In The Matter Of:

Michael T. Little and Ellen Little v.
Memorial Sloan-Kettering Cancer Center et al

June 13, 2023

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NEW YORK STATE SUPREME COURT.
NEW YORK COUNTY : CIVIL TERM : PART 58
----------X
MICHEAL T. LITTLE AND ELLEN LITTLE,

Plaintiffs,

-against-

MEMORIAL SLOAN-KETTERING CANCER CENTER AND
S.K.I. REALTY, INC.,

Defendants.
----------X
Index No. 152386/2015

CONTINUED JURY TRIAL

New York Supreme Court
71 Thomas Street
New York, New York 10013
June 13, 2023

B E F O R E: HON. DAVID B. COHEN
Supreme Court Justice

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

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BY: MR. ZACHARY J. LYON, ESQ.

Matthew Sedacca
Lori Ann Sacco
Official Court Reporters

MR. LYON: Could you mark this.

(Whereupon the photograph was received in evidence as Defendants' Exhibit C as of this date.)

THE COURT: Could you mark these.

(Whereupon the defendant's request to charge was marked received in evidence as Court's Exhibit IV as of this date.)

(Whereupon the defendant's proposed verdict sheet was marked received in evidence as Court's Exhibit V as of this date.)

THE COURT: Case on trial continued. We're on the record. The time is now 9:39. The jury is all here. They are assembled in the jury room and waiting to be brought out. Anything before we bring in the jury?

MR. MADONNA: Just one, your Honor. As it was mentioned off the record, we're working on the wording for a stipulation that we would like to be read to the jury that I anticipate counsel wants in the record before his witness is called.

THE COURT: You stipulated a document into evidence?

MR. MADONNA: Yes, another photograph.

MR. LYON: Defendants' Exhibit C.

THE COURT: A photograph?

MR. LYON: Correct.

THE COURT: And I marked defendants' request to charge and defendants' proposed verdict sheet as Court's Exhibit IV and V respectively. So, you handed up a stipulation that you both agree on?

MR. MADONNA: Yes, your Honor.

MR. LYON: Yes, your Honor.

THE COURT: You want me to read this stipulation to the jury?

MR. LYON: Correct.

THE COURT: Do you want me to read it to them when they first come in or at some later point?

MR. MADONNA: It's up to you.

MR. LYON: When they first come in would be good.

THE COURT: Agreed.

MR. MADONNA: Okay.

THE COURT: I will read it through the first time to make sure I can read it clearly. Your handwriting is pretty good.

MR. MADONNA: I was trying really hard.

THE COURT: Mr. Madonna. It reads as follows. It is stipulated that by October 2015 the exterior construction was completed, which included replacement of the entire exterior sidewalk and pedestrian ramp on both 61st Street and York Avenue.

MR. MADONNA: Correct.

MR. LYON: That's fine by me.

THE COURT: All right. I'll read it to them when they come in. And your witness is here, counsel?

MR. LYON: He is.

THE COURT: Anything else before we bring in the jury?

MR. LYON: No, your Honor.

THE COURT: The jury is ready to be brought into the courtroom.

THE COURT OFFICER: All rise. Jury entering.

(Whereupon the jury panel entered the courtroom.)

THE COURT OFFICER: You may be seated.

THE COURT: Members of the jury, good morning and welcome back. The first thing I want to tell you this morning is we're going to take a witness out of turn. So, the plaintiff hasn't finished their case, but we're going to take a defense witness first before we have a plaintiffs' witness this afternoon. We do this for purely scheduling reasons. There is nothing unusual or irregular about it. And that's my instruction with respect to that.

I'm also going to read you a stipulation that the parties have agreed to. This stipulation is an agreement agreed to the parties. It's a stipulated fact and you are to accept it as such. And it reads as follows: It is stipulated that by October 2015 the exterior construction

was completed, which included replacement of the entire exterior sidewalk and pedestrian ramp on both 61st Street and York Avenue. Keep that stipulation in mind. That is evidence for your consideration.

At this time I call on Mr. Lyon to call his first witness.

MR. LYON: Thank you, your Honor. The defense calls Bernie Lorenz, PE.

B E R N A R D P. L O R E N Z, after having been duly sworn by the court clerk, was examined and testified as follows:

THE COURT CLERK: Thank you. Please state your name for the record.

THE WITNESS: Bernard P., as in Peter, Lorenz, L-O-R-E-N-Z.

THE COURT CLERK: And your address for the record.

THE WITNESS: 777 New Durham, D-U-R-H-A-M, Road, Edison, New Jersey.

THE COURT CLERK: Thank you.

THE WITNESS: Thank you.

THE COURT CLERK: The witness is sworn.

THE COURT: Mr. Lyon, you may inquire.

MR. LYON: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. LYON:

Q Good morning.

A Good morning.

Q Please introduce yourself to the jury.

A Good morning, jury. My name is Bernard Lorenz, Bernie Lorenz as I was referred to earlier, which I prefer. I'm a licensed professional engineer in the states of New York, New Jersey and Pennsylvania. And I perform forensic engineering investigations in matters such as this. Matters involving construction accidents, structural instability of buildings, things along those lines. I've been doing it for approximately 29 years, a little over 29 years.

Q If you could give the jury a summary of your educational background beginning with undergraduate studies.

A Yes. In 1985 I graduated from the George Institute of Technology, also known as Georgia Tech in Atlanta, Georgia with my bachelor in civil engineering. In May of 1999 I graduated from the New Jersey Institute of Technology in Newark, New Jersey with my master's in civil engineering.

Q What training and experience do you have in the field of engineering?

A I'm a civil engineer by education. So, my experience, my training all relates to civil engineering. What is civil engineering. It's engineering matters involving structures that are used by civilians, roadways, bridges, buildings, walkways, ramps, stairways, things of that nature. Throughout my experience I've designed and oversaw construction of buildings,

building renovation, both industrial, residential and commercial. I've -- I've seen the construction and oversaw the construction of walkways, concrete walkways, slate walkways, paver walkways of all different designations. I've been trained in the occupational safety and health administration standards for both general industry and construction. I'm a licensed building inspector also in the state of New Jersey.

Q Do you have any certifications accreditations or applications to your name?

A As I stated earlier, licensed professional engineer, PE, which is that designation in states of New York, New Jersey and Pennsylvania. And a licensed building inspector in the state of New Jersey.

Q And what is your current employment?

A I'm currently employed by Affiliated Engineering Laboratories in Edison, New Jersey as an engineering consultant.

MR. LYON: Your Honor, at this time I would like to ask that Mr. Lorenz be deemed an expert in professional engineering.

THE COURT: Hearing no objection, the witness is so qualified.

Q Mr. Lorenz, was there a time that I contacted you to discuss this matter?

A Yes.

Q All right. Do you remember when that was?

A My recollection is April of 2021.
Q At that time did I show you some photographs of the alleged accident site?
A Yes, you did.
Q Okay. Did I also ask you to teach me a little bit about coefficient of friction?
A Yes.
Q Okay. You didn't do that for free, did you?
A No, absolutely not.
Q And you were paid for your time?
A Yes.
Q All right. And what are your rates?
A $415 an hour.
Q Okay. And as is customary are you being paid for your time to be here today?
A Yes.
Q All right. Do you know how much you've charged for this case to date?
A To date I've sent your office one invoice, and that was for 8.4 hours is my recollection at $415 an hour. I forget what the math is, four to $5,000 I would estimate.
Q Okay. So let's switch gears a little bit. Have you ever tested the coefficient of friction of a walking surface?
A Yes.
Q All right. And tell the jury how that is typically

done.

A It's the matter -- The manner in which the coefficient of friction is tested on floor surfaces has evolved throughout my career as an engineer. There have been certain test methods used in the past that are no longer used.

MR. MADONNA: Your Honor, I'm just going to note my objection. If we can just have this limited to the timeframe at the time that this incident had occurred back in 2014 as opposed to the present. I mean, anything that may have changed over that period of time is not relevant to the date that this incident occurred.

THE COURT: Step up, counsel.

(Whereupon a side bar conference was held.)

Q So, let's go to 2014 and let's stick with 2014. In 2014 how was the coefficient of friction tested for a walking surface?

A It -- it depended on the test method used. There are various and there were various test methods in 2014 to which you could apply, a machine to test the coefficient of friction. One was known as ASTM F 609, which is ASTM stands for The American Society for Testing and Materials. They develop testing procedures for the coefficient of friction and a bunch of other matters. But with regard to the coefficient of friction, that device was called the Whiteley or the Whitely. I believe it's W-H-I-T-L-E-Y. That test method was a method for testing the

coefficient of friction under dry conditions only. And what that test method would do is you would use this machine, essentially drag said sled, drag it across the surface. Do a mathematical calculation. You would come up with a coefficient of friction.

At the same time there was a test method for testing the wet coefficient of friction, and that was an American National Standards, ANSI, Institute document. ANSI being very limit to ASTM. They develop standards again for multiple things, including the test of coefficient of friction. That standard utilized a different device and actually came up with a specific number with regard to the wet coefficient of friction that would be deemed acceptable or safe or unsafe. And that threshold value was 0.42. The Whitely or the Whiteley test, that was a 0.5, but begin that was under dry conditions. The different test method, the ANSI document was 0.42 for wet.

Q Okay. Did you have an opportunity to review the testimony of Michael Kravitz from yesterday?

A Yes.

Q And I want you to assume that Mr. Kravitz testified that the coefficient of friction for the paint mark in this case was 0.72. Is 0.72 generally regarded as a safe coefficient of friction for a walking surface?

A Yes. My recollection is the 0.72 is under dry conditions. Yes, that is a safe level of a coefficient of

friction.

Q Okay. I want you to also assume that Mr. Kravitz testified that he did not test the paint under wet conditions, but instead he used an equation to estimate what the wet coefficient of friction would be based on his result for the dry test. Have you ever heard of anyone doing that?

A I have not.

Q Is that something that a professional engineer can do?

A No. I mean, they can perform a calculation. Whether the value of that calculation results in any meaningful results is a different story and does not.

MR. LYON: Your Honor, I would ask the witness to step down in front of the jury if there is no objection.

THE COURT: You have my permission.

THE WITNESS: Thank you.

THE COURT: Mr. Madonna, find a position where you can see.

Q Looking at Plaintiffs' Exhibit 30, we can see the equation that was used by Mr. Kravitz. Have you ever seen this before?

A (Examining). I have not.

Q Is this equation a generally accepted method in your field for testing wet coefficient of friction or -- or concluding wet coefficient of friction?

A No.

Q Is there a method for testing coefficient of friction under wet conditions?

A Yes.

Q Okay. Is this it (pointing)?

A That is not it.

Q Does this equation make any sense to you?

A It does not for several reasons.

Q Please elucidate those reasons.

A First and foremost, Mr. Kravitz on the bottom scale of this diagram, the axis if you will has a relative level of water on surface. There are numbers that range from zero to one. But there is no dimension provided. It's not in inches. It's not in feet. It's not in millimeters. There is no dimensions provided, which smacks of unacceptability and inaccuracy number one.

Number two. He's assumed a straight line, this get's a little technical, a straight line deviation if you will for both the concrete surface and the painted splotch, I believe it's been referred to. And that's not accurate either. Because under low levels of water on a surface, you get a brief rain shower. You get due on a water surface. It typically does not affect the coefficient of friction, because the surfaces have undulations or protuberances or something, I forget what Mr. Kravitz referred to them as. So, you wouldn't see a straight line here, what you would see -- I'm sorry, a diagonal

line. You would see more of a straight line until that depth got to a certain number. And again we don't know what the depth is here. Again, these results are unreliable.

The third thing is that once you get to this number one, again whatever that represents, I believe his testimony was that this is as slippery as ice. That's certainly not a condition that we experience in our everyday lives. Even if it's pouring rain out and walking on a sidewalk, it doesn't feel like you're walking across an ice skating rink. There is still some traction. Certainly it is going to be reduced under certain conditions, but it's not going to be as slippery as an ice skating rink. So, those are the reasons why I believe that essentially this is junk science.

MR. MADONNA: Note my objection, Judge. Move to strike that last comment.

THE COURT: Objection is sustained. Jury is to disregard the last characterization by the witness.

Q Based on your education, training and experience do you have an opinion as to whether Mr. Kravitz's calculations are valid?

A Yes.

MR. MADONNA: Objection.

THE COURT: Overruled.

MR. MADONNA: Form.

Q And what is that opinion?

A It is my opinion that his calculations are not valid.

Q Based on your education, training and experience, do you have an opinion as to whether Mr. Kravitz's calculations are reliable? First, do you have an opinion?

A Yes, I do.

Q And what is that opinion?

A It is my opinion that these calculations are unreliable.

Q Okay. Is there a linear relationship between dry coefficient of friction and wet coefficient of friction?

A No.

Q And -- and can you kind of explain what that means?

A Certainly. I think I mentioned a little bit earlier. Depending on the thickness of the wetness, will have -- the surface will have different characteristics. But again it's not a straight line that we see her. It would be more of a horizontal line. And as the depth of water got thicker, then it would start to decline. But it would never go to zero ice skating rink number. Absolutely not.

Q Okay. This formula here, did Mr. Kravitz make this up?

A He testified that he derived that, so yes. He was the one that made up that calculation.

Q You may step back in the witness box.

MR. LYON: Actually I'm going to ask the witness to step back down.

THE COURT: Okay.

MR. LYON: My apologies, your Honor.

THE COURT: The witness will get a little exercise this morning.

MR. LYON: Yeah. Sorry.

MR. MADONNA: Yeah, but I don't need it.

THE COURT: Why don't you step down to the easel.

THE WITNESS: Sure.

Q We're looking at Plaintiffs' Exhibit 25. Can you identify this document?

A (Examining). Yes. That's a New York City Department of Transportation pedestrian, I'm sorry, sidewalk pedestrian ramp detail.

Q Are you familiar with this document?

A Yes.

Q And what -- Explain to the jury what it is, what it's used for, where did it come from.

A Certainly. The DOT provides specifications for transportation including pedestrian transportation. In this instance this document is a plan which the DOT would like to exist at the intersections of roadways typically seen in the City of New York. And what it provides for are certain dimensions, certain slopes, meaning the slope of a ramp surface or a sidewalk surface or walkway surface. And essentially these are provided for accessibility purposes, people with

disabilities, the elderly and the infirmed. That's why they are here. They give a couple of scenarios as to, you know, in a perfect world, you know what we would like to see, what the DOT would like to see. However, depending on site conditions, there is note on here that provides for engineering judgment. If there are conditions that exist where this exact diagram cannot be fabricated in the field and adjustments are made by the contractors that install this.

Q Okay. Does this document define what a pedestrian ramp is?

A Yes, it does.

Q Okay. And can you point out on the diagram where the pedestrian ramp is in this plan, case one?

A Absolutely. So, the pedestrian ramp is essentially -- it looks like a piece of pie. It's a pie shape section. It comes from the curb line virtually up to this point here (pointing) and then horizontally across. So that high section, if you will, would be the pedestrian ramp. And it's designated within that -- that pie shape, there is two arrows that point to the horizontal line and vertical line that says limits the sidewalk, which means that the sidewalk ends at this horizontal -- I'm sorry -- this vertical line and this horizontal line based on that diagram (pointing).

Q Now you may step back to the witness box.

MR. LYON: May I approach, your Honor?

THE COURT: Yes.

MR. LYON: I'm handing the witness what has been marked as Defense Exhibit C.

Q Mr. Lorenz, can you please outline with the marker in front of you the limits of the pedestrian ramp in that photograph?

MR. MADONNA: Objection. Absolutely objection, Judge.

THE COURT: Step up. Absolutely objection.

MR. MADONNA: Absolutely objection.

(Whereupon a side bar conference was held.)

Q Mr. Lorenz, looking at Defense Exhibit C, are you able to delineate the boundaries of the pedestrian ramp in that photograph?

A Yes.

Q Okay. Then please take the marker and outline the pedestrian ramp that you see in the photograph.

(Whereupon the witness complied with the above request of counsel.)

MR. LYON: Permission to publish to the jury, your Honor.

THE COURT: Not yet, counsel. You need to ask an additional question or two.

Q Is the outline that you created on Defense Exhibit C a fair and accurate depiction of what the pedestrian ramp is in

that picture?

A Yes.

MR. LYON: Permission to publish.

MR. MADONNA: Objection.

THE COURT: Step up.

(Whereupon a side bar conference was held.)

THE COURT: Objection is overruled. You can publish.

MR. LYON: Thank you, your Honor.

THE WITNESS: Judge, I did a dash line instead of a solid line. I don't know if it matters.

THE COURT: I think it's clear now. You can show it to the jury, counsel.

(Whereupon the exhibit was published to the jury panel.)

MR. LYON: Nothing further, your Honor.

THE COURT: Mr. Madonna.

MR. MADONNA: Certainly.

CROSS EXAMINATION

BY MR. MADONNA:

Q Good morning, Mr. Lorenz.

A Good morning.

Q How are you doing today?

A I'm well. How about yourself.

Q We have never met before this morning, correct?

A Correct.

Q You talked about earlier the -- that you were retained by Memorial Sloan-Kettering and defense counsel to defend this case in April of 2021, is that correct?

A That's my recollection, yes.

Q And when you did that, what did you do when you got this assignment?

A I believe we chatted briefly about the matter. I was provided file material to review the deposition transcript of the plaintiff, the deposition transcript of a Mr. Matera is my recollection. I believe I also reviewed the verified Bill of Particulars, certainly some photographs and exhibits that were marked at depositions.

Q And did you issue a report at that time, in April of 2021?

A No.

Q Why not?

A I wasn't asked to issue a report.

Q At that time, in 2021, in reviewing the plaintiff's deposition transcript, were you provided with any photographs that documented where he said you fell?

A I believe so. Yes.

Q Yeah. Do you have those in your file?

A No.

Q Okay. Were they marked at the deposition?

A Yes.

MR. MADONNA: Your Honor, I would like the Court to take judicial notice that there were no such photographs marked at plaintiff's deposition in this case.

Q Did you know that?

A My recollection was that they were marked. I did see exhibit marks on some of the photographs that I reviewed, that's why I answered in the many they are I did.

Q It didn't correspond to where the plaintiff fell?

THE COURT: Counsel, on your last request I have no such information sufficient for me to take judicial notice at this time. You may continue your inquiry.

MR. MADONNA: Thank you.

Q Where did Mr. Lyon tell you the plaintiff fell?

A I don't recall if he told me exactly where the plaintiff fell. Certainly I reviewed the deposition testimony of the plaintiff, and he was able to figure out, I believe, the area where he alleges the slip and fall occurred.

Q So, your -- your retention with regard to where he fell corresponds to a fall that occurred on the sidewalk, correct?

A It was on a pedestrian ramp in my opinion.

Q Let's include for this discussion right now before we get to the specifics. He was on the concrete?

A He was on a concrete surface.

Q He was not on the asphalt?

A Correct.

Q He was not on a metal grate? That's not what Mr. Lyon told you to review, right?

A I -- I -- Well, actually I recall now that I did review hospital records.

MR. MADONNA: Objection, your Honor.

THE COURT: Sustained.

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

THE COURT: Sustained.

MR. LYON: -- to the scope, the scope of the question.

THE COURT: Ask the next question, counsel. The question and the answer to the point where I sustained the objection is before the jury to that point. Now you may ask your next question.

Q So the information that you received and you were investigating whether or not this paint spot that was on the concrete was a hazardous condition, correct?

MR. LYON: Objection. Scope.

THE COURT: Overruled.

A Yes. I believe so.

(Continue on the next page.)

CROSS-EXAMINATION

BY MR. MADONNA:

Q. Did Mr. Lyon ever ask you to look into whether or not this paint splotch would be a dangerous condition?

A. I don't recall a specific request that Mr. Lyon -- with regard to that.

Q. Do you know what the weather was like that day that Mr. Little fell?

A. My understanding, it was snowing earlier in the day.

Q. And raining all day?

A. And then raining after that.

Q. Did you look at the weather reports?

A. No.

Q. And in 2021, it's only two years ago, at that time, you had no opportunity to go out and do an inspection at the site, correct?

A. That's correct.

Q. You had no opportunity to see and feel what was there to be seen?

A. Correct.

Q. Did you look back at Google images and photographs of that intersection?

A. I did.

Q. And that paint splotch that was on the pictures that Mr. Lyon told you was where the plaintiff fell, that was in

those pictures going back to 2009?

A. That's my recollection.

Q. Would you expect good and safe engineering construction practice to have inspections of the exterior concrete sidewalk and pedestrian ramps of the property while it's under construction?

A. Yes.

Q. That would be daily, at least, to clean up?

A. Yes.

Q. And then good and safe practice would include them identifying hazards that were on the sidewalk on the concrete of the exterior perimeter of the building?

MR. LYON: Objection, scope.

THE COURT: Overruled.

A. I agree that that would be prudent.

Q. And to make a determination of whether or not there would be -- whether that sidewalk, concrete area was in a reasonably safe condition?

A. Yes. That's reasonable.

Q. And if there's a difference in substance between concrete and any other substance, let's take the paint splotch in this instance, would it be prudent to make a determination as to whether or not one was more slippery than the other?

A. That would be prudent, yes.

Q. And would it be prudent to make a determination as to

whether one would be even more slippery if it became wet than the other?

A. Yes.

Q. In fact, good and accepted engineering practices would dictate that two different surfaces with different coefficient of frictions, when somebody's walking, taking one step to another in an even stride, that could cause them to fall?

A. It depends on the variation between the coefficient of friction.

Q. Right. If one is .5 under the Whiteley test that was in effect back in 2004 and less and the other one was .5 and greater, meaning one's slippery and hazardous and one side's not, if you're stepping from a non-slippery surface with one foot to a slippery surface under .5 with the other, that's a hazardous condition, correct?

A. With regard to the Whiteley, under dry conditions that would be a hazardous condition if it were below .5 in one location and the other.

Q. That difference is a big deal, isn't it?

A. It can be.

Q. To someone walking and not knowing what the coefficient of friction when you're walking, you expect it to be the same with each step?

A. That's a reasonable anticipation depending on the person's actions. If they're in a hurry, certainly that's a

variation.

Q. But even if you're walking in a hurry, even if you're walking briskly or walking fast, if you're taking the same steps, continuous stride, that's what we have to assume on average, whether it's a slow walk or a faster walk, what makes that hazardous, is moving from a less, non-slippery surface to a slippery surface, correct?

A. If that condition exists, yes.

Q. And rain, would you agree, would make a surface more slippery?

A. Yes.

Q. Even a concrete surface?

A. In general, yes.

Q. And we talked about the -- you talked about the protuberances, I think, is that a good word for it, the undulation in surfaces?

A. Yes.

Q. Because water itself is impermeable; is that the right word for it? Incompressible? What's not the right word for it? Incompressible?

A. Water is incompressible.

Q. What does that mean, generally, in physics and engineering?

A. If you have a container containing some water and you try to compress or make that water smaller, you can't do it.

But on a sidewalk it's a different situation. That's under a contained, let's say, laboratory-type conditions. So sidewalks are sloped to the road. They drain water. It's not an equal comparison.

Q. But by incompressible, that means that if it's covered, the water, if it's trapped under there, it's not going to sink in, it will find the protuberances; if not, it will fill up and become slippery?

A. Well, talking about on a walking surface, correct?

Q. Yes.

A. On a walking surface it's different than a laboratory scenario that I just outlined. On a walking surface the water's not confined. If you step on it, it will squish out from the sides of your shoes. So that would be the difference.

Q. Right. And depends on how much water is there to determine whether or not there's room for the water to go into those protuberances and under the tread, correct?

A. No.

Q. So water doesn't make a surface more slippery?

A. I'm not saying that.

Q. Water makes a surface more slippery?

A. In general, yes.

Q. It would make a surface that has a lower coefficient of friction more slippery than a surface that has a higher coefficient of friction?

A. Yes.

Q. And if you wanted to determine, in a chart for them, demonstrative purposes, an algebraic equation to show how any data would change with one variable changing, is there an algebraic formula for that?

A. Not to my knowledge.

Q. There's not an algebraic formula that can plot a graph?

A. There's plenty of algebraic formulas that can chart graphs. But the information that goes into that equation is essential with regard --

Q. I'm not talking about the information yet. I'm just talking about the formula.

A. Anyone can develop a formula to plot a graph.

Q. If you use the same formula and change one data point, then that would show you the difference between those two graphs, right?

A. In theory, yes.

Q. Not in theory. It's mathematics, isn't it?

A. Are you basing it on this specific equation?

Q. I'm just asking, how about -- and you can write this down.

MR. MADONNA: Can we have a pad for the good engineer, if that's possible? Or I can give him my paper.

THE COURT: Don't have one here.

MR. MADONNA: I have it.

A. I can write on the back of my file.

Q. Yellow pad (handing). And a marker (handing).

A. I got it.

Q. Okay. A parenthesis B equals C parenthesis one minus A over 100 percent -- no, A, B, C -- can I see what you wrote? Because I'm not good at math.

A. I didn't know if you wanted closed parenthesis.

Q. I'll write it down for you. Let's do it this way.

Do you see the one I just wrote there?

A. I do.

Q. Is that an algebraic equation?

A. Yes.

Q. And that has three different variables in it?

A. Four.

Q. Four different variables.

So if you know three of those variables and one of them change, that can plot an X and Y axis graph?

A. I don't understand that question.

Q. If you know three of the variables and you want to find one of them, can you do that?

A. Yes.

Q. And if you do that and that one changes, you can plot a graph on an X and Y axis?

A. Yes. As that variable changes, you can plot different numbers which would end up in a straight line.

Q. Isn't that exactly what this formula is?
A. That formula plots a line.
Q. Yes.
A. Yes.
Q. A line?
A. Yes.
Q. And with the variable changing on a graph, it will show you what it changes from, one to another, it's straight because you're going gradually from one to another, mathematically, correct?
A. Based on mathematics with that formula, you are, correct. Yes.
Q. Isn't that formula -- aren't you able to compare the variable of one surface with the variable of another surface?
A. No.
Q. So if you're using that formula with the coefficient of friction of the paint at .72 and the coefficient of friction of the concrete at 1, that wouldn't show two different variables as it goes down the graph?
A. It will show a straight line.
Q. Isn't that what it shows?
A. Again, the value of that information is what you --
Q. Is that what it shows?
A. It would show a --
THE COURT: One at a time.

A. It would show an angled line very similar to what we see to that diagram.

Q. So that algebra isn't made up; that's math?

A. It's math. It's math.

Q. And it shows the line so we can see how something gets more slippery as there's more water on the surface as the percentage of the protuberances --

A. No.

Q. You can't?

A. No.

Q. So if the surface of those two substances, the concrete and the paint, are different and one is more slick and one is less slick and one has more protuberances in it, when it rains, one would get more slippery than the other, correct?

A. In theory, yes.

Q. So, in theory or in reality?

A. In theory. It would depend on the material, its characteristics.

Q. Okay. So would you agree with me that in this situation with the paint starting at .72 and the concrete starting at 1, that as they -- the same amount of water poured down from the sky that was raining, that the paint would get more slippery than the concrete?

A. In theory, yes.

Q. Okay. And would the paint get more slippery faster

than the concrete that's slippery?

A. Oh, I don't know about a rate of slipperiness. I don't know if I can answer that.

Q. Would the paint get to the .5 or a less slippery point before the concrete did?

A. Again, I don't know the composition of the paint. I don't know its characteristics. I can't answer that question within a reasonable degree of engineering certainty.

Q. But somebody who went out there and felt the spot might be in a better position to determine how soft -- how flat or what the surface felt like?

A. He would certainly have a better opportunity to feel it than I would, absolutely.

Q. And you would have liked to have done that?

A. Yes.

Q. Now, are you familiar with what the corner quadrant is on a sidewalk?

A. Yes.

Q. What is the corner quadrant?

A. It's essentially one-fourth of the intersection of -- a street intersection that has sidewalks. Where the two sidewalks would intersect would be an intersecting quadrant.

Q. The corner quadrant, that's part of the sidewalk?

A. Yes, it is.

Q. And would that include the area above closer to the

building line and the curb line of the pedestrian ramp area?

MR. LYON: Objection to form.

A. I don't understand the question.

THE COURT: Rephrase it.

Q. Okay. In this picture that you drew your dash line on, and we'll get to where you started it from in a minute, but in this picture, you drew your dash line all the way up to the building line?

A. Yes.

Q. Does the corner quadrant of the sidewalk, does that encompass any portion of the corner area where the two sidewalks meet?

A. It doesn't encompass any portion of the pedestrian ramp, which would be contained within that pie-shaped section.

Q. So the corner quadrant is not in the corner of the sidewalk?

A. No, it is in the corner of the sidewalk.

Q. Can you point to it for me?

A. In that photograph, the pedestrian ramp occupies the entire corner quadrant.

Q. So they're both the same thing here?

A. In this instance, they're not the same thing. A sidewalk's a sidewalk --

Q. No. The corner quadrant and the pedestrian ramp.

A. In this instance, the pedestrian ramp occupies the

corner quadrant.

Q. So the corner quadrant is within your dashed line?

A. No. The pedestrian ramp is within my --

Q. Is the corner quadrant also within the dashed line?

A. Yes.

Q. So they're both within the dashed line?

A. Yes.

Q. The pedestrian ramp and the corner quadrant, sorry it's taking so many questions, but they're both in the same location that you dashed in here?

A. Yes.

Q. I know they're different words. But the place on the area of the sidewalk that we're talking about is synonymous then in this picture?

A. In that instance, yes.

Q. Okay. Now, you talked about the standards and Plaintiffs' 25 in evidence, and you agree that with the notes here, that the engineers had judgment when they're putting the pedestrian ramps in the intersection, they have to take into consideration certain structures that are already there such as the lamp post and the sewer drain and any other preferences that may be there?

A. Yes.

Q. In this instance there's a lamp post here?

A. There is a lamp post within that pedestrian ramp,

correct.

Q. And that lamp post is that within the corner quadrant?

A. If they're synonymous, then it would be.

Q. Is that your opinion?

A. Yes.

Q. Are you familiar with who's responsible for maintaining the sidewalks?

A. Yes.

Q. Who is that?

A. The adjacent property owner.

Q. In this case that would be the cancer center, MSK?

A. Yes.

Q. And you're familiar with the administrative code that -- 7-2 -- is it 210 or 201? 7-210?

A. Yes.

Q. Is that the administrative code that puts the responsibility of the abutting sidewalk on the property owner?

A. Yes.

Q. And isn't it true, Mr. Lorenz, that 7-210 puts the responsibility for the sidewalk, including the corner quadrant of that sidewalk, the responsibility for maintaining that in a safe condition on the property owner?

A. Yes.

Q. So do we agree that your dashed-in line here, which is the corner quadrant also and the pedestrian ramp, would be

included in the responsibility of the property owner because it's part of 7-210's definition of the corner quadrant that the building owner's responsible for maintaining?

A. No.

Q. But you just testified that 7-210 says that the corner quadrant is the responsibility of the property owner?

A. That's correct.

Q. Is there another statute that I'm not aware of?

A. I don't believe so.

Q. So that's the statute that governs responsibility with regard to the maintenance of the sidewalk?

A. Correct.

Q. That's the only one you're aware of?

A. Correct.

Q. That's the only one that exists?

A. It is the only one I'm aware of.

Q. So this paint splotch, again, if those two are synonymous, this paint splotch is also included within the corner quadrant of the sidewalk on the property?

A. It's within the pedestrian ramp. Again, the distinction here is that the pedestrian ramp occupies the entire corner quadrant in this instance. And I can tell you why if you'd like to know.

Q. Does the corner quadrant include the pedestrian ramp?

A. In this instance?

Q. Yes.

A. Yes.

Q. So, you can answer that simple question, is this paint splotch within the corner quadrant of that area?

A. Not in my opinion.

Q. Not in your opinion? Even though it's in the definition and even though it's synonymous with the area that you drew included the corner quadrant?

A. That is the pedestrian ramp which I drew.

Q. I don't want to do this again. It includes the corner quadrant?

A. The pedestrian ramp occupies the entire corner quadrant.

Q. Right. And you would agree with me that it's the property owner's responsibility to maintain the -- under 7-210 the sidewalk, including the corner quadrant, in a reasonably safe condition?

A. Yes.

Q. And if there's a slippery condition on that corner quadrant in that sidewalk, that would be MSK's responsibility in this case?

A. Yes.

Q. And if there was any other hazardous condition on that sidewalk in the corner quadrant, that would also be MSK's responsibility?

A. Yes.

Q. Do you know if anybody ever went out on behalf of Memorial Sloan Kettering and did any other inspection measurement or looked at this spot?

A. No.

Q. As a matter of fact, the deposition testimony that you read, nobody was even aware of it, correct; Mr. Matera said he never noticed it?

A. Certainly Mr. Matera testified to that.

Q. And nobody brought it to his attention as far as he testified?

A. That is my recollection.

Q. So nobody saw this mysterious splotch that was there from 2009 through this accident in 2014 as far as you know from Memorial Sloan Kettering?

A. I'm note sure if anyone didn't see it. But certainly it wasn't brought to his attention as being an unsafe condition.

Q. And, again, if the surface area is less slippery or became slippery when it gets wet, that would be a hazardous condition?

A. Yes.

Q. And that's something that should be rectified?

A. I agree.

Q. So would you agree, Mr. Lorenz -- let's forget about the designations, the definitions because we're arguing over

synonyms according to your testimony of pedestrian ramp and corner quadrant.

MR. LYON: Objection to form.

Q. Would you agree that this paint splotch --

THE COURT: Overruled.

Q. -- is an unsafe condition on the sidewalk?

THE COURT: You can answer.

A. Sorry. Can you repeat the question?

THE COURT: Repeat the question.

MR. MADONNA: Can we have it read back?

THE COURT: Ask it again. It was a little inartful in any event.

Q. Would you agree, regardless of whose responsibility you want us to testify that it is, would you agree that that paint splotch is an unsafe condition on the sidewalk?

A. I can't agree to that.

Q. Would you agree that if the coefficient of friction got below .5 when it was wet, that it would be a slippery condition?

A. I pause because when I testified earlier, I spoke about two different coefficient of frictions, 0.5 number being dry, which is the F609 number, if I may, and then the current - and, actually, it was an existing number back then; when I say back then, in 2014 - 0.42.

So let me state that if it's below the threshold between safe and unsafe, it can be a slipping hazard.

Q. And if it's below the threshold between safe and unsafe, and it gets wet, that's unsafe?

A. Yes.

Q. And that's something that should be rectified by whoever's responsible for it?

A. I agree.

Q. So would it be fair to say that over the years from when MSK purchased this building, having this kind of a condition on the sidewalk should have at least been something that they looked into to make a determination as to whether or not it was slippery or unsafe?

A. That's reasonable.

MR. MADONNA: I have nothing else.

THE COURT: Any redirect, Mr. Lyon?

MR. LYON: Yes, your Honor.

REDIRECT EXAMINATION BY

MR. LYON:

Q. Just to clarify, can you explain the distinction between what the intersection quadrant is and what the pedestrian ramp is?

A. Yes. Can I use an exhibit to explain that? It would probably be more clear. And the one that I marked would be fine, if I can use that.

Q. Sure.

MR. LYON: May I approach, your Honor?

THE COURT: You may.

THE WITNESS: Can I show this to the jurors just to explain it?

THE COURT: It's in evidence. You can hold it up.

THE WITNESS: Okay.

THE COURT: Point to it, describe it if you need.

THE WITNESS: The diagram that we saw earlier, and I forget which, Exhibit 30.

MR. MADONNA: 25.

MR. LYON: 25.

A. Again, under perfect conditions, this is what the DOT would like for pedestrian ramp at an intersection (indicating). Note No. 3 provides the ability of the engineer to make changes if there are certain conditions in the field which exist which could not result in that DOT drawing there. And that's a condition that we see here in this photograph. And that condition is this catch basin steel grate at the very intersection of these two pedestrian ramps. Had that not been there, then these dashed lines (indicating), both horizontally and diagonally, if you will, on this diagram, would have come closer to one another. This pie shape would have gotten smaller (indicating). And then this intersection quadrant -- sorry, this pedestrian ramp (indicating) would then not occupy the entire intersecting quadrant, if that makes sense.

Q. Okay. And, Mr. Lorenz, is every pedestrian ramp within

the intersection quadrant?

A. Yes.

Q. And Mr. Kravtiz testified that the City's responsible for the pedestrian ramp.

MR. MADONNA: Objection. Outside the scope of cross, Judge.

THE COURT: Sustained.

MR. MADONNA: This is redirect.

MR. LYON: Please.

THE COURT: Counsel, you can ask your next question.

MR. LYON: Your Honor, may I have the last question and answer read back?

MR. MADONNA: The last question and answer was sustained, Judge. Objection.

MR. LYON: Well, before that.

THE COURT: Will the Court Reporter please read back the last question and answer prior to the objection?

(Whereupon, the Court Reporter read the requested portion of the record.)

Q. But does every pedestrian ramp occupy the entire pedestrian quadrant?

A. No.

Q. And, for instances like that, where the pedestrian ramp does not occupy the entire intersection quadrant, that piece of

the intersection quadrant that is not the pedestrian ramp, is that the property owner's responsibility?

A. Yes, it is.

MR. LYON: Nothing further, your Honor.

MR. MADONNA: No recross, Judge.

THE COURT: Witness may step down.

THE WITNESS: Thank you, judge.

(Whereupon, the witness was excused from the witness stand.)

THE COURT: Step up, counsel.

Members of the jury, give us a moment, please.

(Whereupon, an off the record discussion was held at the bench.)

THE COURT: Members of the jury, our next witness is going to be here at 2 o'clock. So I'm going to excuse you for a very early and long lunch. Enjoy yourself, but not too much, and be back promptly at 2 o'clock.

Jury may exit.

THE COURT OFFICER: All rise. Jury exiting.

(Whereupon, the jury exited the courtroom.)

THE COURT: Anything on the record before we break for lunch?

MR. MADONNA: No.

MR. LYON: No, your Honor.

(Whereupon, a luncheon recess was taken and the

following was transcribed by Official Court Reporter Lori Sacco:)

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

****

MR. MADONNA: Could you mark these for identification. They are just demonstrative.

THE COURT: Okay.

(Whereupon the model of the knee was marked for identification as Plaintiffs' Exhibit No. 31 as of this date.)

(Whereupon the medical illustration was marked for identification as Plaintiffs' Exhibit no. 32 as of this date.)

THE COURT: On the record. Good afternoon counsel. Anything before we bring in the jury?

MR. MADONNA: No, Judge, I think we're ready.

MR. LYON: No, your Honor.

THE COURT: Bring in the jury.

THE COURT OFFICER: All rise. Jury entering.

(Whereupon the jury panel entered the courtroom.)

THE COURT OFFICER: You may be seated.

THE COURT: Members of the jury, welcome back. At this time I call upon Mr. Madonna to call your next witness.

MR. MADONNA: Thank you, your Honor. The plaintiff calls Jeffrey Kaplan, M.D.

THE COURT CLERK: Raise your right hand.

J E F F R E Y K A P L A N, M. D., after having been duly

sworn by the court clerk, was examined and testified as follows:

THE WITNESS: Yes.

THE COURT CLERK: Thank you. Please state your name for the record.

THE WITNESS: My name is Jeffrey Kaplan, K-A-P-L-A-N.

THE COURT CLERK: And your address.

THE WITNESS: My office is at 160 East 56th Street, Manhattan, 10022.

THE COURT CLERK: Thank you. Witness is sworn.

THE COURT: You may inquire.

MR. MADONNA: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. MADONNA:

Q Good afternoon, Dr. Kaplan.

A Hi.

Q Are you currently licensed to practice medicine?

A Yes.

Q And where are you licensed?

A I have licenses in New York, New Jersey and Nevada.

Q And when did you become licensed?

A In New York in 1994. New Jersey 19 -- I'm sorry 2014. And Nevada 2020.

Q I think that microphone is on.

MS. SACCO: No, I don't think it's on.

THE COURT: Press the button.

Q There you go. Can you tell the jury a little bit about your educational background, undergrad?

A Education, I went to college at Yale University. When I graduated college, I went to medical school here in the city at Columbia University. Following that I did a training program in orthopedic surgery. I did that at a place called The Campbell Clinic in Memphis, Tennessee. I was in the first orthopedic training program in the United States. Following that I moved to New York in 1994 where I've been in private practice ever since.

Q And are you certified in any particular field in medicine?

A I'm board certified in orthopedic surgery.

Q And what does it mean to be board certified in orthopedic surgery?

A Board certification is simply an extra qualification you can receive after graduating college and medical school and doing a residency training program. Basically you take a series of examinations over a number of years. It's given by an expert panel of orthopedists, surgeons of The American Board of Orthopedic Surgeons. You take oral exams and written exams. And if they feel you have reached a certain level of expertise and knowledge, then they deem you board certified.

Q Do you have to become recertified every so often?

A You do. Every ten years you have to recertify.
Q When is the last time you have been recertified?
A 2017, I believe.
Q Now, you mentioned that you've been in the private practice of medicine in the field of orthopedics, correct?
A Yes.
Q Can you explain to the jury what the concentration in the field of orthopedics is in medicine?
A Sure. Orthopedics is the study of bones and joints and injuries or abnormalities to the bones and joints. And the treatment of those things you have conservative means, physical therapy, injections, medications. Or if those things don't work or are inappropriate then surgical treatment of those, those problems.
Q And in that field, doctor, you treat patients who come to you with traumatic injuries as well as other disorders to the bones and joints?
A That's correct.
Q What other besides traumatic injuries that you treat?
A Developmental injuries, meaning birth injuries, things developmental, arthritis, which can occur for many reasons, but either rheumatoid, osteoarthritis, which is wear and tear arthritis, traumatic arthritis, sports injuries, things like that.
Q And what are traumatic injuries?

A A traumatic injury is an injury that occurs because of a force directed at the body that usually overcomes the strength of either bones, muscles or the cartilage. That's most of what we deal with.

Q Okay. And are you affiliated with any hospitals?

A I am. On the staff of New York Presbyterian Hospital, Mount Sinai Hospital Systems and Lenox Hill Hospital.

Q And how long have you been with those hospitals?

A Since --

Q Approximately.

A I moved back to New York in 1994. So, I've been on hospital staff since then.

Q And in your private practice of medicine approximately how many of your patients you treat are patients that are related to traumatic injuries as opposed to other disorders or congenital injuries, conditions?

A Most of what I do is trauma. In fact, the name of my practice is NY Ortho, Sports Medicine and Trauma.

Q Is there a difference between sports medicine and traumatic injuries?

A Yes. You can have wear and tear injuries, overuse injuries from sports. But most injuries that we treat are sports injury that are traumatic.

Q And in your practice, doctor, have you treated patients with traumatic injuries to their knees, including ruptures and

tears to tendons and ligaments?

A Yes.

Q And do you conduct surgery as well?

A I do.

Q How often do you do surgery?

A I'm in surgery one to two days a week, depending on what comes through the office. So, usually definitely on Wednesdays, sometimes Wednesdays and Fridays.

Q And how long have you been on that schedule, approximately?

A Thirty years.

Q Okay. An awful lot of surgeries then.

A Yes.

Q Have you done surgeries for a ruptured quadricep tendon, where you had to repair that?

A Yes, I have.

Q Approximately how many times have you seen that?

A Well over a hundred.

Q Now, doctor, were you retained by my office to conduct an examination of Michael Little with regard to injuries he sustained in an accident back on November 26th, 2014?

A Yes.

Q And have you been retained by my office in that matter before to do an examination and issue a report with regard to a client of mine's injuries?

A I have.

Q Approximately how many times?

A I have no idea. Lots of times since I've done that.

Q Do you also treat some patients of mine who suffer from traumatic injuries who have been referred to your office for treatment?

A I have patients who are clients of yours, yes.

Q Have you issued reports with regard to those clients as well?

A If you ask me for them, yes.

Q Have you testified in court?

A I have.

Q Do you do this for other attorneys too, not just my office?

A Because of the nature of trauma, often times people have lawsuits going on. So, I am asked to give an opinion regarding what the injuries were and what the permanency of those injuries both by defense firms and plaintiffs firms, yeah.

Q In that part of your practice, that's the part where you examine the patient to just give an opinion, do a physical examination, to give an opinion and report, not somebody that you've treating. About how many of those are for plaintiffs and how many are for defendants, what percentage?

A The expert opinions are about 50/50 plaintiffs, defendant.

Q And how often do you come to court to testify either on behalf of those examinations or on behalf of patients who you treat?

A There is not a regular schedule of that. It's been -- During COVID I wasn't here for two and a half years -- but it's generally about once a month, something like that.

Q And have you testified in cases where I was a trial lawyer for?

A I believe so.

Q About how many times?

A Again, I don't remember.

Q Okay. But it has been quite some time since we have done this?

A I haven't seen you in a long time, yeah.

Q Are you compensated in those situations when you're doing an examination and coming in to testify?

A Yes, of course.

Q What are you compensated to do an expert examination and offer an opinion in a report?

A In a report, probably when this was first done, it was $1,700. Now we charge about $2,000 for an examination, and that includes a report and X-rays and things like that.

Q And also for taking time away from your practice, I imagine your practice is fairly busy during the week. But to get down here and spend an afternoon with us at 71 Thomas and

take that time away, are you being compensated for that as well?

A Sure. I had to cancel my office from about 11:30 so that I can make sure that I can get down here. That's $7,500.

Q Now, let's go back to Michael Little. When he came to your office for the examination and reports, how many times have you examined him?

A I've seen him three times.

Q Do you recall when they were?

A I have my chart, if I could give you the dates.

Q Yes.

MR. MADONNA: With the Court's permission.

THE COURT: You have my permission.

THE WITNESS: Okay.

A So, I first saw him on July 2nd of 2015. I saw him again on October 10th of 2017. And most recently January 24th of 2023.

Q And on each of those visits, without getting to the specifics, what did you do on each of those visits?

A Those visits I reviewed medical records that were available to me. Spoke to Mr. Little. Examined Mr. Little. Took some X-rays. And then offered an opinion as to what his injuries were. And some information about my opinion.

Q And what records did you review?

A I reviewed a lot of records. I reviewed records from his -- the day of his injury to his left knee. I reviewed

records from some previous knee surgeries that he's had, two on the right and then an arthroscopy on the left prior to this. And I reviewed the operative report from this injury from Dr. Turtel and some of Dr. Turtel's notes.

Q We have those records, doctor, here in the court in evidence. If there is anything you need to refer to as we're going through, you can refer to them.

A Sure.

Q So, would you then take a history from Mr. Little?

A Yes.

Q What was the history that you took from Mr. Little on the first visit in July 2015?

A My first visit I took a history of injuries that occurred on 11/26/24. Mr. Little slipped on what I interpreted as some construction debris. He believed it was epoxy or wet paint. He fell and ruptured his quadricep tendon, which is the thigh muscle connected to the kneecap. He was taken to New York Presbyterian Hospital and he was placed in a knee immobilizer, which is a brace that keeps the knee from bending or straightening. He came under the care of Dr. Turtel, that's Andy Turtel, who performed a surgical repair of his left quadriceps tendon on December 4th of 2014. He had a period of rehabilitation following that and he was continuing to do rehabilitation, exercises on his own at that time.

Q Now, let's talk about the knee, if we can. And I have

here, if it will assist you, a model of the knee. Would that assist you in explaining the anatomy?

A Sure. Yeah.

MR. MADONNA: May I, Judge?

THE COURT: You may approach.

Q Plaintiffs' 31 for identification.

A Thank you.

Q Can you explain to the jury what that model is and then the working parts of the knee?

A Sure. So, this is a model of the knee. This is actually a right knee, although in this case we're talking about a left knee. They look the same in mirror image. The knee is made up of several structures. Primarily the two major bones of the knee are the thigh bone, the femur, and the shin bone, the tibia. And they come together to form the joint of the knee, which moves normally (indicating). And in between the bones of the knee is a soft cartilage called the meniscus, a lot of people have injuries of (pointing). And also capping each of the bones is a smooth, shiny surface, and that's called the articular cartilage. And the word articular means to move against something else of similar quality. So, the joint articulates between the bones. It moves. This surface is smooth and shiny and has low friction and allows the knee to move smoothly. Normally without any noise or cracking or popping or things like that. You all look at the end of a

chicken bone and you've seen the pearly white, that's the articular cartilage you're looking at.

The third major bone of the knee is the patella, the kneecap. It spans across the knee and it's connected through this tendon to the muscle of the quadriceps or the thigh muscle. That muscle, when it fires, when the muscle fires, it straightens the knee (indicating). So, it's responsible for bending and straightening the knee. In Mr. Little's case, when you fall quickly and your muscle contracts but your body weight pushes in the other direction, you can rupture this mechanism of the quadricep tendon, which is what happened in Mr. Little's case.

Also in Mr. Little's case I noted from reviewing the operative report is that when he fell, the force generated between the kneecap and the femur is responsible for an operative finding of a piece of this cartilage, this smooth, sliding, gliding cartilage being knocked off and becoming a loose body in the joint. And that is the beginning of what we call traumatic arthritis, because it's not a wear and tear problem that occurs over time. But immediately, at the time of the accident, you damage the joint surface. The joint surface damage is what leads to arthritis.

Q And the quadriceps muscle, that's one of the largest muscles in your mode?

A It's four muscles put together, and yes, as an

aggregate they are the largest muscle in the body.

Q And that you said is responsible for the extension of your leg?

A It's responsible for many things, but the thing that we most think of it is the extension of the knee. It's also responsible for, when you step down, it fires to keep you from sliding forward. It stops your knee from buckling. That's another major, major function of the quadriceps muscle.

Q And is a rupture of the quadriceps tendon -- And you reviewed the emergency room record and the ambulance report?

A Yes.

Q -- is that a traumatic injury?

A Yes.

Q Was that a traumatic injury to Mr. Little?

A Yes, it was.

Q Is there any doubt that that occurred traumatically or at the time it occurred?

A That occurs from a traumatic injury.

Q And what is there in the record in Plaintiffs' Exhibit 7 --

MR. MADONNA: May I, Judge?

THE COURT: You may.

Q -- or the hospital record afterwards that tells you as a doctor who is looking at this or the EMT that was examining him at the scene, that there is such a traumatic injury to the

left leg?

A Well, they note, number one, it's -- he was dispatched because of an injury. Let's see (examining). He was complaining of pain in the left knee. That's a symptom of trauma. Let's see. They wrapped his leg in an ice pack and a bandage, which is done for trauma. (Examining). That's from the ambulance call sheet.

Then when he comes to the emergency department, they note again that he had a fall, which sets up trauma. That his chief complaint was the left knee injury, status post mechanical fall, meaning that he had a slip or trip, it's a mechanical fall and he had immediate knee pain. He had swelling. He was unable to bear weight. Let's see. So, those are all signs of trauma.

Q Now, is the rupture to a tendon as large as the quadriceps tendon, is that palpable on physical examination?

A It can be. There can be a separation, because the muscle normally contracts unless it's tethered to the -- to the tendon. If you rupture the tendon, the muscle can contract and you can get a gap. That can quickly fill with blood sometimes or sometimes it is not palpable but it can be.

Q And that is -- would prevent somebody from being able to extend their leg?

A If there is a gap, if there is any rupture it will extend -- it will prevent extension, that's right.

Q And so having reviewed the medical record, what was

their plan -- what did they diagnose Mr. Little having that day?

A Well again just -- just to point out, because I'm just reading this again for the first time in a while, he did note a pop when he fell. That's very common in this type of thing. The knee gave out. Again, that's what I was describing before, the quadriceps protects your knee from just buckling. They do note that he was unable to extend the knee. So, their plan would have been to place him in a knee immobilizer and advise him to see an orthopedic surgeon.

Q And did they do that?

A They did.

Q And did Mr. Little, as far as your review of the records indicate, come under the care of an orthopedic surgeon?

A He came under the care of Dr. Andrew Turtel.

Q And when he saw Dr. Turtel, did he present with the same injury?

A He did.

Q Did Dr. Turtel come to the same findings from your review of the records in the records in evidence here?

A He did.

Q I'm going to provide you with Plaintiffs' 9 and 10 in evidence. Can you review them.

A Sure. (Examining).

Q So, was there any need for further testing to be done upon that diagnosis of the ruptured quadriceps tendon at the

presentation to the emergency room or with the presentation to Dr. Turtel?

A It's a pretty obvious injury when it occurs. So, the only imaging they usually get is an X-ray just to make sure that there is not a piece of -- the patella didn't fracture along with the rupture. That was -- This was primarily a tendon rupture.

Q Is that a painful injury?

A Yes, it is a very painful injury.

Q And what would then be the normal course of care or treatment of that injury once you come under the care of an orthopedic surgeon?

A For a surgery repair of the quadricept's tendon.

Q Is there any other way to repair the quadriceps tendon?

A No. I mean, if someone is very, very sick, you can keep them in a knee immobilizer for the rest of their life, but that's not usually done for a person who can tolerate surgery.

Q Now, let's talk about Mr. Little. Upon your examination of him, what did you find as far as his stature and his activity level when you examined him?

A When I examined him, I noted that he, number one, still had some atrophy.

Q We'll get to the injury in a minute. Just in general was he somebody who stayed in shape?

A Oh, yeah. Yeah.

Q He was a physically active person?

A He's physically active, yep. He's doing exercises on his own at the time I first saw him. That was in July of 2015. So, you know, several months after his -- his surgery.

Q And did part of your history include that he was athletic?

A Yeah. Yeah.

Q Now, with Dr. Turtel, Dr. Turtel then undertook that plan that you had indicated and recommended the surgery for Mr. Little?

A Yes.

Q Did Mr. Little undergo that surgery shortly thereafter?

A He did. December 4th, 2014.

Q And you've done that surgery yourself?

A I have.

Q And similar surgeries to the quadriceps like that?

A That's correct.

Q I'm going to show you what's marked as Plaintiffs' Exhibit 32 for identification. And would this medical illustration, which is not Mr. Little's knee, but would this medical illustration assist you in explaining to the jury about the anatomy and the procedure and how the tendon is re-attached?

A Yes.

Q Okay. I actually have that in a blow up.

MR. MADONNA: With the Court's permission, if you

could come down and we can use this to explain to the jury.

THE COURT: You may step down.

MR. LYON: Judge, may I step aside?

THE COURT: You may.

A So, this is a medical drawing of the quadriceps. One, two, three (pointing) and there is a fourth muscle they don't have on here. This is an illustration of a rupture through the patella tendon, which dislodges the patella from the quadriceps. So, this mechanism, this extension mechanism no longer holds. So, that's the patella, and this is the quadriceps tendon hooked into the quadriceps. So, you're unable to extend the knee by firing the quadriceps.

The surgery that is done, you go in and clean off both surfaces of the quadriceps and quadriceps tendon above as well as the top of the patella. Dr. Turtel then drilled three drill holes with a mechanical drill into the top of the patella. So, into the top surface of the patella (indicating). And then he drove some anchors into the -- into the patella. And those anchors have sutures attached to them. Then you weave the suture through the end of the patella tendon and bring it all together so that the quadriceps tendon and patella tendon are anchored into the patella and they hold in place.

Again, you have to be in a knee immobilizer for a period of time. Once that starts to grow together, you can do exercises and try to get this straightened back up.

Q Now, you mentioned earlier about the surgery that Dr. Turtel did. This is a blowup of the operative report. And this is normal for a surgeon to do at the time of an operation?

A Sure. An operative report is just basically a cookbook of the steps that you took to perform the surgery.

Q And this is in evidence in the Beth Israel record. The number is on the chair. I forget what number it is. It's also in Dr. Turtel's record.

A Ten.

Q Ten. So, this is what Dr. Turtel saw and did at the time that he went into Mr. Little's knee to perform the surgery?

A That's correct.

Q And aside from -- Well, explain to the jury what the surgery consisted of.

A Sure. So, the preoperative diagnosis, before he opened up Mr. Little's knee, because of the quadriceps tendon rupture, so the major procedure that he is expecting to do is to repair that quadriceps tendon. When he got in there, the postoperative diagnosis was not only the quadriceps tendon rupture but also a tear of the anterior horn of the lateral meniscus. Again this is the meniscus (pointing), this cartilage and a loose body. A loose body, as he dictates later in the report, is a chunk of this smooth, sliding, gliding surface that knocked off and is just sitting free in the joint (pointing). So, the surgery -- You want me to go through the surgery?

Q Yeah, sure. Yeah.

A So, the surgery that was performed, Mr. Little was brought in the operating room. Put on the operating table. An incision is made with a tourniquet inflated. The incision is made from the top of the patella superior fold of the patella down, across the knee joint (pointing). Let's see. Immediately the torn and retracted portion of the quadriceps tendon was noted. So, again, since that quadricep is connected to -- I'm sorry -- since the tendon is connected to the muscle, the quadriceps muscle, the muscle normally contracts unless it's tethered across the knee. So it was torn and retracted, pulled back. He debride it, which means to clean off the dead tissue at the top of the patella and at the bottom of the patella tendon. He looked inside the knee joint by flipping the kneecap down. Looked inside. He noted a tear in that cartilage in the joint, the meniscus cartilage (pointing). You can see it's sort of like a circle, and the thigh bone sits in there, and that helps center the knee for motion. So, he's torn that center and cartilage of the knee.

Also noted in addition was a large loose body fragment of articular cartilage. Again articular cartilage means the joint surface. So that's necessary to make the joint move smoothly. When you damage that, the moment you damage that articulate cartilage, you have arthritis in your knee. You have the starting of arthritis. That was removed, because once

that's knocked off, it's not going to grow back. It doesn't have the capacity to grow back.

He also took a knife and cut out the portion of the meniscus that was torn. And then three separate drill holes were placed in the top of the patella, that's the bone, and put in these anchors called bio suture tacks. Those were then each used to suture through the quadriceps tendon in an interlocking fashion and the sutures were tied. And so that brings together the patella tendon and the patella bone. And then, of course, postoperatively he's placed in a plaster splint, an immobilization device, because even when you have repaired the tendon to the bone, it still has to grow together, right. So you have to keep this immobilized while the body does its job. And you can put it in the right spot, but then it has to grow together. So for a period of time you immobilize it before starting exercises and things.

(Continue on the next page.)

Q. And that's all for this.

So after that surgery's done, what would you expect as an orthopedic surgeon to be the plan for care and treatment for somebody with that injury and that surgery?

A. So the plan in my hands, and looks like Dr. Turtel did the same thing, is to start some rehabilitation, some physical therapy and to try to strengthen the muscle up, get the motion of the knee back and things like that.

Q. So Mr. Little rehabilitated his knee?

A. He did rehabilitation exercises, yeah.

Q. Did he do it with an office of physical therapy or someone like that?

A. Yes.

Q. Or on his own?

A. Both.

Q. And the physical therapy that he went through, was he compliant according to the records of Dr. Turtel?

A. As far as I know, yes.

Q. Did he get a good recovery from that?

A. He has gotten a reasonable recovery, yeah.

Q. Now, after the surgery was done and you follow up with the orthopedic surgeon a few times as Mr. Little did with Dr. Turtel, is there any other treatment that's necessary at that time for this injury?

A. There's no other treatment that's necessary. Of

course, as Mr. Little did, he tried to stay as strong as you can, try to get your muscles as equal as possible. And keep your joint moving as much as is possible.

Q. So it's better to stay active and do work even if it's painful?

A. Yeah. Of course.

Q. Let's go back to your examination, the first one, July 22, 2015.

A. Yes.

Q. And you were talking about there, after taking the history and reviewing the records and the injury, that Mr. Little sustained -- you conducted a physical examination?

A. I did.

Q. What did the physical examination consist of?

A. First there's some observations, you take a look at the legs. Mr. Little still has atrophy of his left thigh compared to the right. Atrophy means a loss of muscle bulk and strength. And so when injured, the muscle and the tendon, it's very difficult to get it back to equal. And that's true in Mr. Little's case. Part of that is the injury. Part of that is not being able to surgically get things exactly right. And part of it is the loss of motion that has occurred because of the injury to the meniscus and primarily to the joint surface.

Q. So when we talk about atrophy, is that something normally that you would expect an orthopedic surgeon to do on

examination, particularly one that involved the muscles and tendons?

A. Standard part of the physical exam, yeah.

Q. How do you do that?

A. You simply take a tape measure and measure around the thigh.

Q. Is there a particular place on the thigh you're supposed to measure?

A. You just do it at an equal point.

Q. Meaning the same on one side and the other?

A. Exactly.

Q. So you can do it six inches up or eight inches up or four?

A. You can, uh-huh.

Q. Do you also do measurement of the lower leg?

A. I generally do. His lower leg was not injured in this case. But I think it's a more thorough exam, yeah.

Q. Was the lower leg measurements equal, right and left?

A. Yes, they were.

Q. Would you expect there to be some difference in the measurements with regard to somebody who's right-hand dominant, left-hand dominant?

A. Not of their legs, no.

Q. So you would anticipate the upper legs to be as the lower legs were?

A. That's right.

Q. And with the atrophy that you found in the upper leg on the measurements, how much atrophy, how much loss was there at that initial visit in July 2015, eight months after the injury?

A. Initially three centimeters loss; that's about an inch. An inch in the thigh. You know, it's noticeable. Just like an inch around your waste, which is about double the size of your thigh, is noticeable.

Q. And what's the significance of that?

A. Again, it's loss of muscle bulk and strength generally associated with injuries on the joint surface, injuries to the muscle and arthritic changes.

Q. And did Mr. Little provide you with any -- did he give you any complaints about any activities or issues that he had with his leg?

A. He did. At that time, he was doing exercises on his own, but he was finding it difficult to return to the gym activities that he had previously enjoyed; those included martial arts and sports. He was unable to run or train. He was unable to do squatting exercises or lift at that time.

Let's see. Those were the primary complaints he had.

Q. Did he make a complaint about his knee giving out?

A. Let's see. Yes, his knee was giving out at that time about one to two times a week.

Q. Is that important to an orthopedic surgeon in his

history?

A. It is in a case like this. Again, the quadriceps muscle is responsible for maintaining your knee, keeping it from giving out when you step forward. With weakness in your quadriceps, you can get giving out of your knee. That's one of the primary things people have, giving out of their knee.

Q. Let's talk about this knee. You said you were aware of the prior history of a surgery on his left knee; that's correct?

A. That's correct.

Q. What is the history that was given with regard to his prior injuries?

A. He had a partial meniscotomy on the left. That was done, I believe, around 2010. And he had returned to work in his usual activities, including working out and things like that, after that, which is pretty routine for a meniscus injury.

Q. Would that prior meniscus injury have any affect on this quadriceps tendon rupture and the rehabilitation from it?

A. Not likely.

Q. Now, he did also tear part of the meniscus in this surgery that Dr. Turtel agreed as well?

A. That's right.

Q. That's not really the significant part?

A. That part of the injury is not that significant.

Q. It is an injury though?

A. It's an injury, absolutely. And it required removing

some more of the cartilage. It was a lateral meniscus this time as opposed to the medial meniscus. But the injuries that are of concern now are the joint surface injury and the quadriceps rupture, which causes atrophy and weakness.

Q. And the joint surface you talked about was that a loose body you saw for the bone, for the particular part of the bone, and the significance of that, you told us, was the posttraumatic arthritis?

A. That's right. That leads to arthritis, immediately.

Q. Can you explain to the jury what arthritis is and why that's significant?

A. Sure.

Arthritis is a medical condition, a syndrome that -- meaning it has different symptoms. Those symptoms can include loss of motion, loss of strength, swelling, cracking and popping in the joint, redness of the joint, and certainly pain. And they usually stem from the joint surface not being smooth.

Now, that can be either a wear-and-tear change, meaning over time you wear out that joint surface. That can be a bloodborne problem like rheumatoid arthritis where the blood elements eat away at the joint surface and make it rough, or it can be traumatic where you knock a piece of that joint surface off as we did in this case.

Q. And did you have any other findings?

A. We did. He had the scar that we talked about, the

incision from the patella down.

Q. How large was that?

A. That was ten centimeters by measuring with a tape measure.

He had limited motion of his left knee compared to his right, and that stayed pretty consistent. On the left he can flex to 135 degrees. On the right he can flex to 145 degrees.

When I first saw him, he lacked three degrees of extension of the knee, extensions straightening the knee out. And that is mediated by the patella tendon, and that actually has gotten slightly worst over time, which is what you would expect with aging. And now the most recent time I examined him, he had a five-degree loss of motion. Not much, but it is significant.

Q. And what about did you examine Mr. Little's gait at that time?

A. I did. When he walks, and you can watch him walking, he does have a slight abnormal gait. He has what's called an antalgic gait, which means a limp. When he walks, his leg doesn't swing through on the left the way it does on the right. So he limps along -- it's slight, no question about it. But if you're looking for it, it's very obvious.

Q. It's definitely something that would be obvious to an orthopedic surgeon doing an examination?

A. Absolutely.

Q. And something they would be looking for with an injury to the lower extremity?

A. You would hope so, yeah.

Q. So at that time in July of 2015, after reviewing the records that you reviewed, taking the history, doing the physical examination, did you formulate a diagnosis of what Mr. Little's injury was?

A. I did.

Q. What was that diagnosis?

A. The diagnosis was of a left quadriceps tendon rupture, articular surface injury requiring an excision of an articular surface loose body, status post-surgical repair of the quadriceps tendon, removal of loose body and partial meniscectomy, meaning taking out that meniscus part that was torn.

Q. And do you have an opinion with a reasonable degree of orthopedic certainty as to whether those injuries are permanent?

A. I do believe. Certainly the articular surface injury of the joint is permanent. It's not like permanent, but it's progressive; meaning it will worsen over time as the joint moves.

He has atrophy, which is a sign of permanent injury to the muscle and tendon, even though it has been repaired. And with regard to the meniscus, a portion of it was taken out. So obviously it's a permanent change in the shape of the meniscus.

Q. And at that point you had diagnosed limited range of motion. At that point did you know if that was going to be permanent or not?

A. There's no way to know for sure. But it's usually likely.

Q. And did you formulate a prognosis? And before you tell us if you did, what is that medically?

A. A prognosis is looking into the medical future based on what's happened to the patient and your experience with things. And deciding whether things were going to get better, meaning a good prognosis, or things were going to get -- stay the same, which would be a guarded prognosis, or things were going to get progressively worse, and I felt that things would certainly get worse over time because of the joint surface damage. And so I gave him a poor prognosis.

Q. And then you followed up and saw Mr. Little again. I think you said the next visit was October 2017, a little more than two years later?

A. That's right.

Q. At that examination what did you do?

A. At that examination I reviewed some additional medical records. I did another physical examination, took some more x-rays, came to an opinion.

Q. So can you explain to the jury at that time -- let me ask you, did your physical examination, was it essentially the

same?

A. It was essentially the same, yeah.

Q. And the findings that you came to, did you measure and find atrophy again?

A. I did.

Q. What was that?

A. The atrophy at that time was about two-and-a-half centimeters at the quadriceps.

Q. And you took X-rays?

A. I did.

Q. Did those X-rays show any findings?

A. The X-rays taken at that time showed areas of extensive calcification about the soft tissue. So that's an indication that the soft tissue is damaged as well as the bone. The body uses calcium sort of like a glue to stick things together. It's a healing process. That was true in the distal thigh. There were areas where you can see where the drill holes were from that surgery that I explained earlier. And he had findings consistent with post-traumatic arthritis of the patella as well.

Q. Did you formulate a diagnosis after that visit?

A. I did.

Q. What was that?

A. Similar diagnosis; rupture of the left quadriceps tendon, articular surface injury to the left knee requiring excision of loose body, tear of the lateral meniscus requiring

partial meniscectomy, post-traumatic arthritis of the knee. And at that time we had hypertrophic ossification in the distal quadriceps; that's the calcification that occurs as a result of the injury to the muscle.

Q. And your prognosis?

A. Prognosis, again, is poor.

Q. Why is that?

A. Because of the presence of the posttraumatic arthritis, the persistent limited motion. And this is about three years -- almost three years after his injury.

Q. Was Mr. Little still active and doing the activities, going to the gym and doing all that?

A. He was.

Q. And did he explain to you -- sorry. Do you have an opinion as to whether or not that was also better for his healing and health from this injury as opposed to not doing that?

A. As a sports medicine physician, I always encourage people to do as much activity as they can tolerate because I think it helps keep the motion in the joints as good as possible, the strength of the joints. In this case, the lower extremity as good as possible. And unless it's too painful, I think gym activity is good. I think any type of working out that you can do that's not specifically damaging the area of injury is good, yeah.

Q. Regardless, assuming that Mr. Little was doing those activities, running the best he could and going to the gym and working out, he still had significant findings and residual findings from this injury in 2017 at the time of your examination?

A. Yes, he did.

Q. That included weakness?

A. Yes.

Q. That included loss of motion?

A. Right.

Q. Was it still at 135?

A. At that time I believe it was 135. Yes. Uh-huh.

Q. And extension got worse, five degrees?

A. Extension was five degrees loss of full.

Q. And flexion, I don't want to turn my back to everybody, but that would be turning your leg this way (indicating)?

A. That's right.

Q. And extension would be?

A. Straightening it out.

Q. Raising it up?

A. Raising it up.

Q. I've seen this measurement in different degrees before. Some people do a full, like, 180 or 160 or something. But the way you're measuring is flexion from 90 degrees out -- no. Tell me.

A. I call that zero.

Q. Zero.

A. And then it flexes --

Q. Straight down?

A. It's zero, and then it flexes past 90 to 135; on the other side to 145.

Q. Now, having had the opportunity to see Mr. Little again more recently, January of this year, 2023, you conducted another physical examination?

A. I did.

Q. And what did that consist of?

A. Again, physical exam is observation, doing range-of-motion testing, feeling the joint for what's called crepitus, which is popping and clicking in the joint. And measurements.

Q. And what were the physical -- significant physical findings you found now almost nine years after the -- eight years after the injury?

A. So at that point, he still had loss of motion, basically had not changed; in flexion, 135 degrees of flexion versus 145 on the opposite uninvolved side. He still had lack of five degrees of full extension, not able to fully extend five degrees, and he had some weakness of his quadricep, meaning, when I asked him to straighten it, I can push his left leg down, bending his knee; I cannot do that on the right.

He had atrophy on the left compared to the right. Although at this time he actually had improved in the place that I measured, so he had an inch-and-a-half -- sorry, two inches -- excuse me. Two centimeters -- one inch, two centimeters of atrophy at the quadriceps on the left compared to the right.

And, again, X-rays were taken as part of the examination. And, again, revealed multiple calcified loose bodies in the soft tissue, a loosening or defect in the patella, the kneecap bone, consistent with the surgery that was done and the signs of posttraumatic arthritis in the patellofemoral joint.

Q. Now, Doctor, having had the opportunity to conduct this physical examination of Mr. Little over the last nine years, and on those three different occasions, and having the findings that you found on each of those examinations, including the weakness, the loss of motion, the posttraumatic arthritis and the hypertrophic changes, do you have an opinion with a reasonable degree of medical certainty as to whether or not these injuries and the sequela or the results of those findings are permanent?

A. Yes, I believe they're permanent.

Q. What's the basis of that opinion?

A. The basis of the opinion is the persistence of the atrophy many years after the accident, the knowledge that an injury to the joint's surface is permanent, not only permanent, but progressive, meaning, because it's a moving, a mechanism, it

will get worse over time. So I believe those are permanent problems.

Q. And you mentioned progressive; that's the posttraumatic arthritis?

A. That's right.

Q. And by "progressive," that's an injury that's going to -- not going to get any better?

A. Not only not going to get better, but it will get slowly worse.

Q. As Mr. -- did you have an opinion with a reasonable degree of orthopedic certainty as to what the future holds for Mr. Little with regard to the arthritis in that knee and the outlook of that knee or prognosis?

A. Again, the prognosis will be poor because it's not going to get better. As I said several times, it will get worse over time. That's just the nature of arthritis. Even aging arthritis. Osteoarthritis gets slowly worse in all of us over time. But if you add a traumatic injury to the joint surface on top of that, it happens much more quickly.

Q. The more he moves and the more he tries to keep it strong and keep it active, the longer he'll be able to prolong the symptomology?

A. It's a balancing act, really. You try to keep moving to keep your joint moving as well as it can and to have the muscle strength to support the joints so that all the forces are

not across the bone. But in doing so, you do slowly wear out the joint.

Q. Now, Doctor, for the following questions I'd like you to assume that these facts are in evidence:

I want you to assume that on November 26, 2014, on a rainy day in the afternoon, early afternoon, Mr. Little was walking briskly up 61st Street along York and he stepped with his left foot on this wet paint splotch that was on the sidewalk for at least five years; that his left foot that stepped on that slipped out from under him. He felt his leg twist and fell to the ground. Heard a popping noise. Was picked up by the police at the scene, then taken by ambulance to Presbyterian Hospital.

I want you to assume that he presented with the findings that you found and reviewed in the ambulance core report and the findings that you found and reviewed in the emergency room record, and was diagnosed there of having a ruptured quadriceps tendon.

I want you to assume that Mr. Little came under the care of Dr. Turtel, shortly thereafter, and on December 14th of 2014, underwent a quadriceps tendon repair surgery as you described and as is contained in the operative report that you explained to this jury, which included damage to the meniscus and a large loose body all through the articular surface.

I want you to assume that Mr. Little continued to rehabilitate on his own and worked out and managed to get

himself back to be able to getting back to the gym about six or eight months after the surgery.

I want you to assume he does complain about pain occasionally.

I want you to assume that he does continue to do his gym activities to the extent that he's able to deal with the pain that he has with regard to it.

I want you to assume that he had the findings that I found on your three examinations, which were July 2, 2015, October 10, 2017, and now January 24, 2023, with a continuous, almost nine years' loss of motion in that knee. And the crepitus and the posttraumatic arthritis that you found in the X-rays and the weakness that you found there.

Assuming those, Doctor, first, do you have an opinion with a reasonable degree of orthopedic and medical certainty as to whether or not that slip and fall accident was the competent-producing cause of that traumatic injury?

MR. LYON: Objection.

THE COURT: Overruled.

A. It is my opinion that the injuries that I've described are a result of the accident of 11/26/14.

Q. What is that based on?

A. It's based on the maintenance call sheet showing an initial injury, the emergency room record, Mr. Little's history that's been provided to me, the need for surgery shortly after

the accident, and knowing -- having had the opportunity to review those records associated with that injury.

Q. And do you have an opinion, again, assuming those facts, with a reasonable degree of orthopedic certainty as to whether those injuries that Mr. Little sustained that you examined and saw and are contained in those records, again, whether those injuries are the competent-producing cause of pain?

A. Certainly the injury with a rupture of the quadriceps tendon and one that is significant enough to knock off a piece of joint cartilage and tear a meniscus is a very painful injury, yes.

Q. Do you have an opinion, again, assuming those facts, as to whether or not that injury and the sequela that Mr. Little sustained, including the loss of motion, loss of strength, is permanent and progressive?

A. It's my opinion, as I've stated, that it is not only a permanent injury because of the joint surface damage and the continued atrophy, it is a progressive injury.

Q. Thank you, Doctor.

MR. MADONNA: Nothing further.

THE COURT: Take a break?

MR. LYON: Break would be great.

THE COURT: Members of the jury, we're going to take a ten-minute break.

Jury may exit.

THE COURT OFFICER: All rise. Jury exiting.

(Whereupon, the jury exited the courtroom.)

(Whereupon, the MRI Report was marked as Defendants' Exhibit D in evidence by the Reporter.)

(Whereupon, a brief recess was taken and the following was transcribed by Official Court Reporter Lori Sacco:)

THE COURT: On the record. Bring in the jury.

THE COURT OFFICER: All rise. Jury entering.

(Whereupon the jury panel entered the courtroom.)

THE COURT OFFICER: You may be seated.

THE COURT: You may proceed with your cross examination, Mr. Lyon.

MR. LYON: Thank you, your Honor.

CROSS EXAMINATION

BY MR. LYON:

Q Good afternoon, Dr. Kaplan.

A Hi.

Q Some boring stuff first. How long have you been testifying as an expert?

A I don't know exactly, but I've been in practice since 1994. Probably '98.

Q Okay. So, 25 years or so?

A Something like that, yeah.

Q All right. And you testify in court, let's take COVID out of the equation, but you testify one to two times a month, true?

A Yeah.

Q Okay.

A It's usually now. It's gotten a lot less post COVID. So, it's been a while.

Q Fair enough. Before COVID it was one to two?

A Yeah.
Q Can we compromise, say 1.5?
A Do whatever you want.
Q Well, can we do that?
A Fine with me.
Q 1.5, an average?
A Fine with me.
Q All right. And your rate is 7,500?
A It is now, yeah.
Q All right. When did that change?
A Oh, it's changed many times over the years. It started probably 4,500 and it's gone up.
Q Okay. For a long time it was 5,500?
A True.
Q And then it was 6,500?
A Mm-hmm.
Q Now it's 7,500?
A Right.
Q What would you say an average, what's a fair average? I want to be fair to you.
A I'm not a math guy. You be fair. Go ahead. In fact, it doesn't matter. I make a lot of money over the years with my practice. Just, you know, whatever number you want to put.
Q 6,000 fair?
A Whatever you say, sir.

Q Okay. Well, let's just cut through the chase.
A Yeah.
Q You've testified 450 times, something like that?
A If that's the math, it seems like a lot to me, but if that's the math, sure.
Q All right, 450. You generated millions of dollars testifying in a courtroom, true?
A Over the course of 30 years, you'd have to add it up, but certainly I've testified one to two times a year, I mean, one to two times a month, once a month. I get a fee of 65 to $7,500. It adds up. There is no question about it. It's what I do for a living over 30 years.
Q Doctor, I'm going to ask you to answer my questions yes, no. If you can't answer yes or no, why don't you tell me. Can you do that?
A If you ask me a yes or no question, that would be fine. I'll be glad to.
Q You're a member of the American Association of Orthopedic Surgeons?
A American Board of Orthopedic Surgeons, yeah.
Q The American Academy of Orthopedic Surgeons?
A Yes.
Q Okay. And they have an expert witness affirmation statement. Are you aware of that?
A I'm not.

Q Okay. You're not aware that they put out a list of -- of principles when their members are testifying in a courtroom? You're not aware of that?

A I'm aware that they ask you to speak scientifically and with accepted principles, sure.

Q The first one of those is, I will always be truthful, yes?

A Yes.

Q Okay. And the second one is, I will conduct a thorough, fair and impartial review of the facts and medical care provided, not excluding any relevant information, true?

A True.

Q Okay. And are you going to do that for us today?

A I do the best as I can, sure.

Q That's a yes?

A Yes. Absolutely yes.

Q All right. Fair to say you're no stranger to the courtroom? I think we established that, true?

A I've been here many times. It's part of being an orthopedic surgeon, that's right.

Q Answer my question yes or no, if it's a yes or no, okay.

A Yes. I'm sorry. You're throwing me off by being so informal with me, so I'm just trying to -- trying to keep up with you.

Q Okay. You've worked with Mr. Madonna and his firm before, true?

A We have established that, yes.

Q Yes.

THE COURT: I need an audible answer.

THE WITNESS: Yes.

Q Mr. Little was sent to you by Mr. Madonna's firm, true?

A Yes.

Q Okay. When was the first time, this is not a yes or no, when was the first time you reviewed a case for Mr. Madonna?

A I honestly have no idea.

Q Do you remember a case named Peralta versus Grenadier in 2006 when you testified for Mr. Madonna, do you remember that?

A I never know the case. If you tell me my patient's name, I can tell you if I remember.

Q Anna Ramona Paralta.

A I do not remember Anna Paralta.

Q How about a case named Miguel Angel Virgos in 2006 where you testified for Mr. Madonna, do you remember that one?

A Mr. Virgos was a longtime patient of mine. Yes, I remember that.

Q So, at least as early at 2006 you've been testifying for Mr. Madonna, true?

A Sure.

Q The vast majority of your testimony is on behalf of plaintiffs, true, yes or no?

A Testimony, yes.

Q All right. In this case you examined Mr. Little three times, yes?

A Yes.

Q The first time was in July 2015. Where you aware that that was three months after this lawsuit was filed? Were you aware?

A No.

Q All right. The second time you saw Mr. Little was in October 2017, three months after his deposition was taken. Were you aware of that?

A No.

Q The last time you saw Mr. Little was this year, six months before trial. Were you aware of that?

A No.

Q Okay. And isn't it true that you went over five years without seeing Mr. Little between the second and third time you saw him, isn't that right?

A I saw him October 2017, January 2023.

Q A little over five years?

A If that's the math, yes.

Q Okay. Fair to say you weren't treating Mr. Little, true?

A I'm not treating Mr. Little.
Q Okay. You never performed any surgery on Mr. Little?
A Absolutely not.
Q You never prescribed any medication to Mr. Little?
A I have not treated him, that's correct.
Q You never prescribed any physical therapy to Mr. Little, true?
A That is correct.
Q You never recommended any consultants, true?
A Never.
Q You never recommended any procedures, true?
A Never.
Q You didn't have regular follow up with Mr. Little, did you?
A No. I'm not treating him.
Q He's not your patient, true?
A I am not treating him. That is correct.
Q All right. So, you were seeing Mr. Little not for the purposes of helping his health, but for the purposes of helping him within a lawsuit, true?
MR. MADONNA: Objection to the form, Judge.
THE COURT: Sustained. Rephrase. Move on.
MR. LYON: I'll move on.
Q You would agree, Dr. Kaplan, that before you come into a court to testify, you should master the facts of the case,

true?

A As best as possible, sure.

Q Okay. And as master of the fact, how many left knee surgeries did Mr. Little have before November 26th, 2014?

A I'm aware of one.

Q You're aware of one. That would be pretty fundamental, right, knowing how many surgeries he had?

A The information I have is one. I have one from 2010. He's only told me about one, so that's what I know.

Q That's pretty fundamental in trying to establish whether this event caused his injuries. You would agree with that?

A Not these injuries, no. The injuries that I've spoken about are well documented in the ambulance call sheet and the operative report. So, I've talked about those injuries, and I know about those.

Q If you didn't know about another surgery, how could you tell what was related to that surgery that you don't even know about? How would you know?

A He had an articular surface injury, a large chunk off his joint surface. That's a major injury. That happened at the time of the accident. That's the only way that happened.

MR. LYON: Move to strike as nonresponsive.

THE COURT: Overruled. You can ask your next question.

MR. MADONNA: Well, he's not done answering, Judge.

THE COURT: Yes, he is.

Q So, to your knowledge, Mr. Little had one left knee surgery, true?

A That's what I'm aware of, that's right.

Q The date was July 6th, 2010, correct?

A I don't recall the exact date, but 2010 as I recall, yes.

MR. LYON: May I approach?

THE COURT: The witness?

MR. LYON: Yes.

THE COURT: You may.

MR. MADONNA: Can I see what you're showing him?

THE COURT: Is this part of any record in evidence?

MR. LYON: Yes.

MR. MADONNA: Yeah, this is in evidence.

THE COURT: Then you can show it to the witness.

A Thank you.

Q Please identify that document.

A (Examining). That is an operative report from Dr. Marx from a left knee surgery done July 6th, 2010.

Q Okay. July 6th, 2010. That's the knee surgery you're aware of, true?

A That's correct.

Q All right.

MR. LYON: May I approach, your Honor, with Defendants' Exhibit D in evidence.

THE COURT: Show it to counsel. Is a portion of that document in evidence?

MR. MADONNA: It's in evidence.

MR. LYON: That's in evidence.

Q Please identify that document.

A (Examining). It's an MRI scan report from East River Imaging from 3/12/2010.

Q And that was four months before the surgery, true?

A Yes.

Q All right. The second sentence of the clinical history in that document says, "History of arthroscopic surgery", true?

A It does.

Q And this is an MRI scan of his left knee, true?

A That's correct.

Q So he had a history of an arthroscopic surgery, true?

MR. MADONNA: Objection, Judge.

A It doesn't say left knee.

THE COURT: Overruled.

Q The MRI scan is of his left knee?

THE COURT: What's the answer?

THE WITNESS: It says "History of arthroscopic surgery". It doesn't identify which knee. And he's had a right --

THE COURT: I got it. Go ahead.

Q This is an MRI scan of his left knee, true?

A True.

Q Arthroscopic surgery on his right knee would not be relevant, true?

A I don't know.

THE COURT: Are you objecting or just standing up?

MR. MADONNA: I was going to object, but I withdraw the objection.

THE COURT: You can answer.

A Yeah. I don't know if it's relevant to why they wrote it down or not. I have no idea. I wasn't there.

Q Please go to the second sentence under "Findings".

A Yes.

Q It reads, "Whether this represents the sequela of prior arthroscopic surgery or a retear is uncertain." That's what it says, doesn't it?

A That is what it says, yes.

Q And that implies he had a prior arthroscopic surgery on his left knee, true?

THE COURT: If you can answer.

A No, it does not imply that. It implies that she can't tell if he had a prior arthroscopic surgery on his knee. I'm not aware of one.

THE COURT: Mr. Madonna, if you stand up and raise

your hands at your side and don't say objection, I'm not ruling on the objection.

MR. MADONNA: I understand.

THE COURT: Go ahead, Mr. Lyon.

Q It mentions a prior arthroscopic surgery. It certainly is relevant to the right knee, you would agree with that?

A I'm sorry. I don't understand your question.

Q The report under "Findings" mentions a prior arthroscopic surgery.

A All right. You mean under "Clinical History"?

Q No, under "Findings. Whether this represents the sequela of prior arthroscopic surgery or --

MR. MADONNA: Objection.

Q -- or retear is uncertain."

THE COURT: Overruled.

Q This radiologist is not talking about the right knee, true?

A He also doesn't say that there has been --

Q True? Yes or no?

A I don't know.

THE COURT: Counsel, wait and we'll hear an answer.

A He seems to be talking about the left knee, but he doesn't say there is arthroscopic surgery of the left knee.

Q Does it say arthroscopic surgery right there? Does it say that?

MR. MADONNA: Asked and answered at that point, Judge.

THE COURT: Overruled.

A That's not a yes or no question.

THE COURT: Overruled. We have a question and answer.

Q The truth is, doctor, you don't know how many surgeries he had on his left knee, do you? You don't know?

A With a reasonable degree of medical certainty, I have never seen anything about a prior left knee arthroscopy. This gentleman who is pretty, pretty straightforward, in fact I have never --

THE COURT: Sustained.

MR. LYON: Move to strike.

THE COURT: Jury to disregard.

THE WITNESS: Yeah. Show me it's the left knee.

THE COURT: Wait. Wait. Mr. Lyon, you may ask your next question.

MR. LYON: Thank you, your Honor. May I approach, your Honor?

THE COURT: Is that an excerpt of a page from a document in evidence?

MR. LYON: It is, although I do not know the exhibit number. We can find it later.

MR. MADONNA: Well, if you don't know where it's

from, I don't doubt that you're being --

THE COURT: Connect it.

MR. MADONNA: Connect it.

THE COURT: Connect it to an exhibit and you can show it to the witness.

MR. MADONNA: The medicals are over there (pointing).

MR. LYON: It is in Plaintiffs' 11.

THE COURT: You can show it to the witness.

A Thank you.

Q Doctor, please read the highlighted portion and the highlighted portion alone.

A All right. It says, "Year 2000. Have you ever been hospitalized before? The year 2000, arthroscopic surgery, left knee."

Q Okay. "The year 2000, arthroscopic surgery, left knee"?

A That's what it says, yes.

Q That information came from the patient, true?

A I don't know.

Q The question is, have you ever been hospitalized before? And it's handwriting. Can we presume it came from the patient?

A I don't know where it came from.

Q Can we agree now that you do not know how many left

knee surgeries he's had?

MR. MADONNA: Objection to form, Judge.

THE COURT: Overruled.

A It is my opinion that that's probably an error. Do I know with a hundred percent certainty? I'm going on the medical records I have which say he had a right knee arthroscopy in 2019 by Dr. O'Brien. That says a left knee arthroscopy. I have a record of a right knee.

MR. LYON: Move to strike as not responsive.

THE COURT: Overruled. Next question.

Q When you see a patient, you take a history, right?

A I do.

Q And a medical history is basically asking the patient why they are in your office. What happened to them. What you're seeing them for. True?

A Correct.

Q Taking a history is important to a physician because the history allows a physician to put things into context to try to understand the injury and the accident as it happened, true?

A That's very well put.

Q It's important to find out how the accident happened, true?

A Yes.

Q All right. And the history comes directly from the patient, true?

A It's a combination of -- from the patient and the medical record, yeah.

Q You get your history from the patient as well as medical records, true?

A Yes.

Q And that's what you did in this case?

A Yes.

Q And you got the history from the ER record in this case?

A Yes, and the patient.

Q Do you know Dr. Turtel?

A I do.

Q Do you know why he's not testifying in this case?

A No.

Q You testify in cases where you actually do treat the patient, true?

A I do.

Q Wouldn't Dr. Turtel be more competent to testify in this case?

A I don't know that he would be more competent to give an opinion, but certainly he was the one that did the surgery. I'm not sure why he's not here today.

Q Did you review Dr. Turtel's notes?

A Yes, the ones that were provided. I'm not sure they are complete, but I think they are.

Q Okay. I'm going to read you his last note that he ever wrote for this patient. "We're now four months from the surgery. He's doing very well. Has no specific or significant complaint other than some residual weakness. Range of motion is excellent. And he can flex to 150 degrees." Does that sounds like a poor prognosis?

A That is four months after the surgery. This isn't a yes or no question. I'm sorry.

Q Fair enough.

A This is four months after the surgery. This is something progressive over time. This gentleman has done really well. Even today I think he's done well, but he still has arthritis from this injury, still has weakness and still has limited motion. That's what I base my prognosis on.

Q Is poor prognosis the worst prognosis you can give the patient?

A You can go to severe. You can go to catastrophic, you know.

Q Dr. Turtel gave 150 degrees on flexion, true?

A That's what he reports.

Q That's what he reports?

A That's right.

Q What did you get?

A I got 135. And on the uninjured side 145. 145 is the largest number I've ever seen. I've never seen someone flex 150

degrees. I'm not sure what his range of motions are, Dr. Turtel, and he doesn't report the other side, which may be better than 150.

Q Okay. Did you call Dr. Turtel and tell him you don't know what you're talking about? Did you do that?

A I believe he knows what he's talking about. I think he may be using a different measuring system.

Q Was Mr. Little a compliant patient?

A Seems to have been, yes.

Q Okay. And your definition of noncompliance is a patient who does not follow specific instructions, fair statement?

A Routinely doesn't follow specific instructions.

Q Okay. Did Mr. Little ever do formal physical therapy?

A I believe he did exercises, yeah.

Q Did he ever do formal physical therapy, yes or no?

A I believe I've seen some physical therapy notes. I can't recall exactly where that was or how much.

Q Was physical therapy recommended to Mr. Little?

A Yes.

Q And if he didn't do formal physical therapy, that would be noncompliance, true?

A That would be between him and Dr. Turtel. You can recommend therapy, and if patients can do it on their own, I would not call that noncompliant.

Q You have physical therapists in your office, true?
A I do.
Q Would you hire Mr. Little to be a physical therapist in your office?
MR. MADONNA: Objection.
THE COURT: Sustained.
Q Doing physical therapy at a physical therapy location provides access to treatments beyond what a patient can do by themselves, would agree with that?
A Yes, it can.
Q And there are a number of things physical therapists can do that you can't do on your own, true?
A That is true.
Q For instance, physical therapists have access to certain types of machines, including high heat, ice, diathermy, which is a machine that sends certain medications like steroids into the tissues, true?
A Again, that's not a yes or no question, because you would not use diathermy here. You would use heat and ice and range of motion.
Q Some of the things that physical therapists have, true?
A Yeah.
Q Okay. Mr. Little didn't do that, did he?
A He did range of motion. He did heat and ice.
Q Did he go to a physical therapy location?

A Again, I don't recall. I don't have that.

Q All right. Doctor, we all get wear and tear over time, true?

A Absolutely.

Q All right. And being physically active can cause degeneration of cartilage, true?

A A hundred percent.

Q And Mr. Little was involved in martial arts for more than 40 years, true?

A That's right.

Q That could take a toll on your body, true?

A Sure.

Q You testified that Mr. Little had some atrophy in his left leg, correct?

A Correct.

Q Which leg is Mr. Little's dominant leg?

A Again, legs are not the same as upper extremities. This is not a straightforward answer. You would expect someone who is keeping active would have the same measurements in both legs unlike a dominant arm. As he does in his lower leg, it's equal, you would expect that to be equal.

Q Did you think of the possibility that perhaps Mr. Little who is right legged --

MR. MADONNA: Objection, Judge.

THE COURT: Sustained.

Q Is Mr. Little right handed?

THE COURT: Overruled.

A Yeah.

Q So, did you think of the possibility that Mr. Little has been kicking things with his right leg a lot more than his left leg? Did you think about that?

A I still don't think that would make his legs bigger on one side. The primary activity of keeping your legs the same size is walking, which we all do.

Q Do you have your report in front of you?

A I do.

Q Take a look at your October 10, 2017 report.

A (Examining). Okay.

Q You wrote that Mr. Little was unable to run, correct?

A That's right.

Q Can we agree that that statement was a complete and absolute falsehood?

MR. MADONNA: Objection.

THE COURT: Sustained.

A Not --

MR. MADONNA: You know better, counsel.

THE COURT: Sustained. You don't have to answer.

Q That was not true, was it?

A He told me he was unable to run.

Q Did you read Mr. Little's deposition that he gave in

this case?

A No.

Q No?

A No.

(Continue on the next page.)

CONTINUED CROSS-EXAMINATION

BY MR. LYON:

Q. Dr. Kaplan, can we agree that brisk means fast?

A. In general, yes, sure.

MR. LYON: I have nothing further, your Honor.

MR. MADONNA: I have a short redirect, please.

THE COURT: Go ahead.

REDIRECT EXAMINATION

BY MR. MADONNA:

Q. Dr. Kaplan, I want you to take a look at that MRI report from East River Medical Imaging.

A. Yes.

Q. And just so that it's clear - this is in evidence - this is a radiologist -- explain to the jury what an MRI is and what an MRI was.

A. An MRI is an imaging study that's performed at an imaging center. It's not performed by the physician who has treated the patient, touched the patient, examined the patient. It is reviewed by a radiologist who looks at the imaging studies and bases their findings on the images that they see and the history received.

Q. And the radiologist that reads an MRI is not a clinician?

A. They're a -- I mean -- I can't answer that. They're not touching the patient. They haven't met the patient. I'm

sure that Mr. Little has never met this doctor.

Q. And this was an MRI scan of the left knee of Mr. Little on March 12, 2010, correct?

A. That's correct.

Q. Now, there was some questions that you were asked with regard to the findings here?

A. Yes.

Q. Can you read the findings in that area and explain to the jury what this radiologist is talking about medically?

MR. LYON: Objection.

THE COURT: Overruled.

THE WITNESS: Answer it?

A. So the impression is blunting of the posterior horn of the medial meniscus.

Q. Sorry. The findings that you were asked about earlier on the first page.

A. It says, "The medial meniscus demonstrates blunting of the posterior horn in the medial meniscus best seen in Series 2 and 3, Image 16." So it's seen on one -- on probably 48 to 50 images.

"Whether this represents the sequelae of prior arthroscopic surgery or a retear is uncertain."

Q. You can stop there.

So what this radiologist's seeing here and they're interpreting, and I may have this wrong, but it's magnetic

imaging that's being bounced off the tissues in the leg giving you an image?

A. It's a magnet being placed across the body, and it changes the water molecules in a way that can be recorded. That record can make a picture, which they look at, yes.

Q. But it's not --

A. It's not surgery. It's not looking inside.

Q. It's not a picture like a photograph or anything?

A. That's correct.

Q. It shows different grades and different --

A. Different colors correspond to different water content within the body.

Q. And they're trained to look for things that are abnormal?

A. That's right.

Q. And that's their specialty?

A. That is their specialty; that's right.

Q. And what this radiologist sees here is an abnormality that, without the clinical, hands-on treatment of the patient -- I think it was a she?

A. It is.

Q. -- she can't tell whether or not what she sees was caused by a prior surgery there or by a retear?

A. Correct.

So, radiologists will often say I can't tell if that's

a new injury or something related to something that happened prior.

In this case, she says she can't tell if it's a prior arthroscopy or a new injury. She does not say it is from arthroscopy. She just says there's an abnormality there and she's trying to identify -- she doesn't know if it's from new trauma or arthroscopy.

Q. Now, let's stay with this. You talked a little bit about the meniscus being -- and that's this Figure 8 cartilage thing in your knee. And, medically, you guys like using Latin words. I think, posterior, medially. What does each mean?

A. Posterior means back. Anterior means front. Medial is towards the midline. Lateral is towards the outside.

Q. I always get those mixed up.

But with regard to this MRI and this subsequent arthroscopic surgery here, they were concerned about the medial meniscus, correct?

A. That's correct. Posterior horn of the medial meniscus.

Q. Now, the imaging also showed, because it does the whole knee, the lateral meniscus, correct?

A. Yes, uh-huh.

Q. So I want to direct your attention to the second paragraph on page two where it talks about her findings with regard to the lateral meniscus in 2010.

A. Yes.

MR. LYON: Object to scope.

THE COURT: Overruled.

A. That indicates that the lateral meniscus demonstrates normal morphology. Meaning it looks normal.

Q. No damage?

A. And signal intensity, no change in the water content. So there's no apparent damage.

Q. No damage from wear and tear and aging?

A. That's correct.

Q. And no damage from any surgery or other injury?

A. That's correct.

Q. Now, the surgery that Dr. Turtel did after this injury, that was on the lateral meniscus?

A. It was also on the left knee. Yes, that's correct.

Q. That was the left knee also?

A. Yes.

Q. But --

A. That's an MRI, sorry.

Q. That's on the lateral meniscus?

A. That's correct.

Q. That is a completely different part of the knee that they were looking at with the damage in that MRI. In fact, the lateral meniscus was normal in 2010?

A. It was.

Q. And it was damaged when Dr. Turtel actually looked in

with his own eyes during the surgery?

A. That's correct.

Q. And that's the best way to look at what's going on inside somebody's body, is the surgeon actually looking in and seeing what's there, right?

A. That's the gold standard.

Q. So would you say that that finding of lateral meniscus damage was a result of this slip-and-fall injury in November 2014?

A. It's certainly likely, yes.

Q. And prior to that, at least as far as 2010, there was no damage to the lateral meniscus?

A. That's correct.

Q. And you were shown from Plaintiffs' 10 the handwritten note of the 2000 arthroscopic surgery where it's written "left knee". You reviewed those records and you got the history.

There was a 1999 right knee surgery?

A. Correct.

Q. By Dr. O'Brien?

A. Second half of 1999 there was a right knee surgery by Dr. O'Brien, that's correct.

Q. And do you often, in your practice, do you see patients sometimes many years, after having had an arthroscopic surgery, that they don't have any continuing problems, even having had them on both legs, forget which one is which?

A. I do have people forget which knee they had an arthroscopy on. It's a simple menisectomy, yeah.

Q. Would you have an opinion with a reasonable degree of medical certainty as to whether or not that was just an error?

A. It's my opinion that's an error because I've seen no records and gotten a history from a guy I consider reliable that he's only had one knee arthroscopy on the left and then this surgery on the left.

Q. No other operative reports? And if there was one done in and around when Dr. O'Brien did the right knee surgery, you would expect to see that in the records?

A. I mean, Dr. O'Brien, we have his records. I didn't see one of the left knee. He's a guy who's still around. Those would be available if they were there.

Q. Thank you.

MR. MADONNA: Nothing else, Judge.

MR. LYON: Briefly, your Honor.

THE COURT: Recross.

Go ahead, Mr. Lyon.

RECROSS EXAMINATION

BY MR. LYON:

Q. The records you've seen in this case, did they come from plaintiffs' counsel?

A. Yes.

MR. LYON: I have nothing further, your Honor.

Thank you very much.

MR. MADONNA: That's all, Judge.

THE COURT: Witness may step down.

THE WITNESS: Thank you.

(Whereupon, the witness was excused from the witness stand.)

THE COURT: We have no further witnesses today, right, counsel?

MR. MADONNA: That's correct.

MR. LYON: Correct, your Honor.

THE COURT: You have anything, counsel?

MR. MADONNA: I do, your Honor.

At this point, plaintiff rests.

THE COURT: Okay. Members of the jury, our next witness should be here tomorrow at 9:30.

Do not discuss this case among yourselves or with anybody else.

Do not do any independent research of any kind on any of the issues or subject matter or individuals involved in this case.

Do not visit the scene.

Have a good evening. I'll see you tomorrow at 9:30.

THE COURT OFFICER: All rise. Jury exiting.

(Whereupon, the jury exited the courtroom.)

THE COURT: Counsel have anything at this time?

MR. LYON: I have a motion for a directed verdict. Would you like me to make it now or tomorrow morning?

THE COURT: Now.

MR. LYON: Okay.

THE COURT: If you're ready.

MR. LYON: I would really prefer to have the night to put together some case law on the directed verdict because it pertains to plaintiffs' liability expert.

THE COURT: I just told the jury to come in at 9:30. I understand we have two witnesses tomorrow, right?

MR. LYON: Correct.

MR. MADONNA: I thought you had one.

THE COURT: No.

You're going to bring in the ER doctor as well, right?

MR. LYON: Thursday.

THE COURT: And Mr. Bria also Thursday?

MR. LYON: Thursday.

MR. MADONNA: Who's the other witness tomorrow?

MR. LYON: Meere tomorrow.

THE COURT: Only Meere tomorrow.

Yes, Mr. Madonna?

MR. MADONNA: I have nothing.

THE COURT: On the application to do the motion for

directed verdict, first thing in the morning.

MR. MADONNA: What I would suggest -- I know you have to get out of here by 3:45 tomorrow.

THE COURT: We only have one witness.

MR. MADONNA: What I would suggest is we start the witness in the morning and then do that motion afterwards. I would expect we'll have plenty of time even in the morning. I don't expect that witness to take the whole session.

MR. LYON: And that witness also has no relevance to the motion. There's no problem there.

THE COURT: Fine. So you're reserving motion to dismiss until after the next witness tomorrow, after you call Dr. Meere tomorrow morning?

MR. LYON: Correct, if that's okay with the Court.

THE COURT: Your timetable is preserved.

MR. LYON: Thank you.

THE COURT: Are both the ER doctor and Mr. Bria coming in the morning?

MR. LYON: Yes, they are.

MR. MADONNA: I can't image that they're going to take more than an hour combined.

MR. LYON: Agreed.

MR. MADONNA: On Thursday.

THE COURT: You want to try to sum and charge

Thursday afternoon?

MR. MADONNA: I would like to. And then this way we can address the witness who has to leave Friday afternoon.

THE COURT: The juror.

MR. MADONNA: The juror, I'm sorry, who has to leave Friday afternoon.

We can either dismiss her and let them deliberate all day, or if she leaves, if they're already deliberating, then we can get them to only deliberate a half day if they're still going.

MR. LYON: Your Honor, I really would prefer to sum up on Friday because we wouldn't have the transcript. I like to use the transcript during closing.

MR. MADONNA: The transcript of the testimony that you just elicited?

THE COURT: That they just heard?

MR. LYON: Correct.

THE COURT: From Mr. Bria and the ER doctor?

MR. LYON: Yes.

THE COURT: I understand what you're saying. But we have a juror who apparently advised during jury selection she couldn't be here Friday afternoon. And we have a three-day weekend.

We can give a little bit of -- little more thought

to this. But it may be worthwhile to -- look, I think it's ambitious, but because of that circumstance, I thought it may be worthwhile to try to sum up in the afternoon if we can get the charge conference done in the morning.

MR. LYON: Is it doable, Judge? Yes, it is. However, I'd like to get sleep. And I'm going to be up until four in the morning.

THE COURT: We'll decide this tomorrow. Okay.

MR. LYON: Thank you, your Honor.

THE COURT: Anything before would go off the record?

MR. LYON: Not from me.

MR. MADONNA: No.

THE COURT: Good night, counsel.

(Whereupon, the trial was adjourned to Wednesday, June 14, 2023 at 9:30 a.m.)

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