely [1] - 50:5 cognizant [1] - 2:23 collapses [1] - 9:12 collateral [1] - 39:15 comfortable [2] - 42:19, 42:20 coming [7] - 2:12, 19:1, 30:24, 31:13, 42:19, 45:19, 81:14 commence [1] - 22:15 comment [1] - 51:16 comments [2] - 31:25, 51:13 communicate [2] - 72:20, 72:21 communicated [2] - 8:21, 57:23 compare [3] - 20:6, 37:1, 37:12 compared [1] - 54:9 compensation [5] - 6:13, 6:17, 6:18, 6:20 compiled [1] - 44:24 complain [1] - 9:13 complained [2] - 9:9, 25:19 complaining [1] - 58:18 complaint [8] - 34:13, 58:13, 60:6, 63:16, 63:19, 63:20, 64:1, 64:6 complaints [14] - 8:19, 9:6, 11:9, 21:10, 22:6, 26:5, 27:5, 36:6, 54:14, 58:2, 72:11, 72:12, 80:7, 86:4 complete [1] - 46:2 completed [1] - 3:21 completely [3] - 21:4, 21:8, 26:17 completes [1] - 83:17 computer [1] - 78:1 concern [3] - 22:21, 23:25, 74:22 concerns [6] - 2:22, 8:17, 80:21, 81:3, 84:2, 84:9 conclusion [1] - 85:8 conclusions [6] - 31:17,</p>	<p>45:3, 45:20, 85:1, 85:19, 85:20 condition [9] - 26:14, 33:8, 37:4, 54:17, 71:8, 85:6, 85:12, 85:14 conditions [6] - 21:11, 21:19, 27:12, 32:15, 33:4, 76:17 conducted [2] - 12:18, 68:4 condyle [4] - 10:21, 19:4, 21:3, 49:20 Connecticut [1] - 81:12 connection [6] - 6:5, 13:14, 48:8, 48:12, 76:24, 85:24 consent [5] - 13:17, 47:19, 56:6, 67:17, 77:22 consented [2] - 24:10, 24:14 conservative [7] - 7:24, 8:9, 9:1, 34:14, 37:4, 40:10, 63:4 consider [1] - 7:3 considerate [2] - 2:24, 25:9 consideration [1] - 86:11 consistent [2] - 11:8, 18:9 contain [2] - 35:23, 36:15 contained [1] - 73:25 contains [2] - 30:19, 35:12 contemporaneous [1] - 42:4 contents [1] - 30:19 continue [2] - 27:9, 76:7 CONTINUED [2] - 15:25, 25:14 continued [3] - 2:1, 8:19, 26:5 continuing [1] - 7:25 contributed [1] - 20:25 conversation [1] - 53:4 cooperative [2] - 89:12 copies [1] - 82:2 copy [10] - 16:25, 24:6, 24:10, 47:10, 67:25, 77:25, 78:2, 85:4, 87:3 copying [1] - 35:15 corner [2] - 56:22, 75:3 correct [145] - 6:6, 7:6, 8:11, 10:6, 12:8, 17:19, 18:18, 19:7, 19:13, 19:15, 19:24, 24:15, 27:17, 30:4, 31:18, 32:22, 33:25, 34:18, 34:20, 34:23, 34:24, 35:13, 35:21, 38:3, 38:4, 38:11, 38:13, 38:19, 39:10, 39:23, 39:24, 40:11, 40:24,</p>
	C			
	<p>cable [1] - 9:24 camera [1] - 11:14 candidate [4] - 40:11, 52:21, 53:10, 68:18 cannot [1] - 17:4 car [1] - 32:18 care [2] - 72:16, 81:12 cartilage [14] - 10:24, 11:1, 11:6, 18:10, 19:9, 19:12, 19:17, 48:17, 48:19, 49:11, 50:6, 50:13, 50:16 case [25] - 6:3, 9:8, 11:2, 11:14, 22:16, 26:24,</p>	<p>30:25, 31:22, 32:3, 32:18, 64:8, 66:1, 66:21, 80:24, 83:19, 84:11, 84:25, 85:2, 85:12, 86:7, 86:15, 86:16, 88:2, 88:9, 88:14 caught [1] - 9:11 causality [1] - 80:7 causally [3] - 85:24, 88:2, 88:6 causation [2] - 54:21, 59:6 caused [7] - 20:15, 20:23, 21:1, 26:23, 54:14, 54:17, 76:17 causes [1] - 9:11 caveat [1] - 20:1 CENTER [1] - 64:19 certain [7] - 4:21, 21:12, 38:1, 59:16, 64:4, 83:25, 84:2 certainly [3] - 44:2, 54:1, 86:10 CERTIFICATION [1] - 89:19 certification [1] - 56:3 certified [1] - 5:24 Certified [1] - 89:20 chambers [1] - 16:10 change [1] - 86:6 changes [5] - 49:3, 68:22, 68:25, 69:1, 69:4 CHARLES [1] - 1:20 Charles [1] - 2:7 check [1] - 22:25 chief [3] - 58:13, 83:19, 88:2 child [1] - 81:12 chondromalacia [20] - 19:12, 21:2, 21:7, 49:5, 49:11, 49:14, 49:17, 49:21, 49:23, 50:3, 50:5, 50:11, 50:13, 50:15, 50:18, 53:25, 61:9, 76:5, 76:15 Chondromalacia [1] - 49:8 chronic [6] - 26:16, 32:21, 58:18, 58:23, 59:9 cigarettes [1] - 32:16 circle [2] - 28:1, 28:10 CIVIL [1] - 1:1 claims [6] - 85:8, 87:17, 87:21, 87:24, 88:3, 88:9 clavicular [1] - 69:1 clean [3] - 10:3, 11:3, 74:6 CLERK [10] - 2:1, 3:13, 3:17, 4:6, 4:10, 4:12, 4:14, 4:16, 4:19, 16:11 clicking [1] - 61:20 client [13] - 8:11, 8:14,</p>	<p>21:15, 21:22, 25:16, 26:5, 28:19, 28:24, 71:18, 73:10, 76:9, 86:7, 89:7 client's [7] - 11:8, 27:15, 27:16, 27:23, 74:17, 76:13 clients [1] - 70:14 clinic [1] - 30:7 CLINIC [2] - 41:1, 83:9 Clinic [14] - 8:20, 30:8, 35:2, 35:4, 35:17, 36:9, 36:20, 36:21, </p>	

<p>41:17, 44:5, 44:9, 44:20, 44:21, 44:25, 45:7, 45:20, 45:23, 45:25, 46:1, 46:3, 46:14, 47:11, 48:4, 48:23, 49:1, 49:6, 49:12, 49:15, 49:18, 49:21, 49:25, 50:7, 51:8, 51:14, 51:20, 51:24, 52:7, 52:11, 52:14, 52:15, 52:17, 52:18, 52:22, 52:25, 53:11, 53:12, 53:14, 53:15, 53:18, 53:22, 54:14, 54:25, 55:11, 55:22, 56:18, 56:19, 57:1, 58:24, 59:12, 60:6, 60:12, 60:15, 60:17, 60:21, 61:6, 61:18, 62:12, 63:1, 63:17, 63:20, 63:23, 64:10, 65:9, 65:13, 65:18, 66:2, 66:10, 66:11, 66:14, 66:18, 66:22, 68:1, 68:4, 68:7, 68:19, 69:2, 69:5, 69:7, 69:14, 69:17, 69:18, 69:21, 70:3, 70:4, 70:7, 70:8, 71:9, 71:10, 71:12, 73:3, 73:16, 73:23, 75:9, 79:3, 79:6, 79:15, 79:20, 79:25, 80:4, 80:7, 80:9, 80:11, 80:12, 82:4, 82:14, 83:6, 83:7, 83:8, 86:18, 86:19</p> <p>corresponding [2] - 17:18, 17:19</p> <p>corresponds [1] - 31:23</p> <p>corroborate [1] - 63:25</p> <p>counsel [8] - 4:22, 5:4, 12:8, 13:24, 14:24, 78:2, 82:7, 88:12</p> <p>Counsel [19] - 5:3, 12:10, 14:13, 17:4, 22:21, 23:24, 24:9, 24:13, 40:19, 42:10, 46:21, 55:6, 67:14, 74:22, 77:9, 82:13, 82:18, 84:23, 85:5</p> <p>counselors [1] - 3:13</p> <p>COUNTY [1] - 1:1</p> <p>couple [1] - 80:21</p> <p>course [10] - 25:20, 28:24, 31:6, 34:10, 35:9, 63:8, 64:4, 77:1, 86:24, 87:16</p> <p>Court [7] - 1:23, 5:2, 24:1, 84:9, 85:4, 86:20, 89:23</p> <p>COURT [138] - 1:1, 2:8, 2:11, 2:15, 2:19, 2:21, 3:4, 3:11, 3:18, 4:1, 4:20, 11:19, 11:22,</p>	<p>12:1, 12:5, 12:7, 12:10, 12:12, 13:2, 13:17, 13:21, 13:23, 14:5, 14:7, 14:11, 14:13, 14:16, 14:18, 14:22, 14:24, 15:3, 15:6, 15:10, 15:13, 15:15, 15:17, 15:19, 15:23, 16:7, 16:12, 16:21, 16:24, 17:4, 17:8, 17:14, 17:17, 17:23, 18:17, 18:20, 18:22, 19:5, 19:13, 19:22, 20:1, 22:11, 22:13, 22:18, 22:20, 23:7, 23:17, 23:21, 23:23, 24:8, 24:17, 24:20, 24:24, 25:2, 25:4, 25:6, 28:3, 29:13, 40:19, 40:22, 40:25, 41:3, 41:6, 42:7, 42:9, 42:23, 42:25, 43:2, 46:21, 46:25, 47:3, 47:19, 47:23, 50:9, 55:6, 56:1, 56:6, 56:10, 56:15, 64:21, 67:17, 67:21, 70:21, 74:9, 74:18, 74:22, 74:24, 75:23, 77:13, 77:15, 77:19, 77:22, 77:25, 78:4, 78:8, 80:15, 81:6, 81:8, 81:16, 81:23, 82:5, 82:7, 82:10, 82:16, 82:25, 83:2, 83:13, 83:14, 83:16, 83:22, 84:14, 84:16, 84:22, 86:17, 86:20, 87:1, 87:5, 87:7, 87:9, 87:13, 88:10, 88:12, 88:17, 89:4, 89:17</p> <p>court [6] - 6:9, 6:10, 6:25, 7:3, 29:21, 46:2</p> <p>Court's [2] - 17:10, 74:14</p> <p>Courthouse [1] - 1:8</p> <p>courtroom [6] - 3:12, 22:19, 25:5, 81:7, 83:15, 84:15</p> <p>covering [3] - 10:13, 10:25, 11:1</p> <p>crack [2] - 19:9, 19:11</p> <p>critical [2] - 72:2, 73:7</p> <p>cross [1] - 24:12</p> <p>CROSS [1] - 29:14</p> <p>crucial [1] - 72:1</p> <p>cruciate [1] - 39:7</p> <p>cut [1] - 10:2</p>	<p>83:23, 84:17</p> <p>Danada [3] - 40:4, 40:7, 88:5</p> <p>dashboard [1] - 50:15</p> <p>date [15] - 9:16, 22:1, 36:22, 40:14, 41:19, 41:22, 42:4, 52:24, 54:25, 56:18, 59:1, 69:9, 69:11, 70:6, 77:17</p> <p>days [2] - 43:21, 43:23</p> <p>deals [2] - 5:12, 49:8</p> <p>dealt [1] - 57:8</p> <p>death [1] - 81:11</p> <p>decided [3] - 8:18, 54:2, 63:9</p> <p>decision [3] - 9:14, 53:5, 87:4</p> <p>decoloration [1] - 21:5</p> <p>deemed [1] - 85:7</p> <p>defect [1] - 19:18</p> <p>Defendant [6] - 55:25, 77:16, 83:24, 84:24, 85:1, 85:23</p> <p>defendant [1] - 84:19</p> <p>Defendant's [32] - 41:1, 41:10, 46:23, 47:4, 47:9, 47:19, 47:21, 47:25, 50:22, 56:6, 56:8, 59:17, 59:19, 59:21, 64:19, 64:24, 67:14, 67:17, 67:19, 77:8, 77:23, 78:6, 82:11, 82:17, 82:20, 83:3, 83:4, 83:5, 83:9, 83:11, 86:2, 86:14</p> <p>defendant's [9] - 41:3, 46:25, 47:23, 50:25, 56:10, 64:18, 64:21, 67:21, 78:8</p> <p>defendants [3] - 6:23, 6:25, 7:4</p> <p>Defendants [3] - 1:7, 1:19, 2:6</p> <p>Defense [5] - 17:4, 22:20, 23:24, 84:22, 88:12</p> <p>defense [1] - 14:13</p> <p>degeneration [29] - 21:4, 46:9, 46:12, 46:13, 46:16, 47:6, 48:9, 48:10, 48:12, 48:13, 48:16, 48:17, 48:20, 48:25, 49:25, 50:11, 50:18, 51:6, 51:11, 51:19, 51:21, 51:24, 52:1, 52:2, 52:4, 53:24, 69:10, 74:5</p> <p>degenerative [9] - 26:19, 26:22, 49:3, 50:4, 50:12, 68:22, 68:24, 69:1, 69:4</p> <p>degree [1] - 88:1</p> <p>degrees [10] - 28:8, 28:9, 28:11, 38:23, 42:15,</p>	<p>42:21, 43:6, 43:11, 43:12</p> <p>deliberate [1] - 22:16</p> <p>demonstrate [7] - 16:5, 17:12, 17:21, 42:21, 43:11, 51:17, 74:21</p> <p>demonstrated [2] - 20:2, 20:15</p> <p>demonstrating [1] - 43:3</p> <p>demonstrative [2] - 14:2, 15:22</p> <p>denied [2] - 55:18, 85:17</p> <p>denies [3] - 33:5, 33:18, 33:19</p> <p>DENIS [1] - 1:12</p> <p>Department [1] - 85:2</p> <p>describe [6] - 9:20, 30:22, 37:23, 38:21, 48:15, 50:10</p> <p>described [3] - 10:9, 20:19, 26:22</p> <p>desire [2] - 34:7, 34:8</p> <p>detail [1] - 88:20</p> <p>details [1] - 62:25</p> <p>determination [2] - 20:11, 47:14</p> <p>determine [4] - 36:3, 37:3, 37:11, 52:10</p> <p>determining [1] - 20:7</p> <p>develop [2] - 27:11, 69:13</p> <p>developed [1] - 21:14</p> <p>developing [1] - 26:18</p> <p>develops [1] - 21:7</p> <p>diabetes [2] - 33:4, 58:17</p> <p>diagnose [1] - 44:8</p> <p>diagnosed [1] - 44:7</p> <p>diagnosing [2] - 20:11, 78:25</p> <p>diagnosis [5] - 44:10, 44:17, 71:22, 72:3, 73:12</p> <p>diagnostic [3] - 34:13, 45:4, 53:18</p> <p>dictated [2] - 66:6, 66:11</p> <p>different [6] - 10:3, 19:19, 21:4, 21:8, 34:10, 49:14</p> <p>difficulty [1] - 21:12</p> <p>digital [1] - 31:20</p> <p>DIRE [1] - 13:3</p> <p>direct [1] - 24:11</p> <p>DIRECT [3] - 5:5, 15:25, 25:14</p> <p>direction [1] - 57:6</p> <p>directly [1] - 72:21</p> <p>disagree [2] - 75:14, 75:21</p> <p>disagreement [4] - 75:15, 75:16, 75:24, 76:1</p> <p>disappeared [1] - 19:18</p> <p>discarded [1] - 32:9</p> <p>discontinue [1] - 87:21</p> <p>discuss [3] - 71:5, 80:23,</p>	<p>84:11</p> <p>discussing [1] - 22:15</p> <p>discussion [13] - 2:20, 14:6, 16:9, 22:12, 23:22, 42:8, 71:17, 77:14, 77:16, 78:5, 81:22, 82:9, 88:11</p> <p>dismiss [6] - 84:25, 86:17, 87:22, 87:24, 88:9, 88:13</p> <p>disputed [1] - 86:9</p> <p>divide [1] - 7:4</p> <p>Doctor [45] - 4:17, 4:20, 8:10, 8:14, 9:17, 11:11, 13:5, 16:21, 18:14, 18:18, 19:14, 20:5, 20:14, 21:9, 26:12, 26:21, 27:1, 27:11, 27:15, 28:24, 29:6, 29:11, 30:16, 36:8, 38:11, 43:16, 56:17, 60:11, 63:10, 65:4, 65:14, 69:25, 72:2, 72:16, 72:20, 72:25, 74:9, 75:1, 75:10, 75:16, 76:6, 78:12, 79:1, 80:15</p> <p>doctor [47] - 2:23, 12:12, 12:13, 16:13, 16:25, 17:17, 17:24, 20:1, 21:15, 21:22, 23:7, 26:4, 29:1, 31:6, 33:12, 33:15, 34:2, 35:15, 41:7, 41:18, 42:12, 42:17, 42:19, 42:25, 43:2, 43:8, 47:4, 47:25, 50:10, 58:9, 58:22, 59:12, 59:20, 60:3, 62:14, 64:24, 67:24, 74:24, 75:24, 76:23, 79:9, 81:13, 82:5, 88:17, 88:20, 89:4, 89:6</p> <p>doctor's [4] - 2:24, 23:14, 23:20, 77:8</p> <p>doctors [1] - 79:23</p> <p>documented [1] - 66:25</p> <p>documents [1] - 81:16</p> <p>dollars [1] - 7:11</p> <p>done [15] - 24:11, 32:9, 37:10, 42:4, 42:12, 53:14, 53:19, 53:20, 64:5, 65:9, 79:2, 79:5, 80:5, 81:13, 89:9</p> <p>door [1] - 89:10</p> <p>down [12] - 3:1, 3:6, 19:9, 24:20, 58:10, 61:15, 80:19, 80:25, 81:5, 83:13, 89:7</p> <p>Dr [31] - 2:11, 4:2, 4:4, 5:7, 6:2, 6:21, 7:7, 7:12, 15:21, 16:2, 16:15, 17:12, 17:20, 24:14, 25:16, 28:19, 29:16, 71:17, 74:15,</p>
	<p style="text-align: center;">D</p> <p>damage [5] - 9:10, 10:19, 10:23, 18:7, 50:16</p> <p>damaged [1] - 11:1</p> <p>DAMAGES [1] - 1:6</p> <p>damages [3] - 3:22,</p>			

<p>77:16, 81:13, 81:17, 81:23, 83:18, 85:2, 85:12, 85:20, 85:21, 86:2, 86:10, 87:16</p> <p>draw [3] - 38:18, 38:22, 61:1</p> <p>drink [1] - 32:16</p> <p>driver [2] - 58:20, 58:21</p> <p>due [3] - 21:13, 48:17, 81:3</p> <p>during [4] - 17:21, 18:1, 25:8, 73:20</p>	<p>83:6, 83:10, 87:20, 88:1, 88:4</p> <p>exam [4] - 27:17, 30:15, 37:7, 38:24</p> <p>examination [14] - 5:25, 7:22, 8:3, 22:24, 23:3, 37:18, 37:21, 39:22, 41:18, 44:8, 52:11, 60:14, 70:19</p> <p>EXAMINATION [6] - 5:5, 15:25, 25:14, 29:14, 71:15, 76:21</p> <p>examine [3] - 27:16, 69:23, 73:18</p> <p>examined [14] - 7:20, 25:22, 27:24, 28:1, 30:3, 40:15, 43:9, 43:18, 44:3, 60:21, 69:22, 70:10, 71:11, 75:6</p> <p>examining [3] - 6:12, 66:10, 73:6</p> <p>example [1] - 30:24</p> <p>exchanged [2] - 22:23, 24:1</p> <p>excused [1] - 80:16</p> <p>Exhibit [46] - 12:3, 12:5, 12:14, 12:24, 12:25, 13:19, 13:21, 14:11, 14:20, 16:4, 16:19, 17:20, 41:1, 41:3, 41:10, 46:23, 46:25, 47:4, 47:9, 47:21, 47:23, 47:25, 50:23, 50:25, 56:8, 56:10, 59:17, 59:19, 59:21, 64:18, 64:19, 64:21, 64:24, 67:14, 67:19, 67:21, 67:24, 75:3, 77:8, 78:6, 78:8, 82:18, 82:20, 83:9, 83:11, 88:5</p> <p>EXHIBIT [1] - 83:11</p> <p>Exhibit's [1] - 55:25</p> <p>exhibits [1] - 89:4</p> <p>Exhibits [4] - 14:9, 14:22, 15:17, 74:15</p> <p>exited [3] - 22:19, 81:7, 84:15</p> <p>exiting [3] - 22:18, 81:6, 84:14</p> <p>expect [2] - 28:13, 43:22</p> <p>experience [1] - 36:14</p> <p>experienced [1] - 65:24</p> <p>expert [3] - 84:1, 85:6, 85:9</p> <p>explain [3] - 16:2, 16:17, 57:3</p> <p>extent [1] - 50:6</p> <p>external [1] - 28:8</p> <p>extremely [1] - 74:12</p>	<p>facility [3] - 45:3, 65:8, 87:19</p> <p>fact [11] - 26:12, 27:13, 44:24, 53:16, 55:13, 58:4, 66:20, 73:18, 73:23, 80:5, 86:7</p> <p>factoring [1] - 81:4</p> <p>facts [2] - 8:22, 8:25</p> <p>failed [1] - 63:4</p> <p>failing [1] - 63:8</p> <p>failure [1] - 34:14</p> <p>fair [42] - 12:20, 31:14, 31:17, 32:19, 34:12, 35:6, 39:16, 40:9, 43:16, 43:25, 45:2, 48:2, 48:21, 49:9, 51:11, 52:16, 52:19, 52:23, 53:1, 53:17, 55:18, 56:17, 59:14, 63:12, 63:16, 64:6, 64:15, 65:5, 65:15, 65:22, 66:9, 68:11, 68:15, 68:23, 69:11, 69:23, 70:23, 71:7, 72:16, 72:17, 79:11, 80:2</p> <p>Fair [2] - 89:1, 89:14</p> <p>fairly [1] - 37:7</p> <p>familiar [1] - 34:2</p> <p>family [2] - 23:9, 81:11</p> <p>far [1] - 5:1</p> <p>fast [2] - 65:6, 65:7</p> <p>favor [1] - 85:23</p> <p>fee [1] - 7:10</p> <p>fellow [1] - 5:15</p> <p>femoral [6] - 10:21, 19:4, 21:3, 49:20, 76:4, 76:16</p> <p>femur [5] - 10:21, 10:22, 18:4, 18:24, 19:21</p> <p>few [8] - 22:14, 22:17, 71:24, 80:19, 80:21, 80:25, 81:4, 81:10</p> <p>fiberoptic [1] - 9:24</p> <p>file [14] - 23:14, 23:19, 23:20, 30:16, 30:19, 35:7, 35:8, 35:9, 35:11, 35:16, 35:17, 65:11, 67:8, 82:2</p> <p>fill [2] - 31:21, 31:23</p> <p>filled [1] - 32:4</p> <p>films [7] - 54:6, 54:9, 54:16, 54:22, 67:6, 76:3, 87:18</p> <p>findings [30] - 8:6, 10:6, 11:4, 11:7, 20:22, 21:9, 25:22, 26:12, 27:1, 27:5, 37:2, 37:24, 38:15, 38:24, 39:4, 39:21, 51:18, 52:11, 53:21, 54:9, 63:1, 63:25, 66:7, 66:12, 68:21, 69:10, 71:5, 72:12, 75:13</p>	<p>fine [7] - 2:15, 3:4, 14:18, 15:3, 16:24, 25:2, 83:2</p> <p>finish [1] - 55:7</p> <p>finished [2] - 5:17, 5:20</p> <p>finishes [1] - 23:13</p> <p>Firm [1] - 2:6</p> <p>first [20] - 7:13, 7:14, 7:15, 8:15, 18:2, 23:2, 24:12, 28:1, 30:3, 37:10, 37:18, 39:23, 46:22, 47:10, 60:20, 64:10, 84:1, 85:14, 88:25, 89:17</p> <p>firstly [1] - 8:5</p> <p>five [3] - 43:21, 43:23, 71:25</p> <p>fix [1] - 65:21</p> <p>fixed [1] - 65:21</p> <p>flex [1] - 38:22</p> <p>flexion [5] - 26:1, 28:1, 42:15, 42:16, 42:22</p> <p>folder [2] - 45:24, 67:25</p> <p>folks [1] - 8:20</p> <p>follow [3] - 24:6, 29:18, 60:11</p> <p>follow-up [2] - 29:18, 60:11</p> <p>following [1] - 27:6</p> <p>form [10] - 7:24, 20:14, 31:20, 31:22, 31:23, 40:7, 50:9, 70:21, 76:8</p> <p>formal [2] - 87:22, 87:23</p> <p>formally [3] - 82:11, 84:18, 88:25</p> <p>forthwith [1] - 24:13</p> <p>forward [1] - 38:23</p> <p>four [6] - 27:25, 35:9, 38:3, 56:25, 57:1, 57:16</p> <p>fourteen [2] - 64:15, 88:18</p> <p>fourth [1] - 19:22</p> <p>fractures [1] - 48:2</p> <p>framework [1] - 84:3</p> <p>free [1] - 21:20</p> <p>frequently [2] - 21:17</p> <p>fresh [1] - 19:9</p> <p>FROM [1] - 83:11</p> <p>front [2] - 16:4, 16:16</p> <p>full [2] - 10:24, 50:16</p> <p>functioning [2] - 27:4, 29:8</p> <p>furthermore [1] - 27:8</p> <p>future [1] - 71:2</p>	<p>gentlemen [26] - 2:8, 2:21, 2:25, 3:5, 3:18, 4:25, 5:3, 16:24, 22:13, 23:7, 23:23, 24:1, 25:7, 77:13, 77:15, 80:16, 81:8, 81:16, 82:10, 83:6, 83:17, 83:22, 84:16, 89:1, 89:14</p> <p>given [4] - 31:7, 65:3, 66:7, 69:10</p> <p>glenohumeral [1] - 69:4</p> <p>goal [1] - 65:15</p> <p>golf [2] - 21:17, 28:20</p> <p>grade [7] - 49:5, 49:17, 49:21, 49:23, 50:5, 50:17, 50:18</p> <p>grades [1] - 49:14</p> <p>grind [2] - 61:6, 61:8</p> <p>grittiness [3] - 25:23, 25:24, 26:13</p> <p>guide [2] - 63:13, 63:14</p> <p>Guider [1] - 4:18</p> <p>guides [1] - 63:15</p>
E				H
<p>easel [5] - 15:14, 15:21, 17:1, 17:15, 74:19</p> <p>economy [1] - 89:13</p> <p>edge [1] - 10:17</p> <p>educational [1] - 5:10</p> <p>effect [7] - 32:20, 72:3, 79:8, 79:11, 79:24, 80:3, 86:14</p> <p>effective [1] - 20:10</p> <p>effectiveness [1] - 20:6</p> <p>effects [1] - 79:18</p> <p>efforts [1] - 62:14</p> <p>eighteen [1] - 88:18</p> <p>either [1] - 74:4</p> <p>emergency [4] - 57:4, 57:7, 57:10, 57:24</p> <p>ends [1] - 5:1</p> <p>engage [1] - 21:19</p> <p>engagement [1] - 82:12</p> <p>English [1] - 57:25</p> <p>enlarged [1] - 13:25</p> <p>entered [3] - 3:12, 25:5, 83:15</p> <p>entering [3] - 3:11, 25:4, 83:14</p> <p>entire [1] - 45:25</p> <p>equal [1] - 7:1</p> <p>equally [1] - 7:4</p> <p>ESQ [2] - 1:17, 1:20</p> <p>evaluate [4] - 6:14, 7:15, 7:18</p> <p>evaluating [2] - 34:17</p> <p>evaluation [4] - 35:21, 53:7, 53:11, 60:11</p> <p>evening [2] - 84:11, 84:12</p> <p>evidence [44] - 11:22, 11:23, 12:24, 13:18, 13:20, 13:22, 13:23, 14:15, 14:16, 14:19, 14:21, 14:23, 16:3, 47:17, 47:20, 47:22, 47:24, 55:16, 56:1, 56:3, 56:7, 56:9, 56:11, 59:18, 59:21, 67:15, 67:18, 67:20, 67:22, 77:9, 77:20, 77:21, 77:23, 78:7, 78:9, 78:10, 82:18, 82:21,</p>	<p style="text-align: center;">F</p> <p>facilities [1] - 40:1</p>	<p>facility [3] - 45:3, 65:8, 87:19</p> <p>fact [11] - 26:12, 27:13, 44:24, 53:16, 55:13, 58:4, 66:20, 73:18, 73:23, 80:5, 86:7</p> <p>factoring [1] - 81:4</p> <p>facts [2] - 8:22, 8:25</p> <p>failed [1] - 63:4</p> <p>failing [1] - 63:8</p> <p>failure [1] - 34:14</p> <p>fair [42] - 12:20, 31:14, 31:17, 32:19, 34:12, 35:6, 39:16, 40:9, 43:16, 43:25, 45:2, 48:2, 48:21, 49:9, 51:11, 52:16, 52:19, 52:23, 53:1, 53:17, 55:18, 56:17, 59:14, 63:12, 63:16, 64:6, 64:15, 65:5, 65:15, 65:22, 66:9, 68:11, 68:15, 68:23, 69:11, 69:23, 70:23, 71:7, 72:16, 72:17, 79:11, 80:2</p> <p>Fair [2] - 89:1, 89:14</p> <p>fairly [1] - 37:7</p> <p>familiar [1] - 34:2</p> <p>family [2] - 23:9, 81:11</p> <p>far [1] - 5:1</p> <p>fast [2] - 65:6, 65:7</p> <p>favor [1] - 85:23</p> <p>fee [1] - 7:10</p> <p>fellow [1] - 5:15</p> <p>femoral [6] - 10:21, 19:4, 21:3, 49:20, 76:4, 76:16</p> <p>femur [5] - 10:21, 10:22, 18:4, 18:24, 19:21</p> <p>few [8] - 22:14, 22:17, 71:24, 80:19, 80:21, 80:25, 81:4, 81:10</p> <p>fiberoptic [1] - 9:24</p> <p>file [14] - 23:14, 23:19, 23:20, 30:16, 30:19, 35:7, 35:8, 35:9, 35:11, 35:16, 35:17, 65:11, 67:8, 82:2</p> <p>fill [2] - 31:21, 31:23</p> <p>filled [1] - 32:4</p> <p>films [7] - 54:6, 54:9, 54:16, 54:22, 67:6, 76:3, 87:18</p> <p>findings [30] - 8:6, 10:6, 11:4, 11:7, 20:22, 21:9, 25:22, 26:12, 27:1, 27:5, 37:2, 37:24, 38:15, 38:24, 39:4, 39:21, 51:18, 52:11, 53:21, 54:9, 63:1, 63:25, 66:7, 66:12, 68:21, 69:10, 71:5, 72:12, 75:13</p>	<p>fine [7] - 2:15, 3:4, 14:18, 15:3, 16:24, 25:2, 83:2</p> <p>finish [1] - 55:7</p> <p>finished [2] - 5:17, 5:20</p> <p>finishes [1] - 23:13</p> <p>Firm [1] - 2:6</p> <p>first [20] - 7:13, 7:14, 7:15, 8:15, 18:2, 23:2, 24:12, 28:1, 30:3, 37:10, 37:18, 39:23, 46:22, 47:10, 60:20, 64:10, 84:1, 85:14, 88:25, 89:17</p> <p>firstly [1] - 8:5</p> <p>five [3] - 43:21, 43:23, 71:25</p> <p>fix [1] - 65:21</p> <p>fixed [1] - 65:21</p> <p>flex [1] - 38:22</p> <p>flexion [5] - 26:1, 28:1, 42:15, 42:16, 42:22</p> <p>folder [2] - 45:24, 67:25</p> <p>folks [1] - 8:20</p> <p>follow [3] - 24:6, 29:18, 60:11</p> <p>follow-up [2] - 29:18, 60:11</p> <p>following [1] - 27:6</p> <p>form [10] - 7:24, 20:14, 31:20, 31:22, 31:23, 40:7, 50:9, 70:21, 76:8</p> <p>formal [2] - 87:22, 87:23</p> <p>formally [3] - 82:11, 84:18, 88:25</p> <p>forthwith [1] - 24:13</p> <p>forward [1] - 38:23</p> <p>four [6] - 27:25, 35:9, 38:3, 56:25, 57:1, 57:16</p> <p>fourteen [2] - 64:15, 88:18</p> <p>fourth [1] - 19:22</p> <p>fractures [1] - 48:2</p> <p>framework [1] - 84:3</p> <p>free [1] - 21:20</p> <p>frequently [2] - 21:17</p> <p>fresh [1] - 19:9</p> <p>FROM [1] - 83:11</p> <p>front [2] - 16:4, 16:16</p> <p>full [2] - 10:24, 50:16</p> <p>functioning [2] - 27:4, 29:8</p> <p>furthermore [1] - 27:8</p> <p>future [1] - 71:2</p>	<p>half [1] - 28:1</p> <p>hallmark [1] - 9:13</p> <p>Han [33] - 2:2, 3:21, 6:3, 7:13, 7:22, 8:11, 9:6, 12:16, 13:11, 25:17, 25:19, 27:3, 28:5, 29:19, 30:3, 30:6, 30:20, 33:1, 33:24, 35:13, 40:13, 45:25, 46:9, 47:11, 52:20, 54:5, 59:14, 60:9, 61:15, 70:17, 72:20, 72:21, 75:20</p> <p>HAN [1] - 1:2</p> <p>Han's [2] - 12:21, 43:17</p> <p>hand [6] - 11:17, 18:2, 19:5, 28:3, 56:21, 61:14</p> <p>handle [1] - 80:20</p> <p>handwriting [1] - 32:5</p> <p>happy [2] - 23:2, 72:14</p> <p>HARRIS [1] - 1:15</p> <p>Harris [1] - 2:4</p> <p>head [1] - 28:4</p> <p>health [1] - 71:8</p> <p>hear [5] - 5:1, 5:3, 25:24, 61:25, 62:2</p> <p>heard [1] - 61:25</p> <p>heavy [1] - 28:17</p> <p>held [12] - 2:20, 3:9, 14:6, 16:9, 22:12, 23:22, 42:8, 77:14, 78:5, 81:22, 82:9, 88:11</p> <p>help [5] - 33:13, 37:11, 41:14, 41:20, 65:15</p> <p>helpful [1] - 40:8</p> <p>helping [3] - 9:3, 43:20, 43:25</p> <p>herself [1] - 57:19</p>
		G		
			<p>gait [1] - 79:12</p> <p>game [1] - 72:19</p> <p>general [2] - 59:9, 59:13</p> <p>generally [4] - 53:19, 53:20, 57:5, 74:12</p> <p>generate [1] - 31:25</p> <p>generated [1] - 35:20</p>	

<p>hiked [1] - 21:17 hips [1] - 79:19 histories [1] - 85:18 history [25] - 20:19, 20:21, 30:13, 30:22, 30:23, 30:25, 31:2, 31:3, 31:9, 31:14, 31:16, 31:19, 32:5, 32:11, 32:15, 33:1, 33:5, 33:10, 57:5, 58:11, 58:23, 59:15, 71:18, 85:17 hits [1] - 50:15 HLD [1] - 58:17 holding [1] - 16:25 hole [1] - 10:1 holes [1] - 9:23 Honor [58] - 2:9, 2:10, 2:13, 3:2, 3:7, 3:15, 3:25, 12:9, 12:11, 12:23, 13:1, 13:16, 13:25, 14:4, 14:14, 15:8, 15:20, 16:6, 17:7, 17:16, 17:25, 18:13, 18:19, 22:22, 23:11, 23:12, 24:16, 24:25, 25:1, 25:13, 40:21, 40:23, 42:5, 42:11, 43:1, 47:16, 55:8, 55:24, 56:5, 71:13, 71:14, 74:23, 76:20, 77:11, 77:24, 80:14, 82:15, 83:1, 83:20, 86:1, 86:19, 86:23, 87:8, 88:16, 89:2, 89:3, 89:15, 89:16 HONORABLE [1] - 1:12 hook [1] - 18:12 hopefully [1] - 65:23 horn [3] - 44:11, 44:13, 44:17 HOSPITAL [1] - 56:9 Hospital [3] - 5:18, 5:20, 54:25 hospital [13] - 5:21, 55:2, 55:11, 55:14, 55:17, 55:19, 55:21, 56:3, 56:18, 58:14, 58:23, 59:8, 85:13 hours [1] - 88:18 hypertension [2] - 33:4, 58:17 hypothetically [1] - 79:9</p>	<p>41:4, 46:20, 46:24, 47:1, 64:18, 64:20, 64:22, 77:20, 82:12, 82:23, 83:12 identify [1] - 38:12 illness [1] - 58:11 IME's [1] - 6:11 immediate [1] - 8:8 immediately [5] - 36:12, 62:20, 64:9, 73:2, 86:8 impingement [1] - 68:18 implies [2] - 10:14, 27:14 imply [1] - 58:25 important [11] - 31:4, 32:24, 36:2, 37:1, 37:20, 54:12, 66:20, 71:19, 71:22, 73:9, 76:4 impression [2] - 21:1, 48:1 improved [1] - 43:17 improving [2] - 64:9, 72:14 inaccurate [1] - 59:15 inadequate [1] - 86:15 incision [1] - 65:1 include [1] - 44:15 including [1] - 4:25 incomplete [2] - 44:16, 59:16 incorporate [4] - 33:20, 46:5, 46:6, 84:9 incorporated [3] - 35:8, 46:7, 86:2 incorrect [1] - 63:10 increasing [1] - 63:11 indeed [1] - 76:2 Index [2] - 1:4, 2:1 indicate [10] - 26:8, 26:13, 55:15, 57:23, 59:22, 60:8, 63:3, 63:7, 68:9, 68:17 indicated [11] - 3:22, 11:11, 25:16, 26:13, 41:7, 44:13, 72:9, 78:15, 85:16, 86:5, 86:13 indicates [4] - 26:9, 58:10, 68:13, 85:5 indicating [5] - 18:22, 19:5, 19:22, 28:3, 55:14 indication [3] - 34:11, 60:3, 80:6 indications [6] - 34:2, 34:5, 34:6, 34:12, 52:20, 63:4 individual [5] - 63:16, 63:19, 64:3, 65:22, 68:18 individual's [3] - 38:12, 79:12, 79:14 individuals [1] - 79:22 inflammation [4] - 10:11, 10:12</p>	<p>info [1] - 57:14 inform [1] - 4:22 informally [1] - 84:18 information [5] - 8:22, 31:8, 36:15, 57:1, 62:22 informed [9] - 8:18, 8:20, 36:8, 54:8, 54:17, 54:20, 55:16, 59:7, 59:12 initial [4] - 26:25, 27:17, 27:24, 44:7 injure [3] - 31:1, 32:14 injured [2] - 6:19, 7:19 injuries [4] - 5:13, 7:20, 20:12, 76:13 injuring [1] - 20:20 injury [9] - 10:14, 19:19, 20:15, 26:10, 26:20, 26:25, 30:14, 32:21, 85:24 inner [4] - 18:6, 18:23, 18:25, 19:1 inquire [3] - 13:1, 17:9, 29:12 inquiry [1] - 24:18 inside [14] - 5:12, 6:1, 10:10, 10:24, 11:5, 11:6, 11:12, 12:21, 19:20, 20:8, 20:22, 21:13, 25:25, 26:15 inspect [1] - 66:14 inspected [1] - 66:17 instability [2] - 39:8, 39:10 instance [3] - 64:3, 80:7, 85:5 instances [1] - 31:7 instruct [1] - 89:13 instrument [1] - 9:23 instrumentation [2] - 10:9, 11:12 instruments [2] - 10:1, 10:2 intact [3] - 74:4, 74:6 intake [3] - 30:10, 31:20, 32:2 intense [1] - 9:11 interarticular [1] - 26:15 interest [3] - 23:15, 56:13, 87:23 interesting [1] - 73:3 interior [2] - 9:25, 10:5 internal [4] - 9:10, 28:10, 28:11, 28:17 internship [2] - 5:17, 5:18 interoperative [9] - 12:16, 13:8, 17:13, 18:1, 20:9, 20:12, 54:10, 54:11, 76:10 interoperatively [2] - 20:25, 76:12 interpreter [3] - 58:1,</p>	<p>58:4, 72:22 intrasubstance [5] - 48:10, 51:4, 51:22, 51:23, 52:3 invasive [1] - 9:22 invited [1] - 89:10 involved [1] - 81:3 irrespective [1] - 76:6 Island [1] - 5:19 Israel [1] - 5:18 issue [6] - 3:22, 54:21, 81:13, 83:23, 87:1, 89:5 issues [1] - 23:9 item [1] - 81:19 itis [1] - 10:11 itself [2] - 44:20, 64:12</p>	<p>10:4, 10:5, 10:6, 10:8, 10:10, 10:13, 10:15, 10:20, 10:21, 10:23, 10:25, 11:5, 11:6, 11:8, 11:13, 12:21, 18:3, 18:11, 18:21, 18:22, 19:6, 19:20, 20:2, 20:3, 20:20, 20:22, 21:13, 25:20, 25:22, 25:24, 25:25, 26:1, 26:2, 26:3, 26:5, 26:16, 26:20, 27:4, 29:4, 29:7, 29:8, 30:25, 33:7, 33:10, 33:11, 33:17, 33:19, 33:20, 36:12, 36:24, 37:5, 38:6, 38:22, 39:2, 39:18, 39:22, 40:14, 42:13, 42:24, 43:17, 43:22, 44:4, 44:11, 44:13, 44:17, 45:12, 45:19, 46:10, 48:3, 50:11, 50:15, 50:21, 52:21, 58:18, 58:19, 58:24, 59:9, 59:23, 60:9, 60:20, 61:16, 61:25, 62:8, 67:5, 67:10, 73:21, 73:22, 75:14, 78:17, 78:18, 78:23, 78:25, 79:6, 79:8, 85:14, 86:4, 86:8, 86:12 KNEE [2] - 46:23, 47:21 kneecap [4] - 49:9, 49:12, 61:13, 61:16 knees [2] - 79:19, 79:24 knowledge [1] - 71:3 known [1] - 66:13 Korean [1] - 72:24</p>
<p>I</p> <p>ID [8] - 11:25, 14:16, 14:18, 40:20, 56:1, 81:20, 83:4, 83:5 idea [1] - 80:11 identification [21] - 12:2, 12:4, 12:6, 12:14, 12:24, 14:8, 14:10, 14:12, 40:18, 41:2,</p>			<p>J</p> <p>Jamaica [1] - 1:9 Jewish [1] - 5:19 job [1] - 6:19 JOHNSON [1] - 1:17 Johnson [1] - 2:5 joint [6] - 10:13, 10:15, 25:23, 26:3, 69:2, 69:5 joints [2] - 5:13, 71:9 judge [4] - 22:10, 41:20, 42:18, 46:19 Judge [2] - 56:13, 64:18 judicial [1] - 89:13 juror [2] - 81:11, 81:12 jurors [6] - 2:22, 3:14, 23:9, 80:21, 81:10, 84:2 jurors' [1] - 2:22 JURY [1] - 17:3 jury [51] - 2:25, 3:5, 3:11, 3:12, 4:25, 5:9, 9:20, 14:2, 15:2, 15:7, 15:9, 15:11, 15:16, 15:18, 16:2, 16:5, 16:17, 16:25, 17:2, 17:12, 20:15, 22:13, 22:18, 22:19, 23:15, 24:2, 24:20, 25:3, 25:4, 25:5, 25:9, 27:22, 30:23, 38:21, 42:21, 43:11, 48:15, 50:10, 57:3, 74:15, 74:21, 80:17, 81:6, 81:7, 83:13, 83:14, 83:15, 84:14, 84:15, 89:11 jury's [1] - 16:14</p>	<p>L</p> <p>Lachman's [4] - 39:1, 39:6, 62:3, 62:5 ladies [12] - 2:25, 3:4, 3:18, 4:24, 5:3, 16:24, 22:13, 25:6, 25:7, 80:16, 83:16, 83:22 language [1] - 57:25 last [5] - 4:14, 24:21, 25:21, 69:25, 70:2 lateral [14] - 10:16, 10:20, 10:21, 18:21, 18:24, 19:3, 21:3, 39:15, 49:19, 76:2, 76:4, 76:14, 76:15 Law [1] - 2:6 laying [1] - 61:15 leading [1] - 62:25 leave [2] - 74:6, 89:10 leaves [1] - 81:25 leaving [2] - 89:7, 89:11 LEFT [2] - 46:23, 47:21 left [52] - 2:11, 3:20, 7:20, 18:2, 18:14, 18:16,</p>
			<p>K</p> <p>keep [1] - 82:24 Keumok [3] - 2:2, 6:3, 12:16 KEUMOK [1] - 1:2 kind [1] - 9:21 knee [107] - 7:20, 9:9, 9:10, 9:11, 9:24, 9:25,</p>	

<p>20:3, 20:20, 21:3, 25:20, 25:22, 27:4, 29:4, 29:7, 29:8, 30:25, 33:7, 33:17, 33:19, 33:20, 36:12, 36:24, 38:6, 39:1, 42:13, 42:24, 43:4, 43:17, 44:4, 44:10, 44:11, 44:13, 44:17, 45:12, 45:19, 46:10, 48:3, 52:21, 56:21, 57:13, 57:14, 58:17, 58:18, 58:24, 59:23, 60:9, 60:20, 62:8, 67:10, 68:24, 75:3, 85:14</p> <p>left-hand [2] - 18:2, 56:21</p> <p>leg [2] - 38:23, 61:14</p> <p>legal [1] - 88:21</p> <p>legs [1] - 22:15</p> <p>length [1] - 64:25</p> <p>less [2] - 68:13, 89:12</p> <p>letting [1] - 80:22</p> <p>level [3] - 19:19, 23:25, 32:13</p> <p>liability [1] - 83:23</p> <p>lies [1] - 61:13</p> <p>life [1] - 65:22</p> <p>lifting [2] - 28:16, 28:17</p> <p>ligament [1] - 39:7</p> <p>ligaments [2] - 5:13, 39:15</p> <p>Ligaments [1] - 39:15</p> <p>light [2] - 85:7, 85:11</p> <p>likely [2] - 27:3, 27:8</p> <p>limitation [1] - 29:2</p> <p>limitations [4] - 27:19, 28:14, 28:22, 29:3</p> <p>limited [1] - 29:8</p> <p>line [2] - 24:18, 25:23</p> <p>lines [2] - 21:5, 31:21</p> <p>listening [1] - 61:25</p> <p>litigation [1] - 85:7</p> <p>longstanding [1] - 86:8</p> <p>look [21] - 10:5, 21:5, 21:8, 23:2, 33:15, 35:14, 37:20, 39:12, 41:9, 41:21, 47:5, 47:25, 48:1, 52:10, 52:19, 56:20, 58:9, 63:25, 67:5, 72:7, 72:10</p> <p>looked [5] - 19:19, 20:24, 54:9, 67:6, 72:8</p> <p>looking [9] - 19:20, 20:10, 34:16, 34:22, 39:17, 41:25, 47:9, 56:21</p> <p>loose [5] - 11:5, 18:10, 18:12, 18:17, 76:15</p> <p>lose [1] - 79:22</p> <p>loss [1] - 28:7</p> <p>losses [1] - 28:12</p> <p>loud [1] - 4:24</p> <p>lower [1] - 38:23</p>	<p style="text-align: center;">M</p> <p>M-1 [3] - 82:23, 83:4, 83:11</p> <p>magnetic [1] - 20:11</p> <p>mailing [1] - 82:22</p> <p>MAILLOUX [74] - 1:20, 2:6, 2:10, 2:18, 3:7, 3:15, 11:24, 12:11, 13:1, 13:4, 13:16, 14:3, 14:14, 14:17, 15:12, 17:7, 17:25, 18:13, 22:10, 22:22, 23:12, 23:20, 24:4, 24:16, 24:19, 24:25, 29:12, 29:15, 40:17, 40:23, 41:5, 41:20, 42:18, 42:24, 46:19, 47:2, 47:16, 55:8, 55:24, 56:2, 56:12, 59:17, 62:18, 64:17, 64:23, 67:13, 67:23, 70:1, 71:13, 74:23, 75:22, 76:20, 76:22, 77:7, 77:18, 77:24, 78:2, 78:10, 80:13, 82:1, 82:15, 82:17, 83:7, 84:19, 84:24, 86:19, 86:22, 87:3, 87:6, 87:8, 87:12, 87:15, 89:2, 89:16</p> <p>Mailloux [1] - 2:7</p> <p>Maimonides [1] - 5:18</p> <p>major [2] - 76:1, 76:4</p> <p>maneuvering [1] - 57:21</p> <p>Manhattan [1] - 5:19</p> <p>manner [2] - 4:24, 81:2</p> <p>margins [1] - 21:6</p> <p>Mark [1] - 11:25</p> <p>mark [8] - 12:1, 14:7, 40:25, 46:19, 64:17, 67:13, 83:3, 83:5</p> <p>marked [46] - 11:24, 12:3, 12:5, 12:7, 12:13, 13:17, 13:19, 13:22, 13:23, 14:4, 14:10, 14:12, 14:19, 14:21, 14:23, 15:4, 16:3, 40:17, 41:2, 41:4, 41:9, 46:24, 47:1, 47:20, 47:22, 47:24, 55:25, 56:9, 56:11, 59:18, 59:20, 64:20, 64:22, 67:20, 67:22, 77:7, 77:22, 78:7, 78:9, 81:19, 82:11, 82:20, 82:23, 83:4, 83:10, 83:12</p> <p>marking [1] - 44:14</p> <p>Mary [1] - 40:22</p> <p>matches [1] - 16:21</p> <p>matter [6] - 37:8, 37:15, 78:15, 81:9, 87:14, 87:15</p>	<p>McMurray's [4] - 38:8, 38:11, 38:15, 60:23</p> <p>Mcrae [1] - 85:3</p> <p>MCRAE [1] - 85:4</p> <p>mean [4] - 36:5, 54:18, 57:18, 57:20</p> <p>means [11] - 5:24, 10:11, 10:20, 11:5, 17:5, 18:4, 21:6, 26:16, 44:17, 49:11, 52:14</p> <p>meant [1] - 44:14</p> <p>mechanical [1] - 61:20</p> <p>mechanisms [1] - 79:20</p> <p>medial [15] - 10:16, 18:3, 18:5, 18:6, 18:9, 25:23, 44:11, 44:13, 44:17, 44:18, 48:5, 51:5, 76:2, 76:14</p> <p>Medial [1] - 39:15</p> <p>medical [13] - 5:16, 32:15, 33:4, 33:8, 36:14, 39:25, 53:18, 57:24, 66:16, 84:1, 87:18, 88:1</p> <p>medicine [2] - 5:12, 32:16</p> <p>member [1] - 23:10</p> <p>memorialization [1] - 24:14</p> <p>memorialize [1] - 82:14</p> <p>meniscal [2] - 44:8, 76:2</p> <p>menisci [1] - 51:17</p> <p>meniscus [27] - 10:16, 10:17, 18:5, 18:6, 18:9, 18:23, 18:24, 38:13, 44:11, 44:14, 44:17, 44:18, 46:13, 48:5, 48:18, 48:19, 51:1, 51:5, 51:14, 51:19, 52:1, 52:6, 52:14, 76:2, 76:14</p> <p>mention [3] - 37:25, 38:2, 66:9</p> <p>mentioned [4] - 30:22, 52:3, 72:6, 76:5</p> <p>mentions [1] - 66:11</p> <p>met [1] - 8:16</p> <p>Mexico [1] - 5:17</p> <p>middle [2] - 58:10, 73:21</p> <p>midst [1] - 85:7</p> <p>might [3] - 23:15, 40:8, 80:6</p> <p>mild [4] - 68:24, 69:1, 69:4</p> <p>mind [2] - 34:18, 36:22</p> <p>minimal [1] - 9:22</p> <p>minute [4] - 16:7, 82:7, 87:1, 88:19</p> <p>minutes [5] - 22:14, 64:15, 65:6, 80:25, 88:18</p> <p>miss [1] - 73:22</p> <p>missed [1] - 22:24</p>	<p>missing [1] - 66:24</p> <p>moment [7] - 17:14, 23:10, 55:6, 74:24, 74:25, 78:4, 81:20</p> <p>momentarily [2] - 80:16, 81:5</p> <p>moments [4] - 22:17, 80:19, 81:4, 81:10</p> <p>month [5] - 8:1, 8:5, 20:19, 20:22, 72:13</p> <p>months [1] - 72:13</p> <p>morning [13] - 2:8, 2:9, 2:10, 2:12, 5:7, 5:8, 13:5, 13:6, 29:16, 29:17, 84:12, 89:1, 89:18</p> <p>most [6] - 10:19, 19:3, 49:23, 49:25, 50:5, 76:3</p> <p>mostly [1] - 6:12</p> <p>motion [41] - 27:25, 28:12, 36:11, 36:23, 37:1, 37:2, 37:5, 37:6, 37:9, 37:12, 37:13, 37:14, 37:25, 40:14, 42:3, 42:12, 43:17, 43:23, 44:4, 60:14, 62:8, 62:9, 62:11, 63:11, 63:13, 64:9, 72:6, 72:8, 84:19, 86:2, 86:23, 87:5, 87:6, 87:7, 87:8, 87:22, 87:24, 88:6, 88:16, 88:20, 89:17</p> <p>motions [3] - 84:20, 86:17, 86:21</p> <p>motor [3] - 7:19, 58:19, 76:18</p> <p>move [8] - 12:23, 25:24, 47:16, 56:2, 67:15, 77:9, 84:24, 85:1</p> <p>moved [1] - 61:16</p> <p>MR [135] - 2:4, 2:6, 2:9, 2:10, 2:13, 2:17, 2:18, 3:2, 3:7, 3:8, 3:15, 3:16, 3:25, 4:2, 5:6, 11:17, 11:21, 11:23, 11:24, 11:25, 12:9, 12:11, 12:23, 13:1, 13:4, 13:16, 13:25, 14:3, 14:14, 14:17, 15:1, 15:8, 15:12, 15:14, 15:20, 16:1, 16:6, 16:19, 17:7, 17:10, 17:16, 17:19, 17:25, 18:13, 22:10, 22:22, 23:5, 23:11, 23:12, 23:19, 23:20, 24:4, 24:16, 24:19, 24:25, 25:1, 25:13, 25:15, 29:11, 29:12, 29:15, 40:17, 40:21, 40:23, 40:24, 41:5, 41:20, 42:5, 42:11, 42:18, 42:24, 46:19,</p>	<p>47:2, 47:16, 47:18, 50:8, 55:8, 55:24, 56:2, 56:5, 56:12, 56:16, 59:17, 62:18, 64:17, 64:23, 67:13, 67:16, 67:23, 70:1, 70:20, 71:13, 71:14, 71:16, 74:14, 74:20, 74:23, 75:19, 75:22, 76:19, 76:20, 76:22, 77:7, 77:11, 77:18, 77:21, 77:24, 78:2, 78:10, 80:13, 80:14, 82:1, 82:4, 82:15, 82:17, 83:1, 83:7, 83:8, 83:20, 84:19, 84:24, 86:1, 86:19, 86:22, 87:3, 87:6, 87:8, 87:12, 87:15, 88:4, 88:15, 89:2, 89:3, 89:15, 89:16</p> <p>MRI [48] - 8:6, 8:7, 9:14, 20:7, 20:10, 34:9, 34:10, 34:11, 44:19, 44:20, 45:3, 45:11, 45:12, 45:16, 45:19, 46:23, 47:10, 47:21, 51:18, 52:9, 53:14, 53:19, 53:20, 53:21, 54:6, 54:9, 54:12, 54:16, 54:22, 66:13, 66:22, 67:2, 67:10, 67:19, 68:3, 68:6, 68:21, 72:12, 75:11, 75:13, 75:21, 75:25, 76:5, 76:6, 76:7, 76:10</p> <p>MRIs [3] - 45:6, 71:5, 73:15</p> <p>mucoid [1] - 48:20</p> <p>multiple [2] - 7:20, 23:9</p> <p>muscles [1] - 5:13</p> <p>MVA [2] - 58:19, 76:18</p> <p>myxoid [19] - 46:9, 46:12, 46:13, 46:16, 47:6, 48:9, 48:10, 48:12, 48:13, 48:15, 48:20, 48:25, 51:5, 51:10, 51:21, 51:24, 52:1, 52:2, 52:4</p> <p style="text-align: center;">N</p> <p>name [2] - 4:10, 4:14</p> <p>Nancy [1] - 47:19</p> <p>Narducci [1] - 85:3</p> <p>NARDUCCI [1] - 85:3</p> <p>national [1] - 5:25</p> <p>nature [1] - 6:9</p> <p>necessary [1] - 66:8</p> <p>neck [6] - 58:18, 87:17, 87:21, 87:24, 88:2, 88:13</p> <p>need [14] - 2:15, 3:2, 6:16, 10:2, 14:24, 15:1, 17:5, 25:10, 73:1,</p>
--	--	---	--	--

<p>73:11, 78:10, 81:24, 84:17, 88:20 needs [3] - 25:9, 65:21, 81:11 negative [11] - 38:17, 38:25, 39:5, 39:13, 60:25, 61:3, 61:5, 61:11, 61:22, 62:1, 62:5 never [9] - 24:1, 56:17, 59:1, 59:3, 69:16, 71:4, 71:11, 80:10, 89:8 NEW [4] - 1:1, 41:1, 56:8, 83:9 new [6] - 25:23, 26:12, 30:9, 30:10, 31:13, 79:24 New [16] - 1:9, 1:16, 1:20, 8:20, 30:7, 35:2, 35:3, 35:17, 36:9, 36:19, 36:21, 36:23, 41:8, 54:24, 88:5 next [6] - 15:3, 15:19, 21:25, 25:11, 28:5, 56:21 none [1] - 22:23 nonoperative [1] - 63:8 normal [13] - 13:14, 28:2, 28:6, 28:9, 28:11, 29:8, 44:4, 51:17, 52:6, 52:13, 52:14, 62:11, 77:1 normally [1] - 23:12 notation [2] - 58:4, 63:10 notations [1] - 55:13 note [4] - 57:9, 58:1, 66:17, 71:19 noted [6] - 27:8, 28:25, 49:3, 51:23, 52:6, 56:22 notes [4] - 46:5, 46:6, 58:22, 89:21 nothing [5] - 4:7, 8:7, 18:4, 80:14, 83:20 notice [1] - 85:14 November [2] - 60:11, 70:6 number [1] - 76:1 Number [1] - 2:2 numbers [1] - 56:22 nurse [1] - 57:5</p>	<p>objects [1] - 28:17 obligation [1] - 83:24 observe [1] - 12:21 observed [6] - 10:8, 11:7, 20:25, 25:17, 26:23, 28:22 obvious [1] - 76:3 obviously [2] - 8:7, 87:18 occur [1] - 25:8 October [4] - 1:9, 33:24, 77:18, 77:19 OF [5] - 1:1, 1:1, 14:9, 14:20 offered [1] - 20:20 offering [1] - 77:16 offhand [1] - 46:18 office [3] - 7:25, 70:18, 70:24 OFFICER [20] - 3:11, 12:5, 13:21, 14:11, 14:22, 15:6, 15:17, 22:18, 25:4, 41:3, 41:6, 46:25, 47:23, 56:10, 64:21, 67:21, 78:8, 81:6, 83:14, 84:14 Official [1] - 89:23 officials [1] - 57:24 often [1] - 34:10 once [4] - 54:11, 72:4, 73:21, 76:10 one [37] - 3:3, 9:12, 15:24, 16:7, 17:14, 18:2, 19:8, 20:1, 23:9, 28:1, 36:17, 38:8, 50:14, 50:22, 53:20, 55:6, 56:2, 56:21, 57:7, 60:12, 63:15, 74:16, 74:25, 76:1, 81:10, 81:19, 82:7, 83:25, 84:1, 84:8, 84:22, 86:17, 86:18, 86:22, 87:1, 89:8 ones [1] - 60:20 open [1] - 89:10 opened [1] - 5:22 opening [1] - 26:2 opens [1] - 26:3 operate [1] - 76:11 operating [1] - 78:17 operation [4] - 18:2, 21:22, 34:10, 73:20 operative [9] - 62:24, 63:3, 66:4, 66:6, 66:9, 73:16, 76:25, 77:8, 77:16 OPERATIVE [1] - 78:6 opinion [18] - 20:14, 20:17, 26:21, 27:3, 27:11, 29:1, 29:6, 36:8, 40:7, 54:8, 54:17, 54:21, 59:6, 59:12, 76:8, 86:6, 86:11, 86:14 opportunity [6] - 14:13,</p>	<p>23:5, 24:2, 83:24, 87:10, 88:24 opposed [1] - 54:18 opposes [1] - 86:2 opposition [1] - 88:15 option [1] - 9:7 oral [2] - 87:7, 87:8 order [8] - 16:11, 37:3, 39:18, 40:7, 52:10, 53:18, 73:11, 74:21 original [1] - 89:20 originals [1] - 81:24 orthopedic [6] - 5:11, 5:19, 5:23, 6:6, 52:10, 53:16 orthopedics [1] - 6:1 orthopedists [1] - 5:25 outside [6] - 10:20, 10:23, 18:22, 19:5, 24:2, 25:8 overhead [1] - 28:17 own [6] - 5:22, 24:5, 32:5, 44:25, 53:14, 53:18 oxygen [1] - 56:6</p>	<p>33:9 parts [3] - 20:24, 79:19, 79:25 pass [1] - 5:24 past [4] - 20:21, 33:5, 60:12, 70:15 patella [5] - 49:8, 49:19, 61:6, 61:8, 61:9 pathology [8] - 66:2, 66:18, 66:21, 78:21, 78:22, 79:10, 79:11, 79:17 patience [1] - 3:20 patient [27] - 6:4, 9:2, 13:8, 28:5, 30:9, 30:10, 30:24, 31:13, 31:20, 32:2, 32:12, 32:20, 34:6, 34:7, 34:8, 34:23, 53:4, 57:11, 61:13, 63:22, 70:25, 71:19, 71:24, 72:3, 72:11, 78:18, 79:10 patient's [2] - 36:6, 72:17 patients [7] - 5:14, 6:5, 6:14, 6:22, 6:24, 7:2, 31:7 people [7] - 6:12, 6:19, 8:17, 9:4, 50:12, 74:11, 81:3 percent [1] - 27:7 percentage [1] - 6:11 perform [5] - 8:21, 8:22, 8:25, 65:14, 65:20 performed [16] - 8:10, 8:13, 8:16, 9:17, 9:19, 9:21, 33:24, 38:5, 38:16, 38:18, 49:18, 53:10, 53:13, 62:3, 62:7, 69:19 performing [4] - 13:8, 28:16, 61:24, 66:16 perhaps [1] - 73:8 period [2] - 26:17, 69:13 permanency [1] - 27:14 permanent [2] - 27:12, 29:10 permanently [1] - 29:8 permission [3] - 17:10, 42:18, 74:14 person [2] - 28:13, 79:17 person's [2] - 20:8, 21:10 perspective [1] - 87:18 photo [8] - 18:14, 18:15, 18:17, 18:21, 19:13, 73:23, 74:16, 75:3 PHOTOS [4] - 12:3, 13:19, 14:9, 14:20 photos [29] - 11:11, 11:13, 11:15, 12:16, 12:17, 13:8, 13:10, 13:13, 14:1, 16:3, 16:5, 16:16, 17:13, 17:20, 18:1, 19:23, 20:6, 20:9,</p>	<p>20:12, 54:10, 54:12, 73:25, 74:18, 74:21, 74:25, 76:10, 89:5 phrase [1] - 89:12 physical [10] - 7:25, 30:15, 35:24, 36:3, 36:7, 36:9, 36:15, 36:16, 37:12, 73:9 physically [1] - 43:3 Picciano [1] - 2:7 PICCIANO [1] - 1:18 pick [2] - 24:24, 56:13 pictures [3] - 19:8, 24:5, 76:3 piece [4] - 11:5, 18:8, 18:10, 18:25 place [1] - 48:21 placed [1] - 15:21 Plain [1] - 8:20 Plaintiff [56] - 1:3, 1:15, 2:4, 3:21, 5:4, 23:13, 23:16, 24:10, 30:17, 33:16, 35:1, 35:21, 36:3, 36:19, 37:17, 38:16, 39:25, 40:3, 40:9, 42:4, 43:9, 44:7, 45:3, 53:9, 54:24, 55:2, 55:14, 57:10, 58:13, 59:22, 60:15, 62:7, 62:20, 65:2, 65:15, 65:17, 67:25, 68:6, 69:16, 69:22, 70:3, 78:13, 80:3, 83:22, 84:16, 84:20, 85:11, 85:13, 85:17, 85:23, 86:1, 86:24, 87:16, 87:20, 88:12 plaintiff [3] - 6:3, 59:3, 83:21 Plaintiffs [49] - 11:25, 12:1, 12:3, 12:7, 12:14, 12:24, 12:25, 13:18, 13:19, 13:24, 14:7, 14:9, 14:20, 16:4, 17:15, 17:18, 24:13, 34:16, 35:24, 36:12, 38:6, 39:1, 39:18, 39:22, 42:13, 45:16, 46:17, 46:21, 47:7, 48:3, 49:1, 51:13, 54:14, 59:7, 60:19, 62:15, 66:2, 67:1, 67:2, 68:3, 68:10, 68:22, 69:14, 69:20, 71:8, 84:25, 85:6, 86:4, 88:2 plaintiffs [6] - 12:5, 13:21, 14:11, 14:22, 15:17, 40:19 plaintiffs [4] - 6:23, 6:25, 7:3, 7:4 plan [2] - 36:21, 54:6 played [2] - 21:17, 28:20 pleasure [1] - 17:23</p>
<p style="text-align: center;">O</p> <p>object [1] - 23:4 Objection [1] - 75:22 objection [20] - 12:10, 12:11, 13:16, 14:15, 15:12, 17:23, 23:24, 24:7, 24:18, 42:5, 42:10, 47:18, 50:8, 56:5, 56:15, 56:16, 67:14, 67:16, 70:20, 77:10 objective [2] - 63:25, 85:24</p>	<p style="text-align: center;">P</p> <p>P.C [1] - 1:18 page [16] - 16:15, 16:16, 17:19, 33:15, 41:21, 41:25, 50:22, 56:21, 56:22, 56:25, 57:14, 57:16, 58:9, 58:10, 77:5 pages [7] - 16:15, 38:3, 56:14, 74:16, 82:22, 82:24, 83:3 paid [1] - 7:7 PAIN [2] - 41:1, 83:9 pain [45] - 8:19, 9:11, 21:12, 21:13, 21:18, 21:19, 25:20, 26:5, 26:9, 27:8, 27:9, 28:14, 28:20, 29:1, 30:25, 32:13, 33:7, 33:17, 34:6, 34:13, 58:18, 58:19, 58:23, 59:10, 59:11, 60:5, 60:6, 60:9, 61:17, 63:22, 64:4, 71:19, 71:24, 72:17, 79:10, 85:19, 86:4, 86:8, 86:12, 87:24 Pain [10] - 30:7, 35:2, 35:4, 35:17, 36:9, 36:19, 36:21, 36:23, 41:8, 88:5 paragraph [2] - 51:1, 51:2 PART [1] - 1:1 part [13] - 10:18, 10:19, 19:2, 33:10, 35:7, 37:6, 39:17, 42:23, 48:24, 55:10, 65:11, 71:20, 73:5 particularly [2] - 28:17,</p>			

<p>plus [2] - 9:14 point [4] - 2:16, 53:1, 61:16, 86:9 pointing [2] - 18:11, 20:2 points [1] - 88:8 portion [2] - 58:22, 88:14 portions [1] - 82:19 positioning [1] - 68:9 positive [10] - 8:6, 9:14, 25:22, 34:11, 34:13, 39:21, 45:6, 51:18, 66:6, 72:11 possible [4] - 15:14, 35:10, 35:14, 80:8 post [1] - 58:19 posterior [4] - 44:11, 44:13, 44:17, 58:18 potential [1] - 2:22 potentially [1] - 32:19 practical [2] - 24:13, 88:21 practically [1] - 44:4 practice [6] - 5:22, 6:11, 13:7, 31:6, 53:18, 66:16 practices [2] - 13:14, 55:10 pre [2] - 14:7, 27:4 pre-accident [1] - 27:4 pre-mark [1] - 14:7 preceded [1] - 73:2 predate [1] - 69:11 predated [1] - 86:12 predecessor [1] - 84:25 preferred [2] - 24:12, 57:25 premarked [1] - 89:5 prepared [2] - 62:24, 76:24 Presbyterian [1] - 54:24 PRESBYTERIAN [1] - 56:8 prescribing [1] - 71:23 presence [4] - 3:14, 24:2, 25:8, 68:17 present [7] - 4:4, 10:6, 21:4, 30:14, 58:11, 83:25, 87:19 presuming [1] - 88:19 pretty [2] - 19:25, 28:9 previously [1] - 83:4 primarily [1] - 44:19 problem [2] - 75:7, 78:25 problems [8] - 20:21, 26:15, 26:19, 26:22, 33:11, 60:9, 79:19, 79:23 procedure [3] - 9:20, 17:21, 65:20 procedures [2] - 30:10, 30:12 proceed [1] - 18:20 proceedings [1] - 3:9 process [2] - 31:19, 80:5</p>	<p>professional [1] - 4:16 proffer [1] - 85:23 proffered [1] - 88:1 progressing [2] - 22:3, 26:11 progression [2] - 26:14, 26:25 projects [1] - 9:25 prompt [1] - 81:1 promptly [2] - 84:4, 84:13 proof [1] - 85:24 proper [2] - 3:14, 88:8 provided [1] - 71:18 publish [4] - 12:12, 14:2, 15:6, 47:3 published [10] - 11:19, 12:8, 14:24, 15:1, 15:2, 15:9, 15:10, 15:15, 15:18, 16:13 publishing [1] - 15:4 pull [1] - 38:23 purposes [4] - 14:2, 14:8, 80:17, 82:12 pursuant [1] - 77:15 push [1] - 61:13 pushed [1] - 61:15 pushing [1] - 26:2 put [4] - 9:23, 62:24, 75:7, 82:17 putting [2] - 35:15, 82:21</p>	<p>reached [2] - 70:18, 70:23 read [2] - 24:22, 24:23 ready [3] - 3:1, 3:24, 81:23 real [1] - 18:8 really [2] - 10:14, 37:8 reason [2] - 30:24, 88:19 reasonable [1] - 34:15 recent [1] - 23:3 recently [4] - 21:6, 28:25, 41:15, 41:16 recess [2] - 22:17, 23:14 recollection [6] - 33:13, 33:16, 41:11, 42:1, 47:5, 64:25 recommend [1] - 52:23 recommendation [1] - 8:2 recommendations [1] - 7:23 recommended [3] - 7:24, 8:8, 69:16 recommending [1] - 9:1 record [28] - 2:16, 2:19, 2:20, 2:21, 16:9, 18:13, 22:20, 23:21, 23:22, 23:23, 24:9, 35:15, 42:1, 42:3, 43:2, 46:2, 56:4, 59:8, 81:8, 81:21, 81:22, 81:23, 82:14, 82:19, 82:20, 84:16, 87:23, 88:25 RECORDS [4] - 41:2, 56:9, 64:19, 83:10 records [34] - 22:23, 22:25, 23:1, 23:6, 24:3, 24:9, 30:14, 35:3, 35:17, 35:24, 36:2, 36:9, 36:14, 36:15, 40:7, 41:8, 41:12, 41:19, 53:3, 53:6, 56:18, 56:20, 62:14, 65:8, 65:11, 79:2, 80:4, 80:6, 80:9, 80:11, 82:21, 85:10, 85:15, 88:4 recovery [1] - 65:17 recross [1] - 76:20 RECROSS [1] - 76:21 redacted [1] - 83:3 REDACTIONS [1] - 83:11 REDIRECT [1] - 71:15 redirect [1] - 76:23 reference [3] - 35:23, 73:15, 74:21 referenced [2] - 66:21, 73:15 references [1] - 68:6 referred [6] - 6:14, 30:6, 30:7, 66:5, 70:10, 70:24 referring [1] - 6:17 refers [1] - 51:4</p>	<p>reflect [1] - 43:2 reflecting [1] - 53:3 refresh [6] - 33:13, 33:16, 41:14, 41:25, 47:5, 64:25 refreshes [1] - 41:10 regain [1] - 27:3 regard [12] - 13:10, 20:14, 30:10, 33:7, 37:24, 50:11, 51:19, 57:20, 68:3, 70:17, 76:8, 79:6 regarding [12] - 6:8, 30:17, 46:13, 48:25, 60:19, 66:2, 71:17, 78:20, 85:16, 86:3, 87:17 regards [2] - 6:21, 76:12 registered [1] - 28:7 relate [1] - 22:23 related [6] - 25:20, 35:12, 35:24, 85:8, 85:24, 88:7 relates [1] - 57:1 relating [2] - 87:25, 88:2 relation [1] - 52:3 relationship [1] - 6:2 relative [4] - 21:10, 30:19, 51:19, 79:20 relatively [3] - 37:14, 37:15, 72:11 relevant [2] - 78:21, 79:5 relied [3] - 8:4, 44:24, 47:13 rely [1] - 76:7 relying [2] - 54:18, 76:8 remain [1] - 16:11 remember [1] - 72:1 removed [1] - 82:24 removing [1] - 10:18 render [1] - 32:20 repair [2] - 74:7, 74:13 rephrase [1] - 70:22 report [64] - 6:16, 8:7, 23:1, 23:18, 23:25, 24:5, 24:10, 31:23, 31:24, 32:1, 32:4, 32:9, 33:12, 33:15, 35:20, 35:23, 37:23, 38:2, 44:14, 44:25, 45:3, 45:10, 45:14, 45:16, 45:19, 46:8, 47:10, 47:13, 47:17, 48:1, 50:22, 51:13, 51:18, 52:16, 53:19, 54:19, 55:22, 62:24, 63:3, 66:4, 66:6, 66:9, 66:13, 66:22, 66:24, 67:6, 67:8, 67:10, 67:11, 67:24, 68:6, 68:21, 73:16, 75:8, 76:5, 76:24, 76:25, 77:5, 77:8, 77:17, 77:25, 78:3, 81:17</p>	<p>REPORT [4] - 46:23, 47:21, 67:19, 78:6 Reporter [2] - 1:23, 89:23 REPORTER'S [1] - 89:19 reports [11] - 44:22, 44:23, 44:24, 75:11, 75:13, 75:21, 75:25, 76:6, 76:7, 81:24, 85:21 representation [1] - 12:20 request [2] - 11:24, 15:8 requested [1] - 24:23 requesting [1] - 53:13 required [3] - 58:1, 58:5, 58:8 reserve [3] - 86:20, 88:24, 89:17 residency [4] - 5:15, 5:16, 5:19, 5:20 residents [1] - 5:21 resituate [1] - 17:5 resolved [1] - 81:9 respect [2] - 74:3, 75:20 respectfully [1] - 86:1 respective [2] - 4:20, 5:1 respectively [1] - 19:23 respond [2] - 29:24, 55:5 responding [5] - 36:3, 36:7, 37:4, 37:11, 40:10 response [1] - 65:3 rest [5] - 51:13, 51:17, 52:6, 52:14, 83:21 rested [2] - 84:17, 84:20 restrained [1] - 58:20 restrictions [1] - 88:6 restroom [2] - 25:10, 80:18 rests [1] - 83:22 result [6] - 29:2, 29:9, 55:3, 60:23, 61:1, 61:10 results [1] - 46:7 return [3] - 6:15, 7:25, 81:25 returned [1] - 25:19 revealed [1] - 17:13 review [15] - 23:6, 23:10, 23:14, 23:20, 30:14, 35:3, 36:2, 36:6, 40:6, 41:11, 41:18, 44:20, 47:4, 50:21, 74:24 reviewed [22] - 23:14, 35:9, 35:24, 36:9, 41:8, 41:13, 41:15, 41:16, 42:1, 44:22, 44:23, 45:6, 45:10, 46:4, 47:10, 51:1, 54:6, 54:21, 66:13, 67:2, 67:24, 73:25 reviewing [7] - 17:17, 37:23, 40:19, 42:3, 52:9, 54:16, 64:24 right-hand [1] - 19:5 ripped [1] - 8:7</p>
	Q			
	<p>qualifications [1] - 5:10 qualify [1] - 34:23 quarter [1] - 28:10 QUEENS [1] - 1:1 questions [10] - 4:21, 4:24, 29:18, 29:23, 29:24, 31:24, 32:11, 71:13, 76:19, 80:13 quick [2] - 57:5, 57:13 quicker [1] - 56:23</p>			
	R			
	<p>radiologist [3] - 52:9, 71:4, 75:13 Radiology [1] - 50:25 radiology [1] - 54:19 raise [1] - 28:6 raising [1] - 28:3 range [27] - 27:25, 36:11, 36:23, 37:1, 37:2, 37:5, 37:6, 37:9, 37:12, 37:13, 37:14, 37:25, 40:13, 42:3, 42:12, 43:17, 44:4, 60:14, 62:8, 62:11, 63:11, 63:13, 64:8, 72:6, 72:8, 88:6 ranges [1] - 27:25 rarely [1] - 6:10 rather [1] - 14:18</p>			

<p>rise [6] - 3:11, 22:18, 25:4, 81:6, 83:14, 84:14</p> <p>Robert [1] - 77:23</p> <p>room [5] - 3:5, 57:4, 57:10, 57:24, 82:20</p> <p>rotate [1] - 61:14</p> <p>rotation [5] - 28:8, 28:10, 28:12, 28:18</p> <p>roughed [1] - 19:2</p> <p>rubbing [3] - 25:24, 48:18, 50:13</p> <p>rule [1] - 89:6</p>	<p>September [16] - 30:3, 33:12, 34:16, 35:21, 37:3, 38:16, 43:18, 44:3, 47:11, 52:20, 53:9, 60:1, 60:21, 68:4, 69:9, 70:5</p> <p>services [1] - 58:5</p> <p>setting [6] - 50:10, 51:10, 51:23, 52:2, 53:16, 53:24</p> <p>seven [2] - 58:9, 58:10</p> <p>seventh [2] - 19:13, 19:22</p> <p>several [1] - 28:25</p> <p>severe [1] - 49:23</p> <p>shall [1] - 4:7</p> <p>sharp [2] - 21:5</p> <p>sheet [2] - 32:2, 32:4</p> <p>shoes [3] - 79:22, 79:23, 79:24</p> <p>short [1] - 28:9</p> <p>shortly [1] - 80:23</p> <p>SHOULDER [1] - 67:19</p> <p>shoulder [23] - 7:21, 27:16, 27:23, 27:25, 28:16, 29:4, 30:25, 33:10, 33:21, 45:17, 67:2, 67:3, 68:4, 68:11, 68:14, 68:19, 68:22, 69:14, 69:16, 69:20, 69:23, 75:14</p> <p>show [13] - 16:5, 16:19, 36:6, 41:5, 41:21, 46:21, 47:2, 56:12, 56:14, 59:18, 64:23, 67:23, 74:15</p> <p>showed [2] - 24:14, 80:4</p> <p>showing [4] - 19:8, 20:6, 59:20, 88:6</p> <p>shown [2] - 12:13, 75:11</p> <p>shows [2] - 19:9, 21:5</p> <p>shunt [1] - 57:6</p> <p>side [15] - 18:2, 18:3, 18:21, 19:6, 21:3, 22:20, 23:24, 28:6, 42:9, 57:13, 57:14, 77:15, 81:8, 81:9</p> <p>sided [1] - 58:19</p> <p>sideways [1] - 26:3</p> <p>sign [1] - 9:10</p> <p>signal [4] - 51:17, 52:7, 52:9, 52:13</p> <p>significant [13] - 10:19, 19:1, 19:3, 20:20, 26:4, 26:7, 27:19, 28:7, 28:12, 29:3, 30:15, 72:15</p> <p>similar [2] - 33:19, 85:5</p> <p>similarly [1] - 85:12</p> <p>sin [1] - 10:13</p> <p>sit [3] - 69:25, 75:12, 78:24</p> <p>six [1] - 71:25</p>	<p>Sky [1] - 50:25</p> <p>small [2] - 6:10, 9:23</p> <p>smaller [1] - 76:2</p> <p>smoke [1] - 32:16</p> <p>smooth [5] - 11:3, 18:8, 19:10, 19:17</p> <p>social [1] - 32:15</p> <p>softening [1] - 49:12</p> <p>solemnly [1] - 4:6</p> <p>someone [6] - 21:18, 51:25, 54:18, 55:11, 70:12, 72:12</p> <p>sometimes [3] - 31:10, 70:16, 74:11</p> <p>somewhat [1] - 26:11</p> <p>somewhere [2] - 46:4, 57:8</p> <p>sorry [5] - 4:12, 26:1, 32:21, 43:8, 74:9</p> <p>sort [1] - 57:6</p> <p>sorts [1] - 28:14</p> <p>sound [1] - 65:5</p> <p>sounds [1] - 61:25</p> <p>space [1] - 68:13</p> <p>Spain [1] - 5:17</p> <p>specialist [1] - 6:1</p> <p>specialty [3] - 5:11, 5:12, 5:14</p> <p>specific [5] - 10:14, 16:12, 38:5, 58:4, 62:1</p> <p>specifically [6] - 21:2, 29:7, 33:18, 64:14, 66:25, 73:8</p> <p>speculative [2] - 85:9, 85:19</p> <p>spend [1] - 6:22</p> <p>Spetsieris [2] - 2:2, 2:3</p> <p>SPETSIERIS [2] - 1:5</p> <p>spite [1] - 26:10</p> <p>spoken [1] - 9:3</p> <p>sports [2] - 28:16, 74:8</p> <p>sprains [1] - 88:13</p> <p>SPYRIDON [1] - 1:5</p> <p>Spyridon [1] - 2:2</p> <p>stage [1] - 88:9</p> <p>stand [7] - 3:24, 4:3, 4:5, 42:19, 85:15, 86:13, 88:18</p> <p>standard [3] - 13:7, 30:10, 55:10</p> <p>standards [1] - 53:17</p> <p>start [2] - 43:5, 84:5</p> <p>STATE [1] - 1:1</p> <p>state [1] - 4:10</p> <p>statement [1] - 59:7</p> <p>statements [1] - 64:5</p> <p>status [1] - 58:19</p> <p>stay [2] - 6:15, 80:16</p> <p>stenographic [1] - 89:21</p> <p>step [1] - 3:3</p> <p>stepped [1] - 2:14</p> <p>Stewart [1] - 1:19</p> <p>still [7] - 5:23, 22:6, 26:9,</p>	<p>26:10, 27:5, 27:13, 29:1</p> <p>stipulate [1] - 3:13</p> <p>straight [3] - 43:5, 61:13, 88:23</p> <p>strains [1] - 88:13</p> <p>strength [1] - 79:23</p> <p>stress [3] - 25:25, 26:2</p> <p>stretch [1] - 22:14</p> <p>stricken [2] - 85:21, 85:22</p> <p>strike [2] - 85:1, 86:18</p> <p>structure [3] - 68:10, 68:14, 68:19</p> <p>struggle [1] - 28:14</p> <p>study [1] - 53:14</p> <p>subinternship [1] - 5:18</p> <p>subject [2] - 85:25, 88:3</p> <p>subjective [2] - 63:20, 64:6</p> <p>submitted [1] - 87:3</p> <p>subpoenaed [6] - 22:25, 23:1, 23:6, 24:3, 24:9, 82:19</p> <p>subsequently [1] - 71:20</p> <p>substance [1] - 48:20</p> <p>substantially [1] - 72:3</p> <p>suffering [1] - 34:7</p> <p>suggest [1] - 65:4</p> <p>suggested [1] - 34:9</p> <p>Suite [2] - 1:16, 1:19</p> <p>summary [2] - 45:4, 62:25</p> <p>supposed [1] - 86:3</p> <p>SUPREME [1] - 1:1</p> <p>Supreme [1] - 1:8</p> <p>surface [1] - 49:9</p> <p>surgeon [5] - 5:11, 6:6, 34:20, 52:10, 65:24</p> <p>surgery [67] - 5:15, 5:21, 5:24, 8:8, 8:10, 8:13, 8:16, 8:17, 8:18, 8:21, 8:23, 8:25, 9:4, 9:5, 9:7, 9:14, 9:15, 9:17, 9:19, 9:21, 9:22, 9:23, 12:18, 13:8, 13:9, 22:2, 22:4, 26:18, 27:2, 33:5, 33:24, 34:3, 34:5, 34:6, 34:7, 34:11, 34:13, 34:23, 40:11, 49:18, 52:20, 52:21, 52:24, 53:1, 53:5, 53:10, 53:13, 53:16, 54:3, 62:25, 64:10, 64:12, 64:13, 64:25, 65:8, 65:14, 66:14, 66:17, 69:17, 69:19, 70:6, 72:9, 76:23, 76:24, 88:19</p> <p>SURGERY [1] - 64:19</p> <p>surgical [5] - 5:12, 5:14, 33:5, 63:1, 65:20</p> <p>sustained [3] - 50:9, 70:21, 75:23</p>	<p>Sutphin [1] - 1:8</p> <p>swear [2] - 4:6, 4:9</p> <p>swelling [4] - 37:20, 37:24, 37:25, 38:2</p> <p>symptoms [4] - 9:13, 21:14, 33:19, 34:8</p> <p>synovia [2] - 10:12, 10:13</p> <p>synovitis [1] - 10:10</p>
T				
<p>T-boned [1] - 58:20</p> <p>teaching [1] - 5:21</p> <p>tear [27] - 18:6, 18:7, 18:9, 18:25, 19:3, 21:7, 38:12, 44:8, 44:10, 44:15, 44:19, 48:5, 48:8, 48:11, 48:14, 51:4, 51:10, 51:22, 51:23, 52:1, 52:2, 52:3, 53:23, 53:25, 76:2, 76:3</p> <p>tears [4] - 10:15, 10:16, 20:11, 76:14</p> <p>television [2] - 9:25, 10:1</p> <p>ten [1] - 59:10</p> <p>tend [1] - 74:7</p> <p>tenderness [1] - 25:22</p> <p>tendons [1] - 5:13</p> <p>TERM [1] - 1:1</p> <p>term [2] - 34:2, 57:18</p> <p>terms [4] - 27:22, 34:25, 50:21, 57:9</p> <p>terrific [2] - 84:10, 84:12</p> <p>test [28] - 38:9, 38:11, 38:12, 38:15, 38:18, 38:21, 38:22, 39:1, 39:4, 39:6, 39:8, 39:10, 39:14, 42:3, 43:23, 53:18, 60:23, 61:1, 61:6, 61:8, 61:12, 61:20, 62:1, 62:2, 62:3, 62:5, 62:8</p> <p>testified [7] - 8:14, 8:15, 21:15, 21:16, 29:21, 35:11, 43:8</p> <p>testify [1] - 6:10</p> <p>testimony [19] - 3:21, 4:7, 15:22, 24:23, 33:23, 54:13, 62:19, 78:16, 85:1, 85:11, 85:20, 85:21, 86:3, 86:9, 87:16, 87:17, 88:7, 88:22</p> <p>testing [6] - 37:10, 38:5, 42:12, 61:4, 61:8, 72:6</p> <p>tests [9] - 38:1, 38:5, 38:8, 39:12, 39:16, 45:4, 60:17, 60:19, 61:24</p> <p>THE [149] - 1:1, 1:12, 2:1, 2:8, 2:11, 2:15, 2:19, 2:21, 3:4, 3:13, 3:17, 3:18, 4:1, 4:6, 4:9, 4:10, 4:11, 4:12, 4:13,</p>				

<p>4:14, 4:15, 4:16, 4:18, 4:19, 4:20, 11:19, 11:22, 12:1, 12:7, 12:10, 12:12, 13:2, 13:17, 13:23, 14:5, 14:7, 14:13, 14:16, 14:18, 14:24, 15:3, 15:10, 15:13, 15:15, 15:19, 15:23, 16:7, 16:11, 16:12, 16:21, 16:23, 16:24, 17:3, 17:4, 17:8, 17:14, 17:17, 17:22, 17:23, 18:15, 18:17, 18:19, 18:20, 18:22, 19:5, 19:7, 19:13, 19:15, 19:22, 19:24, 20:1, 20:4, 22:11, 22:13, 22:20, 23:7, 23:17, 23:21, 23:23, 24:8, 24:17, 24:20, 24:24, 25:2, 25:6, 28:3, 29:13, 40:19, 40:22, 40:25, 42:7, 42:9, 42:23, 42:25, 43:1, 43:2, 43:4, 46:21, 47:3, 47:19, 50:9, 55:6, 56:1, 56:6, 56:15, 67:17, 70:21, 74:9, 74:10, 74:18, 74:22, 74:24, 75:23, 77:13, 77:15, 77:19, 77:22, 77:25, 78:1, 78:4, 80:15, 81:8, 81:15, 81:16, 81:23, 82:5, 82:6, 82:7, 82:10, 82:16, 82:25, 83:2, 83:13, 83:16, 83:22, 84:16, 84:22, 86:17, 86:20, 87:1, 87:5, 87:7, 87:9, 87:13, 88:10, 88:12, 88:17, 89:4, 89:17</p> <p>theoretically [1] - 79:21 therapist [1] - 36:17 therapy [16] - 7:25, 9:3, 35:24, 35:25, 36:2, 36:4, 36:7, 36:9, 36:15, 37:12, 43:20, 43:25, 44:1, 63:8, 72:13, 73:9 therefore [2] - 85:19, 86:15 they've [1] - 72:13 thickened [1] - 19:2 thickness [2] - 10:24, 50:16 thin [1] - 48:20 thinning [1] - 48:17 third [2] - 18:21, 19:8 thorough [1] - 37:18 three [11] - 5:20, 16:15, 26:6, 27:5, 27:13, 34:12, 35:10, 37:7, 37:16, 77:5 throughout [1] - 11:14</p>	<p>Throughout [1] - 86:24 tibia [3] - 10:22, 18:5, 18:24 timeframe [1] - 69:10 today [14] - 7:8, 15:18, 30:16, 32:6, 35:18, 45:22, 46:2, 52:17, 54:8, 65:12, 68:1, 75:12, 85:15, 88:19 today's [2] - 56:18, 59:1 tomorrow [10] - 81:2, 84:2, 84:4, 84:6, 84:12, 87:10, 88:21, 89:1, 89:18 tomorrow's [1] - 89:4 took [10] - 12:17, 13:13, 32:5, 37:3, 37:13, 64:13, 73:23, 74:16, 82:22, 85:17 top [4] - 10:21, 10:22, 18:16, 19:5 torn [6] - 8:7, 10:18, 18:6, 18:8, 74:4, 74:6 totality [3] - 30:20, 35:12, 45:24 track [1] - 82:24 transcribed [1] - 3:10 transcript [1] - 89:20 trauma [5] - 45:7, 45:8, 50:17, 53:21, 54:1 traumatic [1] - 50:3 treat [2] - 5:14, 7:2 treated [3] - 10:17, 10:18, 59:11 treating [3] - 6:22, 73:6, 78:18 treatment [38] - 6:16, 7:12, 7:24, 8:9, 9:1, 26:10, 29:19, 30:20, 32:20, 34:14, 34:25, 35:1, 35:13, 35:14, 36:21, 37:4, 39:25, 40:3, 40:10, 45:25, 54:5, 54:6, 59:23, 60:1, 60:4, 62:15, 63:5, 64:4, 64:5, 66:7, 71:23, 73:1, 73:2, 73:5, 78:12, 79:6, 85:16, 85:18 triage [5] - 57:1, 57:3, 57:4, 57:9, 57:13 TRIAL [1] - 1:6 trial [2] - 2:1, 25:8 tries [1] - 57:5 true [1] - 89:20 trump [1] - 76:10 truth [2] - 4:7, 4:8 try [3] - 10:6, 25:9, 38:23 trying [4] - 2:24, 23:8, 72:17, 84:9 turn [3] - 50:22, 56:25, 58:9 turning [1] - 67:1 twice [1] - 72:4</p>	<p>two [16] - 9:23, 10:22, 16:18, 19:8, 20:12, 22:1, 25:21, 27:1, 33:15, 70:2, 71:5, 72:13, 84:20, 86:17, 88:18, 88:23 type [7] - 26:19, 26:22, 34:7, 68:7, 68:17, 81:2, 84:5 typed [3] - 31:23, 31:24, 32:9 types [2] - 10:3, 28:22</p> <p style="text-align: center;">U</p> <p>ultimately [2] - 8:10, 8:18 unable [1] - 85:9 unaware [3] - 22:22, 85:13, 85:15 uncommon [1] - 26:19 uncontroverted [1] - 86:7 under [5] - 8:22, 8:25, 33:9, 49:8, 49:11 undergo [1] - 63:9 undertake [1] - 62:14 unhappy [1] - 9:2 unlikely [1] - 27:6 unnecessary [1] - 32:10 unrelated [1] - 81:9 untruthful [1] - 31:8 unusual [1] - 65:6 up [27] - 3:5, 10:3, 10:4, 11:17, 16:7, 16:21, 17:1, 17:24, 19:2, 23:17, 24:24, 28:6, 29:18, 40:15, 47:5, 60:11, 62:25, 64:9, 65:2, 70:11, 70:12, 71:4, 77:13, 78:4, 82:7, 88:10 update [1] - 84:7 upper [2] - 18:2, 56:21 UPS [2] - 14:9, 14:20</p> <p style="text-align: center;">V</p> <p>valgus [4] - 25:25, 26:2, 39:8, 61:4 variant [2] - 48:9, 51:5 various [1] - 10:2 varus [2] - 39:10, 61:4 vehicle [3] - 7:19, 58:19, 76:18 verbal [1] - 65:3 verdict [1] - 85:22 versions [1] - 14:1 Via [1] - 15:14 view [1] - 19:16 visit [7] - 24:15, 26:23, 27:24, 34:16, 37:10, 37:18, 70:9 visual [2] - 11:12, 16:13 VOIR [1] - 13:3</p>	<p style="text-align: center;">W</p> <p>W-E-R-T [2] - 4:11, 4:15 waiting [1] - 89:8 wake [1] - 23:9 walk [2] - 79:14, 79:18 walking [3] - 57:22, 79:20, 89:7 wants [3] - 88:12, 89:9, 89:10 warrant [2] - 8:8, 85:22 watch [1] - 9:25 water [2] - 10:4, 18:3 waves [1] - 20:11 wear [1] - 21:7 wearing [2] - 50:6, 50:13 weeks [3] - 22:1, 37:8, 37:16 welcome [1] - 81:15 Wert [27] - 2:11, 4:3, 4:4, 4:11, 5:7, 6:2, 6:21, 7:7, 7:12, 15:21, 16:2, 16:15, 17:12, 17:20, 24:14, 25:16, 28:19, 29:16, 71:17, 74:15, 81:13, 81:23, 83:18, 85:2, 85:12, 86:2, 87:16 Wert's [5] - 77:16, 81:17, 85:20, 85:21, 86:10 whereas [1] - 21:6 white [4] - 10:25, 11:1, 18:12, 19:17 whole [2] - 61:16, 72:19 wish [1] - 87:14 withdraw [1] - 24:6 withdrawn [3] - 62:18, 70:1, 75:19 witness [23] - 3:23, 3:24, 4:4, 5:1, 11:18, 11:20, 12:8, 15:2, 15:5, 16:6, 23:13, 41:5, 41:20, 47:2, 47:3, 55:7, 56:12, 56:14, 59:18, 64:23, 67:23, 78:11, 83:18 WITNESS [19] - 4:9, 4:11, 4:13, 4:15, 4:18, 16:23, 17:22, 18:15, 18:19, 19:7, 19:15, 19:24, 20:4, 43:1, 43:4, 74:10, 78:1, 81:15, 82:6 witnesses [1] - 83:25 word [2] - 44:10, 44:15 words [7] - 10:24, 15:16, 44:16, 51:25, 57:6, 88:17, 89:8 workers' [2] - 6:17, 6:19 worse [1] - 44:2 WR [1] - 57:12 write [2] - 6:16, 87:6 writing [2] - 87:2, 87:10 written [2] - 31:25, 87:5</p>	<p style="text-align: center;">Y</p> <p>year [3] - 29:1, 69:22, 70:7 years [19] - 5:21, 21:7, 25:21, 26:6, 27:1, 27:6, 27:13, 28:25, 35:9, 35:10, 59:10, 71:21, 71:25, 74:10, 74:12, 86:4 yesterday [2] - 8:15, 21:16 YORK [4] - 1:1, 41:1, 56:8, 83:9 York [16] - 1:9, 1:16, 1:20, 8:20, 30:7, 35:2, 35:3, 35:17, 36:9, 36:19, 36:21, 36:23, 41:8, 54:24, 88:5 yourself [2] - 17:5, 32:14 yourselves [3] - 22:16, 80:24, 84:11</p> <p style="text-align: center;">Z</p> <p>zero [1] - 43:5 ZOE [1] - 1:5 Zoe [1] - 2:3</p>
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