

1 KINGS COURT OF THE STATE OF NEW YORK  
2 COUNTY OF KINGS: CIVIL TERM: PART 91

3 -----X

4 JOHN AND CARMEN MORA,

5 Plaintiffs,

6 - against -

7 1-10 BUSH TERMINAL OWNER, LP,

8 Defendant.

9 -----X

10 Supreme Court  
11 360 Adams Street  
12 Brooklyn, New York 11201  
13 July 16, 2024

14 B E F O R E :

15 HONORABLE DEVIN P. COHEN,  
16 Justice of the Supreme Court

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

18 GORAYEB & ASSOCIATES, P.C.  
19 Attorneys for the Plaintiffs  
20 100 William Street - Suite 1205  
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24 Attorney for the Defendant  
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LAURA HUTZEL  
SENIOR COURT REPORTER

25

INDEX NUMBER:  
535359/2022

Trial

1 COURT OFFICER: All rise, Part 91 is now in  
2 session. The Honorable Devin P. Cohen presiding. Please be  
3 seated and come to order.

4 THE COURT: Good morning.

5 MR. KELLY: Good morning.

6 MR. BRODY: Good morning.

7 THE COURT: Have you marked the exhibits already?

8 MR. KELLY: That's what we're trying to do.

9 THE COURT: Outstanding.

10 MR. BRODY: Yes, your Honor.

11 THE COURT: Anything?

12 MR. BRODY: On that front no.

13 THE COURT: Okay, that's the only front I'm asking  
14 about.

15 MR. BRODY: There is the legal front.

16 THE COURT: More motions.

17 MR. BRODY: Not a motion, I want to get something  
18 on the record in advance so I'm not interrupting the witness  
19 and you in making rulings.

20 THE COURT: Okay we're not going to get it on the  
21 record, tell me, off the record.

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

23 (Pause in the proceedings.)

24 THE COURT: I understand there is some disagreement  
25 about records, about some uncertainty about the contents of

1 certain subpoenaed records are, I want to clarify, we were  
2 here, half a day, at least, doing motions, having  
3 discussions about the records, we had all kinds of time,  
4 then yesterday everyone asked for and was given permission  
5 to come in and look at the records while the jury was not  
6 here yesterday, and I asked that you came in yesterday and  
7 before yesterday you try to pre-mark all of the exhibits,  
8 not on the jury's time, so that the exhibits would be fully  
9 marked and I also asked the other day when we were here for  
10 a half a day all alone, I said please make sure I know the  
11 if you recall breath of what it is we're fighting about, but  
12 what it is the two of you are arguing about so we can have  
13 this resolved not on jury time, but on other half a day  
14 yesterday, a full day when I said I would be available all  
15 day yesterday sitting in chambers, I said I would be here if  
16 something comes up call me, I said that here the day before  
17 we left.

18 Yesterday I understand you both came in but didn't  
19 coordinate time together, you didn't come in at the same  
20 time and now here we are, 50 minutes after the opening of  
21 court, well, court opened at 9:00, but the courtroom opened  
22 at 9:30, it's 10:30, and we haven't finished marking  
23 exhibits, and we don't have an understanding 200 hundred  
24 what are the subpoenaed records and whether the Comp.  
25 records contain the amount of billing for a given witness,

1           only the amounts approved for that treatment or something  
2           else, and I just, I'm dumb founded we're still at this at  
3           10:30 in the morning we have two witnesses to do today, so  
4           in literally 30 seconds, give me the punch line of what it  
5           is you're disputing about, so that I can figure out how to  
6           make rulings when we get started we really do need to get  
7           started with the witness, Mr. Brody, you can go first.

8                     MR. BRODY: Judge, first of all, I want you to  
9           understand something, there's, I'm only concerned with  
10          Dr. Kolb and Dr. Kaplan in morning, let me start with  
11          Dr. Kolb, Dr. Kolb's records was here yesterday, I had nine  
12          pages of report that I had in my file, no problem.

13                    THE COURT: Great.

14                    MR. BRODY: No objection. There was apparently a  
15          supplemental expert exchange that was served on my former  
16          firm, it was likely emailed to me.

17                    THE COURT: Former firm.

18                    MR. BRODY: Yes, I changed firms on October 1.

19                    THE COURT: I see.

20                    MR. BRODY: My E-mail address changed for a short  
21          period of time, I did not have access to the prior E-mail  
22          account.

23                    THE COURT: Okay.

24                    MR. BRODY: It would appear I knew what he was  
25          going to testify, it was an expert change, I didn't have the

1 records.

2 THE COURT: Okay.

3 MR. BRODY: He actually issued individual reports  
4 for what it says in his expert change, okay, and that's  
5 fine, except those records are not in that record, I have  
6 never seen them for this morning.

7 THE COURT: I apologize for interrupting, when you  
8 say that records --

9 MR. BRODY: In the could be records that's here,  
10 but counsel had them, they say what the expert disclosure  
11 said, I wasn't going to object.

12 THE COURT: Great.

13 MR. BRODY: However, only on Friday, you ruled that  
14 counsel didn't have a standing to move to quash the  
15 subpoena, and therefore, there was no subpoena in place and  
16 records were to be delivered to your chambers.

17 Maybe I was mistaken but given that was Friday and  
18 today was only Tuesday, I figured the doctor would show up  
19 with a file today.

20 THE COURT: Right.

21 MR. BRODY: And your Honor would review it and --

22 THE COURT: Just to clarify, what I actually it's  
23 not that I only got the motions on Friday, it's that I only  
24 got the motions then, right, I didn't get the motions until,  
25 until later on, so I did the best I could ruling on them on

1 Friday.

2 What I think I said and I agree with your  
3 characterization, that I said I would frankly did not have  
4 standing to object to the subpoena per se, to move to quash  
5 the subpoena, but that with respect to the protective order  
6 for contents of what might be subpoenaed, since those are  
7 his client's records, that we could move about, and I said  
8 in the meantime, why don't we, to the extent there's  
9 production to be done, have it done to my chambers rather  
10 than subpoenaed records, I don't think I suggested for a  
11 second I thought it was realistic between Friday evening and  
12 Monday morning to respond to subpoenaed records. All I said  
13 was to the extent there's going to be a further  
14 interruption, let's have it done to my chambers under seal  
15 so I can look at it.

16 I also said I thought this was going to be academic  
17 because I wasn't going to allow in evidence, anymore than I  
18 do with anyone else, I wasn't going to go through Kolb  
19 Radiology, Kolb Radiology's full financials, their entire  
20 business plan only, you know, it sounds like you're saying  
21 you might have some objection to the billing records or to  
22 the billing, I believe I said on the record, I certainly  
23 said then and now and again off the record, that to the  
24 extent that Worker's Comp. file constitutes the total amount  
25 of billing and receipts for the Plaintiff's treatment, and

1 to the extent that I believe I remember, Mr. Kelly saying  
2 that he thought there was no outside medical liens; is that  
3 correct.

4 MR. KELLY: That's correct, no outside lines.

5 THE COURT: In which case, assuming you're prepared  
6 to stipulate to the amount of the Comp. lien rather than  
7 have Plaintiff put in the full billed amount and put that in  
8 front of the jury, which most people do, they agree to the  
9 stipulation, to the Comp. amount as recoverable at the end  
10 of the case, rather than give the impression that the  
11 Plaintiff's bills were more than they were, but with respect  
12 to futures, whether the Plaintiff will likely be cut off  
13 from Comp. the doctors allowed to testify about the private  
14 pay rate, because, because the Plaintiff will no longer be  
15 entitled to get the Comp. rate once he cut off from Comp,  
16 that's fundamentally what I said.

17 In sounds like there's some dispute this morning  
18 whether Dr. Kolb is the treating doctor, but I feel pretty  
19 comfortable saying that if Dr. Kolb's treatment reviews were  
20 paid for by Worker's Comp. in connection with this case,  
21 meaning medical case not the legal case, in connection with  
22 the claims of this accident, then he's a treating doctor,  
23 Worker's Comp. agrees he's a treating doctor, the 3101 (d)  
24 wears the belts and suspenders, I want to get going in front  
25 of the jury, get the witness on the stand, we will have a

1 very tough time finishing the witnesses we have today, I  
2 will give you a chance to respond, then if you have  
3 something else to say, I will give you another chance to  
4 respond.

5 MR. KELLY: I'm trying to preclude a problem, I  
6 don't, cross-examination on hey, doctor, you have a  
7 subpoena, where is the response to your subpoena, which is  
8 what we all fear is going to happen on cross-examination.

9 THE COURT: There shouldn't be a reference to the  
10 subpoena, we can ask him about outside presence of the jury.  
11 If he doesn't have a satisfactory answer, there may be  
12 there's a situation in which he would have to be allowed to  
13 ask about it in front of the jury, that is the ruling on the  
14 of what happened Friday, and since yesterday was down, we  
15 didn't come back yesterday, we had no idea whether Dr.  
16 Goldstein was going to turn up this morning, then you have  
17 to play gotcha with people.

18 To the extent he has additional treatment records  
19 not exchanged or additional reports as part of his medical  
20 consultation, and not just essentially litigation reports or  
21 something like that, he simply has additional treatment  
22 reports, we should be allowed to ask him about them, we  
23 should.

24 MR. KELLY: So, just --

25 THE COURT: And why, and I think it is legitimate

1 to ask the witness even in front of the jury, in it turns  
2 out there's some real discrepancy, if he didn't exchange the  
3 rest of the records, why didn't he exchange them when they  
4 were asked for them?

5 MR. KELLY: Right.

6 THE COURT: Trying to get to Scott's point if he  
7 exchanged nine pages in response to that request for  
8 records, he used the words subpoenas or authorization or  
9 whatever, if he exchanged nine pages, he shows up the day of  
10 with 29 pages it's a legitimate question as to where those  
11 came from, he's entitled to say my office screwed up, I have  
12 created the other 20 pages over the weekend, whatever he  
13 says, but as to the simple question, I only got to see nine  
14 pages before we got here this morning, how come the rest of  
15 the stuff didn't come in.

16 MR. KELLY: Actually --

17 THE COURT: I think that's a legitimate question to  
18 ask.

19 MR. KELLY: I have the answer for that. On  
20 November 2, 2022, expert notice of expert witness disclosure  
21 was made to counsel including all of the disputed reports.

22 THE COURT: So they were previously exchanged here?

23 MR. KELLY: Correct.

24 THE COURT: So even so if there was a suspected  
25 record request, it should come in under subpoenaed records

1 request I'm sorry so interrupt you, back to your other  
2 point, I don't feel like you films you needed to do a 3101  
3 (d) for a treating doctor, that's your business.

4 MR. KELLY: I always do.

5 MR. BRODY: Judge, if I may.

6 MR. KELLY: Well --

7 THE COURT: Two minutes, we really got to go.

8 MR. BRODY: These are the point of distinction,  
9 these other 21 reports are not addressed to the doctors in  
10 the case, they're addressed specifically to the Gorayeb firm  
11 as an expert review.

12 Therefore, with respect to opinions derived out of  
13 those 21 reporting, he's not a treating doctor.

14 THE COURT: No, you're wrong, I want to cut you off  
15 and say you're wrong, treating doctors provide narrative  
16 reports all the time, they're still treating doctors even  
17 when they provide a narrative report, they do it when, it  
18 happens all the time in auto accident cases, where treating  
19 doctors have to produce a narrative or affirmation to resist  
20 summary judgement motion on no fault threshold, it happens  
21 in anticipation of trial, they don't stop being treating  
22 doctors no matter how much the defense might not like that,  
23 it puts them on equal footing with consulting IME doctor.

24 If they're a treating doctor, they're a treating  
25 doctor, doesn't matter they wrote IME report, they're still

1 a treating doctor, the way it's not required, exchanged  
2 those reports along with 3101 (d) doesn't prevent that  
3 doctor from being a treating doctor, consultant who is not  
4 part of the party, 100 percent I agree with that, but a  
5 treating doctor, you know as much as a radiologist can be a  
6 treating doctor. Diagnostic radiologist can be a treating  
7 doctor, a treating doctor, who was billed through no fault.

8 MR. BRODY: It was not billed through no fault, it  
9 was built through Worker's Comp, this was billed to his  
10 firm.

11 THE COURT: Anyway, this is --

12 MR. BRODY: But Judge.

13 THE COURT: Hey, we're not going to do this, I'm  
14 not going to have a shooting match with anybody.

15 First of all, God, please my parents, they're not  
16 here for five years, I can be louder with or without the mic  
17 phones, apologies to the colonel, I could be very loud in  
18 the day, I apologize I can be louder than you most of you.  
19 I promise it won't go nowhere.

20 We're putting a witness on the stand, we're doing  
21 all of our very best to be gentlemenly with this witness,  
22 ask legitimate questions, you have to accept my ruling on  
23 the questions and the objections, and we will get through  
24 this witness this morning, and honestly, you know, if  
25 somebody may be a king for a day, labor law case are

1 preassigned two months ahead of time, we have too much  
2 working volume for that, that's why it's not done.

3 MR. KELLY: The reports are on the discs.

4 THE COURT: Get the witness, you say you exchanged  
5 off paper two years ago, that's enough for me.

6 I want to say this as nicely as I can, there's very  
7 few ways to really get in trouble with me, but one of them  
8 is to get into a shooting match with me in front of the  
9 jury, as we did this here, just us chickens no problem, if  
10 it happens in front of the jury, I will testify very fast.

11 MR. BRODY: I will let the record speak for itself.

12 THE COURT: The record does speak for itself, I  
13 already ruled on it. Off the record.

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

15 THE COURT: So I'm advised by Plaintiff's counsel,  
16 in fact, Dr. Kolb is a consulting doctor not a treating  
17 radiologist, so he will be treated that way for purposes of  
18 his testimony, and I -- we just discovered that in the last  
19 two minutes.

20 (Pause in the proceedings.)

21 COURT OFFICER: Ready?

22 THE COURT: Yes, please.

23 COURT OFFICER: All rise, jury entering.

24 (Whereupon, the jury entered the courtroom.)

25 THE COURT: All right, you can be seated as you

Dr. Kolb - Plaintiff - Direct

1           come in. I hope you had a perfect day off yesterday. As a  
2           reminder we have witnesses today, we will be down on the  
3           trial tomorrow, I have my regular motion conference calendar  
4           and all, so not on this case, and we will be back up, we  
5           anticipate Thursday and Friday this week; correct?

6                     MR. KELLY: Yes, Judge.

7                     THE COURT: Great. Okay. Then call your first  
8           witness.

9                     MR. BRODY: I don't think we have witnesses  
10          Thursday, we're dealing administrative stuff.

11                    THE COURT: We will talk about this case on  
12          Thursday and Friday.

13                    Ready to call your first witness?

14                    MR. KELLY: Yes, the Plaintiff calls Dr. Thomas  
15          Kolb.

16                    (Whereupon, Dr. Kolb took the witness stand.)

17                    (Whereupon, Dr. Thomas Kolb was sworn by the Clerk  
18          of the Court.)

19                    THE CLERK: In a loud clear voice, state your name  
20          and address for the record?

21                    THE WITNESS: Thomas Kolb, K-O-L-B, 257 West 34th  
22          Street, New York, New York 10001.

23                    THE CLERK: Thank you so much, you may be seated.

24                    THE COURT: You may be seated.  
25

1 DIRECT EXAMINATION

2 BY MR. KELLY:

3 Q Good morning, Doctor.

4 A Good morning.

5 Q What is your profession?

6 A Diagnostic radiologist.

7 Q Can you tell us a little bit about your professional  
8 education?

9 A I went to Queens College here in the City of New York,  
10 graduated 1979, and then went do medical school here in  
11 Brooklyn, Downstate Brooklyn, graduated in 1983, I then became a  
12 pediatrician, and I did three years of internship and residency  
13 in the Bronx at Albert Einstein College of Medicine, became  
14 certified in pediatrics.

15 I went back did another four years of training in  
16 Manhattan at Columbia-Presbyterian Medical Center, four years of  
17 radiology, then became board certified in radiology, and since  
18 then, which was 1990, I have been practicing radiology.

19 Q Thank you.

20 Can you tell us if you're licensed to practice medicine  
21 in the State of New York?

22 A I am.

23 Q Doctor, you said you were board certified, can you  
24 describe to the jury what that means to be board certified?

25 A Yes, first, you have to finish a number of years of

1 training in my particular situation, was three years in  
2 pediatrics, then another four years in radiology. After you  
3 finish all of those years of training, you take a written  
4 examination, you pass that written examination, you take an oral  
5 examination, if you pass that, you become a member of the Board  
6 of Radiology, American Board of Radiology, that's called Board  
7 Certified.

8 Q Doctor, have you published in your field of radiology?

9 A I have published, yes.

10 Q Have you conducted any research?

11 A I have.

12 Q Can you tell us a little bit about that?

13 A So my practice is divided into two parts, one part of  
14 my part is breast cancer detection, I specialize in young and  
15 high risk women, I think the largest paper that I published was  
16 on over 27 consecutive women, that paper dealt with comparing  
17 women with dense breasts versus women who didn't have dense  
18 breasts.

19 Nowadays we kind of understand what that means. When  
20 the paper was first published in 2002, it kind of defined the  
21 field and basically talked about how many mammograms miss breast  
22 cancer in women with dense breasts, and how often we can find  
23 that breast cancer, for example, using ultrasound for breasts.

24 Ultrasound has become a very important tool for breast  
25 cancer detection, so I have done research in that field and

1 published papers, so that's one part of what I do, and most  
2 every day, and the other part of what I do as a radiologist, we  
3 read MRIs, CAT scan, X-rays of parts of the bodies but not the  
4 breast, for example, the spines and joints, so I do that every  
5 day as well.

6 Q Doctor, can you tell us a little bit about your current  
7 professional affiliations or societies?

8 A You know, there's Radiological Society of North  
9 America, there was New York Metropolitan Breast Cancer Group,  
10 those are really the major ones.

11 Q Do you engage in any academic endeavors?

12 A Not anymore, I do private practice, I used to teach,  
13 travel throughout the world, give conferences and lectures for  
14 many, many years, but I've done that for many years, I currently  
15 do not do that.

16 Q So, you said that you engage in the private practice of  
17 radiology, kindly tell us or help the jury out to understand  
18 what is it that you do in private practice of radiology?

19 A Well, I'm, in terms of doing MRIs and CAT scans and  
20 MRIs, patients are seen by a doctor, doctor decides they need a  
21 test, whether it's an MRI, CAT scan, X-ray, they will send that  
22 patient with referral to do that test, and I will do that test,  
23 whichever test is being requested, or whichever part of the  
24 body, so that's what it means to be a diagnostic radiologist, I  
25 will interpreted that test and report back to the doctor as to

1 what I see.

2 Q With what frequency do you do that, doctor?

3 A Oh, CAT scans, MRIs, X-rays, many, many thousands per  
4 year, every year, many thousands.

5 Q In our case, Mr. Mora contends he was injured when he  
6 fell straight down from a defective ladder on to a hard cement  
7 surface injuring his neck, back shoulder and ankle.

8 Do you have experience in applying your professional  
9 skills to problems of Mr. Mora's kind?

10 A Yes, patients who complain of pain in different parts  
11 of the body, yes.

12 Q Have you been previously qualified as an expert witness  
13 in New York?

14 A Yes.

15 MR. KELLY: I offer Dr. Kolb as an expert  
16 radiologist.

17 MR. BRODY: As an expert radiologist, no objection,  
18 your Honor.

19 THE COURT: Without objection.

20 Q Doctor, did there come a time when you were asked to  
21 consult on Mr. Mora's case?

22 A Yes.

23 Q Were you asked to provide radiology services and review  
24 studies?

25 A Yes.

1 Q Did my office ask you to review such studies and render  
2 reports?

3 A Yes, they did.

4 Q Doctor, can you tell us what reports you looked at?

5 A Well, there are many.

6 Q Kindly refer feel free to refer to your records?

7 A The main body parts I was asked to look at was the  
8 cervical spine the neck, the lumbar spine which is the back and  
9 the right shoulder, those are the major, oh, and the right  
10 ankle, the right shoulder and the right ankle, those are the  
11 four main body parts.

12 Q During the course of our examination, I'm going to ask  
13 you for opinions and all of those opinions, I ask you, to be a  
14 reasonable degree of medical certainty, is that alright with  
15 you?

16 A Yes, sure.

17 Q With respect to the material that you were sent to look  
18 at, did you make certain findings with respect to that material?

19 A Yes.

20 Q And doctor, we've developed certain demonstrative aids  
21 or blowups of the films you looked at.

22 Would that assist you in explaining to the jury your  
23 findings with respect to those films and studies?

24 A Yes.

25 Q And have you reviewed and compared the blowups that we

1 have here to the original studies?

2 A Yes.

3 Q Are they, did the blowups fairly and accurately  
4 represent the original studies?

5 A Yes.

6 MR. KELLY: Your Honor, may I use the easel for  
7 purposes of presentation?

8 THE COURT: Sure.

9 COURT OFFICER: (Displaying.)

10 THE COURT: Has Mr. Brody had a chance to look at  
11 the demonstrative aid?

12 MR. KELLY: That was certainly my intention.

13 THE COURT: Do you want to look at them before we  
14 put them on the easel?

15 MR. BRODY: We -- I don't need to look at them, I  
16 just want to mark them since they don't fit in the doctor's  
17 reports.

18 MR. KELLY: I would be happy to do that at the next  
19 point.

20 MR. BRODY: If it's okay, I will move over in the  
21 corner to see what's going on.

22 THE COURT: I say the same to our lawyers in the  
23 audience, if you need to sit on the side to see the easel.  
24 I will have to propose we will go in chronological order of  
25 the review of films, is that okay with you?

1 A Yes.

2 (Whereupon, Dr. Kolb exited the witness stand.)

3 Q I have a marker or a laser pointer whichever you prefer  
4 to utilize.

5 (Whereupon, Dr. Kolb exited the witness stand.)

6 MR. BRODY: Your Honor, for the record, can we  
7 identify what doctor has? He has a file with him, while  
8 he's reviewing his notes.

9 THE COURT: Yes, the doctor does appear to have  
10 papers with him, you can ask him what he's looking at, he  
11 can tell you, you can ask him what he's looking at when he  
12 starts reviewing each film.

13 MR. BRODY: Thank you.

14 Q We will start with that one.

15 A Whatever is best for everybody, this is the shoulder  
16 obviously.

17 THE COURT: We're starting with the shoulder?

18 MR. KELLY: Yes.

19 THE COURT: What's -- did we give it an Exhibit  
20 Number or what's its corresponding exhibit, then we can call  
21 that A or B or something like that.

22 Q Doctor, do you know what facility this is?

23 A This is an MRI of the right shoulder, May 12th, 2015  
24 from Lenox Hills Radiology.

25 Q So that, that would be 15A.

Dr. Kolb - Plaintiff - Direct

1 THE COURT: Sorry, it's exhibit what?

2 MR. KELLY: 15A, Lenox Hills.

3 THE COURT: The demonstrative is  
4 Lenox Hills Radiology.

5 Q Doctor, kindly tell us what we're looking at here, tell  
6 the jury what we're looking at?

7 A Let me make it easier, so we're going to look at the  
8 right shoulder, and I'm going to talk a little bit about anatomy  
9 for every little body part so we're all on the same page, so  
10 this is the shoulder, it's a very thin picture through the  
11 shoulder if I was facing you, so you're looking at the bone  
12 here, which is called the humerus and you don't have to remember  
13 any of these medical names, just so we get on the same page, the  
14 bone comes up and this what you can feel is called the humerus  
15 or the head of the humerus and here it is, you see it right  
16 here, so there's a second bone, it looks like a triangle, that's  
17 inside your shoulder, it's called the glenoid.

18 Now, when you go like this and raise your arm,  
19 (indicating) one reason why this humeral head doesn't go away,  
20 or displays away from this bone glenoid, it's held in place by  
21 the rotator cuff, the rotator cuff in the shoulder, there are  
22 four tendons and they all have different names, you don't have  
23 to remember their names, supraspinatus, the infraspinatus,  
24 teres minor and the subscapularis.

25 You can see this is the supraspinatus muscles, here

1 right in the top of the shoulder, this here is the clavicle,  
2 which is your collarbone, here this here is the joint, you can  
3 feel a bump often in your shoulder, bony bump on top, that's  
4 acromioclavicular joint. Underneath that joint, the muscle is  
5 attached to a tendon and the tendon is attached to the bone, so  
6 we have tendons for them in the shoulder that keeps everything  
7 tight, so we can move our shoulder like that.

8           The tendon is supposed to be black, no water in it,  
9 this is an MRI picture, we take many, many pictures going from  
10 front to back, from top to bottom, from side to side, this is an  
11 easy way of looking at the supraspinatus tendon right here, and  
12 the infraspinatus tendon is right next to it.

13           The only thing you need to see here is the tendon is  
14 black here, which is the way the entire tendon should look, so  
15 this entire tendon which attaches to the muscle as it comes down  
16 and attaches to this bone should all be black, but it's not, it  
17 has this white area in it, and this area here is a partial tear  
18 of the supraspinatus and infraspinatus tendon, that's a partial  
19 rotator cuff tear, it's supposed to be black, it's white, that's  
20 a partial rotator cuff tear, that's what's shown on this  
21 picture.

22           Q     Is a partial rotator cuff tear a competent producing  
23 cause of pain in Mr. Mora?

24           A     Yes.

25           Q     You said this is an MRI, doctor, the soft tissue

1 findings on the MRI, would they be shown on X-ray?

2 A You would not see tendons on an X-ray, you would only  
3 see it on an MRI.

4 Q Doctor, can a patient manipulate the findings on the  
5 MRI?

6 A What do you mean by "manipulate"?

7 Q Well, can they fake it?

8 A No, whatever is on the picture is on the picture, no  
9 one can change the pictures once they're taken.

10 Q Alright, do we need to know anything else about this?

11 A No, that's the main finding.

12 THE COURT: I'm sorry, that was the rotator cuff  
13 tear.

14 MR. KELLY: Right rotator cuff tear.

15 Q Doctor, kindly identify this board for us?

16 A So this is MRI cervical spine, May 12th, 2015.

17 Q Is this also Lenox Hills Radiology?

18 A You have to go to the original report, not on here, has  
19 the patient ID, and the patient name and date.

20 Q The date again is?

21 A May 12th, 2015.

22 Q Can you kindly identify what we're looking at in this?

23 A Yes.

24 So different part of the body, different anatomy, let's  
25 talk spine, so this gray stripe coming down here is the

1 spinal cord, it starts in your brain, and goes all the way down  
2 to your back. Now you know that the spinal cord is in the  
3 middle of the spinal column and there are bones around it. The  
4 spinal cord, we don't want it to get damaged when we move around  
5 so we're born with bone at the front and back and this white  
6 stripe here is actually fluid, so there are two pictures here --  
7 let me stop for one second, one is a picture looking from the  
8 side, you're now looking at my neck from the side, that's this  
9 picture right here, but, we can look at pictures in different  
10 ways, think about a loaf of bread, Italian bread, French bread,  
11 you cut it long, open it up, make a hero, a sandwich, you have  
12 two pieces of, bread, both long from top to bottom, you have a  
13 hero sandwiches. You can take that same bread and make many,  
14 when you pull out the slice, it's not long, it's not long, it's  
15 square or round.

16 So that's this round picture here and there's line  
17 here, so we take a side picture and see all of the bones, which  
18 I will tell you about in a second and then we take another  
19 picture going through from top to bone, and we have these round  
20 pictures you can pull it out and put it up here and see all of  
21 the anatomy.

22 So, for example, I told you the spinal cord was along  
23 stripe, well, when you cut it like a sandwich, this spinal cord  
24 is this round gray area here going from the top of the patient  
25 to the bottom of the patient.

1           Okay, now each one of these squares is a bone, and the  
2 cervical spine has seven bones, whether you're male, female,  
3 tall or short it's the same anatomy, there are seven bones in  
4 the neck, and each one is called a number, a letter and number,  
5 C1 is the first bone in the cervical spine which is your neck,  
6 C2, C3, C4, C5, C6, C7, those are the bones, then we move into  
7 the mid-back.

8           Now, we're able to move our neck and do all of this  
9 hopefully because these bones move with each other because there  
10 are discs between the bones, the discs are like shock absorbers.  
11 When you jump up and down and move around, the bones don't touch  
12 each other, if they do, that would be very, very painful, so  
13 we're born with what are called discs, that are little, like  
14 jelly donuts, little gelatinous circles and as you, the bones  
15 come together when you move, they spring back like shock  
16 absorbers, that's normal how we're born.

17           While we move around why do these discs don't spurt  
18 out, there are ligament that hold it in place, there's a  
19 ligament going down the back of the bone here, ligaments go to  
20 the front of the bone and a special ligament goes around the  
21 bone called an annulus, and that holds the disc in place.

22           What could go wrong? Ligament can tear, what happens  
23 when a ligament tears, so the ligament holds the disc in place,  
24 so if there's a, let's say, this is the disc, this is the  
25 ligament and let's say it goes to the bone, edge of the bone and

1 stops, okay, because the ligament holds it in place.

2           If there's a partial tear of the ligament, the disc  
3 will start peeking out a little bit, that's a disc bulge, a  
4 disc bulge is a partial tear of the ligament. What happens when  
5 the disc pushes out a little bit where it shouldn't be, it  
6 pushes out on the white stripe where the spinal fluid.

7           What happens if the ligament tears completely, the disc  
8 goes through, even larger, and it can push on the structures,  
9 why do we care about disc bulges and disc herniations, because  
10 those things can push on the spinal fluid, which is in front of  
11 the spinal cord, and cause pressures on nerves with can cause  
12 you to have pain, we care about disc bulges and disc herniations  
13 in the neck and the back.

14           So I told you that the disc material should go to the  
15 edge of the bone and stop, but you'll see here there's a little  
16 bit of pushing in onto the white stripe which is the fluid that  
17 isn't there before, so on this particular scan, this  
18 cervical spine scan, there are partial tears, partial tears  
19 disc bulges at C3-4, which is between the third bone and fourth  
20 bone, C4-5 and C5-6; in other words, a little bit of disc  
21 material starting to push out into the spinal fluid in front of  
22 the spinal cord because of the partial tears of the annulus and  
23 the disc bulge, and that's the way it looks on MRI, and those  
24 are the findings of the MRI on May 12th, 2015?

25           Q       Where would you expect the pain to be felt in the

1 patient with respect to this, this film?

2 MR. BRODY: Objection.

3 THE COURT: Anatomically.

4 MR. KELLY: I will withdraw it.

5 Q What is the anatomical distribution of the nerves with  
6 respect to C3-C4 C4-5 and C5-6?

7 A So each one of these nerves travels out of the spine,  
8 we didn't talk about that, but what happens is, the spinal cord  
9 gives out nerves; in other words, how to nerves get to our  
10 fingers to do things, because the nerves start in the  
11 spinal cord, from up in the brain, they come down the  
12 spinal cord, and each side of the cervical spine on the left  
13 side and right side there are holes called the neural foramen.  
14 The spinal cord comes down, down out the nerve root, between the  
15 C4 and C5 bone is the C5 nerve root, that comes out one C5 nerve  
16 goes to your right, one C5 nerve goes to your left, they go down  
17 your neck and each nerve goes to different parts from your neck  
18 all the way down your arm to your fingertips, and that's all  
19 mapped out, so you can correlate pain due to a certain nerve,  
20 and there are charts that actually spell that out.

21 Q So with respect to what we're looking at in this image,  
22 the pain would be felt in the distribution of the arms?

23 MR. BRODY: Objection.

24 THE COURT: Pain, pain in this specific pain or  
25 where you would expect pain?

1 MR. KELLY: Generally, you would expect pain  
2 showing an impingement in the arm.

3 THE COURT: Without with respect to whether this  
4 particular patient had pain.

5 A You could have it in the neck, you could have it in the  
6 shoulders and in the upper arms.

7 Q Do you need to see anything more on this?

8 A No.

9 Q Doctor, I kindly ask you to take a look at this MRI?

10 A It's a scan.

11 Q Sorry, CAT scan, can you describe for us the date and  
12 what we're looking at?

13 A Yes, this is a CAT scan, different test we're talking  
14 about, of the neck done on March 2, 2015.

15 MR. BRODY: Judge.

16 Q Is that --

17 THE COURT: Hold on, before we proceed, can we make  
18 sure we mark the last exhibit?

19 MR. KELLY: I did, as B.

20 MR. BRODY: And we mark this as C.

21 MR. KELLY: Well, this is 1A.

22 THE COURT: 1A, there you go.

23 MR. KELLY: This is from Lutheran Medical Center.

24 MR. BRODY: Okay, fine.

25 THE COURT: So I'm sorry, this is which body part?

Dr. Kolb - Plaintiff - Direct

1 MR. KELLY: This is, I'm sorry, doctor.

2 A This is the CT scan of the cervical spine.

3 THE COURT: Plaintiff's Exhibit 1-A.

4 MR. KELLY: That's 15A and B.

5 Q Doctor, would you orient us, first of all, tell us what  
6 is a CAT scan opposed to an MRI, tell us about that?

7 A CAT scans are X-rays, just like you do a regular X-ray,  
8 a scan is actually able to take many, many, many thin slices and  
9 we can look at thin slice like two or three millimeters of a  
10 body parts as opposed to one X-ray.

11 If I took an X-ray of your neck, I would have one  
12 picture shows your entire neck, it's like looking at a book,  
13 there are many words in a book, and I'm holding the book up to  
14 you, a CAT scan, each page you can pull out and read the words  
15 and sentences that's what a CAT scan is.

16 Again, this is a thin picture, only a few millimeters  
17 thick through the middle of the cervical spine. Again, I'm  
18 facing this way, the patient's head is here, the feet are here  
19 and here are the seven bones, right, this is the second bone,  
20 Number 2, this is three, four, five, six, and seven, and the  
21 difference between a CAT scan and an MRI, most importantly, is  
22 X-rays and CAT scans show things that are hard, so it's a really  
23 great test for a fracture when there's a bone broken.

24 The things that are soft, for example, like tendons or  
25 discs, okay, you will see better on an MRI, they show things

1 that are soft and they can even see inside the bone, so MRIs are  
2 a very common test nowadays.

3           The same thing we talked about before, between, these  
4 are the bones, but you really don't see the discs very well  
5 here, you see the bones white and everything else is gray, which  
6 is very different than the picture I showed you before. Here is  
7 our active picture we showed you before, you can see the gray  
8 disc right here pushing down, pushing out partially, because  
9 it's a disc bulge and here it's at the C45 level, bottom line  
10 is, that when I reviewed this, I saw a disc bulges at C3-4,  
11 between this bone and this bone, C4-5 and C6, this is actually  
12 done earlier, done in March the MRI you looked at was done in  
13 the May, but they had the same findings of diagnosis.

14           Q     The significant findings from this study, is that a  
15 competent producing cause of pain in the patient?

16           A     It can be.

17           Q     And once again, with the CT, is this an objective  
18 finding, can you manipulate this somehow or fake it?

19           A     No, the pictures are what the pictures are.

20           Q     Do we need to know anything else about this?

21           A     No.

22           Q     Doctor, if you kindly for the record, identify this  
23 display for us?

24           A     So this is MRI of the lumbar spine done on May 14, 2015  
25 at Regency Medical.

1 THE COURT: Do you have an Exhibit Number for me?

2 Q Doctor, this is contained in your records; is that  
3 correct, Regency?

4 A Yes I will find it now.

5 Q So that would be?

6 A Here.

7 Q 12A?

8 A Yes, my record, yes.

9 Q So doctor, if you kindly orient us, what kind of study  
10 are we looking at here, what is this?

11 A This is an MRI, again, this is of the lumbar spine,  
12 it's dark here in the front, but there are five bones in the  
13 lumbar spine the discs are like in the cervical held in place by  
14 ligaments, annulus, there are five bones, this is the fifth bone  
15 you can't really see it, it's so dark, this is the fourth bone,  
16 this is the third bone.

17 Q Would you like to use the marker?

18 MR. BRODY: Judge, before we move further, can we  
19 approach real quick?

20 THE COURT: Yes.

21 (Whereupon an off the record bench discussion was  
22 held.)

23 THE COURT: No problem, next question.

24 Q Just tell us what we're looking at here?

25 A So, this is the bone number three, bone number four,

1 bone number five, and this is a different part, your tailbone  
2 sacrum, each one has a letter for lumbar, just like the neck was  
3 C for cervical.

4           These white things in between the bones are the discs,  
5 again look at the discs between L3 and 4, what is it supposed to  
6 do it's supposed to stop at the bone it's at normal position and  
7 it does here at the edge of the bone here, it's at the edge of  
8 the bone, this goes to the edge and stops, there's no  
9 indentation in this white area which is the spinal fluid.

10           Let's goes down to this level between the fifth bone  
11 and the next one, which is the first bone, which is right here,  
12 this here this bump coming out is a disc herniation. There's  
13 now a tear in the annulus and now the disc has pulled out, like  
14 pushed out like that, and now occupies space it shouldn't and  
15 you can see it very easily here and there's a disc herniation  
16 that pushes on the anterior epidural fat, which is the fat right  
17 in front of this sac that contains the spinal fluid, so that's  
18 at 51 to talk about.

19           Remember, when we talked about partial tears, you see  
20 how this disc material was pushing out a little bit not as bad  
21 as this one, this is at disc bulge here.

22           THE COURT: At what level, sorry?

23           THE WITNESS: L4-5.

24           A And you can see the difference very clearly L5-S1 there  
25 are a disc herniation, there are other findings not are the

1 major findings on this.

2 Q Are those findings the competent producing cause of  
3 pain?

4 A They can be.

5 Q Doctor, those findings in a 22-year-old patient, do you  
6 find those to be traumatically induced or degeneratively  
7 actually produced?

8 MR. BRODY: Objection.

9 THE COURT: With respect to the scope of his  
10 exchange.

11 MR. BRODY: No, with respect to the scope of the  
12 substance of his opinion.

13 THE COURT: That's what I just said.

14 MR. BRODY: No, with what he's reviewed to draw  
15 that conclusion.

16 THE COURT: It will have to be subject to  
17 connection.

18 MR. BRODY: There's no foundation.

19 THE COURT: All you have to say is "foundation,"  
20 that's all.

21 Q Doctor, in your experience, I will, how long have you  
22 been a radiologist?

23 A 30 years.

24 Q In 30 years of practicing radiology, when you find a  
25 disc herniation like we see in this exhibit and disc bulges like

1 we see in this exhibit is that the result of trauma or  
2 degeneration?

3 MR. BRODY: Objection.

4 THE COURT: Statistically?

5 MR. KELLY: Yes, across the board.

6 THE COURT: Not across the board, foundation still.

7 Q Do you expect, do you expect disc herniations in a  
8 22-year-old who has not engaged in heavy work?

9 MR. BRODY: Objection.

10 THE COURT: I think the testimony is this witness  
11 did engage, this Plaintiff did engage in heavy work.

12 MR. KELLY: No, that's what he said, that's not  
13 true.

14 MR. BRODY: May I voir dire?

15 THE COURT: No, you may not, it's not your turn.

16 Q Doctor, do you expect disc herniations in a 22-year-old  
17 otherwise healthy man?

18 MR. BRODY: Objection.

19 THE COURT: Sustained as to form.

20 Q In the course of your practice as a radiologist, do  
21 22-year-old males normally present with profound  
22 disc herniations without any history of trauma, history of  
23 sports, history of heavy work, history of accidents, things like  
24 that?

25 THE COURT: Overruled.

1 MR. BRODY: Note my objection.

2 THE COURT: Overruled, I just noted your objection  
3 by overruling it.

4 A It's less likely for a 22-year-old to present with a  
5 disc herniation. Disc herniations generally occur later in life  
6 as we get older for whatever reason for two reasons, so the  
7 answer to the question is less likely for a 22-year-old, more  
8 likely in a much older patient.

9 Q I'm sorry, I forgot if I asked you this, are these  
10 findings a competent producing cause of pain?

11 A They can be.

12 Q Can these images be fake, exaggerated or anything else?

13 A No.

14 Q Doctor, do we need to know anything else about this,  
15 I'm sorry, the distribution of the nerves in the lumbar spine,  
16 where would, where would those go in the body?

17 A So from the lumbar spine, the nerves come out of our  
18 back, it goes to our back, down our legs to our toes, so these  
19 nerve roots, you can actually see the nerve roots here coming  
20 down, you can see these thin little lines, they're all going to  
21 come out to the right of the patient, to the left of the patient  
22 and go down the front and back of the legs down to your feet.

23 Q Would you expect complaints of pain in that  
24 circumstance?

25 MR. BRODY: Objection.

1 THE COURT: Sustained.

2 Q So in a situation that's shown in the exhibit, doctor,  
3 where there is a disc herniation, would you expect complaints of  
4 pain in your patient radiating into the legs?

5 MR. BRODY: Objection.

6 THE COURT: Sustained.

7 Q What's the consequence for a patient, potential  
8 consequence of a patient who presents to you in a situation  
9 shown in this exhibit?

10 MR. BRODY: Objection.

11 THE COURT: No, overruled.

12 A They can have --

13 Q Where would that be?

14 A Pain can travel down their buttocks down their legs.

15 Q Would it travel anyplace else?

16 THE COURT: Hold on, Mr. Brody, we're going to have  
17 an agreement. If you want to state your objection, state  
18 your objection, don't roll your eyes, don't mouth words. If  
19 you want to state an objection, state it, I can rule on it,  
20 I can move on, I can't read when you give me just body  
21 language.

22 MR. BRODY: Actually, your Honor, I'm objecting.

23 THE COURT: Your objection is overruled, I'm trying  
24 to follow what you're doing. I'm just asking you to be more  
25 explicit going forward.

1 MR. BRODY: Now he answered, I move to strike on  
2 foundation.

3 THE COURT: I've already overruled the objection,  
4 there's no reason to make another objection.

5 Q Do you with need to look at it?

6 A If there are other pictures of the spine we can look at  
7 it.

8 Q Can you kindly identify what we're looking at, what  
9 this demonstrative aid would be?

10 A Same MRI, lumbar spine, May 14, 2015, and what we did  
11 here is we gave you the round picture axial picture on the left  
12 and the sagittal or the long picture on the right. Again, we're  
13 looking through the level of the disc herniation at L5-S1 and it  
14 looks like that.

15 Q Doctor, with respect to the image on the right, what  
16 are we seeing in that image?

17 A On your right?

18 Q Right facing.

19 A Right, so there's disc material coming down pushing on  
20 the fat which is on the sac, there is also which you can see  
21 better on exams, but see here as well, there are two other  
22 findings, there are bilateral, which means on both sides, L5  
23 pars defect, means piece of the bone is incomplete and because  
24 of that, because the bones are not fused together the way  
25 they're supposed to, but separated between them is a defect,

1 there's slippage of this bone, L5 bone on the S1 bone, meaning  
2 what's called slippage, so like a slipped bone in the back. The  
3 medical term is anterolisthesis if it's lifted to the front,  
4 there's a Grade 1 which is a small anterolisthesis, slippage on  
5 this bone on that bone, L5-S1 because of pars defects, pars are  
6 the bone that come from the large square bones going towards the  
7 back of the patient, back here, and you're starting to see it  
8 here and you can see it on other views as well.

9 Q Are these the findings competent producing cause of  
10 pain?

11 A They can be.

12 Q Where would you expect the pain in this Plaintiff's  
13 patient?

14 A For pars defects usually in the back.

15 Q Doctor, do we need to see this anymore?

16 THE CLERK: Can I have a number?

17 Q This is Regency as well, doctor?

18 A Yes.

19 Q That's one of your facilities, doctor?

20 A No.

21 Q Tell me what Regency is?

22 A It's an MRI center that does MRIs.

23 THE COURT: So that was 12; correct?

24 MR. KELLY: Yes.

25 THE COURT: It should be labeled as Regency

1 Radiology, I'm asking.

2 MR. BRODY: I think it should be Lenox Hills.

3 THE COURT: Hold on, I didn't ask you, you're not  
4 offering the exhibit, Mr. Kelly, the witness has described  
5 it as being Regency Radiology; is that correct?

6 MR. KELLY: Yes.

7 THE COURT: If there's something else we have to  
8 talk about it, we can do it later. Right now, we're only  
9 asking the witness to testify to what's being reviewed,  
10 directly to what the Plaintiff offered, if they have to give  
11 it to me directly.

12 Q Doctor, I'm going to kindly ask you to take a look at  
13 this exhibit and tell us what it is and where it's from?

14 A So, this is an X-ray done January 25, 2017, and -- and  
15 that's what it says here on the picture.

16 Q What do we see in this --

17 A We're seeing all of the bones that we talked about,  
18 there are seven bones in the neck, so this is the second bone,  
19 the third, fourth, fifth, the sixth, the seventh.

20 As I told you when you do X-rays, you can only see  
21 things that are hard not soft, here you see the bones, we know  
22 there are discs in between the bones, but you can't see them on  
23 an X-ray, you can only see them on an X-ray, unless, well, but  
24 you can see them on CT scans as well as we talked about, the MRI  
25 is even better, but on X-ray you will never see the disc.

1 Q Do we need to see anything else?

2 A No.

3 MR. BRODY: Your Honor, I don't think we marked  
4 that.

5 THE COURT: We do need to mark the exhibit?

6 Q Doctor, do you know what facility this is from?

7 A It's not on here.

8 Q Okay. We can compare that.

9 THE COURT: I have to ask that we, I know that you  
10 spent some time trying to match up things before we got  
11 started this morning. Please do not put anything on an  
12 easel until we know what facility it came from.

13 Does the image not indicate what facility it was?

14 THE WITNESS: Some did and some didn't.

15 THE COURT: The one we just took down?

16 THE WITNESS: The one we took on, didn't have a  
17 facility on it, it just had a date, date, patient name and  
18 patient ID.

19 THE COURT: Does the ID match up with the ID being  
20 with the other exhibits, that simply it's from the same  
21 facility, Mr. Kelly.

22 (Pause in the proceedings.)

23 THE COURT: Anything?

24 MR. KELLY: Not yet. It's in the Notice of  
25 Intention, I'm sure, but I will skip the X-rays that aren't

1 identified.

2 THE COURT: Okay.

3 MR. KELLY: Can I take a minute with the doctor,  
4 what I want to show him.

5 THE COURT: Please.

6 (Pause in the proceedings.)

7 THE WITNESS: If there's no name, I won't put it  
8 up.

9 THE COURT: Thank you.

10 Q So, doctor, kindly identify what demonstrative aid  
11 we're looking at?

12 A We really jumped forward, let's just do the next date,  
13 it's in the front.

14 Q Next.

15 A This is an MRI of the lumbar spine on 2/7/2017, from  
16 Lenox Hills Radiology.

17 Q 15?

18 MR. BRODY: 15A.

19 MR. KELLY: 15C.

20 MR. BRODY: C.

21 Q Tell us, doctor, what it is we're looking at in 15C?

22 A Looking at the same two pictures, nothing much has  
23 changed in advance, we're back from there, you see here the  
24 disc herniation we talked about before inside that circle and  
25 the disc bulge right above it there, that disc herniation is



1 MR. KELLY: Withdrawn, withdrawn.

2 THE COURT: Thank you.

3 Q So there's an integral change from the prior films; is  
4 that correct?

5 MR. BRODY: Objection.

6 THE COURT: Overruled.

7 A No, no integral change from the one two to years.

8 THE COURT: Sorry, not off the record, you may  
9 think what he's going to answer.

10 MR. BRODY: He already answered it no change.

11 THE COURT: You may think you know what he's going  
12 to answer, but then he might answer differently, doesn't  
13 make the question objectionable.

14 MR. BRODY: It was asked and answered, objection.

15 THE COURT: Don't worry about it, let's move on.

16 Q Doctor, is the narrowing foramen a competent producing  
17 cause of pain?

18 A Yes.

19 Q What level are we looking at?

20 A L5-S1.

21 Q Where do we expect the distribution of any pain?

22 A In this patient it would be the left L5 nerve roots,  
23 the pain would be the left buttocks and back.

24 Q Do we need to see anymore?

25 A We talked about the pars defect, the bones here which

1 are separated a little bit, that hasn't changed either and the  
2 slippage of the bones we also talked about, it's unchanged.

3 Q Doctor, if you kindly identify when you get a chance,  
4 kindly identify with the demonstrative aid you're using?

5 A So this is again an MRI of the lumbar spine, this date  
6 is August 17, 2018, Advanced Cardiovascular Imaging, 2018, which  
7 is over a year later, and this is a study that I did and I read,  
8 and this patient between the film I showed you on the 17th and  
9 the film I'm going to show you now and surgery, and what happens  
10 is, we now have these lines, you can see it better, these lines  
11 here are screws, what happens is this patient had a fusion,  
12 looks like anterior and posterior fusion at L5-S1 to fix that  
13 slippage and herniation.

14 So the patient had screws put into the L5 bone in both  
15 sides, screws put into the S1 bone on both sides and a little  
16 metal bar connecting them so when the patient moves, that joint  
17 at 5-1 won't move, so the patient is now fused.

18 That's why it's very black here because the metal in  
19 the patient looks black on this MRI sequence, and here you can  
20 kind of get the idea that these are screws here at L5, so that's  
21 what we're looking at here in 2018.

22 Q Is the condition shown here permanent, doctor?

23 A So in this, after the fusion, are you saying is a  
24 fusion permanent?

25 Q Yes.

1           A     Yes, the patient will have screws in and metal hardware  
2 from the surgery and that almost always stays in, yes.

3           Q     Any other significant findings from review of this  
4 film, doctor?

5           A     So, there are still a little slippage even though they  
6 fused it, still a little -- there's still a little slippage at  
7 L5-S1 that still persists, and a little disc perfusion goes into  
8 the leg, like fusing a patient, it's much smaller. Those are  
9 the major findings on this MRI of 2018.

10          Q     Doctor, with respect to the slippage and fusion, can we  
11 expect that to cause pain to the patient?

12          A     It can, for sure, it can.

13          Q     Where would we expect the pain to be in this patient?

14          A     From the fusion it would be in the back.

15          Q     Is there anything else we need to see here?

16          A     No.

17                   THE CLERK: What number is that, counsel?

18                   THE COURT: Exhibit Number?

19                   MR. KELLY: It should be, Dr. Kolb's facility, 12C.

20                   THE COURT: 12C, okay.

21          A     So, I think this is the same day, August 17th, 2018 MRI  
22 lumbar spine, it's just a bigger picture all of the metal is in  
23 here, there is surgery back here and there are other pictures  
24 that shows the fusion, but this picture that's up on the easel  
25 now is from the same study as the one you're marking as 12C.

1 Q This is your facility, doctor?

2 A Yes.

3 Q And what do we see in this particular picture, anything  
4 significant in the fact it's larger than we can identify?

5 A No, it's the same, there's still a little slippage, you  
6 see the back of his thighs here and the back of his thighs here  
7 it slipped, patient is fused, you're not seeing the hardware  
8 from the fusion on this slice, but everything else we talked  
9 about.

10 Q Where is the spine in here?

11 A So, this is all the spine, these are the bones of the  
12 spine in front, these are the bones in the back of your spine  
13 that you can touch, this is the spinal cord, coming down to here  
14 and stopping and giving off nerve roots, these gray lines, this  
15 is spinal fluid, all of this white stuff is spinal fluid, that's  
16 pretty much it.

17 Q Can you kindly identify this exhibit we're looking at?

18 A So this is an MRI of the lumbar spine and the date is  
19 February 8, 2020, and now you can see a little bit better, this  
20 patient has already been fused from the front here, this is the  
21 metal, this black thing is metal, you're not seeing the screws  
22 because on the sides of the patient and this is a picture in the  
23 middle of the patient, there are other pictures that show the  
24 screws.

25 You still see here that the still disc material

1 protruding out in an abnormal space even though the patient was  
2 fused here, you will still see slippage and here you can see it  
3 very well, here is the back of L5, here is the front of S1, and  
4 you can see it slipped back, it's supposed to line up like this  
5 and this, and the bones are slipped, the bones are, look here  
6 this way in relation to that apparently, so even after the  
7 surgery, there's still some slippage to the front and there's  
8 still some disc material pushing out to the back.

9 Q The condition shown in that film, can that be a  
10 competent producing cause of pain?

11 A Yes, it can be.

12 Q This film was taken at your facility?

13 A Yes, the date is February 8, 2020, let me check, yes,  
14 it was.

15 THE COURT: What Exhibit Number is this?

16 MR. KELLY: 12E.

17 THE COURT: 12E?

18 MR. KELLY: Yes, thank you.

19 Q Anything else we need to see here?

20 A No.

21 Q Okay.

22 A So the next one is May 28, 2021, MRI of the  
23 cervical spine, done at Lenox Hills Radiology.

24 THE COURT: Hold on, let me interrupt again.

25 You have to tell us the exhibit number, as soon as

1           you put it up so we don't have a problem here.

2                   MR. KELLY: 15E.

3                   THE COURT: Thanks, and this is Lenox Hills.

4                   MR KELLY: Lenox Hills, correct.

5           Q       What are we looking at here, what kind of a study is  
6 this, in the first instance?

7           A       Now we're back to MRI of the cervical spine, I'm just  
8 going to label the bones again, two, three, four, five, six,  
9 seven, earlier on we looked at pictures in 2015 which showed  
10 small bulges at 3-4, 4-5, and 5-6, but here now we have a piece  
11 of disc material pushing out even more and it wasn't before, and  
12 this is a small disc herniation at C6-7, the findings above  
13 haven't changed, there are bulges at 3-4/5-6 and now there's a  
14 small herniation at C6-7.

15          Q       What is the significance of that herniation at C6-7?

16          A       Pushing on the thecal sac which contains the  
17 spinal fluid in front of the spinal cord.

18          Q       Tell us briefly what the thecal sac is?

19          A       So the thecal sac is the fluid around the spinal cord,  
20 why doesn't it, how does it stay there, why doesn't it just  
21 leave? It's held in like a balloon which is called a sac,  
22 thecal sac, and when you do a spinal tap, you put a needle into  
23 the back, you pierce through the thecal sac that contains the  
24 fluid and take out fluid, that fluid is contained in the sac,  
25 remember this is all round, we can take pictures this way, and

1 you would see the cord in the middle and the spinal cord all the  
2 way around it.

3 The spinal cord is there to cushion the cord so it  
4 doesn't get damaged and also for nutrients, so that the cord can  
5 get nutrients from the spinal fluid, there's the thecal sac in  
6 the spinal cord.

7 Q What is the condition shown in C7 with respect to the  
8 thecal sac?

9 A There's now a disc herniation, that's pushing through  
10 the annulus, and the ligament and pushing on the front of the  
11 thecal sac.

12 Q Is that a competent producing cause of pain?

13 A It can be.

14 Q Where would you expect the distribution of pain to be  
15 in a patient complaining of pain who exhibits objective  
16 diagnostic findings like 15E?

17 A It often will be within the neck itself.

18 Q Anything else we need to see on this?

19 A No.

20 Q What are we looking at?

21 A We're looking at a CAT scan of the cervical spine on  
22 August 22, 2022.

23 Q That's Lenox Hills Radiology?

24 A That's Lenox Hills Radiology, yes.

25 Q Would you put them up, please?

1           A     Yes, so again, we're looking at the neck, I will just  
2 label the bones for you, two, three, four.

3                     MR. KELLY: 15F.

4           A     So again, we've seen CAT scans before, this is the side  
5 view, this is the round view, and we can see, you can't see the  
6 discs here in this picture, you can see when we take the round  
7 view of the axial view, this disc material right there, and that  
8 is exactly what we're looking at on the MRI of the  
9 cervical spine, done the year earlier in 2021, that was just on  
10 the easel, so that's the way it looks on a CAT scan. There are  
11 three bulges between C3 and 4, C4 and 5, C5 and 6 and now  
12 there's a herniation right there, you can see it well, between  
13 C6 and 7. That's the major findings, you can compare it with  
14 the MRI that was done in 2021.

15          Q     And this is, I'm sorry, what part of the back did you  
16 say?

17          A     This is the neck, the cervical spine.

18          Q     Okay, where would we expect -- withdrawn.

19                     Is this a competent producing cause of pain?

20          A     It can be.

21          Q     Where would you expect the pain to be exhibited in a  
22 diagnostic test as 15F?

23          A     A findings like this, usually in the neck.

24          Q     Do we need to see anything else here?

25          A     No.

1 Q Very good. You can go back to your seat.

2 (Whereupon, Dr. Kolb resumed the witness stand.)

3 Q Now, doctor, I didn't ask you individually with each  
4 one of these displays, but are they objective representation of  
5 the Mr. Mora's body?

6 A Yes.

7 Q Can they be manipulated, exaggerated or faked?

8 A No.

9 Q Are the conditions shown in each of these films  
10 permanent?

11 A They are permanent.

12 Q Would you expect that any of these conditions to  
13 resolve in the absence of medical treatment?

14 A No.

15 Q Doctor, tell us a little bit about, we talked briefly,  
16 tell us a bit about findings of degeneration, what, when we're  
17 talking about your practice, what does degeneration mean?

18 A Of what body part, the spine?

19 Q So we're talking about spinal degenerative, yes.

20 A So as we get older unfortunately, we degenerate, there  
21 are three stages to degeneration; first, the disc that we looked  
22 at loses water, we're born with beautiful discs that are like  
23 shock absorbers, jelly donuts, the first thing that happens they  
24 get brittle. When they get brittle, they lose water, that's the  
25 first stage.

1           The second stage is because they lose water, they start  
2 shrinking they get smaller, there's not as much fluid in them as  
3 there was before. When we get smaller, the bones get closer  
4 together, the bones don't like, that's the second stage is the  
5 disc height gets smaller.

6           The third stage is your body actually knows that your  
7 bones are getting too close and become unstable and you start  
8 forming osteophytes or bone spurs at the edges of the bones, and  
9 that's the third phase of degeneration in the spine.

10          Q     What age do we expect degeneration to be shown?

11          A     It varies, there's no way, I mean the older you are,  
12 the more likely you are to have degeneration.

13          Q     So can you have degeneration with no symptoms?

14          A     Yes, you can.

15          Q     Doctor, if you weren't testifying with us today, what  
16 would you be doing?

17          A     I would be in my office.

18          Q     Is your office charging a fee for you to be with us  
19 today?

20          A     They are.

21          Q     Can you tell the jury what the amount of that fee is?

22          A     It's \$12,000.

23          Q     And did your office charge a fee for reports in this  
24 case?

25          A     Yes, it did.

Dr. Kolb - Plaintiff - Direct

1 Q And can you tell us what the fee is for the reports?

2 A \$950 for every MRI and CT scan.

3 Q And doctor, you and I have been together on cases about  
4 three times in the last five times; is that correct?

5 A There's no way I would know that, but it's a small  
6 number.

7 Q You have done work with my firm before; correct?

8 A I have, yes.

9 MR. KELLY: Doctor, I have no further questions for  
10 you at this time.

11 THE COURT: Mr. Brody.

12 MR. BRODY: Can we take five?

13 THE COURT: Sir, you remain under oath, don't  
14 discuss your testimony with anyone.

15 Ladies and gentlemen, let's take a five-minute  
16 break, don't discuss the case amongst yourselves or with  
17 anyone else, don't have any outside contact.

18 COURT OFFICER: All rise, jury exiting.

19 (Whereupon, the jury exited the courtroom.)

20 (Whereupon, a short break was taken.)

21 (Whereupon, Dr. Kolk exited the witness stand.)

22 (Pause in the proceedings.)

23 COURT OFFICER: All rise, jury entering.

24 (Whereupon, the jury entered the courtroom.)

25 (Whereupon, Dr. Kolb resumed the witness stand.)

1 THE COURT: Alright, you can all be seated.

2 Doctor, you remain under oath.

3 Counsel, you may cross.

4 MR. BRODY: Thank you, your Honor.

5 CROSS-EXAMINATION BY

6 MR. BRODY:

7 Q Good afternoon, doctor.

8 A Good afternoon, sir.

9 Q Have you and I ever met before?

10 A I don't remember, sir.

11 Q Okay. You have testified before; correct?

12 A Yes, I have.

13 Q And has the frequency within which you've testified  
14 changed recently at all?

15 A I don't notice it in general, I testify around five to  
16 six times per year, sometimes four, sometimes seven, for in the  
17 past many years, there was Covid, so I don't know how better to  
18 answer that.

19 Q You testify more for the Gorayeb firm than you do for  
20 the other firms?

21 A I believe they call me for frequently, yes.

22 Q And they send you a lot of tests to review; correct?

23 A They send me, for example, like they send me this case,  
24 yes.

25 Q So let's talk about this case for a second.

1           You did a number of MRI reports, CAT scan reports and  
2 fluoroscopic imaging reports; correct?

3           A     Correct.

4           Q     And according to my notes, you said you charged 450 for  
5 an X-ray?

6           A     I didn't talk about it today, that's correct, you must  
7 have gotten that from another time I testified.

8           Q     I did, I did. So you reviewed just in this set you  
9 reviewed ten X-rays at 450 a piece that's \$4500; correct?

10          A     Correct, that would be whatever my biller does, billing  
11 does, correct.

12          Q     And you did eight CAT scans and MRIs at 950 each, so  
13 that's something around \$7500 bucks, \$7600?

14          A     Whatever it always comes down to, yes.

15          Q     What do you charge for reviewing fluoroscopic images?

16          A     Same as an X-ray, 450.

17          Q     So roughly \$15,000 to review these films; correct?

18          A     Whatever are sent into me.

19          Q     Can you explain to me how the process works when you  
20 get request from a firm such as Gorayeb, how is it you review  
21 the film and type up the report?

22          A     So, what happens is that many -- I don't know about  
23 many, but law offices will call my office, there are secretaries  
24 I have that field these calls and they tell them to send in  
25 whatever they have, review whatever is received. If it's

1 complete, they upload it to my server and I will be notified by  
2 my secretary that there's a case for me to look at on the  
3 server.

4 I will look on my server and see what's there and  
5 dictate out what I see and generate a report like all of these  
6 reports. The report is given to my secretary. I then tell my  
7 secretary I finished whatever you gave me.

8 She will take those reports and talk to whatever the  
9 law firm is and say here is Dr. Kolb's report and tabulate  
10 whatever it is, take care of that, that's the process for all of  
11 those.

12 Q Just so I understand, let's say you have records in  
13 front of you; correct?

14 A Yes.

15 Q Is one of those one of your reports?

16 A Yes.

17 Q And in any one of your reports can be either a page or  
18 maybe two pages tops?

19 A Yes.

20 Q So you get a film in, an MRI from Plaintiff's counsel,  
21 now an MRI doesn't come as a big picture like this, it comes  
22 either on a disc or on a thumb drive and it has many exposures  
23 to it; right?

24 A Yes.

25 Q It takes time to look at an MRI?

1 A Correct.

2 Q You get in CT scans and MRIs from the Gorayeb firm, you  
3 sit down with the first one, you have to look through the  
4 images, see what you see, you have to draft a report.

5 Do you draft a report right then and there while  
6 looking at the films?

7 A Most often, sometimes I don't, I will look through the  
8 case and see, but generally I do read what's in front of me and  
9 the answer would be yes.

10 Q And then you type up your report; right?

11 A Yes, I dictate my report, it gets medically typed.

12 Q And at the bottom of each report is a time when you've  
13 completed doing that particular report; correct?

14 A Yes.

15 Q And then you go on to the next one; correct?

16 A No, so, like I said, often times I will have to look  
17 through an entire case to see what they send me.

18 For example, there may be eight studies of one body  
19 part, I'm trying to figure out what's going with this body part,  
20 I will look through the whole case, develop in my head what the  
21 findings are, and I will look at the next one, there could be an  
22 X-ray, there could be an CT, could be an MRI.

23 Radiologists look at all of these things in order to  
24 achieve a diagnosis, so I may not dictate it yet, I may wait  
25 until after I've looked through everything, all eight studies

1 and then go back and start dictating.

2 Q And doctor, in this particular case, you dictated all  
3 of your reports within about a one-hour period; is that right?

4 A No, what I'm saying, that's not what I do.

5 Q It's not what you do.

6 But the report can't get a time on it, until you've  
7 dictated it; correct?

8 A The time is on here is the time that I dictate, it  
9 doesn't take into account everything I just told you. I may  
10 have to go through the entire case which could take me a day or  
11 more whatever, and I often don't have all of the films, and I  
12 have to tell my secretary the reason I looked at everything  
13 first before I dictate is because I am -- I may be missing a  
14 study, so the secretary has to get that before I dictate, I hold  
15 off and dictate before I've gotten everything.

16 Q You have been cross-examined on this very issue before?

17 A Yes.

18 Q Your answers are changing over time; is that correct?

19 MR. KELLY: Objection.

20 THE COURT: Sustained.

21 Don't answer that, sustained.

22 Q Doctor, how long did you spend to earn your \$15,000  
23 reviewing the films in this case?

24 A I can't tell you the exact amount of time.

25 Q But you can tell me exactly how much you earned;

1 correct?

2 A Sure.

3 Q And in addition to reviewing these films for the  
4 Gorayeb firm in this particular case, Drs. Kaplan and Grimm sent  
5 you some films to review; is that correct?

6 A Sent me patients, you mean.

7 Q They --

8 THE COURT: In this case, they're talking about.

9 Q In this case they sent you the patient to be examined  
10 in one of your facilities; correct?

11 A Correct, that's true.

12 Q By the way, have you ever met John Mora before?

13 A No.

14 Q Have you ever offered him any medical advice?

15 A No, sir.

16 Q Drs. Kaplan and Grimm did send you films to review; is  
17 that correct?

18 A No, you just asked me that.

19 Q No, I'm sorry, did they send you a patient to take  
20 pictures of?

21 A Yes.

22 Q Did you take pictures of him?

23 A Yes.

24 Q Did you do that or somebody else in your company or  
25 office do that?

1           A     You have an MRI technologist who places the patient in  
2 the machine, takes the pictures, pictures gets transferred to me  
3 and I read them.

4           Q     So in this case, when you did that work for Drs. Grimm  
5 and Kaplan, your technologist took information from Mr. Mora,  
6 performed tests upon him and then you read the films at a later  
7 time; correct?

8           A     Yes.

9           Q     So right now, would it be fair to say, it's Tuesday  
10 afternoon, at one or more locations people are taking films for  
11 you to do a study on; correct?

12          A     Yes.

13          Q     They're working just like you were there, except you're  
14 not there; correct?

15          A     Yes.

16          Q     And when you leave here, if you chose to, you don't  
17 have to obviously, you can go back home, turn your computer on  
18 and start reading films; correct?

19          A     I could.

20          Q     Okay, and how many films would you say a month you  
21 read?

22          A     I don't have any --

23                   THE COURT:   Just musculoskeletal or including  
24 breast image?

25                   MR. BRODY:   MRI, CAT scans regardless of the body

1 part that they take.

2 A I can't give you an exact number.

3 Q Over thousand?

4 A A month?

5 Q Yes.

6 A I would think so.

7 Q Over 2000?

8 A I can't give you an exact number.

9 Q Now, you said that you testify roughly four to seven  
10 times a year; is that correct?

11 A Yes.

12 Q And you testify for more than the Gorayeb firm;  
13 correct?

14 A I have.

15 Q Have you done that within the past year?

16 A I don't remember.

17 Q Do you keep any records of when you testify?

18 A No, definitely not.

19 Q Have you ever testified in Federal Court?

20 A I believe so.

21 Q When you testified in Federal Court, did the judge  
22 require you to put together a list of all of the cases in which  
23 you testified?

24 MR. KELLY: Objection, move to strike, we discussed  
25 this.

1 THE COURT: Sustained, this is this case.

2 MR. BRODY: I understand, I'm trying to find out.

3 THE COURT: Confine your questioning to things  
4 relevant to this case.

5 Q Well, as to the relevance of this case, you testified  
6 for Mr. Kelly in the Cordova case in January of 2024 of this  
7 year; correct?

8 A I don't remember, I'm happy for you to bring it up.

9 Q Okay. Well, did you testify for Mr. Kelly in January  
10 of 2024?

11 A I have no recollection of January of 2024 of testifying  
12 for Mr. Kelly.

13 Q Are you familiar with a case called Mauro Cordova?

14 A I don't remember.

15 Q On January 25, 2024, did you appear in Civil Part 17 of  
16 this building before The Honorable Sol Stein in the case of  
17 Mauro Cordova?

18 MR. KELLY: Objection.

19 THE COURT: Sustained, I assume this is a specific  
20 question which I just assume is designed to refresh the  
21 witness's recollection.

22 A I don't remember, but if you have it in front of you,  
23 I'm happy to agree to it that I did.

24 Q There are other lawyers at the Gorayeb firm you've  
25 testified for; correct?

1 A Yes, that's true.

2 Q Did you testify on behalf of Joseph Fennola (sic.)  
3 Olivera for Damon Velardi form the Gorayeb firm in March of this  
4 year?

5 A I don't remember the exact names of people that I come  
6 to, and I mean I read a lot of films and a lot of names, but I  
7 will accept everything you say, if you have a notation that says  
8 I did it, I accept that, yes, that's true, I mean, that in  
9 general I will say that. Whenever you have an item that you say  
10 that you have, I accept that as being that I was there and did  
11 it.

12 Q Now doctor, did you also testify for Mr. Velardi on  
13 behalf of the Gorayeb firm on November 8, 2023 in the case of  
14 Rosales?

15 A Again, I don't remember the date and the patient's  
16 name, but I'm certainly not disagreeing with you.

17 Q And do you recall whether or not in each of those three  
18 cases Dr. Kaplan was also the referring physician to you of a  
19 patient for you to do medical records?

20 A No.

21 THE COURT: No, it wasn't?

22 THE WITNESS: No, I don't remember.

23 Q Do you remember Dr. Grimm referring the patient to you  
24 for medical records in those cases?

25 A No, I have no recollection specifically of that.

1 Q At any time in those three cases, did you work with  
2 Drs. Kolb and Kaplan?

3 THE COURT: He's Dr. Kolb, he's Dr. Kolb.

4 MR. BRODY: I will withdraw the question.

5 Q In either of those three cases, do you recall having  
6 any communications with Dr. Kaplan or Dr. Grimm about their  
7 patients?

8 A No.

9 Q In the Cordova and Olivera case, did you have any  
10 communications with Dr. Weinstein about their treatment?

11 MR. KELLY: Objection.

12 THE COURT: Sustained. The witness has already  
13 testified, he testified he has no recollection of these  
14 cases at all.

15 MR. BRODY: I will --

16 THE COURT: That's the answer.

17 MR. BRODY: Okay.

18 THE COURT: Move on.

19 Q Sir, did you testify for the Gorayeb firm in the Pedro  
20 Ramirez case in February of 20 -- withdrawn -- on February 27th  
21 of 2024?

22 A I may have, if you have it, sure.

23 Q Well, were you also contacted to testify in May of 2024  
24 as an expert witness for the Gorayeb firm in the case of Diaz  
25 versus Cornell?

1 THE COURT: Is the question whether he did it or  
2 somebody spoke to him about potentially doing it?

3 MR. BRODY: If somebody spoke to him and scheduled  
4 his appearance.

5 A I'm sorry.

6 THE COURT: That's fine.

7 A I have no idea.

8 THE COURT: Can I ask, I want to get this moving.

9 When somebody needs to schedule your appearance on  
10 a case, a firm, whatever, do they call you directly or do  
11 they call your scheduling folks?

12 THE WITNESS: Scheduling folks.

13 THE COURT: Did you ever speak to these firms  
14 directly about scheduling?

15 THE WITNESS: No.

16 THE COURT: There you go, can we move on?

17 MR. BRODY: Sure.

18 Q But in each of the cases that you testified --

19 A Um-hum.

20 Q -- you would review films just like you did in this  
21 case; correct?

22 A I'm a radiologist, 100 percent.

23 Q You charge for the review of all of those films;  
24 correct?

25 A Of course.

1 Q And when you and in the four other cases in that  
2 four-month period, you charged \$12,000 each time you appeared in  
3 court; correct?

4 MR. KELLY: Objection.

5 THE COURT: I don't think it was four cases in four  
6 months, you referred to a case from last year sometime?

7 MR. BRODY: November to March.

8 THE COURT: Anyway, is the question whether every  
9 time he appeared in the last couple of years for any firm  
10 the fee is \$12,000.

11 MR. BRODY: Just the fee for those cases for  
12 Gorayeb firm.

13 THE COURT: He just testified he doesn't recall  
14 these cases testifying for the Gorayeb firm. Since I've  
15 given you a few options of ways to get the information, you  
16 either have to move on or make the question general enough  
17 he can actually answer.

18 Q Each of the times you appeared on these cases for  
19 whatever firm it was, was your fee \$12,000?

20 THE COURT: The witness has already testified he  
21 doesn't recall appearing on these cases per se and only  
22 taking your word for it, that's why I'm asking so we can  
23 move on, if you want to ask him about a timeframe,  
24 generally, and what his need for court appearances was  
25 generally, I have no problem with it, and if the witness

1 says he's willing to take your word for it, he testified on  
2 certain dates, good, then you can still do the extrapolation  
3 you're trying to do.

4 You can't ask him to testify about specifics of a  
5 thing he says he doesn't recall doing, this is in response  
6 to Mr. Kelly's ongoing objection I keep sustaining.

7 Q Sir, for each of the cases you've testified for in the  
8 past, seven or eight months, has your fee been \$12,000?

9 A So my fee has gone up, so I can't tell you when it went  
10 up, my office increased from \$9500 to 12, I can't tell you what  
11 day it did, I can't answer your question.

12 THE COURT: Was it in the past, I apologize, was it  
13 in the past year?

14 THE WITNESS: Yes.

15 Q Who made the decision was it to increase your fee?

16 MR. KELLY: Objection. It's concerning collateral.

17 THE COURT: Let's step outside.

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

20 THE COURT: Alright, so do you want to get that one  
21 question in, no problem.

22 Doctor, is it you or someone else at Kolb Radiology  
23 who sets the fee for your appearances in the last year?

24 THE WITNESS: I'm the one responsible for what's  
25 charged so the buck stops with me.

1 THE COURT: Great.

2 Q So, doctor, I want to go into some of the films for a  
3 moment we have marked as exhibits, but in doing that, I -- I  
4 want to ask you, did you review films and studies beyond the  
5 pictures that we've seen here today in connection with your  
6 consulting in this case?

7 A I reviewed everything I brought, but not everything I  
8 brought was shown to me in the studies.

9 Q So can we agree, for example, that you reviewed films  
10 related to a claim of an injury to Mr. Mora's right ankle, but  
11 we have none of those films here today; correct?

12 MR. KELLY: Objection.

13 THE COURT: Sustained, not that we don't have them,  
14 they're not on the blowups shown to the doctor.

15 MR. BRODY: Fine, I will rephrase it.

16 Q None of that, none of your review of those films have  
17 been placed into evidence; correct?

18 MR. KELLY: Objection.

19 THE COURT: Sustained. Without getting to the  
20 minutiae of this, we have a shopping cart of subpoenaed  
21 records, some of them may be in records, some of which are  
22 are not, they will be determined based on the normal rules  
23 of evidence.

24 As to the question whether they were blown up and  
25 shown to the jury, which I was trying to stay on track with

1 that, it's a totally appropriate question you can ask.

2 Q Did we blow up any of those photos --

3 A Of.

4 Q -- of the ankle?

5 THE COURT: Of the ankle?

6 A No.

7 Q Of the right ankle?

8 A I have not seen or shown any blowups of the right  
9 ankle.

10 Q Doctor, you were shown, it might be best if you step  
11 down for a moment.

12 THE COURT: I just remind you as you did before  
13 you're under oath when you step off the chair.

14 (Whereupon, Dr. Kolb exited the witness stand.)

15 Q Defendant that's Exhibit 1-A, that's from March 2, I  
16 believe, 2016, the date of the accident; is that correct?

17 MR. KELLY: '15.

18 A '15.

19 Q 2015; is that correct?

20 A That is correct.

21 Q What is that film of?

22 A CT scan of the cervical spine.

23 Q And did you review the corresponding report of the  
24 radiologist who reviewed that films?

25 A Yeah, I don't remember, I believe this was reviewed a

1 while ago, it's on my report, the date that I reviewed it, so I  
2 don't remember corresponding original radiology report.

3 Q So that same day, there was an X-ray of the Plaintiff's  
4 right shoulder; correct?

5 A I believe so, I would have to check, let's agree.

6 Q Well, can you check and see if you read that X-ray?

7 A 5/12 on May 12th?

8 Q No, that would be on the 2nd, the date of the accident.

9 A May 2, 2015, sorry.

10 THE COURT: Doctor, since those aren't in evidence,  
11 do me a favor and look at them on the side.

12 A So March 2, 2015 --

13 Q Yes.

14 A -- X-rays of the right shoulder, correct.

15 Q Would you agree with the findings at Lutheran Hospital  
16 that there was no evidence of traumatic findings on that X-ray?

17 A Yes, I read it as a normal X-ray of the right shoulder,  
18 yes.

19 THE COURT: Left or right?

20 THE WITNESS: Right.

21 MR. BRODY: Right.

22 Q I want to talk to you about the disc bulges you found  
23 on this MRI?

24 A Um-hum.

25 Q Would you agree that the disc bulges on this MRI show

1 some evidence of disc desiccation?

2 A Well, this is a CT scan, what are we looking at.

3 Q Withdrawn.

4 Can you see evidence of defects on this CT scan?

5 A No.

6 Q And all -- you can see on there are disc bulges;

7 correct?

8 A You can see a lot of things, you can't say all you can  
9 see are bulges, there are a lot of things you can see on CT.

10 Q The only abnormality you identified was disc bulging --

11 A Yes.

12 Q -- at multiple levels; correct?

13 A Yes.

14 Q Was the disc bulging at multiple levels consistent, in  
15 other words, none of the discs were protruding more aggressively  
16 than others at this point in time?

17 A There were bulges, there were, I don't know how best to  
18 describe them, I didn't note that one bulge was bigger than  
19 another bulge.

20 Q You didn't note they had any further impact on any of  
21 the other body parts than another; correct?

22 A Well, they were all pushing, they were all pushing on  
23 the thecal sac.

24 Q Can we agree a disc bulge can be caused by things other  
25 than trauma?

1 A Yes.

2 Q And having studied your report a little bit, you  
3 believe that a disc bulge can be caused by trauma; correct?

4 A Correct.

5 MR. KELLY: Objection.

6 THE WITNESS: Sorry, sorry.

7 THE COURT: "Believe" is I think the wrong word,  
8 but in his professional opinion.

9 Q Well --

10 THE COURT: Counsel --

11 MR. BRODY: I will agree and adopt that question.

12 Q In your professional opinion is that a disc bulge can  
13 be caused by trauma; correct?

14 A Yes.

15 Q Whether you've agreed with it or not, is there a part  
16 of the radiological professional community that believes that a  
17 disc bulge by definition is nontraumatic by nature?

18 A Not that I'm aware of, solely nontraumatic that you  
19 can't have a partial tear of the ligament, in other words, is  
20 what you're saying.

21 THE COURT: Hold on, is he done looking at the  
22 easel so he can sit back on the witness stand.

23 MR. BRODY: Yes, for the moments.

24 (Whereupon, Dr. Kolb resumed the witness stand.)

25 A Are you saying that certain people that say all bulges

1 and partial tears have nothing to do with trauma ever?

2 Q Yes.

3 A No, so, I disagree with that, as I said, I don't know  
4 people -- I mean people can believe what they want, I guess,  
5 yes.

6 THE COURT: The question is are you aware there's a  
7 segment or do you believe -- I have to rephrase it now.

8 Is it your understanding there's a segment of the  
9 radiologic profession that has the opinion that no  
10 disc bulges come out of trauma?

11 THE WITNESS: I think that anybody can have their  
12 opinion about that, and if people do, they can say that it's  
13 definitely not due to trauma and the answer to your question  
14 is sure, there are people that can say that, but I can't  
15 answer it any better than that.

16 Q That's fine. Doctor, you would agree with me that with  
17 regard to a disc herniation, a disc herniation is caused by  
18 trauma?

19 A It can be, yes.

20 Q You would agree with me, it's your professional opinion  
21 that a disc herniation can be caused non-traumatically; correct?

22 A Yes.

23 Q And I believe we talked about the spine earlier, I will  
24 get into it, into greater detail in a moment, but you identified  
25 something called a pars defect; do you recall that?

1 A Yes, sir.

2 Q Can we agree that a pars defect is a congenital  
3 condition?

4 A It often is.

5 Q And it's often found in adolescents?

6 A It often is.

7 Q So unlike counsel was asking you earlier about  
8 degenerative conditions, and you said it was more likely for a  
9 congenital -- for a degenerative condition could be found in an  
10 older person, but it's more likely to identify a pars defect in  
11 an adolescent?

12 A I'm not so sure if the same is more likely. I think  
13 it's likely to find in some part of life, the answer to your  
14 question directly, I don't know that if a teenager is commonly  
15 found in teenage years as opposed to later in life, I don't know  
16 the answer to that.

17 Q But it's formed in teenage years or in adolescent age;  
18 correct?

19 A Or earlier.

20 Q Or earlier?

21 A Yes.

22 Q So the pars defect that was identified in the hospital  
23 Lutheran and in the MRI which you identified to this jury, was  
24 something that was congenitally formed and not a result of this  
25 accident; correct?

1 MR. KELLY: Objection.

2 A It might be, correct.

3 Q And doctor, I want to be clear before I get too  
4 specific, when you were asked a question, looking at a film  
5 about the lumbar fusion, the first thing you said was it was  
6 performed to fix the slippage; correct?

7 A Well, I did say that, but it doesn't preclude  
8 everything else that I said as well.

9 Q Okay.

10 A But sure, whether it's first, second or third is  
11 irrelevant to me, but yes, let's answer yes.

12 Q Doctor, did you review a March 2nd, 2015 CT scan of the  
13 brain of Mr. Mora?

14 A I'm sorry, I will have to look through the reports now,  
15 sorry.

16 THE COURT: Do you remember?

17 MR. BRODY: He didn't testify about it on direct,  
18 but it's in the notes.

19 THE COURT: He's looking for it, do you want to let  
20 him know the source it came from?

21 MR. BRODY: March 15, 2000, it's Lutheran.

22 A Yes.

23 Q Did it identify a fracture to Mr. Mora's orbit?

24 A Yes.

25 Q That's the eye; correct?

1 A Correct.

2 Q Do you know when he got that?

3 A I don't.

4 Q It was surgically repaired; correct?

5 A I don't know the answer to that.

6 THE COURT: You don't make a claim for that.

7 MR. KELLY: There's no claim for it, no claim for  
8 brain injury, oral injury.

9 MR. BRODY: Just making sure.

10 Q Doctor, you already said you reviewed that X-ray of the  
11 right shoulder and you found it to be otherwise normal; correct?

12 A Correct.

13 Q You also found degenerative changes at the  
14 acromioclavicular joint; isn't that correct?

15 A Yes.

16 Q What are degenerative changes?

17 A That means the bones have come together, a little bit  
18 of hypertrophy of the bone.

19 Q What causes degenerative changes of the shoulder?

20 A Degeneration is usually caused over a period of time.

21 Q So the degenerative changes you saw in the shoulder  
22 preexisted the date of the accident?

23 MR. KELLY: Objection, objection.

24 THE COURT: As to form you mean?

25 MR. KELLY: Yes, yes.

1 THE COURT: Okay. I don't know when the film was  
2 taken, it's tough to rule on the objection without knowing  
3 more about the shoulder film.

4 Do you know anything about whether or not the  
5 degeneration in the shoulder resulted from the accident or  
6 came after the accident?

7 THE WITNESS: It came before the date of this  
8 patient on March 6, 2015.

9 MR. BRODY: I'm fine with that.

10 Q Doctor, there are a couple of films up here of the  
11 right shoulder MRI of March 12, 2015.

12 Can you come up here and identify those films that  
13 you've testified about?

14 A Yes.

15 Q It might be 15A, yes, 15A.

16 Doctor, are there degenerative conditions depicted on  
17 that MRI that predated the accident of May 6, 2015?

18 A It was the accident.

19 MR. KELLY: Objection.

20 THE COURT: Sustained.

21 Q I'm sorry, March 2, 2015?

22 A No, on the MRI, I look at the acromioclavicular joint,  
23 I say it's unremarkable.

24 Q When you reviewed the entirety of that set of films --

25 A Um-hum.

1 Q -- did you find a curved acromion process with a  
2 subacromial osteophyte?

3 A It's not in my report.

4 Q I'm not asking what's in your report. I'm asking  
5 whether or not it was depicted on the films when you reviewed  
6 them?

7 A No.

8 Q It wasn't?

9 A Not that I saw.

10 Q I will represent to you, that a radiologist wrote a  
11 report which said there is a current --

12 MR. KELLY: Objection.

13 Q -- process?

14 MR. KELLY: Objection.

15 THE COURT: Sustained.

16 Q Doctor, did you review the entirety of that film?

17 A You're, you mean the MRI?

18 Q Yes.

19 A Yes.

20 Q Is it your testimony as you stand there today to this  
21 jury that there was no osteophyte on that MRI?

22 A Yes.

23 Q Are there cystic degenerative changes of the humeral  
24 head depicted on the March 2, 2015 -- I'm sorry, on the May  
25 12th, 2015 MRI?

1           A     They're not in my report.  In general, I would put them  
2 in, I would have to review the disc again to tell you for sure  
3 if they are or they're not, they're not in my report.

4           Q     Who decided which pictures to blow up?

5           A     I did.

6           Q     When you decided which pictures to blow up, did you do  
7 it from what was written in your report?

8           A     No, I, yeah, I mean I'm trying to show the findings, I  
9 knew at some point I may end up somewhere I was to show the  
10 findings, I just focus on what the findings were; in other  
11 words, there are a lot of pictures as you said.  I just chose  
12 the picture that had findings.

13          Q     Do you know what a Type 2 curved acromion process is?

14          A     Yes.

15          Q     Is that depicted on the MRI?

16          A     No.

17          Q     Was it depicted on the X-ray that you examined at  
18 Lutheran Hospital?

19          A     No, not that I remember.

20          Q     Did you note cystic degenerative changes of the humeral  
21 head in the MRI?

22                   MR. KELLY:  Objection, asked and answered, the same  
23 question.

24                   THE COURT:  Sustained, you did ask him that.

25          Q     Did you identify subacromial subdeltoid bursitis?

1           A     I identified, yes, subdeltoid bursal effusion is in my  
2 report, yes.

3           Q     Doctor, knowing that, knowing the findings of the MRI  
4 and the fact that the X-ray evidenced degenerative changes,  
5 isn't it fair to say there was some degenerative process taking  
6 place in Mr. Mora's right shoulder prior to the day of this  
7 accident?

8           A     No, just to answer your question, yes, as I said  
9 before, the degenerative changes on the X-ray predate the  
10 accident, so the answer is yes.

11          Q     Doctor, you can't tell, as a radiologist, whether a  
12 tear of a ligament or something else occurred on a specific date  
13 just from looking at a film, can you?

14          A     That is correct.

15          Q     Doctor, if we can go to the -- we can finish with this  
16 exhibit, if we can go to the films of May 14, 2015, which should  
17 be Exhibits 12A and/or B?

18          A     I'm sorry, what body part?

19          Q     Lumbar spine.

20          A     May 14, 2015, sure, okay.

21          Q     Now, doctor, I believe you said that on the first film  
22 there was evidence of a herniation and the evidence of that  
23 herniation is less likely in a 22-year-old; is that correct?

24          A     I was asked is it common to find herniations in a  
25 22-year-old, and my response was it's less common to find in a

1 22-year-old than in an older patient.

2 Q But no way to know when that herniation began to take  
3 place from this radiologist film; correct?

4 A Right, no one can say it wasn't there on the date of  
5 the accident or just after that.

6 Q So if we can make sure we look at 12B, is that one, is  
7 it this one here, right, this film?

8 A I don't know what 12B.

9 Q 12B is the one you saw the pars defect on?

10 A Okay.

11 Q I think this is B here?

12 A Okay.

13 Q Doctor, the pars defect caused slippage in Mr. Mora's  
14 spine; correct?

15 A Correct.

16 Q And that slippage is documented on the MRI film;  
17 correct?

18 A Correct.

19 Q And a small amount of it was documented on the X-ray,  
20 that was done four days after the accident, March 6, 2015;  
21 correct?

22 A I would have to check, but I believe you're correct,  
23 X-ray of March 6, 2015, yes, there's slippage on the X-ray, yes.

24 Q And at L5-S1 and please use either 12A or 12B, there is  
25 defects at L5-S1; correct?

1 A That's on May 14, 2015?

2 Q Yes, doctor, do you need your report?

3 THE COURT: Hold on, if you ask him a question, you  
4 have to let him answer the question before you ask more  
5 questions.

6 A You asked if it's correct, no, it's not in my report,  
7 and no, I don't see disc desiccation.

8 Q You have the film right there?

9 A Yes.

10 Q Do you see any disc desiccation only at L5-S1 on that  
11 film?

12 A On this particular film, no, I don't.

13 Q You do see the lysis defect?

14 A It's on the site for sure, absolutely.

15 Q Do the lysis defects have any effect on the disc?

16 A So, you can have slippage, so when bone is broken you  
17 have no slippage at all, the bone can be a defect and the bones  
18 still line up. You can have a defect where the bones slip, you  
19 can have a defect where the bone slipped but no herniation. You  
20 can have a defect where the bone slipped and there's herniation.

21 So those are the four things that can happen, so the  
22 answer to your question is, you can have a slipped bone with a  
23 herniation that may not have been there before, but it's there  
24 now, there's no way to know.

25 Q So you have no way from a diagnostic radiological

1 standpoint at all to know when this herniation took place and  
2 whether it resulted from the slippage; correct?

3 A Yes, you asked me that before, is there any way I can  
4 look at a film and tell you exactly what day and time the  
5 herniation happened and the answer is no.

6 Q Let's go to the cervical spine for a moment, doctor,  
7 can we go to, bear with me one second, the cervical spine film  
8 of May 12, 2015, I just wanted to get a letter for you, if I  
9 can?

10 A Okay, let me help, let me help you, yes, May 12th,  
11 2015, MRI of 15B.

12 Q Great. On that, doctor, you identified three bulging  
13 discs; is that correct?

14 A Correct.

15 Q And you indicated that there was some level by which  
16 those bulging discs were pressing on the epidural fat; is that  
17 correct?

18 A No.

19 Q What are they pressing on the?

20 A The thecal sac.

21 Q Now, the mere fact that those discs on the MRI are  
22 pressing on the thecal sac, does that mean the person is  
23 experiencing pain?

24 A My answer is exactly what I said before, it can be.

25 Q But it cannot?

1 A It can, it may not.

2 Q Did you review any other records of this gentleman  
3 other than the films?

4 A No.

5 Q Doctor, do you see any measure of defects at C4-5 or  
6 C5-6?

7 A No.

8 Q By the way, are the disc space heights normal in that  
9 MRI?

10 A Yes.

11 Q Let's go back to 12A or B, either one which has the  
12 history of the lumbar spine in May of 2015.

13 A 12A.

14 Q Right behind this one?

15 THE COURT: 12A was the L-spine?

16 THE WITNESS: Yes.

17 Q Are the disc heights normally maintained on those  
18 films?

19 A Yes.

20 Q When a person has a herniated disc, one of the things  
21 that happens, doctor, if I understand correctly, and please  
22 correct me if I'm wrong, is that as the material extrudes out  
23 into the canal, the bones start to compress, and the height of  
24 the discs decreases; is that correct?

25 A So I will have to correct you.

1 Q Okay.

2 A That can happen, but it's unusual that it happens to  
3 that degree that the actual height goes down; in other words, if  
4 you take a normal disc and it just herniate, it's possible for  
5 enough disc material to go out so it gets shorter and the bones  
6 come together, but that's an unusual circumstance for a garden  
7 variety disc herniation.

8 Q Bear with me one second.

9 THE COURT: Sure. Just for a time check we're at  
10 quarter to 1:00.

11 MR. BRODY: That's why I'm moving to a different  
12 area.

13 THE COURT: I'm just letting you know.

14 (Whereupon, Dr. Kolb resumed the witness stand.)

15 Q Doctor, you became a radiologist in or about 1990; is  
16 that correct?

17 A That is correct.

18 Q And today we reviewed films from Lenox Hills Radiology,  
19 were you previously associated with Lenox Hills Radiology?

20 A We rented space, so, prior to doing what I do now, I  
21 had a partner, who I was with for 20 years, with a different  
22 name of our group. Unfortunately, he passed away, I believe in  
23 2017, and so prior to 2017, actually from, and yes, prior to  
24 2013, we rented space in Lenox Hills Radiology to do our  
25 patients, so that was my association, our association with them.

1 Q By the way, doctor, you understood today when you came  
2 here that you were being placed under oath to tell the truth?

3 A Yes.

4 Q And in or around 2015 to 2017 when you were reviewing  
5 the firms and began providing consulting work to the Gorayeb  
6 firm in this case, would you agree with me that you had  
7 approximately 500 referring attorneys firms?

8 MR. KELLY: Objection.

9 THE COURT: Sustained.

10 Q Did you, in fact, have 500 --

11 MR. KELLY: Objection, we're going to have to  
12 approach on this.

13 THE COURT: I'm sorry.

14 MR. KELLY: If you don't mind, can we approach?

15 THE COURT: Yes.

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

18 THE COURT: The objection is sustained, if you have  
19 another question, let's move along.

20 Q Doctor, the partner that you had your practice with,  
21 was that Dr. Jacob Lichy?

22 MR. KELLY: Objection.

23 THE COURT: Overruled.

24 A Yes.

25 Q Doctor, did that relationship end amicably?

1 MR. KELLY: Objection relevance.

2 THE COURT: Sustained.

3 Q Did you testify in a trial with the Gorayeb firm that  
4 it didn't end amicably?

5 MR. KELLY: Objection.

6 THE COURT: Sustained.

7 Is it Dr. Lichy alive now?

8 THE WITNESS: No.

9 MR. KELLY: He's dead.

10 THE COURT: I understand that.

11 Q Doctor, did you testify the reason you were no longer  
12 in practice with him because he passed away?

13 MR. KELLY: Objection.

14 THE COURT: Sustained, not relevant.

15 Q Doctor, did you ever modify an MRI report to be more  
16 favorable toward a Plaintiff than another radiologist?

17 MR. KELLY: Objection, I'm going to ask for an  
18 instruction here, this is --

19 THE COURT: Yeah.

20 MR. BRODY: Just one question.

21 THE COURT: Hold on. If you have a basis other  
22 than your opinion or the opinion of a witness you have paid,  
23 and you're willing to put your license on the line to ask a  
24 question like that, feel free to ask it, but we are going to  
25 talk about this later.

1 MR. BRODY: Fine, it's one question.

2 A And it us?

3 Q I will --

4 THE COURT: Have you ever deliberately modified a  
5 report to make it more favorable to one side or another in a  
6 case?

7 THE WITNESS: Absolutely not.

8 THE COURT: Great, move on with this, please.

9 Q Doctor, if there were findings on these MRIs --  
10 withdrawn.

11 Do you know whether or not there were findings on the  
12 MRIs that you reviewed in this case that were not contained in  
13 your report?

14 A Can you ask that again?

15 THE COURT: Findings that he made or findings  
16 that --

17 MR. BRODY: That he made.

18 THE COURT: Did you make any material findings on  
19 any of these films that you then didn't include in your  
20 reports?

21 THE WITNESS: I would have included everything that  
22 that was important in my report. I feel like if it wasn't  
23 important, I wouldn't have put it in my report.

24 Q When you decided something is important, if it's  
25 unfavorable to the patient or the Plaintiff in a claim, do you

1 not include it in your report?

2 MR. KELLY: Objection, this is the same question.

3 THE COURT: Same line of questioning, that's right,  
4 unless you have, unless you have a foundational basis for  
5 this, then it is essentially improper personal character  
6 assassination.

7 MR. BRODY: I will rephrase it.

8 THE COURT: No. Rephrasing if you have a  
9 professional foundation, actual foundation, that's one  
10 thing.

11 If you are just speculating, then it's improper,  
12 and I have now admonished you twice.

13 MR. BRODY: I understand, he used the word if it's  
14 important, I want to understand what "important" mean.

15 THE COURT: By that, do you mean medically  
16 important?

17 THE WITNESS: Yes, the patient has 13 ribs and it's  
18 not important to mention that, patients generally have 12,  
19 that something, it's not important to the finding, a finding  
20 that's not important.

21 Q Is it possible you thought a mild desiccation in a  
22 person who had a herniated disc or or a bulging disc was not  
23 important?

24 MR. KELLY: Objection.

25 THE COURT: Overruled.

1           A     If I thought it was important and generally, I do put  
2 into records desiccation, if there is, then I would put it into  
3 a report, I wouldn't leave it out.

4           Q     Generally.

5           A     To answer your question, yes, I consider that an  
6 important finding, to be clear.

7           Q     Doctor, do you have before you a report which you  
8 generated for a lumbar MRI dated August 17, 2018?

9           A     Yes.

10          Q     And that was postfusion; is that correct?

11          A     Yes.

12          Q     And in that report, consistent with -- withdrawn.

13                 In your report, you describe that the protrusion of the  
14 disc impinges upon the anterior epidural fat; is that correct?

15          A     Correct.

16          Q     But you indicate that the neural foramen and exiting  
17 nerve roots are unremarkable; is that correct?

18          A     Correct.

19          Q     In making those comments, were you indicating that at  
20 least on the films there was no evidence that the nerve was  
21 being impinged postfusion?

22          A     The reason the statement is there is because the  
23 patient was fused, and it's an important fact to know that if it  
24 was compromised, the neural foramen was compromised before the  
25 surgery, they now look good which means the surgeon did a job in

1 fixing that job with the slippage, that's the reason that  
2 comment is in the report.

3 Q And would it be fair to say then that you were trying  
4 to describe a situation where there was no impact on the  
5 nerve root?

6 A There was no impact on the exiting; in other words,  
7 there was no direct impingement on the exiting nerve roots.

8 Q After the fusion?

9 A After the fusion, that's stated in my report, that's  
10 exactly what I'm saying.

11 MR. BRODY: I have no further questions.

12 MR. KELLY: I can do two minutes.

13 THE COURT: We have two minutes.

14 MR. KELLY: I will be fast.

15 REDIRECT EXAMINATION BY

16 MR. KELLY:

17 Q Doctor, the X-rays that we talked about of the right  
18 shoulder, do X-rays show soft tissue?

19 A No.

20 Q So the injury that was suffered by Mr. Mora in his  
21 fall, would have to be shown on something that shows the soft  
22 tissues; correct?

23 A Correct.

24 Q And would that be the MRI film?

25 A That would be the MRI.

1 Q Does the MRI show the injury to Mr. Mora?

2 A Yes.

3 Q I didn't ask you about the causation, but counsel did.  
4 Assuming that Mr. Mora fell from a height on to a hard  
5 surface, no symptoms before of any kind of right shoulder  
6 injury, no complaints, no treatment, is it your opinion to a  
7 reasonable degree of medical certainty, that the fall from a  
8 height caused the right shoulder pain?

9 MR. BRODY: Objection.

10 THE COURT: You asked.

11 MR. BRODY: I didn't ask.

12 THE COURT: You asked.

13 MR. BRODY: Fine.

14 THE COURT: Overruled.

15 A Yes.

16 Q What is that opinion?

17 A If he had no pain before the trauma, and there's a  
18 partial rotator cuff tear on the MRI, and he has pain since the  
19 trauma, then it's partial rotator cuff tear was caused by the  
20 fall.

21 Q Assume also, doctor, that Mr. Mora had no prior  
22 treatment, no prior complaints of neck or back injuries, no  
23 prior treatment, no prior complaints of disc herniations or disc  
24 bulges?

25 THE COURT: What was that?

1 MR. BRODY: Nothing.

2 Q -- disc herniations or disc bulges, assume Mr. Mora  
3 fell from at least a six foot height flat down on to cement  
4 surface.

5 Do you have an opinion, within a reasonable degree of  
6 medical certainty, whether or not the accident caused Mr. Mora's  
7 complaints?

8 MR. BRODY: Objection.

9 THE COURT: Overruled, you know what, he didn't ask  
10 about it on direct, you opened the door on cross, he's  
11 not --

12 MR. BRODY: I didn't open the door to anything on  
13 the back end.

14 THE COURT: Anyway, we don't have speaking  
15 arguments, do we, so you asked me --

16 MR. BRODY: That's fine, Judge.

17 THE COURT: -- there was an objection, I made a  
18 ruling, that's it.

19 MR. BRODY: That's fine.

20 Q What is that opinion?

21 A If the patient wasn't having pain, wasn't seeing  
22 doctors, wasn't getting treatment, whatever you said, and the  
23 patient fell and now has neck pain and back pain and findings on  
24 the MRI, then it's reasonable to conclude that those findings on  
25 the MRI are due to the trauma.

1           Q     Assume further, doctor, that Mr. Mora had no prior  
2 complaints or treatment with respect to his pars defect, prior  
3 to the happening of the accident, he fell from at least a six  
4 foot height flat down on to cement surface, and therefore, had  
5 complaints of pain in the back and radiating pain.

6                     Do you have an opinion, to a reasonable degree of  
7 medical certainty, whether or not the accidents caused  
8 Mr. Mora's injury and complaints?

9                     MR. BRODY:  Objection.

10                    THE COURT:  Same thing, it's overruled.  You could  
11 have left well enough alone, I wouldn't say it.  Now it's  
12 the third time you're making the same objection, you brought  
13 it up on cross.

14                    Now Mr. Kelly is allowed to ask it on redirect,  
15 it's the way it happened, he's allowed to now.

16            A     I don't know about the pars, you could have a defect of  
17 pars without slippage, without herniation.  This patient has  
18 slippage with herniation.  I don't know what the back looked  
19 like before he fell down, but given that he didn't have pain,  
20 complaining of pain or before seeing doctors and having surgery.

21                    The most reasonable logical conclusion is because of  
22 the fall something happened to his back, whether at that time or  
23 additionally because of the pars defect that was caused by the  
24 trauma.

25                    THE COURT:  But you're not claiming the pars defect

1 is related to --

2 THE WITNESS: I cannot say that.

3 Q But just the complaints of pain thereafter were related  
4 to the trauma?

5 A This he had no pars, he had a slippage and he had a  
6 herniation. He may or or may not have had it before, but  
7 there's no reason to believe he had it. If he wasn't having  
8 pain, it's as far as anyone can go with that.

9 MR. KELLY: I have nothing further.

10 THE COURT: Any recross?

11 MR. BRODY: Yes.

12 RECROSS EXAMINATION BY

13 MR. BRODY:

14 Q Doctor, an injury to the pars, or an aggravation of the  
15 pars caused by twisting injury; correct?

16 MR. KELLY: Objection.

17 THE COURT: Overruled.

18 A I -- I just repeat the question, so I understand,  
19 twisting?

20 Q A pars defect injury is aggravated by a twisting  
21 injury; correct?

22 A I don't know the answer to that question.

23 Q How do you know what caused possible aggravation of the  
24 pars injury if you don't know what causes a pars injury to cause  
25 pain?

1 MR. KELLY: Objection.

2 A I didn't say it was aggravated, there are three  
3 injuries going on, pars defect, there's slippage and there's a  
4 herniation.

5 I'm saying the pars defect problem is probably not from  
6 the trauma, preexisted the trauma. I don't know whether the  
7 slippage or the herniation predates the trauma. What I'm being  
8 told is he had no pain, he then fell and had pain, we now have  
9 three things going on, two of the three could have been caused  
10 by the trauma, and it's reasonable, I can't tell you more than  
11 that, it's as far as I can go.

12 Q Who is telling you he didn't have pain before the  
13 accident, Mr. Kelly?

14 A Yes.

15 Q Basically your testimony is whatever Mr. Kelly tells  
16 you?

17 MR. KELLY: Objection.

18 THE COURT: It is argumentative, horrible question.

19 A Of course not.

20 THE COURT: It is, of course, you as a witness are  
21 asked to assume certain facts, they're entitled to be asked  
22 to assume certain facts as long as those are based in some  
23 way on the record, he didn't ask about causation until you  
24 asked.

25 MR. BRODY: I didn't ask causation either.

1 THE COURT: Anyway, let's keep moving.

2 Q With regards to the shoulder, he had degenerative  
3 changes before the accident; correct?

4 A The acromioclavicular joint, yes.

5 Q Do you know whether he had tears in the shoulder before  
6 the accident?

7 A No.

8 Q You have no way to know that, do you?

9 A No, all I can be told was the patient was feeling.  
10 Unless he had an MRI before the accident, I don't know, I'm not  
11 aware of one.

12 Q And the type of tear that you saw on the MRI that was  
13 taken two months after the accident, what causes that type of  
14 tear in the shoulder?

15 A It could be trauma.

16 Q What kind of trauma?

17 A I can't tell you that.

18 Q Why not?

19 A I don't understand what you mean by what "kind of  
20 trauma," I mean, when you ask me what kind of trauma, you could  
21 fall, you could be hit, and I mean I guess there are other types  
22 of trauma, any trauma that causes a -- that any trauma, there  
23 are multiple causes of trauma to the shoulder that can cause a  
24 rotator cuff tear.

25 THE COURT: I want to interrupt you, we're four

1 minutes --

2 MR. BRODY: I will be about two minutes.

3 THE COURT: Okay.

4 Q Isn't is it fair to say rotator cuff injuries generally  
5 occur from repetitive use of the shoulders?

6 MR. KELLY: Objection.

7 THE COURT: Overruled.

8 A So rotator cuff tears do not have to be from trauma,  
9 just like herniations, they can be just from using your  
10 shoulder, yes, I think that's the answer to your question.

11 THE COURT: He asked, his question was do they  
12 generally, are they generally nontraumatic, not can they be  
13 nontraumatic?

14 THE WITNESS: Well, I don't know the answer  
15 generally, I don't know if the majority of patients that  
16 have rotator cuff tears are from repetitive movements or  
17 from trauma or microtrauma, I don't know the answer to that.

18 Q Baseball pitchers get them.

19 MR. KELLY: Objection.

20 THE COURT: Sustained. Is there any evidence  
21 Mr. Mora was a baseball player?

22 MR. BRODY: I was trying to make a point, Judge.

23 THE COURT: He's willing to accept it or willing to  
24 go with you on the theory that, that you can get rotator  
25 cuff tear from repetitive use, microtrauma, actual trauma,

1 and that he can't tell you, because he says he acknowledges  
2 he doesn't know what percentage are caused by which.

3 Q Working with things over your head can cause it;  
4 correct?

5 A I'm not --

6 Q Because that's the type of motion that can cause the  
7 trauma repetitively?

8 A I guess that's one of the things that could cause it,  
9 as far as I could go with that.

10 MR. BRODY: No further questions.

11 THE COURT: Thank you very much, sir, you are  
12 excused.

13 Ladies and gentlemen, again, since we ran five over  
14 we will be back at 2:20, be back in the jury room at 2:10,  
15 2:15.

16 Same admonitions, don't do any research, don't talk  
17 to anybody about the case. Thank you very much.

18 COURT OFFICER: All rise, jury exiting.

19 (Whereupon, the jury exited the courtroom.)

20 THE COURT: We need to clear the courtroom for  
21 lunch, but I want to see counsel for a minute. Everyone can  
22 go, thank you.

23 (Whereupon, a lunch break was taken.)

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

25 COURT OFFICER: Be seated and come to order.

## Proceedings

1 THE COURT: Ready to call your next witness?

2 MR. KELLY: Yes, Judge.

3 THE COURT: Great.

4 Ready for the jury?

5 MR. KELLY: Yes, Judge.

6 MR. BRODY: Oh, Judge, can we approach?

7 THE COURT: Yes, please do.

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

10 COURT OFFICER: All rise, jury entering.

11 (Whereupon, the jury entered the courtroom.)

12 THE COURT: You can all be seated as you come,  
13 thanks, I want to make an observation I think I made during  
14 opening charges, that sometimes our courtroom will be an ice  
15 box and sometimes it will be not so much, and yesterday and  
16 today, there's been maybe, there will be and tomorrow, it  
17 won't matter for your guys, a Con Ed service alert, is my  
18 understanding, and so all large buildings are being asked to  
19 reduce energy consumption and so, of course, our courtroom  
20 is a little more warmer and humid than it was the other day.

21 That's my way of saying the same thing as before,  
22 if you need to change number of layers, you know just take  
23 care of it. If you need a break, you're getting overheated  
24 or need water because you're getting overheated, let us know  
25 we will try to accommodate, okay.

1                   Gentlemen, the same goes for you, it's not hot  
 2                   enough, we're not there, if it gets hot enough, it's okay to  
 3                   me to take your jackets off. It's 17 minutes to 3:00.

4                   Do you have another witness?

5                   MR. KELLY: Yes, I call Dr. Jeffrey Kaplan.

6                   THE COURT: We are down on Thursday, we have  
 7                   Thursday, because we have a scheduling conflict, and so we  
 8                   won't have witnesses Thursday, we will be back on Friday and  
 9                   so that hopefully gives you two days in a row to get what  
 10                  you need to get done. Thanks.

11                  (Whereupon, Dr. Kaplan took the witness stand.)

12                  THE COURT: Remain standing and raise your right  
 13                  hand.

14                  (Whereupon, Dr. Kaplan was sworn by the Clerk of  
 15                  the Court.)

16                  THE CLERK: In a loud clear voice, please state  
 17                  your name and address for the record?

18                  THE WITNESS: My name is Jeffrey Kaplan  
 19                  K-A-P-L-A-N. My office 160 East 56th Street, Manhattan,  
 20                  10022.

21                  THE CLERK: Your last name is K-A-P-L-I-N.

22                  THE WITNESS: K-A-P-L-A-N.

23                  THE CLERK: Thank you. You may be seated.

24                  THE WITNESS: Thank you.

25                  THE COURT: Your witness.

1 MR. KELLY: Thank you your Honor.

2 DIRECT EXAMINATION BY

3 MR. KELLY:

4 Q Good afternoon, doctor, how are you?

5 A Good, how are you?

6 Q Alright, can you tell the jury what is your profession?

7 A I'm an orthopedic surgeon.

8 Q Describe for the jury a little about your professional  
9 education?

10 A Education.

11 Q Yes.

12 A I went to college at Yale University, graduating from  
13 college went to medical school at Columbia University here in  
14 the City. Following that, I did a training program in  
15 orthopedic surgery I did that at place called Campbell Clinic,  
16 which is in Memphis, Tennessee, actually the first orthopedic  
17 training program in United States.

18 Following that, I moved back to New York, and in 1994,  
19 I have been in private practice ever since.

20 Q Tell us a little bit about your, I'm sorry, are you  
21 licensed to practice medicine in New York?

22 A Yes.

23 Q And are you board certified?

24 A I am.

25 Q Tell the jury what that means to be board certified in

1 your specialty?

2 A Board certification is simply an additional  
3 qualification you can get out of college medical school and  
4 residency training program. Basically, you take a series of  
5 examinations over a number of years, and either by expert panel  
6 of physicians, in my case, it's called the American Board of  
7 Orthopedic Surgeons.

8 If they feel after you've reached a certain amount of  
9 knowledge and expertise in orthopedic surgery, they deem you  
10 board certified.

11 Q Tell us a little bit about your professional research  
12 and publications of any kind?

13 A I have in the past done research in anatomic studies,  
14 having to do with orthopedics, creating antibiotics specifically  
15 bone targeted, written some papers on new surgical techniques,  
16 and currently, I spent my -- most of my extracurricular time I'm  
17 the Orthopedic for the Boxing Division of New York State  
18 Athletic Division and also work in Nevada and New Jersey in that  
19 capacity as well.

20 Q Can you tell us about any current professional  
21 affiliations you may have?

22 A I'm a member of the State Athletic Commission of New  
23 York, Nevada and New Jersey. I -- I am a member of the American  
24 Trauma Association board certified by the Board of American  
25 Orthopedic Surgery.

1 Q Are you engaged in the private practice of orthopedics?

2 A I am.

3 Q What is orthopedic medicine?

4 A Orthopedics is a study of bones and joints and  
5 supporting structures of the bones and joint, so ligaments,  
6 tendons, cartilages, other soft tissues. It has what to with  
7 injuries or abnormalities to these structures and treatment of  
8 those injuries or abnormalities either with conservative meaning  
9 injection, recommendations for physical therapy, medications or  
10 if those things don't work or inappropriate, then surgical  
11 treatment of those problems.

12 Q Do you regularly see patients?

13 A I do.

14 Q In our case, Mr. Mora contends he was injured when he  
15 fell straight down from a defective ladder on to a flat cement  
16 surface injuring his neck, back, shoulder and ankle.

17 Do you have experience in applying your professional  
18 skill and problems of Mr. Mora's kind?

19 A Yes.

20 Q Doctor, have you been previously qualified as an expert  
21 witness in New York?

22 A I have.

23 MR. KELLY: Your Honor, Plaintiff offers Dr. Kaplan  
24 as an expert witness in orthopedic medicine.

25 MR. BRODY: No objection.

1 THE COURT: Without objection.

2 MR. KELLY: Thank you.

3 Q Dr. Kaplan in the course of our discussion this  
4 afternoon, I will ask you for certain opinions and of those  
5 opinions, I ask you need to be to a reasonable degree of medical  
6 certainty; is that okay?

7 A Yes.

8 Q I may not say it every time, all of the opinions need  
9 to be a within a reasonable degree of medical certainty.

10 During the course of my questioning of you, feel free  
11 to refer to your records and so on?

12 A Yes.

13 Q Did there come a time when you encountered Mr. Mora as  
14 a patient?

15 A Yes, there was.

16 Q Tell us a little bit about the nature of that contact?

17 A So Mr. Mora was seen initially in my office which is  
18 called N.Y. Ortho Sports Medicine & Trama by an associate of  
19 mine, Dr. Eric Crone, who is no longer working as an  
20 orthopedic surgeon. He was initially seen on March 6, 2015, for  
21 injuries from this accident that was mentioned a fall from a  
22 ladder that occurred on March 2, 2015.

23 Dr. Crone initially saw Mr. Mora, he gave assessment  
24 including that he felt he had injuries to his neck, to his low  
25 back with pain radiating into his legs, specifically the right

1 leg.

2 Q Let me ask you, did Mr. Mora make any complaints at the  
3 time that he initially presented to your practice?

4 A He did.

5 Q Tell the jury what complaints he made?

6 A So Dr. Crone indicates that, let's see, that he is  
7 complaining of right shoulder pain, and loss of motion, right  
8 wrist pain, and back pain radiating down the right lower  
9 extremity and hip region, right lower extremities means the leg,  
10 he had an abrasion to the right flank, and he had lateral right  
11 thigh pain noted, and those were the main complaints according  
12 to Dr. Crone at that time.

13 Q Was a history of how the accident -- withdrawn.

14 Was a history taken of the patient?

15 A Yes.

16 Q Can you tell us what the history was?

17 A Sure, the history as I noted said that he indicated a  
18 fall from approximately ten feet from a ladder. He didn't know  
19 whether he had gotten knocked out, lost consciousness, and notes  
20 that he was initially evaluated at Lutheran Medical Center.

21 Q Was a physical examination performed of Mr. Mora?

22 A Yes.

23 Q And what were the findings of the physical examination,  
24 describe the physical examination to the jury if you could?

25 A The physical examination that was done?

1 Q Yes.

2 A So Dr. Crone notes that Mr. Mora ambulate with an  
3 antalgic gait, means he had a limp painful for him to walk and  
4 he was favoring the or babying the right lower extremity, the  
5 right leg, he had abrasions present in the right flank with  
6 bruising there, and tenderness over the iliac crest, which is  
7 the bone that you feel sort of just above your hip, and he notes  
8 that he had limited flexion of the hip of about 60 degrees, and  
9 he had low back pain with midline spasm, means the muscles were  
10 in spasm in the back, and more so to the right. He notes that  
11 he had pain on bending side to side, if you go 20 degrees to the  
12 left and 25 degrees -- I'm sorry, 30 degrees to the right,  
13 consistent with muscular spasm.

14 He had pain on single leg stance, meaning when he  
15 stand, stood on one leg versus the other, it was painful in his  
16 back, he didn't have weakness when he did that in the lumbar  
17 musculature.

18 He noted that the wrist, he had pain but full range of  
19 motion, and he had tenderness about the elbow, and in his right  
20 shoulder he had limited motion including elevation to 100  
21 degrees, and abduction to 90 degrees, elevation is going this  
22 way (indicating), 100 degrees is here, normally 180, the same  
23 with abduction, which is moving away from the body, he was at 90  
24 degrees, normal is about 180.

25 He noted he had good strength in his rotator cuff, that

1 he had a positive impingement sign, meaning he had irritated or  
2 injured rotator cuff when he moved it, he noted some swelling  
3 consistent with a contusion, about the deltoid muscle, that is  
4 the muscle over the cap of the shoulder.

5 Let's see, at the knee, he had tenderness, and slight  
6 limited motion, 130 out of 145 degrees, he had some, let's see,  
7 and he took some X-rays as part of the exam.

8 Q Is there any indication, on your initial encounter of  
9 any significant prior medical history with respect to Mr. Mora,  
10 complaints to his shoulder or specifically his ankle?

11 A No, he notes that there's no prior history of drug  
12 allergy, no medical problems or injury history, he does have a  
13 surgical history of some ocular surgery.

14 Q Okay, what does that mean, "ocular surgery"?

15 A That means about the eye.

16 Q Does that have anything to do with his current  
17 complaints when he went to you?

18 A I don't believe so, no.

19 Q And are those findings that were made in the initial  
20 encounter, are they the competent producing cause of pain?

21 A They can be, yes.

22 Q Would they be in Mr. Mora's case?

23 MR. BRODY: Objection.

24 A I suspect not.

25 MR. KELLY: He's treating physician.

1 THE COURT: Subject to connection, he's a treating  
2 physician. I will allow him to answer.

3 A The pain complaints he had are related to his injury.

4 Q At that time, was an initial diagnosis formed?

5 A Several diagnoses were made, they included neck pain,  
6 called cervical posttraumatic myofacial pain which is what  
7 Dr. Crone called it, he had symptoms of radiculopathy meaning an  
8 injury to the neck which causes radiating pain in the arms, he  
9 felt he had a severe contusion at the right shoulder, a  
10 contusion is any bicuspid injury meaning from a hit to the  
11 shoulder, he felt he had posttraumatic lumbar pain, which means  
12 low back pain, with a complaint of radiating pain to the leg to  
13 the right leg, and he had a contusion of his flank, and those  
14 were the main complaints, but they additionally talked about the  
15 wrist and the elbow and things like that.

16 Q Was a treatment plan formed?

17 A Yes, um-hum.

18 Q Describe the treatment plan, first of all tell, the  
19 jury what is a treatment plan?

20 A A treatment plan is trying to get some imaging studies  
21 of the injured area, and beginning the healing process with some  
22 therapy, some medications, things like that that are  
23 appropriate, so Dr. Grimm did indicate that the rotator cuff,  
24 the shoulder was probably injured, and it would need some  
25 imaging studies, he recommended local modalities, that means

1 heat, ice, therapeutic exercises, and those are the -- that's  
2 the main plan with Dr. Crone at that time.

3 Q Alright, so was Mr. Mora referred to other physicians  
4 from your office?

5 A He was eventually referred to other physicians. In  
6 fact, Dr. Crone as I said got imaging studies, that he noted  
7 overtime, and eventually referred the patient to me to be seen  
8 by me because of persistent pain initially of the shoulder.

9 Q Did you review the diagnostic studies?

10 A I have reviewed the diagnostics studies, I reviewed  
11 them at that time as well.

12 Q What was the results of the diagnostic studies?

13 A So, Mr. Mora had an MRI of the right shoulder, and he's  
14 had MRI of the right shoulder performed on 5/12/15, and that  
15 revealed by MRI criteria a partial tear of the supraspinatus  
16 tendon partial tear of the superior fibers of the subscapularis  
17 tendon. He noted some fluid in an area called the bursa, and  
18 some MRI findings which were consistent with what's called  
19 impingement syndrome. I have a model with me will which will  
20 may be helpful in some of the terms I threw out.

21 MR. KELLY: With your Honor's permission, can the  
22 witness utilize the model?

23 THE COURT: Without objection.

24 MR. BRODY: I ask that we mark it and take a  
25 picture of it.

1 THE COURT: Of course, I remind the jurors, we will  
 2 ask the doctor, is it, are you familiar with the term  
 3 "demonstrative exhibit"?

4 THE WITNESS: Yes.

5 THE COURT: Is it fair to say this is intended as  
 6 an demonstrative exhibit, not the exact model of this  
 7 patient's shoulder?

8 THE WITNESS: Correct.

9 THE COURT: What you're going to see, ladies and  
 10 gentlemen, is just a model in resin or plastic, whatever, of  
 11 a typical shoulder, not necessarily this patient's shoulder,  
 12 and it's just used to sort of demonstrate structures to you  
 13 and not to model this person's specific shoulder size or  
 14 injuries or anything else, alright, we should snap a picture  
 15 of it, and put it up.

16 What exhibit are we up to?

17 THE CLERK: I think it's 19 demonstrative,  
 18 Plaintiff's Exhibit 19 for demonstrative purposes, alright,  
 19 go ahead we will take a picture later, we will do it when we  
 20 finish up.

21 A So, this is a model of a right shoulder, and again,  
 22 it's not John's shoulder, but it's a model, and most shoulders  
 23 are similar. The main things that I thought were important to  
 24 show, I'm using words like supraspinatus tendon, infraspinatus  
 25 tendon, subscapularis tendon, those are tendons connected to

1 muscle and this group of tendons forms a cuff about the top of  
2 the arm button and this cuff around the arm bone, top of the  
3 shoulder is called the rotator cuff, because when any one or two  
4 of these muscle or even three or four fire, and contract, they  
5 cause the arm to move. This is the rotator cuff of muscles.  
6 They're named by their position on the shoulder blade, this is  
7 the spine of the shoulder blade, above it is the supraspinatus,  
8 below is the infraspinatus, underneath is the subscapularis, you  
9 will note the scapula.

10 So the MRI notes partial tearing of two of the tendons  
11 of the rotator cuff, as well as some fluid in this space between  
12 the top of the arm bone which is acromion, sorry -- top of the  
13 shoulder blade acromion and top of the shoulder humerus, that is  
14 the subacromial space beneath the acromion.

15 If that space is filled with inflammatory tissue, which  
16 is called bursitis, because of an injury to the tendons, you can  
17 get impingement which means when you raise your arm, the muscles  
18 are impinged upon by the bone above and the bone below are  
19 pinched that's what's reporting in the MRI.

20 Q Does the impingement cause pain?

21 A It's related to pain, partial tearing of the tendon,  
22 it's productive of pain and the inflammation with the bursitis  
23 can be productive of pain.

24 Q Does that yield a reduced range of motion?

25 A It does.

1 Q And doctor, assume that Mr. Mora had no prior  
2 complaints of pain in the shoulder, no prior medical treatment  
3 with respect to the shoulder, and suffered a fall from a height  
4 on to a hard surface, and complained immediately thereafter of  
5 right shoulder pain, do you have an opinion, within a reasonable  
6 degree of medical certainty, whether the accident was the cause  
7 of Mr. Mora's medical condition?

8 A It is my opinion --

9 MR. BRODY: Objection.

10 THE COURT: Hold on, there's an objection.

11 MR. BRODY: Foundation.

12 THE COURT: Foundation, are his records,  
13 Dr. Kaufman's records in evidence.

14 MR. KELLY: They are marked for ID, I can put them  
15 in evidence, if you wish.

16 THE COURT: You did not agree to put them in  
17 evidence, why don't you.

18 MR. KELLY: Plaintiff's Exhibit 2.

19 THE COURT: Subject to redaction, do you have any  
20 objection?

21 MR. BRODY: No, your Honor.

22 THE COURT: Without objection, Plaintiff's Exhibit  
23 2 is in evidence.

24 Does your foundation objection still stand?

25 MR. BRODY: No -- yes.

1 THE COURT: Oh, great, overruled.

2 Q You may answer, doctor -- let me rephrase.

3 Assume Mr. Mora never complained before about right  
4 shoulder pain and suffered a fall from a height on to cement  
5 surface and immediately complained of right shoulder pain, is  
6 that -- withdrawn.

7 Do you have an opinion, to a reasonable degree of  
8 medical certainty, whether or not the fall from a height was the  
9 cause of Mr. Mora's medical condition and complaints of pain?

10 A It is my opinion that the injury that he recorded is  
11 the cause of the injury to the shoulder.

12 Q And during your treatment of Mr. Mora, was he given  
13 medications?

14 A He was given antiinflammatory medications, he had  
15 postsurgically, he required pain medications, yes.

16 Q Was he prescribed physical therapy?

17 A He was.

18 Q What is the purpose of physical therapy?

19 A Physical therapy is exercises that stimulates healing  
20 in the muscles and tendons in this case, and increase strength  
21 and ability to move, things like that, so it's an attempt to  
22 heal problems without surgery.

23 Q Is that called conservative treatment?

24 A Conservative treatment, yes.

25 Q Did Mr. Mora undertake such conservative treatment?

1 A He did.

2 Q What was the result of the conservative treatment of  
3 Mr. Mora?

4 A Well, despite conservative treatment, he had incomplete  
5 relief of his symptoms and continued to have symptoms that were  
6 significant enough that we eventually recommended surgery for  
7 him.

8 Q Was surgery actually performed on Mr. Mora?

9 A Yes.

10 Q Doctor, we've developed some demonstrative aids  
11 previously disclosed to counsel, which described the surgery.

12 Would a demonstrative aid assist you in explaining the  
13 nature of your surgery?

14 A Yes.

15 MR. KELLY: Your Honor, can we use the  
16 demonstrative aid?

17 MR. BRODY: Same issue as earlier, as long as we  
18 mark them.

19 THE COURT: We will mark them, note what he's going  
20 to refer to, step down off the stand, give me an exhibit,  
21 number, thank you.

22 (Whereupon, Dr. Kaufman exited the witness stand.)

23 THE COURT: What Exhibit Number is this?

24 MR. KELLY: 20.

25 THE COURT: 20.

1 Q Doctor, I have a laser pointer or marker, do you care?

2 A No.

3 Q Doctor, with respect to Plaintiff's Exhibit 20,  
4 demonstrative aid, can you tell us what it is we're looking at?

5 A So we're looking at a drawing, medical drawing of what  
6 is a shoulder arthroscopy looks like, typically right shoulder  
7 arthroscopy, arthroscope is a special tool we use, arthro means  
8 joint like arthritis, scope means like a telescope, so it allows  
9 us to look inside the joint through a relatively small incision,  
10 and we can look around the joint, we make multiple holes about  
11 the shoulder in order to put our camera in, and see, as well as  
12 our working tools, which include biter, shavers, snippers and  
13 coagulation devices and electronic devices that can stop  
14 bleeding and also ablate, get rid of tissue that's inflamed.

15 Q Doctor, did you perform this surgery on Mr. Mora?

16 A Yes, I did.

17 Q Was that on October 16, 2015?

18 A Correct.

19 Q That's -- that's eight months, seven months after the  
20 accident?

21 A Let's see, that's five months after the accident, I'm  
22 sorry, seven months after the accident.

23 Q Seven months after the accident?

24 A Yes.

25 Q Walk us through a little bit, what you do, and what has

1 to go on with respect to the surgery?

2 A Okay, so, first thing patient is positioned and usually  
3 given an injection at the top of the shoulder right near the  
4 neck to make all of the nerves come out of the neck into the arm  
5 go to sleep, you're also given medicine through an IV, they  
6 actually sleep through the procedure, and they don't feel  
7 anything during the procedure, and we can work, so the telescope  
8 is put in through the back, and we make an assessment of what we  
9 see initially.

10 In the joint, the shoulder joint between the top of the  
11 arm bone and the shoulder blade, we found a tear in a structure  
12 called the labrum, this is the end of the shoulder blade, I will  
13 grab my model again, I'm sorry, so we can see what we're looking  
14 at, this picture is, we're looking inside the shoulder at this  
15 structure, the end of the shoulder blade here it has a cartilage  
16 ring around it, that was torn, so we took trimming devices, and  
17 I shaved that out, took out of the torn cartilage, we looked at  
18 the biceps tendons, which is, which is here and goes in the  
19 joint, and we looked all around, and we then moved the scope  
20 from inside the joint to just above the joint, from inside the  
21 joint to just above the joint, we're looking at the tendon from  
22 above, and that's where we found the majority of the problem,  
23 and he had a partial tear in this tendon of the rotator cuff,  
24 and we used a trimming tool to clean or debride what we called  
25 the damaged tissue.

1           We also took out this inflamed tissue called bursa,  
2 bursa is a thin tissue that becomes inflamed with fluid, bursa  
3 is generally are tissues that are flat, and they lay between  
4 soft tissue, the tendon and hard tissue the bone above and allow  
5 for us, for us sliding between those two areas without having  
6 pressure on the hard tissue poking done into the bone.

7           The most common bursa is at thing at the end of our  
8 elbow allows, which allows our elbow to rest it without eroding  
9 through the skin, if that becomes inflamed, often times that  
10 will be taken out.

11           We then have to make more room so there's no more  
12 impingement, then we describe moving the arm, so we shave down  
13 the undersurface of this bone, acromion to make more space for  
14 the bursa, for the ligament and tendon to move. The bursa  
15 normally will reform to some degree, it is a normal part of the  
16 healing process, but hopefully not as thick and not as inflamed.

17           So this surgery was tear of the cartilage, tear of the  
18 tendon and inflammation with impingement that required shaving  
19 all of those structures down and cleaning the shoulder joint  
20 out.

21           Q     The findings that -- your intraoperative findings, are  
22 they consistent with a trauma to Mr. Mora on March 2, 2015?

23           A     These findings are consistent with a trauma for sure,  
24 and again, my opinion is they're from the accident.

25           Q     Doctor, are there risks dependent upon the surgery like

1 general anesthesia, things of that nature?

2 A This gentleman had a -- not general anesthesia, he had  
3 an IV sedative, but an injection around the nerves, top of the  
4 shoulder, there's risk with that, which you can damage the  
5 nerves and blood vessels here, but also any time you do surgery,  
6 any time you cut the skin, the risk of damaging nerves and blood  
7 vessel risk of introducing infection, increased stiffness,  
8 increased pain, scar tissue forming, things like that, yes.

9 Q Is the aftermath of the surgery painful?

10 A This is a very painful surgery once the arm wakes up,  
11 the first couple of weeks are very, very uncomfortable, yes.

12 Q Doctor, you can go back to the witness stand.

13 (Whereupon, Dr. Kaufman resumed the witness stand.)

14 Q Did Mr. Mora follow-up with you after the surgery?

15 A He did.

16 Q Tell us about that, if you would?

17 A Specifically regarding the right shoulder, Mr. Moro did  
18 have a significant amount of pain following the surgery, he did  
19 an extensive amount of physical therapy, in an attempt to  
20 rehabilitate his shoulder, get his motion back, get his strength  
21 back, and he developed a complication called adhesions in the  
22 shoulder.

23 Adhesions cause what's called adhesive capsulitis means  
24 the shoulder joint contracts a bit, he had continued pain, loss  
25 of motion and fairly aggressive return of inflammation that was

1 treated in the routine way, which is physical therapy, sometimes  
2 injections of steroids, oral medications.

3           Unfortunately, Mr. Mora required a follow-up surgery to  
4 the shoulder to clean out the adhesions, that's called lysis of  
5 adhesions, and the rotator cuff tear we cleaned up actually  
6 ended up degrading further, likely due to the inflammation and  
7 the loss of motion, and he developed a full thickness tear of  
8 the rotator cuff which required a repair.

9           Q     These findings of Mr. Mora's deterioration, are they  
10 causally related to the accident?

11           A     They are, in my mind they absolutely are.

12           Q     Did there come a time when you actually performed a  
13 second surgery to Mr. Mora?

14           A     Yes.

15           Q     Okay. Again, we can offer a demonstrative aid, we will  
16 mark as Plaintiff's Exhibit 21, previously disclosed to counsel  
17 in a Notice of Intention.

18                     Doctor, if I may, I kindly ask you to come down,  
19 doctor, take a look at this board and tell us what we're looking  
20 at, including the date of the surgery?

21                             (Whereupon, Dr. Kaplan the witness stand.)

22           A     The date of the surgery is 6/15/22, and again, set up  
23 for shoulder arthroscopy, inspection of the joint would be a lot  
24 of inflammation, redness, and adhesions inside the joint, it's  
25 pretty accurate picture, this is an actual intraoperative

1 photograph of Mr. Mora from the date of the surgery, you can see  
2 all of this red collection of red inflammation, that's,  
3 that's --

4 THE COURT: Some of the jurors can't see you.

5 THE WITNESS: I'm sorry.

6 A That is a result of adhesive capsulitis and  
7 inflammation, that inflammation can erode the tendon as well,  
8 and this is inside the joint, and you start to see some areas of  
9 problem inside the joint.

10 The last time I showed you the problems on top of the  
11 tendon, this is inside the tendon, so we mark that with a little  
12 stitch from the outside in, and when we went to the other side  
13 of the joint we found a full thickness hole, we were able to  
14 stick our little probe through. A probe is like a pen, stick it  
15 through the tendon there, and this is repairing it, these are  
16 two sutures where we grab the tendon and anchored it back down  
17 to the bone.

18 This is the representation of that, he had the severe  
19 inflammation, anything with "itis" after it means inflammation,  
20 so severe synovitis was addressed with, this tool, which burns  
21 the tissue, and causes it to coagulate and dry up, this is the  
22 tear in the tendon, and after we clean it, we add a stitch to  
23 it, and take this thing which is a bone anchor, push that into  
24 bone and that pulls the tendon back over to a prepared area of  
25 the bone and we put it back in place much.

1           Now, that's putting it back in place and preparing it,  
2 so the body can heal it over time, again, this is, the surgical  
3 fix of it, this is not the healing process. The healing process  
4 begins after this, after the body tries to grow that back  
5 together when you cut your skin putting stitches in it, doesn't  
6 mean your skin is healed, it takes time for your skin to grow  
7 together, similar here.

8           Q     So the second surgery on June 15, 2022, to Mr. Mora, is  
9 this causally related to his fall?

10          A     This is a sequelae or natural consequence of the fall,  
11 the initial surgery and his permanent development of adhesions,  
12 and erosive tear of the rotator cuff, I believe it's all  
13 causally related.

14          Q     Thank you, doctor.

15                     (Whereupon, Dr. Kaplan resumed the witness stand.)

16          Q     Did Mr. Mora continue, I will wait until you get back  
17 on the stand, thank you.

18                     Did Mr. Mora continue to follow-up with your office for  
19 treatment?

20          A     Yes.

21          Q     Describe some of the treatment for us, please?

22          A     Mr. Mora continued treatment in my office, not only for  
23 his shoulder, but also for pain in his right leg, specifically  
24 about the ankle, we got an MRI of his ankle, which showed that  
25 he had a small fracture in the ankle of a small portion of the

1 talus bone. The talus bone is part of the ankle, again, can I  
2 show, there's a model here.

3 MR. KELLY: Your Honor, if we may, yes, mark it as  
4 21?

5 THE COURT: Yes.

6 A So this is a model of a foot and ankle, in this case,  
7 again, it's a right foot and ankle, and the ankle is made up of  
8 three bones, fibula, tibia, and the talus. The talus is the  
9 dome shaped bone that allows the foot to go up and down.

10 Everyone has this little piece on the back of the  
11 talus, it's got funny name called the Stieda process, it's an  
12 interesting piece of the anatomy in that when we're developing  
13 as embryos, it's a separate piece of bone. In most people it  
14 fuses together and gets calcified to the talus. In some people  
15 it forms a fibrous union where those two bones are connected by  
16 fiber rather than by bone, and in that case it's called an os  
17 trigone, I'm sorry, os trigone, T-R-I-G-O-N-E, that is not as  
18 stable as if it were a bony connection and with trauma, it can  
19 break off and it's not like a normal fracture in that you're  
20 breaking between one bone and another fibrous union, it's not  
21 breaking the bones, it's breaking the fiber between them.

22 So it really is one of those things that's annoying and  
23 can become painful, mainly because of the inflammation that's  
24 caused by the unstable bone with motion and in Mr. Mora's case,  
25 in fact, I started speaking to him about this persistent and

1 annoying pain of his ankle a year and a half after we started  
2 treating him.

3           Although he complained of ankle pain in the hospital on  
4 the day of the accident and he complained about leg pain to  
5 Dr. Crone initially, although not specifically noted as ankle  
6 pain by Dr. Crone.

7           And so I started treating this, first conservatively  
8 with an inflammatory medications, things like that, eventually  
9 got an MRI, because his symptoms were specific to a problem here  
10 and that is pain on dorsiflexion where you get an impingement  
11 back here, pain on plantar flexion where you get pulling, back  
12 in the back, and specifically moving of the big toe, because  
13 there's a tendon that wraps around this piece all the way to the  
14 big toe. If you move the big toe and someone has a problem back  
15 here, oddly enough, they will complain of pain in the back of  
16 their ankle.

17           So that all matched in John's exam, and his MRI, so I  
18 recommended that we do ankle arthroscopy, similar equipment, the  
19 arthroscope looking in the back of his ankle. In fact, we found  
20 this os trigone in the back of the ankle, not well attached to  
21 the bone, it was not solid, so we were able to remove a bulge of  
22 soft tissue, pull that piece out, and relieve some of the pain  
23 at the back of his ankle.

24           Q       Now, doctor, I have a demonstrative aid, it shows your  
25 surgeries.

1 THE COURT: What Exhibit Number?

2 MR. KELLY: It's 22.

3 THE COURT: Just show it to counsel first.

4 MR. BRODY: I've seen it.

5 (Whereupon, Dr. Kaufman exited the witness stand.)

6 Q Just before we start this, doctor, the trigone os,  
7 Mr. Mora's condition, the condition where the bone doesn't fuse,  
8 that wasn't caused by the accident, was it?

9 A No, no, exactly.

10 Q But Mr. Mora had no prior complaints of any pain and no  
11 prior treatment to his ankle?

12 A Correct.

13 Q Do you have an opinion as to whether or not the  
14 accident caused Mr. Mora's ankle condition?

15 MR. BRODY: Objection.

16 THE COURT: Can I hear question again? Read back  
17 the question.

18 (Whereupon, the question was read back by the Court  
19 Reporter.)

20 THE COURT: Okay, overruled.

21 Q You may answer.

22 A So as you noted, it didn't cause the os trigone, but it  
23 did cause the symptoms of a separated os trigone and the  
24 subsequent inflammatory pain and what's called posterior  
25 impingement.

1           So this is talus, this is the talus, this is the tibia,  
2 and, this little piece on the back is the -- what's called the  
3 Stieda process, S-T-I-E-D-A process, when it's connected to the  
4 talus when it's not it's called the os trigone, there's a  
5 fibrous union between the talus and the os trigone trying, in  
6 this case, I believe it broke off, and I believe that's what  
7 caused his symptoms, and again, it's not breaking a bone, it's  
8 breaking of fibrous tissue, it's not severely painful initially  
9 at times, and it becomes symptomatic as inflammation and  
10 impingement because of the instability occurs, and this is the  
11 MRI image of it, here is the, here is the os trigone, here is a  
12 bulge of fluid and inflammation around it, here is the talus,  
13 this is the fibrous tissue in between.

14           The surgery again is taking our telescope, arthroscope  
15 looking in the back of the joint, and taking out the inflamed  
16 tissue to allow us to see if that's inflamed tissue, there is  
17 the os trigone, you can see it's pretty separate, we dug it out,  
18 we grabbed it, you can see the little graspers there, grabbed  
19 it, pulled it out.

20           Now we have this area that we're looking at back in the  
21 back here without the -- without the os trigone, and we can see  
22 the ankle joint better, we can see the talus, which is the ankle  
23 bone and the tibia, which is the end of the shin bone, we're  
24 able to then see the joint here, whereas before the os trigone  
25 was blocking all of that from our view, because it was inflamed,

1 unstable and in this case elevated, out of place, it was  
2 actually sought of in here (indicating), blocking our view, so  
3 that's how you relieve the posterior impingement that results  
4 from the os trigone injury.

5 Q Doctor, is the presurgical condition a competent  
6 producing cause of pain?

7 A Yes.

8 MR. BRODY: Objection.

9 THE COURT: Is it or can it be?

10 MR. KELLY: Withdrawn.

11 Q Was the presurgical condition of Mr. Mora's competent  
12 producing of pain?

13 A It is my opinion that's what was causing his pain and  
14 in fact, the surgery helped relieve that pain, so I believe  
15 that's the case, yeah.

16 Q Do you need to see this anymore?

17 A No.

18 (Whereupon, Dr. Kaplan resumed the witness stand.)

19 Q In addition to showing to us by your surgeries of  
20 Mr. Mora, are those permanent conditions?

21 A The conditions of the rotator cuff tear, we've  
22 addressed, but there's permanent residual, certainly with the  
23 ankle he has some posttraumatic arthritis of the ankle, so yes,  
24 those are permanent conditions.

25 Q Did you form a prognosis with respect to Mr. Mora at

1 any time?

2 A I do have a prognosis with regard to the shoulder and  
3 the ankle. A prognosis is predicting the medical future, based  
4 on my knowledge of his anatomy and the injury, and prognosis is  
5 usually good, guarded, fair, or poor.

6 Mr. Mora is a relatively young guy, he does have  
7 posttraumatic arthritis in his ankle, in his shoulder.  
8 Posttraumatic arthritic is not only permanent but it worsens  
9 over time like any arthritic condition, so I believe he has a  
10 poor prognosis, this will be permanent, and associated with the  
11 worsening.

12 Q Do you anticipate Mr. Mora requiring future medical  
13 care for his lifetime?

14 A I do. He will need symptomatic care for symptoms of  
15 discomfort, pain, limited motion, to which will come and go,  
16 sometimes be severe, sometimes be tolerable, but always likely  
17 to be there.

18 Q You may have said it, I apologize if you did, do you  
19 anticipate Mr. Mora suffering pain as a result of the shoulder,  
20 the shoulder condition for the balance of his lifetime?

21 A I do.

22 Q Do you think the pain will worsen?

23 A I think the general trend will be worsening. As I say,  
24 arthritic conditions are worse sometimes, better at other times,  
25 but the general trend is that he will have more worsening days

1 than better days.

2 Q Do you have an opinion, to a reasonable degree of  
3 medical certainty, whether or not the prognosis for the shoulder  
4 is causally related to the fall on to a hard surface by  
5 Mr. Mora?

6 A Yes.

7 Q What is that opinion?

8 A My opinion is that the injuries to the shoulder, that  
9 necessitated the two surgeries and the permanent condition that  
10 he has are causally related to the accident.

11 Q Doctor, are you charging a fee to be away from your  
12 office today?

13 A Yes.

14 Q If you weren't here, what would you doing?

15 A Seeing patients today, I had to cancel patients.

16 Q Kindly tell the jury what your fee?

17 A It's \$8500 for the day.

18 Q And did there come a time when you produced reports  
19 with respect to this case?

20 A Yes.

21 Q Did you charge a fee for that?

22 A Yes.

23 Q Can you tell us what that fee is?

24 A The fee is \$450 for the report.

25 Q And you and I have been together on a case, I think

1 it's three times in the last three, three times in the last ten  
2 years; is that true?

3 A I remember two, but if you say three, I will accept  
4 that.

5 Q Okay, no problem.

6 And you do some work with the Gorayeb firm; is that  
7 correct?

8 A I have patients who are clients of theirs, yes.

9 MR. KELLY: Doctor, I have nothing further, thank  
10 you very much.

11 THE COURT: Thank you. Do you want to take five or  
12 go straight in?

13 MR. BRODY: I will do whatever your Honor wants, I  
14 need to set up.

15 THE COURT: Let's take five, you remain under oath,  
16 please don't discuss your testimony with anyone, ladies and  
17 gentlemen. Why don't you take a quick five-minute break,  
18 get some air outside the courtroom, and we will see you  
19 back.

20 COURT OFFICER: All rise, jury exiting.

21 (Whereupon, the jury exited the courtroom.)

22 THE COURT: Okay. You can sit or stands thank you.

23 THE WITNESS: I appreciate it.

24 (Whereupon, a short break was taken.)

25 COURT OFFICER: All rise, jury entering.

1 (Whereupon, the jury entered the courtroom.)

2 THE COURT: Alright, thanks, you can all be seated  
3 as you come in.

4 Doctor, I remind you, you remain under oath.

5 MR. BRODY: Thank you.

6 CROSS-EXAMINATION BY

7 MR. BRODY:

8 Q Good morning doctor, how are you?

9 A Good.

10 Q Doctor, I guess I will start with the end of the exam  
11 first, you have testified for Mr. Kelly two or three times in  
12 the last ten years?

13 A I remember two times, but he mentioned three, yep.

14 Q One of those would have been in January of this year?

15 A It was recently, I'm not sure.

16 Q In the Cordova case?

17 A I don't recall the name.

18 Q Are you familiar with a person by the name of Mauro  
19 Cordova?

20 A Yes.

21 Q He is, that would be a patient of yours?

22 A He was a patient of mine.

23 Q Did you testify in a case of his?

24 A I don't recall if that's the Cordova, if you tell me he  
25 is, that's a patient of mine.

1 Q Doctor, how often do you testify?

2 A I testify probably every two months, every three  
3 months, something like that.

4 Q So that would make sense in November 8 of 2023, did you  
5 testify for the Gorayeb firm in the Sol Rosales case?

6 A I know Mr. Rosales, yes.

7 Q That was with Mr. Velardi, not with Mr. Kelly?

8 A I have no recollection who it was.

9 Q Well, do you know who Damon Velardi is?

10 A You tell me, he is the attorney?

11 Q He is an attorney from the Gorayeb firm.

12 A Okay.

13 Q You testified for him a second time in March of 2024,  
14 in the Olivera case; do you recall that?

15 A Tell me Olivera's name, probably, if you're telling me  
16 these things, I'm going to accept it. Again. This is a small  
17 part of what I do, once every couple of months, so I -- I don't  
18 recall dates and things like that usually.

19 Q You would think, you correct me if I'm wrong, would you  
20 think that you would remember the name of a lawyer that you  
21 testified for twice over a four or five month period when you  
22 don't do it that often?

23 MR. KELLY: Objection.

24 THE COURT: Sustained. Don't speculate what he  
25 thinks he remembers, you can ask him. Don't speculate what

1           you think he ought to remember.

2           Q       I will flip it around.

3                   Is it your testimony you don't recall the name of the  
4 lawyer you testified to from the Gorayeb firm twice, once in  
5 November of '23 and once in March of 2024?

6           A       I don't, I meet them for a half a day, you know, I  
7 don't, you say you and I have met, I don't recall that.

8           Q       I was a lot younger and had hair and you were a lot  
9 less gray.

10                   MR. KELLY:  Objection.

11                   THE COURT:  Sustained.  Sustained.

12           Q       Did you again testify for the Gorayeb firm in February  
13 in a case called Pedro Ramirez?

14           A       I know Pedro Ramirez.  If you tell me I testified in  
15 that, I probably did.

16           Q       Do you remember any of the times you have actually  
17 testified recently?

18           A       I do, but I don't necessarily connect the names with  
19 the testimony.

20           Q       So I've identified four not counting this case so far  
21 since November?

22           A       Okay.

23           Q       Do you recall testifying in any other times during that  
24 period of time?

25           A       I probably testified a couple of times because it's not

1 always for Mr. Gorayeb's office, you seem to have only picked  
2 Mr. Gorayeb's office, I have testified for other patients of  
3 mine who are not clients of their law firm.

4 Q Recently?

5 A Probably within the year.

6 Q So would you say that is frequency within which you  
7 have been testifying has increased recently?

8 A No.

9 Q Okay, you still think it's every two months?

10 A That's about right.

11 Q And in this particular case, you were a treating  
12 physician; correct?

13 A Yes.

14 Q And New York Ortho is your practice, you own that  
15 practice; correct?

16 A That is correct.

17 Q And Dr. Grimm works for that practice; correct?

18 A That is correct.

19 Q And at some point in time up until a couple of years  
20 ago, Dr. Crone worked for that practice?

21 A He did.

22 Q And so they were employees of yours; correct?

23 A Employees of the practice, yes.

24 Q And the physical therapy that you indicated that  
25 Mr. Mora went for, that was physical therapy performed by a

1 physical therapist in your practice; correct?

2 A I don't recall if he used our physical therapist or  
3 another physical therapist, we tell people to go wherever it's  
4 convenient for them.

5 Q You were coming here to testify?

6 A Testify, yes.

7 Q And part of what you were going to testify about, would  
8 be the care and treatment that Mr. Mora received from your firm;  
9 correct?

10 A From me?

11 Q Only from you?

12 A That's what I'm testifying about, the shoulder and the  
13 ankle.

14 Q I understand that, but you have physical therapy at  
15 your facility for the shoulder and ankle?

16 A Okay.

17 MR. KELLY: Objection.

18 THE COURT: Objection what, because he's  
19 testifying, sustained. It's in the record, it's sustained  
20 as to form, but I'm going to say as I think the doctor keeps  
21 saying, if it's in the record and Mr. Brody makes a  
22 representation about it, it's fine, it's subject to  
23 connection to the records. Unless your objection is your  
24 understanding of the records is your client didn't go to PT  
25 at that office.

1 MR. KELLY: No, he did.

2 THE COURT: So then that's fine, we're trying to  
3 get to the --

4 MR. KELLY: Okay.

5 THE COURT: -- to get to the stuff, we're not  
6 trying to, I wouldn't want to have him testify, I don't mind  
7 him refreshing the witness's recollection about something in  
8 evidence.

9 Q Doctor, just to be clear, when you came here to testify  
10 for this jury, you wanted to testify based upon what your  
11 records show was the care and treatment of Mr. Mora; correct?

12 A My records, yes.

13 Q You keep saying "my records"?

14 A Yeah.

15 Q Isn't it the work of your physical therapist at your  
16 physical therapy part of your care and treatment of this person?

17 A No, he's independent.

18 MR. KELLY: Objection.

19 THE COURT: Overruled.

20 A No, he's a licensed physical therapy, I don't keep his  
21 records as part of my treatment of the patient, I can review  
22 them if he sends me a note, but the contact that I have with  
23 him, like any other physical therapist is I write a prescription,  
24 and I give it to Mr. Mora in this case, John, and I say, you  
25 know, go to physical therapy, you can do it here or you can do

1 it at your house, we have a list of places we had worked with in  
2 the past that have been good, they're not always, we suggest  
3 people go to physical therapy.

4 Q When it's done inhouse, who bills for it?

5 A Our billing department does.

6 Q And your billing department is the billing department  
7 of New York Sports Ortho?

8 A Yes.

9 Q The business that you own?

10 A That's correct.

11 Q So you do collect money?

12 A Of course.

13 Q For the treatment, for the care and treatment that was  
14 provided to Mr. Mora in this case?

15 A Absolutely.

16 Q Just as a total number, can you tell me how much New  
17 York Sports Ortho billed for the care and treatment of Mr. Mora  
18 in this case?

19 A I don't have that on me today.

20 Q Did you bill for all of the physical therapy?

21 A Sorry.

22 Q Did you bill for all of the physical therapy?

23 A We bill for physical therapy every time they come.

24 THE COURT: You're talking about this case?

25 MR. BRODY: This case, that's all I care it.

1 THE COURT: The witness said he didn't know if he  
2 went to physical therapy there.

3 Q Would you like me to get the records and show them to  
4 you?

5 A I'm happy to look at the records, I don't have any  
6 problem with that.

7 THE COURT: Do you have an exhibit number for it?

8 MR. BRODY: We do have a number for it, you know  
9 what, I'm going to show him his record, I think it's 2.

10 MR. KELLY: 2.

11 MR. BRODY: Jeffrey Kaplan's records.

12 MR. KELLY: Ortho Sports is 11.

13 COURT OFFICER: It's all 11.

14 MR. BRODY: This is all 11.

15 COURT OFFICER: Yes.

16 THE COURT: Is that 11 in evidence, 11 for ID  
17 something else?

18 MR. BRODY: No, we can offer, I can consent to 11  
19 in evidence, I'm asking him about it.

20 THE COURT: That's fine.

21 MR. KELLY: No objection.

22 THE COURT: Without objection, 11 is marked in  
23 evidence.

24 MR. BRODY: Judge, we have our standing objection  
25 subject to redaction.

1 THE COURT: I understand that, we have a recess  
2 where we can mark stuff, I want to make sure we can mark it  
3 now.

4 A What would you like me to look at?

5 Q All I want to establish is he had physical therapy at  
6 your facility?

7 A Sure, let me see, these are Dr. Grimm's records, my  
8 records, medication records, Dr. Crone's records, these are  
9 essentially the same, my records, and some billing for  
10 Dr. Grimm, and myself, and these do not have records from  
11 physical therapy that I have seen immediately. If you point  
12 them out to me, I'm happy to agree with you with whatever, I'm  
13 certainly not trying to hide anything.

14 Q I can only go with what's in evidence, you don't see  
15 physical therapy records?

16 A I don't see physical therapy records here.

17 Q So then, if you don't see physical therapy records  
18 there, can you identify any physical therapy records that you  
19 can state show treatment for Mr. Mora?

20 THE COURT: The witness hasn't been shown every  
21 record, again, there was a shopping cart full of medical  
22 records, you can't ask the witness to speculate what's in  
23 other records.

24 MR. BRODY: He gave an opinion about failing  
25 conservative treatment. I wanted to know what evidence of

1 physical therapy he has in his chart he would have reviewed.

2 A So that has to do with my speaking to the patient, that  
3 has to do with, again, authorization for the surgeries, which  
4 was approved, surgeries, by the careers, and based on.

5 THE COURT: Sir, just what your treatment was, and  
6 not about anything else. Let's have a quick side bar with  
7 the witness.

8 (Whereupon an off the record discussion was held.)

9 (Pause in the proceedings.)

10 COURT OFFICER: Remain seated and come to order.

11 (Whereupon, Dr. Kaplan resumed the witness stand.)

12 THE COURT: Let's get back on track, ask another  
13 question and try to get back on track.

14 MR. BRODY: I will be very brief so we can move on  
15 to other topics.

16 THE COURT: Sure.

17 Q To the extent Mr. Mora did receive physical therapy  
18 from the physical therapist affiliated with your practice?

19 A Yes.

20 Q Those records, the actual physical therapy records  
21 would be kept in a different set of documents; is that correct?

22 A They would be kept, correct, under physical therapy.

23 Q So the fact that you don't see them there, doesn't mean  
24 he didn't treat there, it just means those records aren't part  
25 of what was delivered here; correct?

1 A Exactly, yes.

2 Q Let me move on from that.

3 A Okay.

4 Q Doctor, another record that's generally not kept in  
5 your official record, but which your office maintains is that  
6 record of the first time that a patient comes to your office,  
7 like a handwritten document or a referral from Mr. Gorayeb's  
8 office; is that correct?

9 A I've never seen a referral from Mr. Gorayeb's office,  
10 but, you're talking about an intake sheet?

11 Q Yes, sir.

12 A We have an intake sheet.

13 Q Can I see your intake sheet for this matter?

14 A Yes. (Handing.)

15 MR. BRODY: Your Honor, I'm going to ask when we're  
16 done, make a copy of it and mark it as an exhibit, I don't  
17 want to waste time with the jury.

18 THE COURT: That's great.

19 Q Doctor, is this the intake sheet that would have been  
20 taken on the date that Mr. Mora first came to your office?

21 A It should be, yeah, I have to look at it and see what  
22 the date of it is, yes.

23 Q Do you know who referred Mr. Mora to your office?

24 A I do not know who referred Mr. Mora to my office, but I  
25 would suspect it was Mr. Gorayeb's office.

1 Q And they have referred clients to you, from time to  
2 time; correct?

3 A Yes.

4 Q Do you know how long that relationship has lasted?

5 A I don't know exactly how long that's, I don't know.

6 Q Let's move on to this case for a second.

7 Doctor, did you ever see the Lutheran Medical Center  
8 record in this case?

9 A Yes, sorry, one --

10 THE COURT: Sorry, one second before you ask it, if  
11 you want that marked separately, you're done with the intake  
12 folder.

13 MR. BRODY: I'm done.

14 THE COURT: I want to keep it separate until you  
15 mark it.

16 Q Did you ever see the hospital record in this case?

17 A Yes.

18 Q When did you see the hospital record in this case?

19 A I had the hospital record, I don't know exactly when,  
20 but I certainly refer to it during my treatment of Mr. Mora.

21 Q You saw an MRI of Mr. Mora's ankle, and I will focus on  
22 the ankle for a moment?

23 A Okay.

24 Q You saw an MRI of his ankle shortly after the accident;  
25 is that correct?

1           A     I saw an MRI of his ankle that was performed on  
2 12/27/16.

3           Q     Before that, you had seen other records with regard to  
4 his right ankle?

5           A     You would have to refresh my memory.

6           Q     Did your office take an X-ray of --

7           A     Oh, X-rays.

8           Q     -- of Mr. Mora's right ankle four days after the  
9 accident?

10          A     Let's see, four days after the accident.

11          Q     I believe that's March 16, 2015?

12          A     I believe that's Dr. Crone's note. I'm sorry, I'm  
13 scrambled here, if you have it, you can save me time and show me  
14 what you're looking at.

15          Q     Just one second.

16          A     I've got it.

17          Q     You got it?

18          A     Yep, okay, let's see, Dr. Crone, does he take an X-ray,  
19 I don't see where he reports an X-ray of the ankle on that day.

20          Q     Give me one second.

21          A     Okay.

22                         (Pause in the proceedings.)

23                         MR. BRODY: You know what, Judge, I will come back  
24 to the X-ray and go to the MRI, I don't want to waste time.

25                         THE COURT: Don't worry about it, it's three

1 minutes to 4:00, so we're good on time so far.

2 Q Doctor, I would like to go to this right ankle MRI?

3 A Yes.

4 Q By the way, if you want to step down and take a look at  
5 it with me, that would be great.

6 (Whereupon, Dr. Kaplan exited the witness stand.)

7 Doctor, were you aware that -- withdrawn, do you know  
8 who took that MRI?

9 A I can look on my, my report of it, let's see, it looks  
10 like that was done at Kolb Radiology.

11 THE COURT: What exhibit was that?

12 MR. BRODY: This is Exhibit 23.

13 THE COURT: 23, thanks.

14 Q Kolb Radiology?

15 A Yes.

16 Q Were you aware that Dr. Kolb was here earlier today?

17 A I was.

18 Q You were?

19 A Yes.

20 Q Did you ever discuss his findings on that MRI with him?

21 A I don't recall, this is -- this was 2016.

22 Q Did you ever have any radiologist discuss the findings  
23 on that MRI with you?

24 A I'm trained in reading MRIs, so the answer is no, I  
25 looked at the reports, I looked at the films, they corresponded

1 with his area of pain, that's what I did.

2 THE COURT: I just have to ask either that you, we  
3 have a mic for you or that's on the stand.

4 THE WITNESS: I will speak louder.

5 THE COURT: You stand further back so you can have  
6 your voice projecting across the Court Reporter.

7 Q So you never discussed the findings on this MRI with  
8 Dr. Kolb; is that correct?

9 MR. KELLY: Objection. Asked and answered.

10 THE COURT: Sustained.

11 Q And doctor, was there evidence of an acute fracture of  
12 the ankle on that MRI?

13 A My interpretation of it --

14 Q Evidence of an acute fracture?

15 THE COURT: So he's giving his opinion about it.

16 MR. BRODY: It should be a yes-or-no answer.

17 A No, it should not be.

18 MR. KELLY: Objection.

19 THE COURT: I don't know what you think it should  
20 be. You're asking him his opinion, he's giving you his  
21 opinion, he's not giving you somebody else's opinion, it's  
22 okay for him to preface with that, sorry, your read of it  
23 was?

24 A My opinion was that there was a separation between the  
25 os trigone and the talus, that there's fluid there, there's no

1 timestamp on an MRI, acute versus not acute, there's enough  
2 fluid that it's either acute or it's inflammatory fluid that's  
3 collected over time open to interpretation.

4 THE COURT: I think the question was your  
5 interpretation?

6 THE WITNESS: Yes, my interpretation. The question  
7 was to ask his interpretation not if someone read it  
8 differently.

9 MR. BRODY: I asked him if there was evidence of  
10 acute trauma, but that's okay.

11 THE COURT: But meaning from his read of the film,  
12 I'm trying to clarify, the doctor is saying someone else can  
13 read it differently, I don't think that's what Mr. Brody  
14 asked you, he just asked you for your read of the film; do  
15 you see evidence of acute trauma?

16 THE WITNESS: I would say I can't tell, there's  
17 enough fluid it could be, but it also can be inflammatory  
18 fluid.

19 THE COURT: Great, thanks.

20 THE WITNESS: Yes.

21 Q Was there soft tissue edema on the film?

22 A There is so much soft tissue edema, yes.

23 Q And the amount of the edema and effusion that's shown  
24 on that MRI, that consistent with an injury that would have  
25 occurred within 12 weeks of the day of imaging?

1           A     Again, in my opinion, you can't put a timestamp on it,  
2 it can be inflammatory fluid which could be huge or small or it  
3 can be traumatic fluid which can be huge or small.

4           Q     There was --

5           A     That's why we correlate things clinically.

6           Q     Did you ever see an X-ray at any time of Mr. Mora's  
7 right ankle?

8           A     I'm sure I've seen an X-ray, I've taken them after his  
9 surgery, I've taken them before his surgery to show the os  
10 trigone, which shows the separated os trigone; again, the  
11 separation between the two pieces of bone.

12          Q     Doctor, stay here, I'm going to refer to Exhibit 20.

13                    Doctor, that's an MRI that was performed in October of  
14 2015; is that correct?

15          A     That's.

16          Q     That was the surgery that was performed in October of  
17 2015; is that correct?

18          A     That is an artist representation of the surgery, yes.

19          Q     And I just want to go back what you said about the  
20 shoulder for a second.

21          A     Um-hum.

22          Q     By the way, doctor, one last thing I will ask, before I  
23 need a break to find the record in a minute, you said you  
24 started to talk to him about his ankle a year and a half after  
25 the accident; is that correct?

1           A     My recollection is he started to really complain about  
2 it, so I went back through his medical records to make sure that  
3 he had mentioned it before I found that he had mentioned it  
4 before, that was my recollection.

5           Q     So now, let's talk about the shoulder for a minute,  
6 what causes degenerative changes in the shoulder that are  
7 visible on an X-ray?

8           A     Degenerative change means a change that occurs over  
9 time.

10          Q     So in this particular case, Mr. Mora had an X-ray done  
11 with Dr. Kolb read on the day of the accident as showing  
12 degenerative acromioclavicular; is that correct?

13          A     Acromioclavicular, between the acromion and clavicle.

14          Q     Of the shoulder?

15          A     Yes.

16          Q     What causes that condition?

17          A     Wear and tear.

18          Q     And that wear and tear, if it's depicted on an X-ray  
19 while he's in the hospital, had to have taken place before he  
20 was in the hospital; correct?

21          A     The change occurred before the hospital, yeah, that's  
22 not part of his injury, yeah.

23          Q     What soft tissue repetitive injuries did Mr. Mora  
24 suffer from before the date of the accident that caused him to  
25 have degenerative changes visible on an X-ray at the time of the

1 accident?

2 MR. KELLY: Objection.

3 THE COURT: Sustained.

4 MR. BRODY: Grounds?

5 MR. KELLY: Should I argue to him?

6 THE COURT: I don't actually have to explain myself  
7 to you, but it's sustained.

8 What soft tissue injury causes, would he have had  
9 to have sustained ahead of time to cause a damage to a  
10 joint.

11 MR. BRODY: Damage depicted on the day he appeared  
12 at the hospital.

13 THE COURT: In an X-ray?

14 MR. BRODY: Yes.

15 THE COURT: Let's have a side bar.

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

18 THE COURT: The objection is still sustained, he  
19 can ask another question.

20 (Whereupon, Dr. Kaplan exited the witness stand.)

21 Q Doctor, in a broader sense, what types of conditions  
22 were factors -- or factors can cause in a 22-year-old gentleman  
23 who have degenerative shoulder evidence on an X-ray, I will  
24 leave there, what can cause that type of condition to be  
25 depicted in a 22-year-old man?

1 MR. KELLY: Objection --

2 THE COURT: No, overruled.

3 MR. KELLY: -- to the question.

4 THE COURT: No, overruled, what sorts of conditions  
5 can cause --

6 THE WITNESS: Sure.

7 THE COURT: -- that sort of degenerative change in  
8 a 22-year-old?

9 A Mild degenerative change can occur from normal daily  
10 activities, simply breathing moves your acromioclavicular joint,  
11 any type of lifting, pulling, pushing can affect the  
12 acromioclavicular joint, that's not what we think of as the  
13 shoulder joint.

14 The shoulder joint is generally thought to be the  
15 glenoid humeral joint here. The acromioclavicular joint is  
16 between the collarbone and the shoulder blade and it's up here,  
17 so you've all seen people with little bumps on their shoulder,  
18 that is the acromioclavicular joint most people have it, that is  
19 not a serious condition, and that's certainly not what we  
20 operated on.

21 Q Did you operate on his subacromial osteophyte?

22 A We operate on the subacromial bone here, not the  
23 acromioclavicular joint.

24 Q Was there a subacromial osteophyte present when you  
25 operated?

1           A       I have to check my operative report, it does not note a  
2 subacromial osteophyte being present, I just noticed notes  
3 impingement when I look at the operative photographs, there's  
4 not a significant osteophyte there, there's thickening of the  
5 subacromial space.

6           Q       But, in fact, there's an osteophyte there, isn't there?

7                   MR. KELLY:  Objection.

8                   THE COURT:  He just said there isn't, he said there  
9 is not an osteophyte there.

10                  MR. BRODY:  He said not a significant one.

11          A       That means I don't see one.

12          Q       That means you don't see one?

13          A       Yes.

14          Q       The radiologist that you sent this gentleman to was  
15 Lenox Hills Radiology?

16          A       Okay.  I don't send them to any particular place, but  
17 he went to Lenox Hills Radiology.

18          Q       You reviewed that report?

19          A       I did.

20          Q       And that report indicates that there was a subacromial  
21 marginal osteophyte causing a mild degree of subacromial  
22 impingement?

23          A       It does.

24          Q       So what you found in the operation was different than  
25 what the MRI showed?

1           A     You see different things on different studies which is  
2 why you do them, I did not see and I don't see in my photographs  
3 an osteophyte, what we do is we thin out the acromion, because  
4 it's impinging on the subacromial space, so I think you're  
5 asking me for a semantics question how we call things, I don't  
6 see an osteophyte on my report, I don't see it in the pictures I  
7 took, but there's thickening causing impingement.

8           Q     But, Dr. Kolb testified earlier that an osteophyte is  
9 the last stage, the third stage of a degenerative process; do  
10 you agree with that?

11                   MR. KELLY:  Objection.

12                   THE COURT:  No, only as to form, like I want you to  
13 assume Dr. Kolb testify, other than that, the question is  
14 not improper.

15           Q     I want you to assume for a moment that Dr. Kolb, in  
16 fact, testified that an osteophyte is the third stage of the  
17 degenerative process?

18           A     I've never heard that, I would like to hear his  
19 explanation of it, the osteophyte forms as a degenerative  
20 process over time, I don't know what his three stages are, but  
21 yeah.

22           Q     So is it, in your professional opinion, is it medically  
23 possible, there was an ongoing process with regards to  
24 Mr. Mora's shoulder prior to the date of this accident that was  
25 causing him degenerative changes in his shoulder?

1 MR. KELLY: Objection.

2 THE COURT: Is it, objection to whether is it  
3 possible.

4 MR. KELLY: Well, yes, the broad is impossible, but  
5 the condition of his shoulder, we're talking there's a vast  
6 difference between the bony condition and the soft tissue  
7 condition, I think we're --

8 THE COURT: That's okay, I don't want you  
9 testifying either.

10 MR. KELLY: Okay.

11 THE COURT: But, can I get you to take another stab  
12 at that question, I don't want, I can't tell, maybe I'm,  
13 maybe you're getting at something permissible, not hearing  
14 it in that question, I will let you take another shot at it.

15 MR. BRODY: Okay.

16 Q Would you agree with me, doctor, that to the extent  
17 there was thickening taking place in Mr. Mora's shoulder, it was  
18 chronic and long standing in nature?

19 A The thickening?

20 Q Yes.

21 A It could be, possible, yes, do I think it was  
22 predictive of symptoms prior to the accident.

23 Q Did he have a Type 2 --

24 MR. KELLY: Objection, he's answering.

25 THE COURT: He's done.

1 MR. KELLY: All right.

2 THE COURT: There was a period after that last word  
3 okay, keep going.

4 Q Did he have a Type 2 curve acromion process?

5 A According to the MRI, I believe he did.

6 Q Does that predispose someone to the development of  
7 rotator cuff pathology?

8 A Type 2 does not generally, Type 3 and Type 4 do, Type 1  
9 and 2 do not.

10 Q You described the repair of a SLAP lesion on this  
11 diagram; is that correct?

12 A Treatment of a SLAP lesion, not repair.

13 Q By treatment, we're not fixing the tear, we're just  
14 cleaning up around it and it; correct?

15 A We're not anchoring it to bone, we're fixing it, we're  
16 getting rid of the torn fibers.

17 Q You described it in your operative report as a Type 1  
18 SLAP lesion?

19 A Yes.

20 Q Isn't it true, doctor, that the use of the term Type 1  
21 SLAP lesion generally denotes a repetitive wear and tear injury?

22 A Not necessarily, but it can, yes.

23 Q If someone were reading your report, what would you  
24 want them to interpret from your use of the term Type 1 SLAP  
25 lesion?

1 MR. KELLY: Objection.

2 A It's a pattern.

3 MR. KELLY: I object to the speculation, if  
4 somebody.

5 THE COURT: As to what somebody else should  
6 speculate.

7 MR. KELLY: I can't.

8 THE COURT: I'm sorry to do this, we're done at  
9 4:15, can I reask the question once, because I think I know  
10 what we're getting at, if I'm wrong, I will stop asking  
11 questions for you.

12 Can you tell us what you meant by, rather than what  
13 somebody else should guess from it, can you tell us what you  
14 meant by a Type 1 SLAP lesion?

15 THE WITNESS: So the SLAP lesion is described by  
16 the pattern of the tear, so.

17 THE COURT: If you're about to create a new  
18 exhibit, you have to show it to counsel.

19 A The labrum is a circle Type 1 means there's torn  
20 fibers, Type 2 means that the labrum has detached, a Type 3 is a  
21 further detachment, Type 4 is a circular detachment, it is just  
22 a description of what it looked like, it indicates why I didn't  
23 have to fix it, but, in fact, just took out the torn fibers,  
24 that's my reason for putting in SLAP one.

25 Q Were there cystic degenerative changes in the shoulder

1 as well?

2 A Not that I saw, they're reported in the well, in the  
3 acromioclavicular joint, I didn't enter the acromioclavicular  
4 joint, that's not where the pathology was.

5 Q You found a significant amount of fluid and synovitis?

6 A Yes.

7 Q But the MRI report, again, indicated to you to expect  
8 only a mild amount; correct?

9 A The MRI is done prior to my getting to do surgery, so  
10 somewhere in the interim clearly collected more.

11 Q You did multiple X-rays of the shoulder and found no  
12 evidence of any traumatic injury, only on the MRI; is that  
13 correct?

14 A There's -- an X-ray is only a bony picture, there's no  
15 fracture, so there's no indication of bony trauma, but it  
16 doesn't show the soft tissue.

17 Q Doctor, I want -- withdrawn.

18 What type of work did Mr. Mora do before his accident?

19 A I don't recall exactly what he was doing, but it was in  
20 the construction trade.

21 Q Does the type of work that someone does, go ahead and  
22 sit.

23 (Whereupon, Dr. Kaplan resumed the witness stand.)

24 Q Does the type of work a person does affect their  
25 predisposition to having changes to the shoulder, whether it be

1 a partial rotator cuff tear, a SLAP tear or other tears within  
2 the bodies of the shoulder?

3 A Changes or symptoms?

4 Q Changes, physical changes as opposed to whether they're  
5 complaining of pain?

6 A It's possible, sure.

7 Q Doctor, if I understand the way you're diagnosing the  
8 situation here, you are, in part, relying on what Mr. Mora has  
9 told you about both his history, and when he first began to  
10 experience pain; correct?

11 A Yes.

12 Q So if just hypothetically Mr. Mora had been  
13 experiencing shoulder pain before this accident, you would have  
14 no way to know from the records you reviewed whether or not his  
15 injuries that you're describing today were from this accident or  
16 a prior accident; correct?

17 A I've never seen any records of his prior accident or  
18 any treatment, that's why I'm going on as well.

19 Q But again my point is, if there were such records that  
20 would affect your opinion because you're relying upon Mr. Mora  
21 as a historian to formulate a significant portion of your  
22 opinion?

23 MR. KELLY: Objection, based on facts not in  
24 evidence.

25 THE COURT: Sustained, as to the way the question

1 was asked, as to the question, as to the first part of the  
2 question as to whether you have to rely in part on  
3 Mr. Mora's history, do you know whether or not the diagnosis  
4 is causally related?

5 THE WITNESS: In part, yes, absolutely, every  
6 patient I see, yes.

7 Q Doctor, can we agree that if Mr. Mora's shoulder  
8 condition was caused by something other than this accident, then  
9 the second surgery that you did would also be causally related  
10 to something else, because the reason for the second surgery is  
11 the reaction of his body to your first surgery; correct?

12 A I believe the second surgery was necessitated because  
13 of his reaction to the first surgery, yes.

14 Q So in time the second surgery to this accident, you're  
15 really tying it to the first surgery; correct?

16 A I am, I'm tying it to the need for surgery, which I  
17 don't believe was causally related to the accident, correct.

18 MR. BRODY: Judge, if I can have one minute, I'm  
19 probably done.

20 THE COURT: Of course.

21 (Pause in the proceedings.)

22 MR. BRODY: I just need to see one exhibit.

23 THE COURT: Yes.

24 MR. BRODY: Lutheran Hospital.

25 THE COURT: I thought you had it out.

1 MR. BRODY: I have Lenox Hill.

2 THE COURT: You asked for Lutheran, you have it  
3 there?

4 MR. BRODY: It's here.

5 (Pause in the proceedings.)

6 Q Doctor, if you could, could you, I'm sorry.

7 Doctor, can you take a look at your records and see if  
8 you have an X-ray report dated March 10, 2017 of the right  
9 ankle?

10 A I do, yes.

11 Q And can you tell me what that report discloses?

12 A I'm sorry, tell me again, March 10.

13 THE COURT: March 10, 2015.

14 MR. BRODY: I believe it's going to be March 10,  
15 2015, I'm sorry.

16 A Sorry, I was looking at the wrong day, two seconds.

17 Do you have it there, my things are now scrambled.

18 Q I have somebody else's review of it, I don't have your  
19 records as complete as you do.

20 A I do not see, unfortunately, it's just scrambled in  
21 here.

22 Q No problem?

23 A Yes.

24 Q Let me ask you this, prior to ordering the MRI --

25 A Um-hum.

1 Q -- of Mr. Mora's right ankle; did you do an X-ray?

2 A I would have likely done an X-ray, yes.

3 Q Do you have a copy of that report?

4 THE COURT: You just asked him that you just asked  
5 him that, he said he's looking for it now.

6 MR. BRODY: Okay.

7 A That would be in my notes, I don't see in the notes of  
8 Dr. Crone who was seeing the patient at that time, I don't see a  
9 visit from that day from Dr. Crone.

10 THE COURT: Do you have, I think the follow-up  
11 question was, do you have any, do you see a note of any  
12 X-ray before the ankle MRI was done; is that right?

13 MR. BRODY: Correct.

14 THE COURT: Yes.

15 THE WITNESS: That would require me to go through  
16 all of my notes.

17 THE COURT: Just the notes up until the ankle MRI?

18 THE WITNESS: Yes, that's a year and a half of  
19 notes.

20 THE COURT: You said the pages got shuffled?

21 THE WITNESS: Here we go, I have one, that before  
22 the MRI, that's the shoulder.

23 I don't see that in my notes, but again, they're  
24 scrambled, I'm sorry about that, if you can help me out, I'm  
25 happy to look at it with him.

1 Q Unfortunately, I have another doctor's review it.

2 THE COURT: He said the pages are scrambled, but he  
3 doesn't see it in the notes.

4 MR. BRODY: I have no other questions of the  
5 witness.

6 THE COURT: Any redirect?

7 MR. KELLY: Yes, Judge, thank you.

8 REDIRECT EXAMINATION BY

9 MR. KELLY:

10 Q Doctor, assume that Mr. Mora was a 22-year-old man  
11 working less than a year or about a year in demolition, and  
12 prior to the time he was working part-time as a bus boy in a  
13 restaurant and prior to the day of the accident, on March 2,  
14 2015, he had no prior complaints of right shoulder pain, no  
15 prior complaints of ankle pain, do you have an opinion, to a  
16 reasonable degree of medical certainty, whether the accident of  
17 March 2, 2015 caused Mr. Mora's right shoulder pain and right  
18 ankle condition or wasn't able to work?

19 A I do have an opinion, and I stated my opinion given  
20 that history and imaging and the results of treatment, and  
21 surgical intervention, that his injuries are causally related to  
22 the accident at work.

23 Q When, in your experience, doctor, when people come to  
24 see you and they're going to have surgery, are they usually  
25 forthcoming with you about their medical condition?

1 MR. BRODY: Objection.

2 THE COURT: As to form, yes?

3 MR. KELLY: Okay, Judge.

4 Q On cross-examination, you were asked, do you rely on  
5 history as given to you by Mr. Mora; is that correct?

6 A Yes.

7 Q You usually do?

8 A I am skeptical person by nature, I don't like operating  
9 on people who don't need it, I go through a lot of conservative  
10 treatment, I go through a lot of imaging studies and I make ure  
11 patient's complaints march the technology and then I ask myself  
12 does it all make sense in a case like this, yes, I believe  
13 Mr. Mora's history.

14 Q And you were asked to compare your findings at surgery  
15 with MRI findings?

16 THE COURT: MRI findings by Lenox Hills Radiology  
17 you mean?

18 MR. KELLY: Yes.

19 Q Doctor, which is the more definitive, is it the MRI or  
20 was it you when you actually opened and looked?

21 A That's an interesting question, it will take a little  
22 bit more than a -- one or the other, it depends on what you're  
23 looking for.

24 The MRI showed cystic changes in the acromioclavicular  
25 joint but that's not the problem, so it shows that better than

1 what I'm going to see, I'm not looking at the acromioclavicular  
2 joint, as far as the soft tissue, as far as what I'm looking at  
3 directly, I believe my exam is more definitive, but there are  
4 things inside of the bone, inside the tissue that I can't see as  
5 well as an MRI can see.

6 Q With respect to your care and treatment of Mr. Mora, it  
7 concerned the soft tissues of the shoulder; is that correct?

8 A Primarily the instructions of the shoulders.

9 Q With respect to the care and treatment of Mr. Mora,  
10 with respect to his ankle, did you find -- withdrawn.

11 You mentioned something about clinical correlation,  
12 just, if you kindly explain what clinical correlation means to  
13 the jury?

14 A Yeah, clinical correlation means what I was saying  
15 earlier, things have to make sense, you can have MRIs that have  
16 findings and patients that don't have symptoms, you can patients  
17 who have symptoms and don't have findings, somehow you have to  
18 find ground where either they match, and that drives you with  
19 specific treatment and possibly surgery in this case or they  
20 don't match and I say to the patient, I can't help you, so the  
21 clinical correlation is making sense of a story, the exam, and  
22 the interim findings and response to the treatment.

23 Q When you talked about the right ankle and fluid, is it  
24 possible that the fluid is from a chronic condition?

25 A It can be from a chronic condition, meaning an injury

1 separation of the soft tissue bridge that then irritates, so he  
2 over time fluid collects which is why it's difficult for me to  
3 say definitively whether there's a traumatic injury, you can see  
4 or a chronic injury that you can see.

5           The fact is, I operated on his ankle, for that  
6 condition we see on the MRI which he has noted in his Lutheran  
7 records that ankle injury and it gave him some relief, so I  
8 believe it's from the accident.

9           Q     And this inflammation that you saw in the right ankle  
10 with Mr. Mora, was that as a result of his antalgic gait?

11          A     I think it's the cause of his antalgic gait.

12                   MR. KELLY: I have nothing further.

13                   THE COURT: Recross.

14                   MR. BRODY: Yes, your Honor.

15 RE CROSS EXAMINATION BY

16 MR. BRODY:

17                   MR. BRODY: I will be brief.

18                   THE COURT: It's 4:30, but yes.

19                   MR. BRODY: I understand.

20           Q     Doctor, I'm going to hand you the Lutheran record.

21                   THE COURT: Hold on no, you're not only the officer  
22 who can hand records.

23                   MR. BRODY: Thank you, your Honor.

24                   COURT OFFICER: (Handing.)

25           Q     Once you have it, doctor, can you tell me what they did

1 for this ankle injury?

2 A All I can tell you is they gave him discharge papers  
3 which I saw and, indicating an injury to the ankle and the need  
4 for follow-up, and what you do about that, I don't know if  
5 that's in the discharge papers are going to be in here, but I  
6 will find it if they are.

7 So the discharge papers that they gave the paper to go  
8 home with don't appear to be in this record, but in the record  
9 that I have, and there is an indication to follow-up regarding,  
10 what did I call it, I'm scrambled, here we go, so I turn this  
11 page down on 11/9, I indicate he tells me he had an injury to  
12 the right ankle since the time of the accident.

13 I reviewed the outside medical records from Lutheran  
14 Medical Center from 3/2/15, which do indicate that he was given  
15 a follow-up instruction sheet for intuition of the right ankle  
16 and foot, so it's not in this, it was the papers they gave him.

17 Q You're relying on that note to causally relate the need  
18 for the ankle surgery to this accident; is that correct?

19 A I'm partially relying on that note to let me know that,  
20 in fact, he did complain about ankle pain initially because when  
21 he came to us, he was really having generalized leg pain on the  
22 right, it was not localized to the ankle, which is not uncommon  
23 as I say, this is not a bony fracture this is a fibrous  
24 disruption which can be more of an annoyance until the  
25 inflammation appeared, fluid builds up.

1 Q It's congenital; correct?

2 A The -- not the disruption.

3 Q The os trigone?

4 A The os trigone, that's a congenital condition.

5 Q If he sprained his ankle 12 weeks before this MRI or  
6 six weeks before this MRI, it could cause the same condition  
7 that you see there as his accident; correct?

8 A I suppose that's possible, but not likely, yeah.

9 Q He also didn't make any complaints to you about it for  
10 18, until 18 months after the accident?

11 A He was complaining of leg pain not specifically ankle  
12 pain, you're correct.

13 Q This is in a specific part of the back and the foot  
14 almost below the ankle?

15 A It's in the ankle part of the ankle.

16 Q It's a very specific place?

17 A Yes, it is.

18 MR. KELLY: Objection, it is argumentative, he just  
19 said it's entire leg pain, he wants it not to be entire leg  
20 pain.

21 THE COURT: It doesn't matter what he wants to be,  
22 if that's the objection, it's overruled.

23 Q Doctor, to be clear, the pain caused by the condition  
24 in this ankle surgery, is in a very specific location?

25 A Yes.

1 Q So generalized leg pain, and the pain that one would  
2 describe with an os trigone fracture is completely different;  
3 correct?

4 A It's not completely different, but it is, it can be  
5 more specific, and again, he was first seen by Dr. Crone, who  
6 described it as leg pain, I wasn't there for that.

7 Q Then 18 months went by hold on, 18 months went by and  
8 he started complaining about something and you ran an MRI, and  
9 there was a very specific condition found; correct?

10 A I sent him for the MRI because of that complaint.

11 Q Would you have any ability to dispute a statement by a  
12 radiologist who, in evaluating the same MRI that you did,  
13 determined that the condition was from a recent trauma as  
14 opposed to a trauma that had taken place 18 months earlier?

15 A Again --

16 THE COURT: Hold on, stop, I'm going to have to ask  
17 you, sir, and the same as I asked Mr. Kelly earlier, if you  
18 want to object, stand up and object out loud, when either of  
19 you mutters under your breath "objection," I have no idea  
20 what you want from me. If you want to object, say  
21 objection, I will rule on it.

22 MR. KELLY: Objection.

23 THE COURT: If you don't want to object.

24 MR. KELLY: I was trying to wait for him to finish,  
25 objection, thanks.

## Proceedings

1 THE COURT: Thanks, sustained.

2 Q Doctor, is it equally, I will rephrase it.

3 Within a reasonable degree of medical certainty,  
4 science, is it equally possible, medically for that injury to  
5 the ankle to have been caused by a recent trauma and not from  
6 the accident that is the subject of this lawsuit?

7 A Not my opinion, because there's clinical correlation I  
8 have that the radiologist that you hired does not have.

9 Q And that clinical correlation is this discharge note  
10 that you can't find in the Lutheran record; correct?

11 A Is the discharge note that I have seen in the Lutheran  
12 record, that's right.

13 MR. BRODY: Nothing further.

14 THE COURT: Sir, you're excused, thank you for your  
15 time, ladies and gentlemen, as a reminder we are now off of  
16 this trial until Friday when we expect to have --

17 MR. KELLY: Two.

18 MR. BRODY: Two.

19 THE COURT: -- two witnesses on Friday, in the  
20 meantime, please don't discuss the case among yourself or  
21 with anyone else, don't do any research, don't have any  
22 contact with anyone in the case, thank you for your time and  
23 work see you on Friday.

24 COURT OFFICER: All rise, jury exiting.

25 (Whereupon, the jury exited the courtroom.)

Proceedings

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(Whereupon, the trial was adjourned to Friday, July  
is 19, 2024.)

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CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE ORIGINAL  
MINUTES TAKEN OF THIS PROCEEDING.



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LAURA C. HUTZEL  
Senior Court Reporter

<b>\$12,000</b> [5] - 77:22, 91:2, 91:10, 91:19, 92:8	147:8	130:22, 141:17, 143:22, 168:11, 172:14, 172:17, 184:13, 184:15, 186:14, 186:17	<b>4:00</b> [1] - 169:1	35:18, 94:16, 95:8, 99:25, 101:22, 102:5, 102:6, 102:17, 102:18, 105:7, 105:10, 106:5, 106:20, 118:6, 119:3, 121:13, 122:3, 122:6, 122:10, 122:13, 130:21, 131:13, 138:6, 141:20, 141:21, 141:22, 141:23, 143:24, 145:10, 149:4, 150:8, 150:14, 154:10, 167:24, 168:9, 168:10, 172:25, 173:11, 173:24, 174:1, 177:24, 178:22, 181:18, 182:13, 182:15, 182:16, 182:17, 183:8, 183:14, 183:17, 186:13, 186:16, 186:22, 189:8, 190:12, 190:18, 191:7, 191:10, 193:6
<b>\$15,000</b> [2] - 80:17, 83:22	<b>15A</b> [6] - 45:25, 46:2, 54:4, 66:18, 102:15	<b>2016</b> [2] - 94:16, 169:21	<b>4:15</b> [1] - 180:9	<b>accidents</b> [2] - 59:23, 119:7
<b>\$450</b> [1] - 154:24	<b>15B</b> [1] - 108:11	<b>2017</b> [6] - 64:14, 67:11, 110:23, 111:4, 184:8	<b>4:30</b> [1] - 189:18	<b>accommodate</b> [1] - 125:25
<b>\$4500</b> [1] - 80:9	<b>15C</b> [2] - 66:19, 66:21	<b>2018</b> [6] - 69:6, 69:21, 70:9, 70:21, 115:8	<b>5</b> [1] - 75:11	<b>according</b> [3] - 80:4, 131:11, 179:5
<b>\$7500</b> [1] - 80:13	<b>15E</b> [2] - 73:2, 74:16	<b>2019</b> [6] - 69:6, 69:21, 70:9, 70:21, 115:8	<b>5-1</b> [1] - 69:17	<b>account</b> [2] - 29:22, 83:9
<b>\$7600</b> [1] - 80:13	<b>15F</b> [2] - 75:3, 75:22	<b>2020</b> [2] - 71:19, 72:13	<b>5-6</b> [1] - 73:10	<b>ACCURATE</b> [1] - 194:3
<b>\$8500</b> [1] - 154:17	<b>15th</b> [1] - 26:21	<b>2021</b> [3] - 72:22, 75:9, 75:14	<b>5/12</b> [1] - 95:7	<b>accurate</b> [1] - 145:25
<b>\$950</b> [1] - 78:2	<b>16</b> [3] - 26:10, 141:17, 168:11	<b>2022</b> [3] - 34:20, 74:22, 147:8	<b>5/12/15</b> [1] - 135:14	<b>accurately</b> [1] - 44:3
<b>\$9500</b> [1] - 92:10	<b>160</b> [1] - 126:19	<b>2023</b> [2] - 88:13, 157:4	<b>5/14/2015</b> [1] - 67:10	<b>achieve</b> [1] - 82:24
<b>'15</b> [2] - 94:17, 94:18	<b>17</b> [4] - 69:6, 87:15, 115:8, 126:3	<b>2024</b> [10] - 26:10, 87:6, 87:10, 87:11, 87:15, 89:21, 89:23, 157:13, 158:5, 194:2	<b>50</b> [1] - 28:20	<b>acknowledges</b> [1] - 124:1
<b>'23</b> [1] - 158:5	<b>17th</b> [2] - 69:8, 70:21	<b>21</b> [4] - 35:9, 35:13, 145:16, 148:4	<b>500</b> [2] - 111:7, 111:10	<b>acromioclavicular</b> [15] - 47:4, 101:14, 102:22, 122:4, 173:12, 173:13, 175:10, 175:12, 175:15, 175:18, 175:23, 181:3, 187:24, 188:1
<b>1</b> [8] - 29:18, 63:4, 179:8, 179:17, 179:20, 179:24, 180:14, 180:19	<b>18</b> [5] - 191:10, 192:7, 192:14	<b>22</b> [2] - 74:22, 150:2	<b>51</b> [1] - 57:18	<b>acromion</b> [9] - 103:1, 104:13, 137:12, 137:13, 137:14, 143:13, 173:13, 177:3, 179:4
<b>1-10</b> [1] - 26:6	<b>180</b> [2] - 132:22, 132:24	<b>22-year-old</b> [13] - 58:5, 59:8, 59:16, 59:21, 60:4, 60:7, 105:23, 105:25, 106:1, 174:22, 174:25, 175:8, 186:10	<b>535</b> [1] - 26:21	<b>active</b> [1] - 55:7
<b>1-A</b> [2] - 54:3, 94:15	<b>19</b> [3] - 136:17, 136:18, 194:2	<b>23</b> [2] - 169:12, 169:13	<b>535359/2022</b> [1] - 26:5	<b>activities</b> [1] - 175:10
<b>10</b> [4] - 184:8, 184:12, 184:13, 184:14	<b>1979</b> [1] - 39:10	<b>25</b> [3] - 64:14, 87:15, 132:12	<b>56th</b> [1] - 126:19	<b>actual</b> [5] - 110:3,
<b>100</b> [5] - 26:17, 36:4, 90:22, 132:20, 132:22	<b>1983</b> [1] - 39:11	<b>27</b> [1] - 40:16	<b>6</b> [6] - 75:11, 102:8, 102:17, 106:20, 106:23, 130:20	
<b>10001</b> [1] - 38:22	<b>1990</b> [2] - 39:18, 110:15	<b>27th</b> [1] - 89:20	<b>6/15/22</b> [1] - 145:22	
<b>10018</b> [1] - 26:21	<b>1994</b> [1] - 127:18	<b>28</b> [1] - 72:22	<b>60</b> [1] - 132:8	
<b>10022</b> [1] - 126:20	<b>1A</b> [2] - 53:21, 53:22	<b>29</b> [1] - 34:10	<b>7</b> [2] - 67:11, 75:13	
<b>10038</b> [1] - 26:17	<b>2</b> [22] - 34:20, 53:14, 54:20, 94:15, 95:9, 95:12, 102:21, 103:24, 104:13, 130:22, 138:18, 138:23, 143:22, 163:9, 163:10, 178:23, 179:4, 179:8, 179:9, 180:20, 186:13, 186:17	<b>2:10</b> [1] - 124:14	<b>8</b> [4] - 71:19, 72:13, 88:13, 157:4	
<b>10:30</b> [2] - 28:22, 29:3	<b>2/7/2017</b> [1] - 66:15	<b>2:15</b> [1] - 124:15	<b>8th</b> [1] - 26:21	
<b>11</b> [7] - 163:12, 163:13, 163:14, 163:16, 163:18, 163:22	<b>20</b> [8] - 34:12, 89:20, 110:21, 132:11, 140:24, 140:25, 141:3, 172:12	<b>2:20</b> [1] - 124:14	<b>90</b> [2] - 132:21, 132:23	
<b>11/9</b> [1] - 190:11	<b>200</b> [1] - 28:23	<b>2nd</b> [2] - 95:8, 100:12	<b>91</b> [2] - 26:1, 27:1	
<b>11201</b> [1] - 26:10	<b>2000</b> [2] - 86:7, 100:21	<b>3</b> [2] - 179:8, 180:20	<b>950</b> [1] - 80:12	
<b>12</b> [7] - 63:23, 92:10, 102:11, 108:8, 114:18, 171:25, 191:5	<b>2002</b> [1] - 40:20	<b>3-4</b> [1] - 73:10	<b>9:00</b> [1] - 28:21	
<b>12/27/16</b> [1] - 168:2	<b>2013</b> [1] - 110:24	<b>3-4/5-6</b> [1] - 73:13	<b>9:30</b> [1] - 28:22	
<b>1205</b> [1] - 26:17	<b>2015</b> [38] - 45:23, 48:16, 48:21, 51:24, 53:14, 55:24, 62:10, 73:9, 94:19, 95:9, 95:12, 100:12, 102:8, 102:11, 102:17, 102:21, 103:24, 103:25, 105:16, 105:20, 106:20, 106:23, 107:1, 108:8, 108:11, 109:12, 111:4, 130:20,	<b>3/2/15</b> [1] - 190:14	<b>abduction</b> [2] - 132:21, 132:23	
<b>12A</b> [6] - 56:7, 105:17, 106:24, 109:11, 109:13, 109:15		<b>30</b> [4] - 29:4, 58:23, 58:24, 132:12	<b>ability</b> [2] - 139:21, 192:11	
<b>12B</b> [4] - 106:6, 106:8, 106:9, 106:24		<b>3101</b> [3] - 32:23, 35:2, 36:2	<b>able</b> [6] - 50:8, 54:8, 146:13, 149:21, 151:24, 186:18	
<b>12C</b> [3] - 70:19, 70:20, 70:25		<b>34th</b> [1] - 38:21	<b>ablate</b> [1] - 141:14	
<b>12E</b> [2] - 72:16, 72:17		<b>360</b> [1] - 26:9	<b>able</b> [6] - 50:8, 54:8, 146:13, 149:21, 151:24, 186:18	
<b>12th</b> [7] - 45:23, 48:16, 48:21, 51:24, 95:7, 103:25, 108:10		<b>3:00</b> [1] - 126:3	<b>abnormal</b> [1] - 72:1	
<b>13</b> [1] - 114:17		<b>4</b> [4] - 57:5, 75:11, 179:8, 180:21	<b>abnormalities</b> [2] - 129:7, 129:8	
<b>130</b> [1] - 133:6		<b>4-5</b> [1] - 73:10	<b>abnormality</b> [1] - 96:10	
<b>14</b> [5] - 55:24, 62:10, 105:16, 105:20, 107:1		<b>450</b> [3] - 80:4, 80:9, 80:16	<b>abrasion</b> [1] - 131:10	
<b>145</b> [1] - 133:6			<b>abrasions</b> [1] - 132:5	
<b>15</b> [3] - 66:17, 100:21,			<b>absence</b> [1] - 76:13	

<p>114:9, 123:25, 145:25, 165:20</p> <p><b>acute</b> [7] - 170:11, 170:14, 171:1, 171:2, 171:10, 171:15</p> <p><b>Adams</b> [1] - 26:9</p> <p><b>add</b> [1] - 146:22</p> <p><b>addition</b> [2] - 84:3, 152:19</p> <p><b>additional</b> [4] - 33:18, 33:19, 33:21, 128:2</p> <p><b>additionally</b> [2] - 119:23, 134:14</p> <p><b>address</b> [3] - 29:20, 38:20, 126:17</p> <p><b>addressed</b> [4] - 35:9, 35:10, 146:20, 152:22</p> <p><b>adhesions</b> [6] - 144:21, 144:23, 145:4, 145:5, 145:24, 147:11</p> <p><b>adhesive</b> [2] - 144:23, 146:6</p> <p><b>adjourned</b> [1] - 194:1</p> <p><b>administrative</b> [1] - 38:10</p> <p><b>admonished</b> [1] - 114:12</p> <p><b>admonitions</b> [1] - 124:16</p> <p><b>adolescent</b> [2] - 99:11, 99:17</p> <p><b>adolescents</b> [1] - 99:5</p> <p><b>adopt</b> [1] - 97:11</p> <p><b>advance</b> [2] - 27:18, 66:23</p> <p><b>Advanced</b> [1] - 69:6</p> <p><b>advice</b> [1] - 84:14</p> <p><b>advised</b> [1] - 37:15</p> <p><b>affect</b> [3] - 175:11, 181:24, 182:20</p> <p><b>affiliated</b> [1] - 165:18</p> <p><b>affiliations</b> [2] - 41:7, 128:21</p> <p><b>affirmation</b> [1] - 35:19</p> <p><b>aftermath</b> [1] - 144:9</p> <p><b>afternoon</b> [5] - 79:7, 79:8, 85:10, 127:4, 130:4</p> <p><b>age</b> [2] - 77:10, 99:17</p> <p><b>aggravated</b> [2] - 120:20, 121:2</p> <p><b>aggravation</b> [2] - 120:14, 120:23</p> <p><b>aggressive</b> [1] - 144:25</p> <p><b>aggressively</b> [1] - 96:15</p>	<p><b>ago</b> [3] - 37:5, 95:1, 159:20</p> <p><b>agree</b> [19] - 31:2, 32:8, 36:4, 87:23, 93:9, 95:5, 95:15, 95:25, 96:24, 97:11, 98:16, 98:20, 99:2, 111:6, 138:16, 164:12, 177:10, 178:16, 183:7</p> <p><b>agreed</b> [1] - 97:15</p> <p><b>agreement</b> [1] - 61:17</p> <p><b>agrees</b> [1] - 32:23</p> <p><b>ahead</b> [4] - 37:1, 136:19, 174:9, 181:21</p> <p><b>aid</b> [9] - 44:11, 62:9, 66:10, 69:4, 140:12, 140:16, 141:4, 145:15, 149:24</p> <p><b>aids</b> [2] - 43:20, 140:10</p> <p><b>air</b> [1] - 155:18</p> <p><b>Albert</b> [1] - 39:13</p> <p><b>alert</b> [1] - 125:17</p> <p><b>alive</b> [1] - 112:7</p> <p><b>allergy</b> [1] - 133:12</p> <p><b>allow</b> [4] - 31:17, 134:2, 143:4, 151:16</p> <p><b>allowed</b> [5] - 32:13, 33:12, 33:22, 119:14, 119:15</p> <p><b>allows</b> [4] - 141:8, 143:8, 148:9</p> <p><b>almost</b> [3] - 67:11, 70:2, 191:14</p> <p><b>alone</b> [2] - 28:10, 119:11</p> <p><b>alright</b> [9] - 43:14, 48:10, 79:1, 92:20, 127:6, 135:3, 136:14, 136:18, 156:2</p> <p><b>ambulate</b> [1] - 132:2</p> <p><b>America</b> [1] - 41:9</p> <p><b>American</b> [4] - 40:6, 128:6, 128:23, 128:24</p> <p><b>amicably</b> [2] - 111:25, 112:4</p> <p><b>amount</b> [14] - 28:25, 31:24, 32:6, 32:7, 32:9, 77:21, 83:24, 106:19, 128:8, 144:18, 144:19, 171:23, 181:5, 181:8</p> <p><b>amounts</b> [1] - 29:1</p> <p><b>anatomic</b> [1] - 128:13</p> <p><b>anatomical</b> [1] - 52:5</p> <p><b>anatomically</b> [1] -</p>	<p>52:3</p> <p><b>anatomy</b> [6] - 46:8, 48:24, 49:21, 50:3, 148:12, 153:4</p> <p><b>anchor</b> [1] - 146:23</p> <p><b>anchored</b> [1] - 146:16</p> <p><b>anchoring</b> [1] - 179:15</p> <p><b>AND</b> [2] - 26:3, 194:3</p> <p><b>anesthesia</b> [2] - 144:1, 144:2</p> <p><b>ankle</b> [71] - 42:7, 43:10, 93:10, 94:4, 94:5, 94:7, 94:9, 129:16, 133:10, 147:24, 147:25, 148:1, 148:6, 148:7, 149:1, 149:3, 149:5, 149:16, 149:18, 149:19, 149:20, 149:23, 150:11, 150:14, 151:22, 152:23, 153:3, 153:7, 160:13, 160:15, 167:21, 167:22, 167:24, 168:1, 168:4, 168:8, 168:19, 169:2, 170:12, 172:7, 172:24, 184:9, 185:1, 185:12, 185:17, 186:15, 186:18, 188:10, 188:23, 189:5, 189:7, 189:9, 190:1, 190:3, 190:12, 190:15, 190:18, 190:20, 190:22, 191:5, 191:11, 191:14, 191:15, 191:24, 193:5</p> <p><b>annoyance</b> [1] - 190:24</p> <p><b>annoying</b> [2] - 148:22, 149:1</p> <p><b>annulus</b> [5] - 50:21, 51:22, 56:14, 57:13, 74:10</p> <p><b>answer</b> [34] - 33:11, 34:19, 60:7, 68:9, 68:12, 79:18, 82:9, 83:21, 89:16, 91:17, 92:11, 98:13, 98:15, 99:13, 99:16, 100:11, 101:5, 105:8, 105:10, 107:4, 107:22, 108:5, 108:24, 115:5, 120:22, 123:10, 123:14, 123:17, 134:2,</p>	<p>139:2, 150:21, 169:24, 170:16</p> <p><b>answered</b> [5] - 62:1, 68:10, 68:14, 104:22, 170:9</p> <p><b>answering</b> [1] - 178:24</p> <p><b>answers</b> [1] - 83:18</p> <p><b>antalgic</b> [3] - 132:3, 189:10, 189:11</p> <p><b>anterior</b> [4] - 57:16, 67:6, 69:12, 115:14</p> <p><b>anterolisthesis</b> [2] - 63:3, 63:4</p> <p><b>antibiotics</b> [1] - 128:14</p> <p><b>anticipate</b> [3] - 38:5, 153:12, 153:19</p> <p><b>anticipation</b> [1] - 35:21</p> <p><b>antiinflammatory</b> [1] - 139:14</p> <p><b>anyplace</b> [1] - 61:15</p> <p><b>anyway</b> [4] - 36:11, 91:8, 118:14, 122:1</p> <p><b>apologies</b> [1] - 36:17</p> <p><b>apologize</b> [4] - 30:7, 36:18, 92:12, 153:18</p> <p><b>appear</b> [4] - 29:24, 45:9, 87:15, 190:8</p> <p><b>appearance</b> [2] - 90:4, 90:9</p> <p><b>appearances</b> [2] - 91:24, 92:23</p> <p><b>appeared</b> [5] - 91:2, 91:9, 91:18, 174:11, 190:25</p> <p><b>appearing</b> [1] - 91:21</p> <p><b>applying</b> [2] - 42:8, 129:17</p> <p><b>appreciate</b> [1] - 155:23</p> <p><b>approach</b> [4] - 56:19, 111:12, 111:14, 125:6</p> <p><b>appropriate</b> [2] - 94:1, 134:23</p> <p><b>approved</b> [2] - 29:1, 165:4</p> <p><b>area</b> [10] - 47:17, 49:24, 57:9, 110:12, 134:21, 135:17, 146:24, 151:20, 170:1</p> <p><b>areas</b> [2] - 143:5, 146:8</p> <p><b>argue</b> [1] - 174:5</p> <p><b>arguing</b> [1] - 28:12</p> <p><b>argumentative</b> [2] - 121:18, 191:18</p>	<p><b>arguments</b> [1] - 118:15</p> <p><b>arm</b> [12] - 46:18, 52:18, 53:2, 137:2, 137:5, 137:12, 137:17, 142:4, 142:11, 143:12, 144:10</p> <p><b>arms</b> [3] - 52:22, 53:6, 134:8</p> <p><b>arthritic</b> [3] - 153:8, 153:9, 153:24</p> <p><b>arthritis</b> [3] - 141:8, 152:23, 153:7</p> <p><b>arthro</b> [1] - 141:7</p> <p><b>arthroscope</b> [3] - 141:7, 149:19, 151:14</p> <p><b>arthroscopy</b> [4] - 141:6, 141:7, 145:23, 149:18</p> <p><b>artist</b> [1] - 172:18</p> <p><b>assassination</b> [1] - 114:6</p> <p><b>assessment</b> [2] - 130:23, 142:8</p> <p><b>assist</b> [2] - 43:22, 140:12</p> <p><b>associate</b> [1] - 130:18</p> <p><b>associated</b> [2] - 110:19, 153:10</p> <p><b>ASSOCIATES</b> [1] - 26:16</p> <p><b>Association</b> [1] - 128:24</p> <p><b>association</b> [2] - 110:25</p> <p><b>assume</b> [12] - 87:19, 87:20, 117:21, 118:2, 119:1, 121:21, 121:22, 138:1, 139:3, 177:13, 177:15, 186:10</p> <p><b>assuming</b> [2] - 32:5, 117:4</p> <p><b>Athletic</b> [2] - 128:18, 128:22</p> <p><b>attached</b> [3] - 47:5, 149:20</p> <p><b>attaches</b> [2] - 47:15, 47:16</p> <p><b>attempt</b> [2] - 139:21, 144:19</p> <p><b>attorney</b> [2] - 157:10, 157:11</p> <p><b>Attorney</b> [1] - 26:20</p> <p><b>attorneys</b> [1] - 111:7</p> <p><b>Attorneys</b> [1] - 26:16</p> <p><b>audience</b> [1] - 44:23</p>
---	---	--	---	--

<p><b>August</b> [4] - 69:6, 70:21, 74:22, 115:8</p> <p><b>authorization</b> [2] - 34:8, 165:3</p> <p><b>auto</b> [1] - 35:18</p> <p><b>available</b> [1] - 28:14</p> <p><b>Avenue</b> [1] - 26:21</p> <p><b>aware</b> [5] - 97:18, 98:6, 122:11, 169:7, 169:16</p> <p><b>axial</b> [2] - 62:11, 75:7</p> <p><b>babying</b> [1] - 132:4</p> <p><b>bad</b> [1] - 57:20</p> <p><b>balance</b> [1] - 153:20</p> <p><b>balloon</b> [1] - 73:21</p> <p><b>bar</b> [3] - 69:16, 165:6, 174:15</p> <p><b>baseball</b> [2] - 123:18, 123:21</p> <p><b>based</b> [6] - 93:22, 121:22, 153:3, 161:10, 165:4, 182:23</p> <p><b>basis</b> [2] - 112:21, 114:4</p> <p><b>BE</b> [1] - 194:3</p> <p><b>bear</b> [2] - 108:7, 110:8</p> <p><b>beautiful</b> [1] - 76:22</p> <p><b>became</b> [4] - 39:11, 39:13, 39:17, 110:15</p> <p><b>become</b> [4] - 40:5, 40:24, 77:7, 148:23</p> <p><b>becomes</b> [3] - 143:2, 143:9, 151:9</p> <p><b>began</b> [3] - 106:2, 111:5, 182:9</p> <p><b>beginning</b> [1] - 134:21</p> <p><b>begins</b> [1] - 147:4</p> <p><b>behalf</b> [2] - 88:2, 88:13</p> <p><b>behind</b> [1] - 109:14</p> <p><b>believes</b> [1] - 97:16</p> <p><b>below</b> [3] - 137:8, 137:18, 191:14</p> <p><b>belts</b> [1] - 32:24</p> <p><b>bench</b> [5] - 56:21, 92:18, 111:16, 125:8, 174:16</p> <p><b>bending</b> [1] - 132:11</p> <p><b>beneath</b> [1] - 137:14</p> <p><b>best</b> [5] - 30:25, 36:21, 45:15, 94:10, 96:17</p> <p><b>better</b> [11] - 54:25, 62:21, 64:25, 69:10, 71:19, 79:17, 98:15, 151:22, 153:24, 154:1, 187:25</p> <p><b>between</b> [28] - 31:11, 50:10, 51:19, 52:14, 54:21, 55:3, 55:11,</p>	<p>57:4, 57:5, 57:10, 62:25, 64:22, 69:8, 75:11, 75:12, 137:11, 142:10, 143:3, 143:5, 148:20, 148:21, 151:5, 151:13, 170:24, 172:11, 173:13, 175:16, 178:6</p> <p><b>beyond</b> [1] - 93:4</p> <p><b>biceps</b> [1] - 142:18</p> <p><b>bicuspid</b> [1] - 134:10</p> <p><b>big</b> [4] - 81:21, 149:12, 149:14</p> <p><b>bigger</b> [2] - 70:22, 96:18</p> <p><b>bilateral</b> [1] - 62:22</p> <p><b>bill</b> [3] - 162:20, 162:22, 162:23</p> <p><b>billed</b> [5] - 32:7, 36:7, 36:8, 36:9, 162:17</p> <p><b>biller</b> [1] - 80:10</p> <p><b>billing</b> [9] - 28:25, 31:21, 31:22, 31:25, 80:10, 162:5, 162:6, 164:9</p> <p><b>bills</b> [2] - 32:11, 162:4</p> <p><b>bit</b> [21] - 39:7, 40:12, 41:6, 46:8, 51:3, 51:5, 51:16, 51:20, 57:20, 69:1, 71:19, 76:15, 76:16, 97:2, 101:17, 127:20, 128:11, 130:16, 141:25, 144:24, 187:22</p> <p><b>biter</b> [1] - 141:12</p> <p><b>black</b> [7] - 47:8, 47:14, 47:16, 47:19, 69:18, 69:19, 71:21</p> <p><b>blade</b> [7] - 137:6, 137:7, 137:13, 142:11, 142:12, 142:15, 175:16</p> <p><b>bleeding</b> [1] - 141:14</p> <p><b>blocking</b> [2] - 151:25, 152:2</p> <p><b>blood</b> [2] - 144:5, 144:6</p> <p><b>blow</b> [3] - 94:2, 104:4, 104:6</p> <p><b>blown</b> [1] - 93:24</p> <p><b>blowups</b> [5] - 43:21, 43:25, 44:3, 93:14, 94:8</p> <p><b>board</b> [12] - 39:17, 39:23, 39:24, 48:15, 59:5, 59:6, 127:23, 127:25, 128:2,</p>	<p>128:10, 128:24, 145:19</p> <p><b>Board</b> [5] - 40:5, 40:6, 128:6, 128:24</p> <p><b>bodies</b> [2] - 41:3, 182:2</p> <p><b>body</b> [23] - 41:24, 42:11, 43:7, 43:11, 46:9, 48:24, 53:25, 54:10, 60:16, 61:20, 67:19, 76:5, 76:18, 77:6, 82:18, 82:19, 85:25, 96:21, 105:18, 132:23, 147:2, 147:4, 183:11</p> <p><b>bone</b> [83] - 46:11, 46:14, 46:16, 46:20, 47:5, 47:16, 49:5, 49:19, 50:1, 50:5, 50:19, 50:20, 50:21, 50:25, 51:15, 51:19, 51:20, 52:15, 54:19, 54:23, 55:1, 55:11, 56:14, 56:15, 56:16, 56:25, 57:1, 57:6, 57:7, 57:8, 57:10, 57:11, 62:23, 63:1, 63:2, 63:5, 63:6, 64:18, 69:14, 69:15, 77:8, 101:18, 107:16, 107:17, 107:19, 107:20, 107:22, 128:15, 132:7, 137:2, 137:12, 137:18, 142:11, 143:4, 143:6, 143:13, 146:17, 146:23, 146:24, 146:25, 148:1, 148:9, 148:13, 148:16, 148:20, 148:24, 149:21, 150:7, 151:7, 151:23, 172:11, 175:22, 179:15, 188:4</p> <p><b>bones</b> [43] - 49:3, 49:17, 50:2, 50:3, 50:6, 50:9, 50:10, 50:11, 50:14, 54:19, 55:4, 55:5, 56:12, 56:14, 57:4, 62:24, 63:6, 64:17, 64:18, 64:21, 64:22, 68:25, 69:2, 71:11, 71:12, 72:5, 73:8, 75:2, 77:3, 77:4, 77:7, 77:8, 101:17, 107:17, 107:18, 109:23, 110:5,</p>	<p>129:4, 129:5, 148:8, 148:15, 148:21</p> <p><b>bony</b> [6] - 47:3, 148:18, 178:6, 181:14, 181:15, 190:23</p> <p><b>book</b> [3] - 54:12, 54:13</p> <p><b>born</b> [4] - 49:5, 50:13, 50:16, 76:22</p> <p><b>bottom</b> [5] - 47:10, 49:12, 49:25, 55:9, 82:12</p> <p><b>box</b> [1] - 125:15</p> <p><b>Boxing</b> [1] - 128:17</p> <p><b>boy</b> [1] - 186:12</p> <p><b>brain</b> [4] - 49:1, 52:11, 100:13, 101:8</p> <p><b>bread</b> [5] - 49:10, 49:12, 49:13</p> <p><b>break</b> [8] - 78:16, 78:20, 124:23, 125:23, 148:19, 155:17, 155:24, 172:23</p> <p><b>breaking</b> [5] - 148:20, 148:21, 151:7, 151:8</p> <p><b>breast</b> [6] - 40:14, 40:21, 40:23, 40:24, 41:4, 85:24</p> <p><b>Breast</b> [1] - 41:9</p> <p><b>breasts</b> [4] - 40:17, 40:18, 40:22, 40:23</p> <p><b>breath</b> [2] - 28:11, 192:19</p> <p><b>breathing</b> [1] - 175:10</p> <p><b>bridge</b> [1] - 189:1</p> <p><b>brief</b> [2] - 165:14, 189:17</p> <p><b>briefly</b> [2] - 73:18, 76:15</p> <p><b>bring</b> [1] - 87:8</p> <p><b>brittle</b> [2] - 76:24</p> <p><b>broad</b> [1] - 178:4</p> <p><b>broader</b> [1] - 174:21</p> <p><b>BRODY</b> [148] - 26:20, 26:22, 27:6, 27:10, 27:12, 27:15, 27:17, 29:8, 29:14, 29:18, 29:20, 29:24, 30:3, 30:9, 30:13, 30:21, 35:5, 35:8, 36:8, 36:12, 37:11, 38:9, 42:17, 44:15, 44:20, 45:6, 45:13, 52:2, 52:23, 53:15, 53:20, 53:24, 56:18, 58:8, 58:11, 58:14, 58:18, 59:3, 59:9, 59:14, 59:18, 60:1, 60:25,</p>	<p>61:5, 61:10, 61:22, 62:1, 64:2, 65:3, 66:18, 66:20, 67:24, 68:5, 68:10, 68:14, 78:12, 79:4, 79:6, 85:25, 87:2, 89:4, 89:15, 89:17, 90:3, 90:17, 91:7, 91:11, 93:15, 95:21, 97:11, 97:23, 100:17, 100:21, 101:9, 102:9, 110:11, 112:20, 113:1, 113:17, 114:7, 114:13, 116:11, 117:9, 117:11, 117:13, 118:1, 118:8, 118:12, 118:16, 118:19, 119:9, 120:11, 120:13, 121:25, 123:2, 123:22, 124:10, 125:6, 129:25, 133:23, 135:24, 138:9, 138:11, 138:21, 138:25, 140:17, 150:4, 150:15, 152:8, 155:13, 156:5, 156:7, 162:25, 163:8, 163:11, 163:14, 163:18, 163:24, 164:24, 165:14, 166:15, 167:13, 168:23, 169:12, 170:16, 171:9, 174:4, 174:11, 174:14, 176:10, 178:15, 183:18, 183:22, 183:24, 184:1, 184:4, 184:14, 185:6, 185:13, 186:4, 187:1, 189:14, 189:16, 189:17, 189:19, 189:23, 193:13, 193:18</p> <p><b>Brody</b> [6] - 29:7, 44:10, 61:16, 78:11, 160:21, 171:13</p> <p><b>broke</b> [1] - 151:6</p> <p><b>broken</b> [2] - 54:23, 107:16</p> <p><b>Bronx</b> [1] - 39:13</p> <p><b>Brooklyn</b> [3] - 26:10, 39:11</p> <p><b>brought</b> [3] - 93:7, 93:8, 119:12</p> <p><b>bruising</b> [1] - 132:6</p>
---	---	---	--	--

<p><b>buck</b> [1] - 92:25  <b>bucks</b> [1] - 80:13  <b>building</b> [1] - 87:16  <b>buildings</b> [1] - 125:18  <b>builds</b> [1] - 190:25  <b>built</b> [1] - 36:9  <b>bulge</b> [14] - 51:3, 51:4, 51:23, 55:9, 57:21, 66:25, 96:18, 96:19, 96:24, 97:3, 97:12, 97:17, 149:21, 151:12  <b>bulges</b> [17] - 51:9, 51:12, 51:19, 55:10, 58:25, 73:10, 73:13, 75:11, 95:22, 95:25, 96:6, 96:9, 96:17, 97:25, 98:10, 117:24, 118:2  <b>bulging</b> [5] - 96:10, 96:14, 108:12, 108:16, 114:22  <b>bump</b> [3] - 47:3, 57:12  <b>bumps</b> [1] - 175:17  <b>burns</b> [1] - 146:20  <b>bursa</b> [7] - 135:17, 143:1, 143:2, 143:7, 143:14  <b>bursal</b> [1] - 105:1  <b>bursitis</b> [3] - 104:25, 137:16, 137:22  <b>bus</b> [1] - 186:12  <b>BUSH</b> [1] - 26:6  <b>business</b> [3] - 31:20, 35:3, 162:9  <b>buttocks</b> [2] - 61:14, 68:23  <b>button</b> [1] - 137:2  <b>BY</b> [10] - 26:18, 26:22, 39:2, 79:5, 116:15, 120:12, 127:2, 156:6, 186:8, 189:15  <b>C1</b> [1] - 50:5  <b>C2</b> [1] - 50:6  <b>C3</b> [2] - 50:6, 75:11  <b>C3-4</b> [2] - 51:19, 55:10  <b>C3-C4</b> [1] - 52:6  <b>C4</b> [3] - 50:6, 52:15, 75:11  <b>C4-5</b> [4] - 51:20, 52:6, 55:11, 109:5  <b>C45</b> [1] - 55:9  <b>C5</b> [6] - 50:6, 52:15, 52:16, 75:11  <b>C5-6</b> [3] - 51:20, 52:6, 109:6  <b>C6</b> [3] - 50:6, 55:11, 75:13  <b>C6-7</b> [3] - 73:12, 73:14, 73:15</p>	<p><b>C7</b> [2] - 50:6, 74:7  <b>calcified</b> [1] - 148:14  <b>calendar</b> [1] - 38:3  <b>camera</b> [1] - 141:11  <b>Campbell</b> [1] - 127:15  <b>canal</b> [1] - 109:23  <b>cancel</b> [1] - 154:15  <b>Cancer</b> [1] - 41:9  <b>cancer</b> [4] - 40:14, 40:22, 40:23, 40:25  <b>cannot</b> [2] - 108:25, 120:2  <b>cap</b> [1] - 133:4  <b>capacity</b> [1] - 128:19  <b>capsulitis</b> [2] - 144:23, 146:6  <b>Cardiovascular</b> [1] - 69:6  <b>care</b> [15] - 51:9, 51:12, 81:10, 125:23, 141:1, 153:13, 153:14, 160:8, 161:11, 161:16, 162:13, 162:17, 162:25, 188:6, 188:9  <b>careers</b> [1] - 165:4  <b>CARMEN</b> [1] - 26:3  <b>cart</b> [2] - 93:20, 164:21  <b>cartilage</b> [3] - 142:15, 142:17, 143:17  <b>cartilages</b> [1] - 129:6  <b>case</b> [78] - 32:5, 32:10, 32:20, 32:21, 35:10, 36:25, 38:4, 38:11, 42:5, 42:21, 67:17, 77:24, 78:16, 79:23, 79:25, 81:2, 82:8, 82:17, 82:20, 83:2, 83:10, 83:23, 84:4, 84:8, 84:9, 85:4, 87:1, 87:4, 87:5, 87:6, 87:13, 87:16, 88:13, 89:9, 89:20, 89:24, 90:10, 90:21, 91:6, 93:6, 111:6, 113:6, 113:12, 124:17, 128:6, 129:14, 133:22, 139:20, 148:6, 148:16, 148:24, 151:6, 152:1, 152:15, 154:19, 154:25, 156:16, 156:23, 157:5, 157:14, 158:13, 158:20, 159:11, 161:24, 162:14, 162:18, 162:24, 162:25, 167:6, 167:8, 167:16,</p>	<p>167:18, 173:10, 187:12, 188:19, 193:20, 193:22  <b>cases</b> [16] - 35:18, 78:3, 86:22, 88:18, 88:24, 89:1, 89:5, 89:14, 90:18, 91:1, 91:5, 91:11, 91:14, 91:18, 91:21, 92:7  <b>CAT</b> [18] - 41:3, 41:19, 41:21, 42:3, 53:11, 53:13, 54:6, 54:7, 54:14, 54:15, 54:21, 54:22, 74:21, 75:4, 75:10, 80:1, 80:12, 85:25  <b>causally</b> [10] - 145:10, 147:9, 147:13, 154:4, 154:10, 183:4, 183:9, 183:17, 186:21, 190:17  <b>causation</b> [3] - 117:3, 121:23, 121:25  <b>caused</b> [25] - 96:24, 97:3, 97:13, 98:17, 98:21, 101:20, 106:13, 117:8, 117:19, 118:6, 119:7, 119:23, 120:15, 120:23, 121:9, 124:2, 148:24, 150:8, 150:14, 151:7, 173:24, 183:8, 186:17, 191:23, 193:5  <b>causes</b> [10] - 101:19, 120:24, 122:13, 122:22, 122:23, 134:8, 146:21, 173:6, 173:16, 174:8  <b>causing</b> [4] - 152:13, 176:21, 177:7, 177:25  <b>cement</b> [5] - 42:6, 118:3, 119:4, 129:15, 139:4  <b>Center</b> [5] - 39:16, 53:23, 131:20, 167:7, 190:14  <b>center</b> [1] - 63:22  <b>certain</b> [10] - 28:1, 43:18, 43:20, 52:19, 92:2, 97:25, 121:21, 121:22, 128:8, 130:4  <b>certainly</b> [7] - 31:22, 44:12, 88:16, 152:22, 164:13, 167:20, 175:19</p>	<p><b>certainty</b> [11] - 43:14, 117:7, 118:6, 119:7, 130:6, 130:9, 138:6, 139:8, 154:3, 186:16, 193:3  <b>certification</b> [1] - 128:2  <b>CERTIFIED</b> [1] - 194:3  <b>certified</b> [8] - 39:14, 39:17, 39:23, 39:24, 127:23, 127:25, 128:10, 128:24  <b>Certified</b> [1] - 40:7  <b>cervical</b> [19] - 43:8, 48:16, 50:2, 50:5, 51:18, 52:12, 54:2, 54:17, 56:13, 57:3, 72:23, 73:7, 74:21, 75:9, 75:17, 94:22, 108:6, 108:7, 134:6  <b>chair</b> [1] - 94:13  <b>chambers</b> [4] - 28:15, 30:16, 31:9, 31:14  <b>chance</b> [4] - 33:2, 33:3, 44:10, 69:3  <b>change</b> [12] - 29:25, 30:4, 48:9, 68:3, 68:7, 68:10, 125:22, 173:8, 173:21, 175:7, 175:9  <b>changed</b> [7] - 29:18, 29:20, 66:23, 67:12, 69:1, 73:13, 79:14  <b>changes</b> [18] - 101:13, 101:16, 101:19, 101:21, 103:23, 104:20, 105:4, 105:9, 122:3, 173:6, 173:25, 177:25, 180:25, 181:25, 182:3, 182:4, 187:24  <b>changing</b> [1] - 83:18  <b>character</b> [1] - 114:5  <b>characterization</b> [1] - 31:3  <b>charge</b> [4] - 77:23, 80:15, 90:23, 154:21  <b>charged</b> [3] - 80:4, 91:2, 92:25  <b>charges</b> [1] - 125:14  <b>charging</b> [2] - 77:18, 154:11  <b>chart</b> [1] - 165:1  <b>charts</b> [1] - 52:20  <b>check</b> [6] - 72:13, 95:5, 95:6, 106:22, 110:9, 176:1  <b>chickens</b> [1] - 37:9  <b>chose</b> [2] - 85:16, 104:11</p>	<p><b>chronic</b> [4] - 178:18, 188:24, 188:25, 189:4  <b>chronological</b> [1] - 44:24  <b>circle</b> [2] - 66:24, 180:19  <b>circles</b> [1] - 50:14  <b>circular</b> [1] - 180:21  <b>circumstance</b> [2] - 60:24, 110:6  <b>City</b> [2] - 39:9, 127:14  <b>CIVIL</b> [1] - 26:1  <b>Civil</b> [1] - 87:15  <b>claim</b> [5] - 93:10, 101:6, 101:7, 113:25  <b>claiming</b> [1] - 119:25  <b>claims</b> [1] - 32:22  <b>clarify</b> [3] - 28:1, 30:22, 171:12  <b>clavicle</b> [2] - 47:1, 173:13  <b>clean</b> [3] - 142:24, 145:4, 146:22  <b>cleaned</b> [1] - 145:5  <b>cleaning</b> [2] - 143:19, 179:14  <b>clear</b> [7] - 38:19, 100:3, 115:6, 124:20, 126:16, 161:9, 191:23  <b>clearly</b> [2] - 57:24, 181:10  <b>Clerk</b> [2] - 38:17, 126:14  <b>CLERK</b> [8] - 38:19, 38:23, 63:16, 70:17, 126:16, 126:21, 126:23, 136:17  <b>client</b> [1] - 160:24  <b>client's</b> [1] - 31:7  <b>clients</b> [3] - 155:8, 159:3, 167:1  <b>Clinic</b> [1] - 127:15  <b>clinical</b> [6] - 188:11, 188:12, 188:14, 188:21, 193:7, 193:9  <b>clinically</b> [1] - 172:5  <b>close</b> [1] - 77:7  <b>closer</b> [1] - 77:3  <b>coagulate</b> [1] - 146:21  <b>coagulation</b> [1] - 141:13  <b>COHEN</b> [1] - 26:12  <b>Cohen</b> [1] - 27:2  <b>collarbone</b> [2] - 47:2, 175:16  <b>collateral</b> [1] - 92:16  <b>collect</b> [1] - 162:11  <b>collected</b> [2] - 171:3,</p>
--	---	---	--	--

<p>181:10  <b>collection</b> [1] - 146:2  <b>collects</b> [1] - 189:2  <b>College</b> [2] - 39:9,  39:13  <b>college</b> [3] - 127:12,  127:13, 128:3  <b>colonel</b> [1] - 36:17  <b>Columbia</b> [2] - 39:16,  127:13  <b>Columbia-</b>  <b>Presbyterian</b> [1] -  39:16  <b>column</b> [1] - 49:3  <b>comfortable</b> [1] -  32:19  <b>coming</b> [7] - 48:25,  57:12, 60:19, 62:19,  67:18, 71:13, 160:5  <b>comment</b> [1] - 116:2  <b>comments</b> [1] -  115:19  <b>Commission</b> [1] -  128:22  <b>common</b> [4] - 55:2,  105:24, 105:25,  143:7  <b>commonly</b> [1] - 99:14  <b>communications</b> [2] -  89:6, 89:10  <b>community</b> [1] - 97:16  <b>Comp</b> [10] - 28:24,  31:24, 32:6, 32:9,  32:13, 32:15, 32:20,  32:23, 36:9  <b>company</b> [1] - 84:24  <b>compare</b> [3] - 65:8,  75:13, 187:14  <b>compared</b> [1] - 43:25  <b>comparing</b> [1] - 40:16  <b>competent</b> [13] -  47:22, 55:15, 58:2,  60:10, 63:9, 67:20,  68:16, 72:10, 74:12,  75:19, 133:20,  152:5, 152:11  <b>complain</b> [4] - 42:10,  149:15, 173:1,  190:20  <b>complained</b> [5] -  138:4, 139:3, 139:5,  149:3, 149:4  <b>complaining</b> [6] -  74:15, 119:20,  131:7, 182:5,  191:11, 192:8  <b>complaint</b> [2] -  134:12, 192:10  <b>complaints</b> [24] -  60:23, 61:3, 117:6,</p>	<p>117:22, 117:23,  118:7, 119:2, 119:5,  119:8, 120:3, 131:2,  131:5, 131:11,  133:10, 133:17,  134:3, 134:14,  138:2, 139:9,  150:10, 186:14,  186:15, 187:11,  191:9  <b>complete</b> [2] - 81:1,  184:19  <b>completed</b> [1] - 82:13  <b>completely</b> [3] - 51:7,  192:2, 192:4  <b>complication</b> [1] -  144:21  <b>compress</b> [1] - 109:23  <b>compromised</b> [2] -  115:24  <b>computer</b> [1] - 85:17  <b>Con</b> [1] - 125:17  <b>concerned</b> [2] - 29:9,  188:7  <b>concerning</b> [1] - 92:16  <b>conclude</b> [1] - 118:24  <b>conclusion</b> [2] -  58:15, 119:21  <b>condition</b> [33] - 67:13,  69:22, 72:9, 74:7,  99:3, 99:9, 138:7,  139:9, 150:7,  150:14, 152:5,  152:11, 153:9,  153:20, 154:9,  173:16, 174:24,  175:19, 178:5,  178:6, 178:7, 183:8,  186:18, 186:25,  188:24, 188:25,  189:6, 191:4, 191:6,  191:23, 192:9,  192:13  <b>conditions</b> [10] - 76:9,  76:12, 99:8, 102:16,  152:20, 152:21,  152:24, 153:24,  174:21, 175:4  <b>conducted</b> [1] - 40:10  <b>conference</b> [1] - 38:3  <b>conferences</b> [1] -  41:13  <b>confine</b> [1] - 87:3  <b>conflict</b> [1] - 126:7  <b>congenital</b> [4] - 99:2,  99:9, 191:1, 191:4  <b>congenitally</b> [1] -  99:24  <b>connect</b> [1] - 158:18  <b>connected</b> [3] -</p>	<p>136:25, 148:15,  151:3  <b>connecting</b> [1] - 69:16  <b>connection</b> [7] -  32:20, 32:21, 58:17,  93:5, 134:1, 148:18,  160:23  <b>consciousness</b> [1] -  131:19  <b>consecutive</b> [1] -  40:16  <b>consent</b> [1] - 163:18  <b>consequence</b> [3] -  61:7, 61:8, 147:10  <b>conservative</b> [8] -  129:8, 139:23,  139:24, 139:25,  140:2, 140:4,  164:25, 187:9  <b>conservatively</b> [1] -  149:7  <b>consider</b> [1] - 115:5  <b>consistent</b> [8] - 96:14,  115:12, 132:13,  133:3, 135:18,  143:22, 143:23,  171:24  <b>constitutes</b> [1] - 31:24  <b>construction</b> [1] -  181:20  <b>consult</b> [1] - 42:21  <b>consultant</b> [1] - 36:3  <b>consultation</b> [1] -  33:20  <b>consulting</b> [4] - 35:23,  37:16, 93:6, 111:5  <b>consumption</b> [1] -  125:19  <b>contact</b> [4] - 78:17,  130:16, 161:22,  193:22  <b>contacted</b> [1] - 89:23  <b>contain</b> [1] - 28:25  <b>contained</b> [3] - 56:2,  73:24, 113:12  <b>contains</b> [5] - 57:17,  67:5, 67:7, 73:16,  73:23  <b>contends</b> [2] - 42:5,  129:14  <b>contents</b> [2] - 27:25,  31:6  <b>continue</b> [2] - 147:16,  147:18  <b>continued</b> [3] - 140:5,  144:24, 147:22  <b>contract</b> [1] - 137:4  <b>contracts</b> [1] - 144:24  <b>contusion</b> [4] - 133:3,  134:9, 134:10,</p>	<p>134:13  <b>convenient</b> [1] - 160:4  <b>coordinate</b> [1] - 28:19  <b>copy</b> [2] - 166:16,  185:3  <b>cord</b> [20] - 49:1, 49:2,  49:4, 49:22, 49:23,  51:11, 51:22, 52:8,  52:11, 52:12, 52:14,  71:13, 73:17, 73:19,  74:1, 74:3, 74:4,  74:6  <b>Cordova</b> [7] - 87:6,  87:13, 87:17, 89:9,  156:16, 156:19,  156:24  <b>Cornell</b> [1] - 89:25  <b>corner</b> [1] - 44:21  <b>correct</b> [143] - 32:3,  32:4, 34:23, 38:5,  56:3, 63:23, 64:5,  68:4, 73:4, 78:4,  78:7, 79:11, 79:22,  80:2, 80:3, 80:6,  80:9, 80:10, 80:11,  80:17, 81:13, 82:1,  82:13, 82:15, 83:7,  83:18, 84:1, 84:5,  84:10, 84:11, 84:17,  85:7, 85:11, 85:14,  85:18, 86:10, 86:13,  87:7, 87:25, 90:21,  90:24, 91:3, 93:11,  93:17, 94:16, 94:19,  94:20, 95:4, 95:14,  96:7, 96:12, 96:21,  97:3, 97:4, 97:13,  98:21, 99:18, 99:25,  100:2, 100:6,  100:25, 101:1,  101:4, 101:11,  101:12, 101:14,  105:14, 105:23,  106:3, 106:14,  106:15, 106:17,  106:18, 106:21,  106:22, 106:25,  107:6, 108:2,  108:13, 108:14,  108:17, 109:22,  109:24, 109:25,  110:16, 110:17,  115:10, 115:14,  115:15, 115:17,  115:18, 116:22,  116:23, 120:15,  120:21, 122:3,  124:4, 136:8,  141:18, 150:12,  155:7, 157:19,</p>	<p>159:12, 159:15,  159:16, 159:17,  159:18, 159:22,  160:1, 160:9,  161:11, 162:10,  165:21, 165:22,  165:25, 166:8,  167:2, 167:25,  170:8, 172:14,  172:17, 172:25,  173:12, 173:20,  179:11, 179:14,  181:8, 181:13,  182:10, 182:16,  183:11, 183:15,  183:17, 185:13,  187:5, 188:7,  190:18, 191:1,  191:7, 191:12,  192:3, 192:9, 193:10  <b>correctly</b> [1] - 109:21  <b>correlate</b> [2] - 52:19,  172:5  <b>correlation</b> [6] -  188:11, 188:12,  188:14, 188:21,  193:7, 193:9  <b>corresponded</b> [1] -  169:25  <b>corresponding</b> [3] -  45:20, 94:23, 95:2  <b>counsel</b> [14] - 30:10,  30:14, 34:21, 37:15,  70:17, 79:3, 81:20,  99:7, 117:3, 124:21,  140:11, 145:16,  150:3, 180:18  <b>Counsel</b> [1] - 97:10  <b>counting</b> [1] - 158:20  <b>COUNTY</b> [1] - 26:1  <b>couple</b> [6] - 91:9,  102:10, 144:11,  157:17, 158:25,  159:19  <b>course</b> [11] - 43:12,  59:20, 90:25,  121:19, 121:20,  125:19, 130:3,  130:10, 136:1,  162:12, 183:20  <b>court</b> [4] - 28:21, 91:3,  91:24  <b>COURT</b> [314] - 26:1,  26:25, 27:1, 27:4,  27:7, 27:9, 27:11,  27:13, 27:16, 27:20,  27:24, 29:13, 29:17,  29:19, 29:23, 30:2,  30:7, 30:12, 30:20,  30:22, 32:5, 33:9,</p>
---	--	---	---	---

33:25, 34:6, 34:17,  
34:22, 34:24, 35:7,  
35:14, 36:11, 36:13,  
37:4, 37:12, 37:15,  
37:21, 37:22, 37:23,  
37:25, 38:7, 38:11,  
38:24, 42:19, 44:8,  
44:9, 44:10, 44:13,  
44:22, 45:9, 45:17,  
45:19, 46:1, 46:3,  
48:12, 52:3, 52:24,  
53:3, 53:17, 53:22,  
53:25, 54:3, 56:1,  
56:20, 56:23, 57:22,  
58:9, 58:13, 58:16,  
58:19, 59:4, 59:6,  
59:10, 59:15, 59:19,  
59:25, 60:2, 61:1,  
61:6, 61:11, 61:16,  
61:23, 62:3, 63:23,  
63:25, 64:3, 64:7,  
65:5, 65:9, 65:15,  
65:19, 65:23, 66:2,  
66:5, 66:9, 67:25,  
68:2, 68:6, 68:8,  
68:11, 68:15, 70:18,  
70:20, 72:15, 72:17,  
72:24, 73:3, 78:11,  
78:13, 78:18, 78:23,  
79:1, 83:20, 84:8,  
85:23, 87:1, 87:3,  
87:19, 88:21, 89:3,  
89:12, 89:16, 89:18,  
90:1, 90:6, 90:8,  
90:13, 90:16, 91:5,  
91:8, 91:13, 91:20,  
92:12, 92:17, 92:20,  
93:1, 93:13, 93:19,  
94:5, 94:12, 95:10,  
95:19, 97:7, 97:10,  
97:21, 98:6, 100:16,  
100:19, 101:6,  
101:24, 102:1,  
102:20, 103:15,  
104:24, 107:3,  
109:15, 110:9,  
110:13, 111:9,  
111:13, 111:15,  
111:18, 111:23,  
112:2, 112:6,  
112:10, 112:14,  
112:19, 112:21,  
113:4, 113:8,  
113:15, 113:18,  
114:3, 114:8,  
114:15, 114:25,  
116:13, 117:10,  
117:12, 117:14,  
117:25, 118:9,  
118:14, 118:17,  
119:10, 119:25,

120:10, 120:17,  
121:18, 121:20,  
122:1, 122:25,  
123:3, 123:7,  
123:11, 123:20,  
123:23, 124:11,  
124:18, 124:20,  
124:25, 125:1,  
125:3, 125:7,  
125:10, 125:12,  
126:6, 126:12,  
126:25, 130:1,  
134:1, 135:23,  
136:1, 136:5, 136:9,  
138:10, 138:12,  
138:16, 138:19,  
138:22, 139:1,  
140:19, 140:23,  
140:25, 146:4,  
148:5, 150:1, 150:3,  
150:16, 150:20,  
152:9, 155:11,  
155:15, 155:20,  
155:22, 155:25,  
156:2, 157:24,  
158:11, 160:18,  
161:2, 161:5,  
161:19, 162:24,  
163:1, 163:7,  
163:13, 163:15,  
163:16, 163:20,  
163:22, 164:1,  
164:20, 165:5,  
165:10, 165:12,  
165:16, 166:18,  
167:10, 167:14,  
168:25, 169:11,  
169:13, 170:2,  
170:5, 170:10,  
170:15, 170:19,  
171:4, 171:11,  
171:19, 174:3,  
174:6, 174:13,  
174:15, 174:18,  
175:2, 175:4, 175:7,  
176:8, 177:12,  
178:2, 178:8,  
178:11, 178:25,  
179:2, 180:5, 180:8,  
180:17, 182:25,  
183:20, 183:23,  
183:25, 184:2,  
184:13, 185:4,  
185:10, 185:14,  
185:17, 185:20,  
186:2, 186:6, 187:2,  
187:16, 189:13,  
189:18, 189:21,  
189:24, 191:21,  
192:16, 192:23,  
193:1, 193:14,

193:19, 193:24  
**Court**<sup>[9]</sup> - 26:9,  
26:12, 38:18, 86:19,  
86:21, 126:15,  
150:18, 170:6, 194:8  
**courtroom**<sup>[13]</sup> -  
28:21, 37:24, 78:19,  
78:24, 124:19,  
124:20, 125:11,  
125:14, 125:19,  
155:18, 155:21,  
156:1, 193:25  
**Covid**<sup>[1]</sup> - 79:17  
**create**<sup>[1]</sup> - 180:17  
**created**<sup>[1]</sup> - 34:12  
**creating**<sup>[1]</sup> - 128:14  
**crest**<sup>[1]</sup> - 132:6  
**criteria**<sup>[1]</sup> - 135:15  
**Crone**<sup>[15]</sup> - 130:19,  
130:23, 131:6,  
131:12, 132:2,  
134:7, 135:2, 135:6,  
149:5, 149:6,  
159:20, 168:18,  
185:8, 185:9, 192:5  
**Crone's**<sup>[2]</sup> - 164:8,  
168:12  
**cross**<sup>[7]</sup> - 33:6, 33:8,  
79:3, 83:16, 118:10,  
119:13, 187:4  
**CROSS**<sup>[2]</sup> - 79:5,  
156:6  
**cross-examination**<sup>[3]</sup>  
- 33:6, 33:8, 187:4  
**CROSS-**  
**EXAMINATION**<sup>[2]</sup> -  
79:5, 156:6  
**cross-examined**<sup>[1]</sup> -  
83:16  
**CT**<sup>[11]</sup> - 54:2, 55:17,  
64:24, 78:2, 82:2,  
82:22, 94:22, 96:2,  
96:4, 96:9, 100:12  
**cuff**<sup>[29]</sup> - 46:21,  
47:19, 47:20, 47:22,  
48:12, 48:14,  
117:18, 117:19,  
122:24, 123:4,  
123:8, 123:16,  
123:25, 132:25,  
133:2, 134:23,  
137:1, 137:2, 137:3,  
137:5, 137:11,  
142:23, 145:5,  
145:8, 147:12,  
152:21, 179:7, 182:1  
**current**<sup>[4]</sup> - 41:6,  
103:11, 128:20,  
133:16  
**curve**<sup>[1]</sup> - 179:4

**curved**<sup>[2]</sup> - 103:1,  
104:13  
**cushion**<sup>[1]</sup> - 74:3  
**cut**<sup>[7]</sup> - 32:12, 32:15,  
35:14, 49:11, 49:23,  
144:6, 147:5  
**cystic**<sup>[4]</sup> - 103:23,  
104:20, 180:25,  
187:24  
**daily**<sup>[1]</sup> - 175:9  
**damage**<sup>[3]</sup> - 144:4,  
174:9, 174:11  
**damaged**<sup>[3]</sup> - 49:4,  
74:4, 142:25  
**damaging**<sup>[1]</sup> - 144:6  
**Damon**<sup>[2]</sup> - 88:3,  
157:9  
**dark**<sup>[2]</sup> - 56:12, 56:15  
**date**<sup>[24]</sup> - 48:19,  
48:20, 53:11, 65:17,  
66:12, 69:5, 71:18,  
72:13, 88:15, 94:16,  
95:1, 95:8, 101:22,  
102:7, 105:12,  
106:4, 145:20,  
145:22, 146:1,  
166:20, 166:22,  
173:24, 177:24  
**dated**<sup>[2]</sup> - 115:8,  
184:8  
**dates**<sup>[2]</sup> - 92:2,  
157:18  
**days**<sup>[6]</sup> - 106:20,  
126:9, 153:25,  
154:1, 168:8, 168:10  
**dead**<sup>[1]</sup> - 112:9  
**dealing**<sup>[1]</sup> - 38:10  
**dealt**<sup>[1]</sup> - 40:16  
**debride**<sup>[1]</sup> - 142:24  
**decided**<sup>[3]</sup> - 104:4,  
104:6, 113:24  
**decides**<sup>[1]</sup> - 41:20  
**decision**<sup>[1]</sup> - 92:15  
**decreases**<sup>[1]</sup> - 109:24  
**deem**<sup>[1]</sup> - 128:9  
**defect**<sup>[21]</sup> - 62:23,  
62:25, 68:25, 98:25,  
99:2, 99:10, 99:22,  
106:9, 106:13,  
107:13, 107:17,  
107:18, 107:19,  
107:20, 119:2,  
119:16, 119:23,  
119:25, 120:20,  
121:3, 121:5  
**defective**<sup>[2]</sup> - 42:6,  
129:15  
**defects**<sup>[6]</sup> - 63:5,  
63:14, 96:4, 106:25,  
107:15, 109:5

**defendant**<sup>[1]</sup> - 94:15  
**Defendant**<sup>[2]</sup> - 26:7,  
26:20  
**defense**<sup>[1]</sup> - 35:22  
**defined**<sup>[1]</sup> - 40:20  
**definitely**<sup>[2]</sup> - 86:18,  
98:13  
**definition**<sup>[1]</sup> - 97:17  
**definitive**<sup>[2]</sup> - 187:19,  
188:3  
**definitively**<sup>[1]</sup> - 189:3  
**degenerate**<sup>[1]</sup> - 76:20  
**degeneration**<sup>[10]</sup> -  
59:2, 76:16, 76:17,  
76:21, 77:9, 77:10,  
77:12, 77:13,  
101:20, 102:5  
**degenerative**<sup>[26]</sup> -  
76:19, 99:8, 99:9,  
101:13, 101:16,  
101:19, 101:21,  
102:16, 103:23,  
104:20, 105:4,  
105:5, 105:9, 122:2,  
173:6, 173:8,  
173:12, 173:25,  
174:23, 175:7,  
175:9, 177:9,  
177:17, 177:19,  
177:25, 180:25  
**degeneratively**<sup>[1]</sup> -  
58:6  
**degrading**<sup>[1]</sup> - 145:6  
**degree**<sup>[14]</sup> - 43:14,  
110:3, 117:7, 118:5,  
119:6, 130:5, 130:9,  
138:6, 139:7,  
143:15, 154:2,  
176:21, 186:16,  
193:3  
**degrees**<sup>[9]</sup> - 132:8,  
132:11, 132:12,  
132:21, 132:22,  
132:24, 133:6  
**deliberately**<sup>[1]</sup> -  
113:4  
**delivered**<sup>[2]</sup> - 30:16,  
165:25  
**deltoid**<sup>[1]</sup> - 133:3  
**demolition**<sup>[1]</sup> -  
186:11  
**demonstrate**<sup>[1]</sup> -  
136:12  
**demonstrative**<sup>[16]</sup> -  
43:20, 44:11, 46:3,  
62:9, 66:10, 69:4,  
136:3, 136:6,  
136:17, 136:18,  
140:10, 140:12,  
140:16, 141:4,

<p>145:15, 149:24  <b>denotes</b> [1] - 179:21  <b>dense</b> [3] - 40:17, 40:22  <b>department</b> [3] - 162:5, 162:6  <b>dependent</b> [1] - 143:25  <b>depicted</b> [8] - 102:16, 103:5, 103:24, 104:15, 104:17, 173:18, 174:11, 174:25  <b>derived</b> [1] - 35:12  <b>describe</b> [11] - 39:24, 53:11, 96:18, 115:13, 116:4, 127:8, 131:24, 134:18, 143:12, 147:21, 192:2  <b>described</b> [6] - 64:4, 140:11, 179:10, 179:17, 180:15, 192:6  <b>describing</b> [1] - 182:15  <b>description</b> [1] - 180:22  <b>desiccation</b> [5] - 96:1, 107:7, 107:10, 114:21, 115:2  <b>designed</b> [1] - 87:20  <b>despite</b> [1] - 140:4  <b>detached</b> [1] - 180:20  <b>detachment</b> [2] - 180:21  <b>detail</b> [1] - 98:24  <b>detection</b> [2] - 40:14, 40:25  <b>deterioration</b> [1] - 145:9  <b>determined</b> [2] - 93:22, 192:13  <b>develop</b> [2] - 67:23, 82:20  <b>developed</b> [5] - 43:20, 67:22, 140:10, 144:21, 145:7  <b>developing</b> [1] - 148:12  <b>development</b> [2] - 147:11, 179:6  <b>devices</b> [3] - 141:13, 142:16  <b>DEVIN</b> [1] - 26:12  <b>Devin</b> [1] - 27:2  <b>diagnoses</b> [1] - 134:5  <b>diagnosing</b> [1] - 182:7  <b>diagnosis</b> [4] - 55:13, 82:24, 134:4, 183:3</p>	<p><b>diagnostic</b> [8] - 36:6, 39:6, 41:24, 74:16, 75:22, 107:25, 135:9, 135:12  <b>diagnostics</b> [1] - 135:10  <b>diagram</b> [1] - 179:11  <b>Diaz</b> [1] - 89:24  <b>dictate</b> [7] - 81:5, 82:11, 82:24, 83:8, 83:13, 83:14, 83:15  <b>dictated</b> [2] - 83:2, 83:7  <b>dictating</b> [1] - 83:1  <b>difference</b> [3] - 54:21, 57:24, 178:6  <b>different</b> [17] - 42:10, 46:22, 48:24, 49:9, 52:17, 53:13, 55:6, 57:1, 110:11, 110:21, 165:21, 176:24, 177:1, 192:2, 192:4  <b>differently</b> [3] - 68:12, 171:8, 171:13  <b>difficult</b> [1] - 189:2  <b>dire</b> [1] - 59:14  <b>direct</b> [3] - 100:17, 116:7, 118:10  <b>DIRECT</b> [2] - 39:1, 127:2  <b>directly</b> [6] - 64:10, 64:11, 90:10, 90:14, 99:14, 188:3  <b>disagree</b> [1] - 98:3  <b>disagreeing</b> [1] - 88:16  <b>disagreement</b> [1] - 27:24  <b>disc</b> [80] - 50:21, 50:23, 50:24, 51:2, 51:3, 51:4, 51:5, 51:7, 51:9, 51:12, 51:14, 51:19, 51:20, 51:23, 55:8, 55:9, 55:10, 57:12, 57:13, 57:15, 57:20, 57:21, 57:25, 58:25, 59:7, 59:16, 59:22, 60:5, 61:3, 62:13, 62:19, 64:25, 66:24, 66:25, 70:7, 71:25, 72:8, 73:11, 73:12, 74:9, 75:7, 76:21, 77:5, 81:22, 95:22, 95:25, 96:1, 96:6, 96:10, 96:14, 96:24, 97:3, 97:12, 97:17, 98:10, 98:17, 98:21, 104:2, 107:7, 107:10,</p>	<p>107:15, 109:8, 109:17, 109:20, 110:4, 110:5, 110:7, 114:22, 115:14, 117:23, 118:2  <b>discharge</b> [5] - 190:2, 190:5, 190:7, 193:9, 193:11  <b>disclosed</b> [2] - 140:11, 145:16  <b>discloses</b> [1] - 184:11  <b>disclosure</b> [2] - 30:10, 34:20  <b>discomfort</b> [1] - 153:15  <b>discovered</b> [1] - 37:18  <b>discrepancy</b> [1] - 34:2  <b>discs</b> [18] - 37:3, 50:10, 50:13, 50:17, 54:25, 55:4, 56:13, 57:4, 57:5, 64:22, 75:6, 76:22, 96:15, 108:13, 108:16, 108:21, 109:24  <b>discuss</b> [6] - 78:14, 78:16, 155:16, 169:20, 169:22, 193:20  <b>discussed</b> [2] - 86:24, 170:7  <b>discussion</b> [9] - 27:22, 37:14, 56:21, 92:18, 111:16, 125:8, 130:3, 165:8, 174:16  <b>discussions</b> [1] - 28:3  <b>display</b> [1] - 55:23  <b>Displaying</b> [1] - 44:9  <b>displays</b> [2] - 46:20, 76:4  <b>dispute</b> [2] - 32:17, 192:11  <b>disputed</b> [1] - 34:21  <b>disputing</b> [1] - 29:5  <b>disruption</b> [2] - 190:24, 191:2  <b>distinction</b> [1] - 35:8  <b>distribution</b> [5] - 52:5, 52:22, 60:15, 68:21, 74:14  <b>divided</b> [1] - 40:13  <b>Division</b> [2] - 128:17, 128:18  <b>doctor</b> [154] - 30:18, 32:18, 32:22, 32:23, 33:6, 35:3, 35:13, 35:23, 35:24, 35:25, 36:1, 36:3, 36:5, 36:6, 36:7, 37:16, 39:23, 40:8, 41:6,</p>	<p>41:20, 41:25, 42:2, 42:20, 43:4, 43:20, 45:7, 45:9, 45:22, 46:5, 47:25, 48:4, 48:15, 53:9, 54:1, 54:5, 55:22, 56:2, 56:9, 58:5, 58:21, 59:16, 60:14, 61:2, 62:15, 63:15, 63:17, 63:19, 64:12, 65:6, 66:3, 66:10, 66:21, 68:16, 69:3, 69:22, 70:4, 70:10, 71:1, 76:3, 76:15, 77:15, 78:3, 78:9, 79:2, 79:7, 83:2, 83:22, 88:12, 92:22, 93:2, 93:14, 94:10, 95:10, 98:16, 100:3, 100:12, 101:10, 102:10, 102:16, 103:16, 105:3, 105:11, 105:15, 105:21, 106:13, 107:2, 108:6, 108:12, 109:5, 109:21, 110:15, 111:1, 111:20, 111:25, 112:11, 112:15, 113:9, 115:7, 116:17, 117:21, 119:1, 120:14, 127:4, 129:20, 136:2, 138:1, 139:2, 140:10, 141:1, 141:3, 141:15, 143:25, 145:18, 145:19, 147:14, 149:24, 150:6, 152:5, 154:11, 155:9, 156:4, 156:8, 156:10, 157:1, 160:20, 161:9, 166:4, 166:19, 167:7, 169:2, 169:7, 170:11, 171:12, 172:12, 172:13, 172:22, 174:21, 178:16, 179:20, 181:17, 182:7, 183:7, 184:6, 184:7, 186:10, 186:23, 187:19, 189:20, 189:25, 191:23, 193:2  <b>Doctor</b> [2] - 39:3, 144:12  <b>doctor's</b> [2] - 44:16, 186:1  <b>doctors</b> [8] - 32:13,</p>	<p>35:9, 35:15, 35:16, 35:19, 35:22, 118:22, 119:20  <b>document</b> [1] - 166:7  <b>documented</b> [2] - 106:16, 106:19  <b>documents</b> [1] - 165:21  <b>dome</b> [1] - 148:9  <b>done</b> [35] - 31:9, 31:14, 37:2, 40:25, 41:14, 53:14, 55:12, 55:24, 64:14, 72:23, 75:9, 75:14, 78:7, 86:15, 97:21, 106:20, 126:10, 128:13, 131:25, 143:6, 162:4, 166:16, 167:11, 167:13, 169:10, 173:10, 178:25, 180:8, 181:9, 183:19, 185:2, 185:12  <b>donuts</b> [2] - 50:14, 76:23  <b>door</b> [2] - 118:10, 118:12  <b>dorsiflexion</b> [1] - 149:10  <b>down</b> [43] - 33:14, 38:2, 42:6, 47:15, 48:25, 49:1, 50:11, 50:19, 52:11, 52:14, 52:16, 52:18, 55:8, 57:10, 60:18, 60:20, 60:22, 61:14, 62:19, 65:15, 67:3, 71:13, 80:14, 82:3, 94:11, 110:3, 118:3, 119:4, 119:19, 126:6, 129:15, 131:8, 140:20, 143:12, 143:19, 145:18, 146:16, 148:9, 169:4, 190:11  <b>Downstate</b> [1] - 39:11  <b>Dr</b> [74] - 29:10, 29:11, 32:18, 32:19, 33:15, 37:16, 38:14, 38:16, 38:17, 42:15, 45:2, 45:5, 70:19, 76:2, 78:21, 78:25, 81:9, 88:18, 88:23, 89:3, 89:6, 89:10, 94:14, 97:24, 110:14, 111:21, 112:7, 126:5, 126:11, 126:14, 129:23, 130:3, 130:19,</p>
---	---	---	---	---

<p>130:23, 131:6, 131:12, 132:2, 134:7, 134:23, 135:2, 135:6, 138:13, 140:22, 144:13, 145:21, 147:15, 149:5, 149:6, 150:5, 152:18, 159:17, 159:20, 164:7, 164:8, 164:10, 165:11, 168:12, 168:18, 169:6, 169:16, 170:8, 173:11, 174:20, 177:8, 177:13, 177:15, 181:23, 185:8, 185:9, 192:5</p> <p><b>draft</b> [2] - 82:4, 82:5</p> <p><b>draw</b> [1] - 58:14</p> <p><b>drawing</b> [2] - 141:5</p> <p><b>drive</b> [1] - 81:22</p> <p><b>drives</b> [1] - 188:18</p> <p><b>Drs</b> [4] - 84:4, 84:16, 85:4, 89:2</p> <p><b>drug</b> [1] - 133:11</p> <p><b>dry</b> [1] - 146:21</p> <p><b>due</b> [4] - 52:19, 98:13, 118:25, 145:6</p> <p><b>dug</b> [1] - 151:17</p> <p><b>dumb</b> [1] - 29:2</p> <p><b>during</b> [7] - 43:12, 125:13, 130:10, 139:12, 142:7, 158:23, 167:20</p> <p><b>E-mail</b> [2] - 29:20, 29:21</p> <p><b>earn</b> [1] - 83:22</p> <p><b>earned</b> [1] - 83:25</p> <p><b>easel</b> [7] - 44:6, 44:14, 44:23, 65:12, 70:24, 75:10, 97:22</p> <p><b>easier</b> [1] - 46:7</p> <p><b>easily</b> [1] - 57:15</p> <p><b>East</b> [1] - 126:19</p> <p><b>easy</b> [1] - 47:11</p> <p><b>Ed</b> [1] - 125:17</p> <p><b>edema</b> [3] - 171:21, 171:22, 171:23</p> <p><b>edge</b> [5] - 50:25, 51:15, 57:7, 57:8</p> <p><b>edges</b> [1] - 77:8</p> <p><b>education</b> [3] - 39:8, 127:9, 127:10</p> <p><b>effect</b> [1] - 107:15</p> <p><b>effusion</b> [2] - 105:1, 171:23</p> <p><b>eight</b> [5] - 80:12, 82:18, 82:25, 92:8, 141:19</p>	<p><b>Einstein</b> [1] - 39:13</p> <p><b>either</b> [15] - 69:1, 81:17, 81:22, 89:5, 91:16, 106:24, 109:11, 121:25, 128:5, 129:8, 170:2, 171:2, 178:9, 188:18, 192:18</p> <p><b>elbow</b> [4] - 132:19, 134:15, 143:8</p> <p><b>electronic</b> [1] - 141:13</p> <p><b>elevated</b> [1] - 152:1</p> <p><b>elevation</b> [2] - 132:20, 132:21</p> <p><b>emailed</b> [1] - 29:16</p> <p><b>embryos</b> [1] - 148:13</p> <p><b>employees</b> [2] - 159:22, 159:23</p> <p><b>encounter</b> [2] - 133:8, 133:20</p> <p><b>encountered</b> [1] - 130:13</p> <p><b>end</b> [10] - 32:9, 104:9, 111:25, 112:4, 118:13, 142:12, 142:15, 143:7, 151:23, 156:10</p> <p><b>endeavors</b> [1] - 41:11</p> <p><b>ended</b> [1] - 145:6</p> <p><b>energy</b> [1] - 125:19</p> <p><b>engage</b> [4] - 41:11, 41:16, 59:11</p> <p><b>engaged</b> [2] - 59:8, 129:1</p> <p><b>enter</b> [1] - 181:3</p> <p><b>entered</b> [4] - 37:24, 78:24, 125:11, 156:1</p> <p><b>entering</b> [4] - 37:23, 78:23, 125:10, 155:25</p> <p><b>entire</b> [8] - 31:19, 47:14, 47:15, 54:12, 82:17, 83:10, 191:19</p> <p><b>entirety</b> [2] - 102:24, 103:16</p> <p><b>entitled</b> [3] - 32:15, 34:11, 121:21</p> <p><b>epidural</b> [3] - 57:16, 108:16, 115:14</p> <p><b>equal</b> [1] - 35:23</p> <p><b>equally</b> [2] - 193:2, 193:4</p> <p><b>equipment</b> [1] - 149:18</p> <p><b>Eric</b> [1] - 130:19</p> <p><b>erode</b> [1] - 146:7</p> <p><b>eroding</b> [1] - 143:8</p> <p><b>erosive</b> [1] - 147:12</p> <p><b>ESQ</b> [2] - 26:18, 26:22</p> <p><b>essentially</b> [3] - 33:20,</p>	<p>114:5, 164:9</p> <p><b>establish</b> [1] - 164:5</p> <p><b>evaluated</b> [1] - 131:20</p> <p><b>evaluating</b> [1] - 192:12</p> <p><b>evening</b> [1] - 31:11</p> <p><b>eventually</b> [4] - 135:5, 135:7, 140:6, 149:8</p> <p><b>evidence</b> [28] - 31:17, 93:17, 93:23, 95:10, 95:16, 96:1, 96:4, 105:22, 115:20, 123:20, 138:13, 138:15, 138:17, 138:23, 161:8, 163:16, 163:19, 163:23, 164:14, 164:25, 170:11, 170:14, 171:9, 171:15, 174:23, 181:12, 182:24</p> <p><b>evidenced</b> [1] - 105:4</p> <p><b>exact</b> [5] - 83:24, 86:2, 86:8, 88:5, 136:6</p> <p><b>exactly</b> [10] - 75:8, 83:25, 108:4, 108:24, 116:10, 150:9, 166:1, 167:5, 167:19, 181:19</p> <p><b>exaggerated</b> [2] - 60:12, 76:7</p> <p><b>exam</b> [5] - 133:7, 149:17, 156:10, 188:3, 188:21</p> <p><b>EXAMINATION</b> [8] - 39:1, 79:5, 116:15, 120:12, 127:2, 156:6, 186:8, 189:15</p> <p><b>examination</b> [11] - 33:6, 33:8, 40:4, 40:5, 43:12, 131:21, 131:23, 131:24, 131:25, 187:4</p> <p><b>examinations</b> [1] - 128:5</p> <p><b>examined</b> [3] - 83:16, 84:9, 104:17</p> <p><b>example</b> [7] - 40:23, 41:4, 49:22, 54:24, 79:23, 82:18, 93:9</p> <p><b>exams</b> [1] - 62:21</p> <p><b>except</b> [2] - 30:5, 85:13</p> <p><b>exchange</b> [4] - 29:15, 34:2, 34:3, 58:10</p> <p><b>exchanged</b> [6] - 33:19, 34:7, 34:9, 34:22, 36:1, 37:4</p> <p><b>excused</b> [2] - 124:12, 193:14</p>	<p><b>exercises</b> [2] - 135:1, 139:19</p> <p><b>Exhibit</b> [15] - 45:19, 54:3, 56:1, 70:18, 72:15, 94:15, 136:18, 138:18, 138:22, 140:23, 141:3, 145:16, 150:1, 169:12, 172:12</p> <p><b>exhibit</b> [22] - 45:20, 46:1, 53:18, 58:25, 59:1, 61:2, 61:9, 64:4, 64:13, 65:5, 71:17, 72:25, 105:16, 136:3, 136:6, 136:16, 140:20, 163:7, 166:16, 169:11, 180:18, 183:22</p> <p><b>exhibited</b> [1] - 75:21</p> <p><b>exhibits</b> [7] - 27:7, 28:7, 28:8, 28:23, 65:20, 74:15, 93:3</p> <p><b>Exhibits</b> [1] - 105:17</p> <p><b>exited</b> [12] - 45:2, 45:5, 78:19, 78:21, 94:14, 124:19, 140:22, 150:5, 155:21, 169:6, 174:20, 193:25</p> <p><b>exiting</b> [7] - 78:18, 115:16, 116:6, 116:7, 124:18, 155:20, 193:24</p> <p><b>expect</b> [21] - 51:25, 52:25, 53:1, 59:7, 59:16, 60:23, 61:3, 63:12, 67:22, 68:21, 70:11, 70:13, 74:14, 75:18, 75:21, 76:12, 77:10, 181:7, 193:16</p> <p><b>experience</b> [5] - 42:8, 58:21, 129:17, 182:10, 186:23</p> <p><b>experiencing</b> [2] - 108:23, 182:13</p> <p><b>expert</b> [14] - 29:15, 29:25, 30:4, 30:10, 34:20, 35:11, 42:12, 42:15, 42:17, 89:24, 128:5, 129:20, 129:24</p> <p><b>expertise</b> [1] - 128:9</p> <p><b>explain</b> [3] - 80:19, 174:6, 188:12</p> <p><b>explaining</b> [2] - 43:22, 140:12</p> <p><b>explanation</b> [1] - 177:19</p>	<p><b>explicit</b> [1] - 61:25</p> <p><b>exposures</b> [1] - 81:22</p> <p><b>extensive</b> [1] - 144:19</p> <p><b>extent</b> [7] - 31:8, 31:13, 31:24, 32:1, 33:18, 165:17, 178:16</p> <p><b>extracurricular</b> [1] - 128:16</p> <p><b>extrapolation</b> [1] - 92:2</p> <p><b>extremities</b> [1] - 131:9</p> <p><b>extremity</b> [2] - 131:9, 132:4</p> <p><b>extrudes</b> [1] - 109:22</p> <p><b>eye</b> [2] - 100:25, 133:15</p> <p><b>eyes</b> [1] - 61:18</p> <p><b>facilities</b> [2] - 63:19, 84:10</p> <p><b>facility</b> [11] - 45:22, 65:6, 65:12, 65:13, 65:17, 65:21, 70:19, 71:1, 72:12, 160:15, 164:6</p> <p><b>facing</b> [3] - 46:11, 54:18, 62:18</p> <p><b>fact</b> [16] - 37:16, 71:4, 105:4, 108:21, 111:10, 115:23, 135:6, 148:25, 149:19, 152:14, 165:23, 176:6, 177:16, 180:23, 189:5, 190:20</p> <p><b>factors</b> [2] - 174:22</p> <p><b>facts</b> [3] - 121:21, 121:22, 182:23</p> <p><b>failing</b> [1] - 164:24</p> <p><b>fair</b> [6] - 85:9, 105:5, 116:3, 123:4, 136:5, 153:5</p> <p><b>fairly</b> [2] - 44:3, 144:25</p> <p><b>fake</b> [3] - 48:7, 55:18, 60:12</p> <p><b>faked</b> [1] - 76:7</p> <p><b>fall</b> [13] - 116:21, 117:7, 117:20, 119:22, 122:21, 130:21, 131:18, 138:3, 139:4, 139:8, 147:9, 147:10, 154:4</p> <p><b>familiar</b> [3] - 87:13, 136:2, 156:18</p> <p><b>far</b> [7] - 120:8, 121:11, 124:9, 158:20, 169:1, 188:2</p> <p><b>fast</b> [2] - 37:10, 116:14</p> <p><b>fat</b> [6] - 57:16, 62:20, 67:6, 108:16, 115:14</p>
---	--	---	--	--

<p><b>fault</b> [3] - 35:20, 36:7, 36:8</p> <p><b>favor</b> [1] - 95:11</p> <p><b>favorable</b> [2] - 112:16, 113:5</p> <p><b>favoring</b> [1] - 132:4</p> <p><b>fear</b> [1] - 33:8</p> <p><b>February</b> [6] - 67:11, 71:19, 72:13, 89:20, 158:12</p> <p><b>Federal</b> [2] - 86:19, 86:21</p> <p><b>fee</b> [16] - 77:18, 77:21, 77:23, 78:1, 91:10, 91:11, 91:19, 92:8, 92:9, 92:15, 92:23, 154:11, 154:16, 154:21, 154:23, 154:24</p> <p><b>feet</b> [3] - 54:18, 60:22, 131:18</p> <p><b>fell</b> [8] - 42:6, 117:4, 118:3, 118:23, 119:3, 119:19, 121:8, 129:15</p> <p><b>felt</b> [5] - 51:25, 52:22, 130:24, 134:9, 134:11</p> <p><b>female</b> [1] - 50:2</p> <p><b>Fennola</b> [1] - 88:2</p> <p><b>few</b> [3] - 37:7, 54:16, 91:15</p> <p><b>fiber</b> [2] - 148:16, 148:21</p> <p><b>fibers</b> [4] - 135:16, 179:16, 180:20, 180:23</p> <p><b>fibrous</b> [6] - 148:15, 148:20, 151:5, 151:8, 151:13, 190:23</p> <p><b>fibula</b> [1] - 148:8</p> <p><b>field</b> [4] - 40:8, 40:21, 40:25, 80:24</p> <p><b>fifth</b> [3] - 56:14, 57:10, 64:19</p> <p><b>fighting</b> [1] - 28:11</p> <p><b>figure</b> [2] - 29:5, 82:19</p> <p><b>figured</b> [1] - 30:18</p> <p><b>file</b> [4] - 29:12, 30:19, 31:24, 45:7</p> <p><b>filled</b> [1] - 137:15</p> <p><b>film</b> [28] - 45:12, 52:1, 69:8, 69:9, 70:4, 72:9, 72:12, 80:21, 81:20, 94:21, 100:4, 102:1, 102:3, 103:16, 105:13, 105:21, 106:3, 106:7, 106:16,</p>	<p>107:8, 107:11, 107:12, 108:4, 108:7, 116:24, 171:11, 171:14, 171:21</p> <p><b>films</b> [37] - 35:2, 43:21, 43:23, 44:25, 68:3, 76:9, 80:17, 82:6, 83:11, 83:23, 84:3, 84:5, 84:16, 85:6, 85:10, 85:18, 85:20, 88:6, 90:20, 90:23, 93:2, 93:4, 93:9, 93:11, 93:16, 94:24, 102:10, 102:12, 102:24, 103:5, 105:16, 109:3, 109:18, 110:18, 113:19, 115:20, 169:25</p> <p><b>financials</b> [1] - 31:19</p> <p><b>findings</b> [52] - 43:18, 43:23, 48:1, 48:4, 51:24, 55:13, 55:14, 57:25, 58:1, 58:2, 58:5, 60:10, 62:22, 63:9, 70:3, 70:9, 73:12, 74:16, 75:13, 75:23, 76:16, 82:21, 95:15, 95:16, 104:8, 104:10, 104:12, 105:3, 113:9, 113:11, 113:15, 113:18, 118:23, 118:24, 131:23, 133:19, 135:18, 143:21, 143:23, 145:9, 169:20, 169:22, 170:7, 187:14, 187:15, 187:16, 188:16, 188:17, 188:22</p> <p><b>fine</b> [13] - 30:5, 53:24, 90:6, 93:15, 98:16, 102:9, 113:1, 117:13, 118:16, 118:19, 160:22, 161:2, 163:20</p> <p><b>fingers</b> [1] - 52:10</p> <p><b> fingertips</b> [1] - 52:18</p> <p><b>finish</b> [5] - 39:25, 40:3, 105:15, 136:20, 192:24</p> <p><b>finished</b> [2] - 28:22, 81:7</p> <p><b>finishing</b> [1] - 33:1</p> <p><b>fire</b> [1] - 137:4</p> <p><b>firm</b> [30] - 29:16, 29:17, 35:10, 36:10, 78:7, 79:19, 80:20,</p>	<p>81:9, 82:2, 84:4, 86:12, 87:24, 88:3, 88:13, 89:19, 89:24, 90:10, 91:9, 91:12, 91:14, 91:19, 111:6, 112:3, 155:6, 157:5, 157:11, 158:4, 158:12, 159:3, 160:8</p> <p><b>firms</b> [5] - 29:18, 79:20, 90:13, 111:5, 111:7</p> <p><b>first</b> [34] - 29:7, 29:8, 36:15, 38:7, 38:13, 39:25, 40:20, 50:5, 54:5, 57:11, 73:6, 76:21, 76:23, 76:25, 82:3, 83:13, 100:5, 100:10, 105:21, 127:16, 134:18, 142:2, 144:11, 149:7, 150:3, 156:11, 166:6, 166:20, 182:9, 183:1, 183:11, 183:13, 183:15, 192:5</p> <p><b>fit</b> [1] - 44:16</p> <p><b>five</b> [16] - 36:16, 54:20, 56:12, 56:14, 57:1, 73:8, 78:4, 78:12, 78:15, 79:15, 124:13, 141:21, 155:11, 155:15, 155:17, 157:21</p> <p><b>five-minute</b> [2] - 78:15, 155:17</p> <p><b>fix</b> [4] - 69:12, 100:6, 147:3, 180:23</p> <p><b>fixing</b> [3] - 116:1, 179:13, 179:15</p> <p><b>flank</b> [3] - 131:10, 132:5, 134:13</p> <p><b>flat</b> [4] - 118:3, 119:4, 129:15, 143:3</p> <p><b>flexion</b> [2] - 132:8, 149:11</p> <p><b>flip</b> [1] - 158:2</p> <p><b>Floor</b> [1] - 26:21</p> <p><b>fluid</b> [32] - 49:6, 51:6, 51:10, 51:16, 51:21, 57:9, 57:17, 71:15, 73:17, 73:19, 73:24, 74:5, 77:2, 135:17, 137:11, 143:2, 151:12, 170:25, 171:2, 171:17, 171:18, 172:2, 172:3, 181:5, 188:23, 188:24, 189:2, 190:25</p>	<p><b>fluoroscopic</b> [2] - 80:2, 80:15</p> <p><b>focus</b> [2] - 104:10, 167:21</p> <p><b>folder</b> [1] - 167:12</p> <p><b>folks</b> [2] - 90:11, 90:12</p> <p><b>follow</b> [8] - 61:24, 144:14, 145:3, 147:18, 185:10, 190:4, 190:9, 190:15</p> <p><b>follow-up</b> [7] - 144:14, 145:3, 147:18, 185:10, 190:4, 190:9, 190:15</p> <p><b>following</b> [3] - 127:14, 127:18, 144:18</p> <p><b>foot</b> [7] - 118:3, 119:4, 148:6, 148:7, 148:9, 190:16, 191:13</p> <p><b>footing</b> [1] - 35:23</p> <p><b>foramen</b> [8] - 52:13, 67:2, 67:4, 67:6, 67:14, 68:16, 115:16, 115:24</p> <p><b>foraminal</b> [2] - 67:15, 67:16</p> <p><b>forgot</b> [1] - 60:9</p> <p><b>form</b> [7] - 59:19, 88:3, 101:24, 152:25, 160:20, 177:12, 187:2</p> <p><b>formed</b> [4] - 99:17, 99:24, 134:4, 134:16</p> <p><b>former</b> [2] - 29:15, 29:17</p> <p><b>forming</b> [2] - 77:8, 144:8</p> <p><b>forms</b> [3] - 137:1, 148:15, 177:19</p> <p><b>formulate</b> [1] - 182:21</p> <p><b>forthcoming</b> [1] - 186:25</p> <p><b>forward</b> [3] - 61:25, 66:12, 67:1</p> <p><b>foundation</b> [9] - 58:18, 58:19, 59:6, 62:2, 114:9, 138:11, 138:12, 138:24</p> <p><b>foundational</b> [1] - 114:4</p> <p><b>founded</b> [1] - 29:2</p> <p><b>four</b> [23] - 39:15, 39:16, 40:2, 43:11, 46:22, 54:20, 56:25, 73:8, 75:2, 79:16, 86:9, 91:1, 91:2, 91:5, 106:20, 107:21, 122:25, 137:4, 157:21, 158:20, 168:8,</p>	<p>168:10</p> <p><b>four-month</b> [1] - 91:2</p> <p><b>fourth</b> [3] - 51:19, 56:15, 64:19</p> <p><b>fracture</b> [9] - 54:23, 100:23, 147:25, 148:19, 170:11, 170:14, 181:15, 190:23, 192:2</p> <p><b>FRANK</b> [1] - 26:18</p> <p><b>frankly</b> [1] - 31:3</p> <p><b>free</b> [3] - 43:6, 112:24, 130:10</p> <p><b>French</b> [1] - 49:10</p> <p><b>frequency</b> [3] - 42:2, 79:13, 159:6</p> <p><b>frequently</b> [1] - 79:21</p> <p><b>Friday</b> [13] - 30:13, 30:17, 30:23, 31:1, 31:11, 33:14, 38:5, 38:12, 126:8, 193:16, 193:19, 193:23, 194:1</p> <p><b>front</b> [28] - 27:12, 27:13, 27:15, 32:8, 32:24, 33:13, 34:1, 37:8, 37:10, 47:10, 49:5, 50:20, 51:10, 51:21, 56:12, 57:17, 60:22, 63:3, 66:13, 71:12, 71:20, 72:3, 72:7, 73:17, 74:10, 81:13, 82:8, 87:22</p> <p><b>full</b> [7] - 28:14, 31:19, 32:7, 132:18, 145:7, 146:13, 164:21</p> <p><b>fully</b> [1] - 28:8</p> <p><b>fundamentally</b> [1] - 32:16</p> <p><b>funny</b> [1] - 148:11</p> <p><b>fuse</b> [1] - 150:7</p> <p><b>fused</b> [7] - 62:24, 69:17, 70:6, 71:7, 71:20, 72:2, 115:23</p> <p><b>fuses</b> [1] - 148:14</p> <p><b>fusing</b> [1] - 70:8</p> <p><b>fusion</b> [11] - 69:11, 69:12, 69:23, 69:24, 70:10, 70:14, 70:24, 71:8, 100:5, 116:8, 116:9</p> <p><b>future</b> [2] - 153:3, 153:12</p> <p><b>futures</b> [1] - 32:12</p> <p><b>gait</b> [3] - 132:3, 189:10, 189:11</p> <p><b>garden</b> [1] - 110:6</p> <p><b>gelatinous</b> [1] - 50:14</p> <p><b>general</b> [8] - 79:15, 88:9, 91:16, 104:1,</p>
--	---	---	---	--

<p>144:1, 144:2, 153:23, 153:25 <b>generalized</b> [2] - 190:21, 192:1 <b>generally</b> [17] - 53:1, 60:5, 82:8, 91:24, 91:25, 114:18, 115:1, 115:4, 123:4, 123:12, 123:15, 143:3, 166:4, 175:14, 179:8, 179:21 <b>generate</b> [1] - 81:5 <b>generated</b> [1] - 115:8 <b>gentleman</b> [4] - 109:2, 144:2, 174:22, 176:14 <b>gentlemen</b> [6] - 78:15, 124:13, 126:1, 136:10, 155:17, 193:15 <b>gentlemenly</b> [1] - 36:21 <b>given</b> [13] - 28:4, 28:25, 30:17, 81:6, 91:15, 119:19, 139:12, 139:14, 142:3, 142:5, 186:19, 187:5, 190:14 <b>glenoid</b> [3] - 46:17, 46:20, 175:15 <b>God</b> [1] - 36:15 <b>Goldstein</b> [1] - 33:16 <b>GORAYEB</b> [1] - 26:16 <b>Go-rayeb</b> [20] - 35:10, 79:19, 80:20, 82:2, 84:4, 86:12, 87:24, 88:3, 88:13, 89:19, 89:24, 91:12, 91:14, 111:5, 112:3, 155:6, 157:5, 157:11, 158:4, 158:12 <b>Go-rayeb's</b> [5] - 159:1, 159:2, 166:7, 166:9, 166:25 <b>gotcha</b> [1] - 33:17 <b>grab</b> [2] - 142:13, 146:16 <b>grabbed</b> [2] - 151:18 <b>Grade</b> [1] - 63:4 <b>graduated</b> [2] - 39:10, 39:11 <b>graduating</b> [1] - 127:12 <b>graspers</b> [1] - 151:18 <b>gray</b> [6] - 48:25, 49:24, 55:5, 55:7, 71:14, 158:9 <b>great</b> [12] - 29:13,</p>	<p>30:12, 38:7, 54:23, 93:1, 108:12, 113:8, 125:3, 139:1, 166:18, 169:5, 171:19 <b>greater</b> [1] - 98:24 <b>Grimm</b> [8] - 84:4, 84:16, 85:4, 88:23, 89:6, 134:23, 159:17, 164:10 <b>Grimm's</b> [1] - 164:7 <b>ground</b> [1] - 188:18 <b>grounds</b> [1] - 174:4 <b>group</b> [2] - 110:22, 137:1 <b>GROUP</b> [1] - 26:20 <b>Group</b> [1] - 41:9 <b>grow</b> [2] - 147:4, 147:6 <b>guarded</b> [1] - 153:5 <b>guess</b> [5] - 98:4, 122:21, 124:8, 156:10, 180:13 <b>guy</b> [1] - 153:6 <b>guys</b> [1] - 125:17 <b>hair</b> [1] - 158:8 <b>half</b> [7] - 28:2, 28:10, 28:13, 149:1, 158:6, 172:24, 185:18 <b>hand</b> [3] - 126:13, 189:20, 189:22 <b>handing</b> [2] - 166:14, 189:24 <b>handwritten</b> [1] - 166:7 <b>happy</b> [6] - 44:18, 87:8, 87:23, 163:5, 164:12, 185:25 <b>hard</b> [8] - 42:6, 54:22, 64:21, 117:4, 138:4, 143:4, 143:6, 154:4 <b>hardware</b> [2] - 70:1, 71:7 <b>head</b> [7] - 46:15, 46:19, 54:18, 82:20, 103:24, 104:21, 124:3 <b>heal</b> [2] - 139:22, 147:2 <b>healed</b> [1] - 147:6 <b>healing</b> [5] - 134:21, 139:19, 143:16, 147:3 <b>healthy</b> [1] - 59:17 <b>hear</b> [2] - 150:16, 177:18 <b>heard</b> [1] - 177:18 <b>hearing</b> [1] - 178:13 <b>heat</b> [1] - 135:1 <b>heavy</b> [3] - 59:8,</p>	<p>59:11, 59:23 <b>height</b> [10] - 77:5, 109:23, 110:3, 117:4, 117:8, 118:3, 119:4, 138:3, 139:4, 139:8 <b>heights</b> [2] - 109:8, 109:17 <b>held</b> [11] - 27:22, 37:14, 46:20, 56:13, 56:22, 73:21, 92:19, 111:17, 125:9, 165:8, 174:17 <b>help</b> [5] - 41:17, 108:10, 185:24, 188:20 <b>helped</b> [1] - 152:14 <b>helpful</b> [1] - 135:20 <b>herniate</b> [1] - 110:4 <b>herniated</b> [2] - 109:20, 114:22 <b>herniation</b> [36] - 57:12, 57:15, 57:25, 58:25, 60:5, 61:3, 62:13, 66:24, 66:25, 67:5, 67:8, 67:11, 67:17, 69:13, 73:12, 73:14, 73:15, 74:9, 75:12, 98:17, 98:21, 105:22, 105:23, 106:2, 107:19, 107:20, 107:23, 108:1, 108:5, 110:7, 119:17, 119:18, 120:6, 121:4, 121:7 <b>herniations</b> [10] - 51:9, 51:12, 59:7, 59:16, 59:22, 60:5, 105:24, 117:23, 118:2, 123:9 <b>hero</b> [2] - 49:11, 49:13 <b>hide</b> [1] - 164:13 <b>high</b> [1] - 40:15 <b>Hill</b> [1] - 184:1 <b>Hills</b> [17] - 45:24, 46:2, 46:4, 48:17, 64:2, 66:16, 72:23, 73:3, 73:4, 74:23, 74:24, 110:18, 110:19, 110:24, 176:15, 176:17, 187:16 <b>hip</b> [3] - 131:9, 132:7, 132:8 <b>hired</b> [1] - 193:8 <b>historian</b> [1] - 182:21 <b>history</b> [18] - 59:22, 59:23, 109:12, 131:13, 131:14, 131:16, 131:17, 133:9, 133:11,</p>	<p>133:12, 133:13, 182:9, 183:3, 186:20, 187:5, 187:13 <b>hit</b> [2] - 122:21, 134:10 <b>hold</b> [13] - 50:18, 53:17, 61:16, 64:3, 72:24, 83:14, 97:21, 107:3, 112:21, 138:10, 189:21, 192:7, 192:16 <b>holding</b> [1] - 54:13 <b>holds</b> [3] - 50:21, 50:23, 51:1 <b>hole</b> [3] - 67:3, 67:5, 146:13 <b>holes</b> [2] - 52:13, 141:10 <b>home</b> [2] - 85:17, 190:8 <b>honestly</b> [1] - 36:24 <b>Honor</b> [17] - 27:10, 30:21, 42:18, 44:6, 45:6, 61:22, 65:3, 79:4, 127:1, 129:23, 138:21, 140:15, 148:3, 155:13, 166:15, 189:14, 189:23 <b>Honor's</b> [1] - 135:21 <b>Honorable</b> [2] - 27:2, 87:16 <b>HONORABLE</b> [1] - 26:12 <b>hope</b> [1] - 38:1 <b>hopefully</b> [3] - 50:9, 126:9, 143:16 <b>horrible</b> [1] - 121:18 <b>Hospital</b> [3] - 95:15, 104:18, 183:24 <b>hospital</b> [9] - 99:22, 149:3, 167:16, 167:18, 167:19, 173:19, 173:20, 173:21, 174:12 <b>hot</b> [2] - 126:1, 126:2 <b>hour</b> [1] - 83:3 <b>house</b> [1] - 162:1 <b>huge</b> [2] - 172:2, 172:3 <b>hum</b> [6] - 90:19, 95:24, 102:25, 134:17, 172:21, 184:25 <b>humeral</b> [4] - 46:19, 103:23, 104:20, 175:15 <b>humerus</b> [4] - 46:12, 46:14, 46:15, 137:13 <b>humid</b> [1] - 125:20</p>	<p><b>hundred</b> [1] - 28:23 <b>HUTZEL</b> [2] - 26:24, 194:7 <b>hypertrophy</b> [1] - 101:18 <b>hypothetically</b> [1] - 182:12 <b>ice</b> [2] - 125:14, 135:1 <b>ID</b> [6] - 48:19, 65:18, 65:19, 138:14, 163:16 <b>idea</b> [4] - 33:15, 69:20, 90:7, 192:19 <b>identified</b> [8] - 66:1, 96:10, 98:24, 99:22, 99:23, 105:1, 108:12, 158:20 <b>identify</b> [15] - 45:7, 48:15, 48:22, 55:22, 62:8, 66:10, 69:3, 69:4, 71:4, 71:17, 99:10, 100:23, 102:12, 104:25, 164:18 <b>iliac</b> [1] - 132:6 <b>image</b> [6] - 52:21, 62:15, 62:16, 65:13, 85:24, 151:11 <b>images</b> [3] - 60:12, 80:15, 82:4 <b>Imaging</b> [1] - 69:6 <b>imaging</b> [7] - 80:2, 134:20, 134:25, 135:6, 171:25, 186:20, 187:10 <b>IME</b> [2] - 35:23, 35:25 <b>immediately</b> [3] - 138:4, 139:5, 164:11 <b>impact</b> [3] - 96:20, 116:4, 116:6 <b>impinged</b> [2] - 115:21, 137:18 <b>impingement</b> [15] - 53:2, 116:7, 133:1, 135:19, 137:17, 137:20, 143:12, 143:18, 149:10, 150:25, 151:10, 152:3, 176:3, 176:22, 177:7 <b>impinges</b> [1] - 115:14 <b>impinging</b> [1] - 177:4 <b>important</b> [15] - 40:24, 113:22, 113:23, 113:24, 114:14, 114:16, 114:18, 114:19, 114:20, 114:23, 115:1, 115:6, 115:23, 136:23</p>
---	---	---	--	--

<p><b>importantly</b> [1] - 54:21  <b>impossible</b> [1] - 178:4  <b>impression</b> [1] - 32:10  <b>improper</b> [3] - 114:5, 114:11, 177:14  <b>inappropriate</b> [1] - 129:10  <b>incision</b> [1] - 141:9  <b>include</b> [3] - 113:19, 114:1, 141:12  <b>included</b> [2] - 113:21, 134:5  <b>including</b> [5] - 34:21, 85:23, 130:24, 132:20, 145:20  <b>incomplete</b> [2] - 62:23, 140:4  <b>increase</b> [2] - 92:15, 139:20  <b>increased</b> [4] - 92:10, 144:7, 144:8, 159:7  <b>indentation</b> [1] - 57:9  <b>independent</b> [1] - 161:17  <b>INDEX</b> [1] - 26:4  <b>indicate</b> [5] - 65:13, 115:16, 134:23, 190:11, 190:14  <b>indicated</b> [4] - 108:15, 131:17, 159:24, 181:7  <b>indicates</b> [3] - 131:6, 176:20, 180:22  <b>indicating</b> [5] - 46:19, 115:19, 132:22, 152:2, 190:3  <b>indication</b> [3] - 133:8, 181:15, 190:9  <b>individual</b> [1] - 30:3  <b>individually</b> [1] - 76:3  <b>induced</b> [1] - 58:6  <b>infection</b> [1] - 144:7  <b>inflamed</b> [8] - 141:14, 143:1, 143:2, 143:9, 143:16, 151:15, 151:16, 151:25  <b>inflammation</b> [15] - 137:22, 143:18, 144:25, 145:6, 145:24, 146:2, 146:7, 146:19, 148:23, 151:9, 151:12, 189:9, 190:25  <b>inflammatory</b> [6] - 137:15, 149:8, 150:24, 171:2, 171:17, 172:2  <b>information</b> [2] - 85:5, 91:15</p>	<p><b>infraspinus</b> [5] - 46:23, 47:12, 47:18, 136:24, 137:8  <b>inhouse</b> [1] - 162:4  <b>initial</b> [4] - 133:8, 133:19, 134:4, 147:11  <b>injection</b> [3] - 129:9, 142:3, 144:3  <b>injections</b> [1] - 145:2  <b>injured</b> [5] - 42:5, 129:14, 133:2, 134:21, 134:24  <b>injuries</b> [12] - 117:22, 121:3, 123:4, 129:7, 129:8, 130:21, 130:24, 136:14, 154:8, 173:23, 182:15, 186:21  <b>injuring</b> [2] - 42:7, 129:16  <b>injury</b> [35] - 93:10, 101:8, 116:20, 117:1, 117:6, 119:8, 120:14, 120:15, 120:20, 120:21, 120:24, 133:12, 134:3, 134:8, 134:10, 137:16, 139:10, 139:11, 152:4, 153:4, 171:24, 173:22, 174:8, 179:21, 181:12, 188:25, 189:3, 189:4, 189:7, 190:1, 190:3, 190:11, 193:4  <b>inside</b> [13] - 46:17, 55:1, 66:24, 141:9, 142:14, 142:20, 145:24, 146:8, 146:9, 146:11, 188:4  <b>inspection</b> [1] - 145:23  <b>instability</b> [1] - 151:10  <b>instance</b> [1] - 73:6  <b>instruction</b> [2] - 112:18, 190:15  <b>instructions</b> [1] - 188:8  <b>intake</b> [5] - 166:10, 166:12, 166:13, 166:19, 167:11  <b>integral</b> [2] - 68:3, 68:7  <b>intended</b> [1] - 136:5  <b>Intention</b> [2] - 65:25, 145:17  <b>intention</b> [1] - 44:12  <b>interesting</b> [2] -</p>	<p>148:12, 187:21  <b>interim</b> [2] - 181:10, 188:22  <b>internship</b> [1] - 39:12  <b>interpret</b> [1] - 179:24  <b>interpretation</b> [5] - 170:13, 171:3, 171:5, 171:6, 171:7  <b>interpreted</b> [1] - 41:25  <b>interrupt</b> [3] - 35:1, 72:24, 122:25  <b>interrupting</b> [2] - 27:18, 30:7  <b>interruption</b> [1] - 31:14  <b>intervention</b> [1] - 186:21  <b>intraoperative</b> [2] - 143:21, 145:25  <b>introducing</b> [1] - 144:7  <b>intuition</b> [1] - 190:15  <b>irrelevant</b> [1] - 100:11  <b>irritated</b> [1] - 133:1  <b>irritates</b> [1] - 189:1  <b>issue</b> [2] - 83:16, 140:17  <b>issued</b> [1] - 30:3  <b>Italian</b> [1] - 49:10  <b>item</b> [1] - 88:9  <b>itis</b> [1] - 146:19  <b>itself</b> [3] - 37:11, 37:12, 74:17  <b>IV</b> [2] - 142:5, 144:3  <b>jackets</b> [1] - 126:3  <b>Jacob</b> [1] - 111:21  <b>January</b> [6] - 64:14, 87:6, 87:9, 87:11, 87:15, 156:14  <b>Jeffrey</b> [3] - 126:5, 126:18, 163:11  <b>jelly</b> [2] - 50:14, 76:23  <b>Jersey</b> [2] - 128:18, 128:23  <b>job</b> [2] - 115:25, 116:1  <b>JOHN</b> [1] - 26:3  <b>John</b> [2] - 84:12, 161:24  <b>John's</b> [2] - 136:22, 149:17  <b>joint</b> [41] - 47:2, 47:4, 69:16, 101:14, 102:22, 122:4, 129:5, 141:8, 141:9, 141:10, 142:10, 142:19, 142:20, 142:21, 143:19, 144:24, 145:23, 145:24, 146:8, 146:9, 146:13,</p>	<p>151:15, 151:22, 151:24, 174:10, 175:10, 175:12, 175:13, 175:14, 175:15, 175:18, 175:23, 181:3, 181:4, 187:25, 188:2  <b>joints</b> [2] - 41:4, 129:4  <b>Joseph</b> [1] - 88:2  <b>Judge</b> [10] - 36:12, 38:6, 118:16, 123:22, 125:2, 125:5, 125:6, 168:23, 186:7, 187:3  <b>judge</b> [7] - 29:8, 35:5, 53:15, 56:18, 86:21, 163:24, 183:18  <b>judgement</b> [1] - 35:20  <b>July</b> [2] - 26:10, 194:1  <b>jump</b> [1] - 50:11  <b>jumped</b> [1] - 66:12  <b>June</b> [1] - 147:8  <b>jurors</b> [2] - 136:1, 146:4  <b>jury</b> [45] - 28:5, 28:13, 32:8, 32:25, 33:10, 33:13, 34:1, 37:9, 37:10, 37:23, 37:24, 39:24, 41:17, 43:22, 46:6, 77:21, 78:18, 78:19, 78:23, 78:24, 93:25, 99:23, 103:21, 124:14, 124:18, 124:19, 125:4, 125:10, 125:11, 127:6, 127:8, 127:25, 131:5, 131:24, 134:19, 154:16, 155:20, 155:21, 155:25, 156:1, 161:10, 166:17, 188:13, 193:24, 193:25  <b>jury's</b> [1] - 28:8  <b>Justice</b> [1] - 26:12  <b>K-A-P-L-A-N</b> [2] - 126:19, 126:22  <b>K-A-P-L-I-N</b> [1] - 126:21  <b>Kaplan</b> [20] - 29:10, 84:4, 84:16, 85:5, 88:18, 89:2, 89:6, 126:5, 126:11, 126:14, 126:18, 129:23, 130:3, 145:21, 147:15, 152:18, 165:11, 169:6, 174:20, 181:23</p>	<p><b>Kaplan's</b> [1] - 163:11  <b>Kaufman</b> [3] - 140:22, 144:13, 150:5  <b>Kaufman's</b> [1] - 138:13  <b>keep</b> [7] - 86:17, 92:6, 122:1, 161:13, 161:20, 167:14, 179:3  <b>keeps</b> [2] - 47:6, 160:20  <b>Kelly</b> [12] - 32:1, 64:4, 65:21, 87:6, 87:9, 87:12, 119:14, 121:13, 121:15, 156:11, 157:7, 192:17  <b>KELLY</b> [135] - 26:18, 27:5, 27:8, 32:4, 33:5, 33:24, 34:5, 34:16, 34:19, 34:23, 35:4, 35:6, 37:3, 38:6, 38:14, 39:2, 42:15, 44:6, 44:12, 44:18, 45:18, 46:2, 48:14, 52:4, 53:1, 53:19, 53:21, 53:23, 54:1, 54:4, 59:5, 59:12, 63:24, 64:6, 65:24, 66:3, 66:19, 68:1, 70:19, 72:16, 72:18, 73:2, 73:4, 75:3, 78:9, 83:19, 86:24, 87:18, 89:11, 91:4, 92:16, 93:12, 93:18, 94:17, 97:5, 100:1, 101:7, 101:23, 101:25, 102:19, 103:12, 103:14, 104:22, 111:8, 111:11, 111:14, 111:22, 112:1, 112:5, 112:9, 112:13, 112:17, 114:2, 114:24, 116:12, 116:14, 116:16, 120:9, 120:16, 121:1, 121:17, 123:6, 123:19, 125:2, 125:5, 126:5, 127:1, 127:3, 129:23, 130:2, 133:25, 135:21, 138:14, 138:18, 140:15, 140:24, 148:3, 150:2, 152:10, 155:9, 157:23, 158:10, 160:17, 161:1, 161:4,</p>
--	--	---	--	---

161:18, 163:10,  
163:12, 163:21,  
170:9, 170:18,  
174:2, 174:5, 175:1,  
175:3, 176:7,  
177:11, 178:1,  
178:4, 178:10,  
178:24, 179:1,  
180:1, 180:3, 180:7,  
182:23, 186:7,  
186:9, 187:3,  
187:18, 189:12,  
191:18, 192:22,  
192:24, 193:17  
**Kelly's** [1] - 92:6  
**kept** [3] - 165:21,  
165:22, 166:4  
**kind** [12] - 40:19,  
40:20, 42:9, 56:9,  
69:20, 73:5, 117:5,  
122:16, 122:19,  
122:20, 128:12,  
129:18  
**kindly** [17] - 41:17,  
43:6, 46:5, 48:15,  
48:22, 53:9, 55:22,  
56:9, 62:8, 64:12,  
66:10, 69:3, 69:4,  
71:17, 145:18,  
154:16, 188:12  
**kinds** [1] - 28:3  
**king** [1] - 36:25  
**KINGS** [2] - 26:1, 26:1  
**knee** [1] - 133:5  
**knocked** [1] - 131:19  
**knowing** [3] - 102:2,  
105:3  
**knowledge** [2] -  
128:9, 153:4  
**knows** [1] - 77:6  
**Kolb** [30] - 29:10,  
29:11, 31:18, 31:19,  
32:18, 37:16, 38:15,  
38:16, 38:17, 38:21,  
42:15, 45:2, 45:5,  
76:2, 78:25, 89:2,  
89:3, 92:22, 94:14,  
97:24, 110:14,  
169:10, 169:14,  
169:16, 170:8,  
173:11, 177:8,  
177:13, 177:15  
**KOLB** [1] - 38:21  
**Kolb's** [4] - 29:11,  
32:19, 70:19, 81:9  
**Kolk** [1] - 78:21  
**L-spine** [1] - 109:15  
**L3** [1] - 57:5  
**L4-5** [1] - 57:23  
**L5** [8] - 62:22, 63:1,

67:9, 67:19, 68:22,  
69:14, 69:20, 72:3  
**L5-S1** [9] - 57:24,  
62:13, 63:5, 68:20,  
69:12, 70:7, 106:24,  
106:25, 107:10  
**label** [2] - 73:8, 75:2  
**labeled** [1] - 63:25  
**labor** [1] - 36:25  
**labrum** [3] - 142:12,  
180:19, 180:20  
**ladder** [4] - 42:6,  
129:15, 130:22,  
131:18  
**ladies** [5] - 78:15,  
124:13, 136:9,  
155:16, 193:15  
**language** [1] - 61:21  
**large** [2] - 63:6,  
125:18  
**larger** [2] - 51:8, 71:4  
**largest** [1] - 40:15  
**laser** [2] - 45:3, 141:1  
**last** [14] - 37:18,  
53:18, 78:4, 91:6,  
91:9, 92:23, 126:21,  
146:10, 155:1,  
156:12, 172:22,  
177:9, 179:2  
**lasted** [1] - 167:4  
**lateral** [1] - 131:10  
**LAURA** [2] - 26:24,  
194:7  
**law** [4] - 36:25, 80:23,  
81:9, 159:3  
**LAW** [1] - 26:20  
**lawsuit** [1] - 193:6  
**lawyer** [2] - 157:20,  
158:4  
**lawyers** [2] - 44:22,  
87:24  
**lay** [1] - 143:3  
**layers** [1] - 125:22  
**least** [4] - 28:2,  
115:20, 118:3, 119:3  
**leave** [4] - 73:21,  
85:16, 115:3, 174:24  
**lectures** [1] - 41:13  
**left** [12] - 28:17, 52:12,  
52:16, 60:21, 62:11,  
67:9, 67:19, 68:22,  
68:23, 95:19,  
119:11, 132:12  
**leg** [16] - 70:8, 131:1,  
131:9, 132:5,  
132:14, 132:15,  
134:12, 134:13,  
147:23, 149:4,  
190:21, 191:11,  
191:19, 192:1, 192:6

**legal** [2] - 27:15, 32:21  
**legitimate** [4] - 33:25,  
34:10, 34:17, 36:22  
**legs** [6] - 60:18, 60:22,  
61:4, 61:14, 67:4,  
130:25  
**Lenox** [18] - 45:24,  
46:2, 46:4, 48:17,  
64:2, 66:16, 72:23,  
73:3, 73:4, 74:23,  
74:24, 110:18,  
110:19, 110:24,  
176:15, 176:17,  
184:1, 187:16  
**lesion** [7] - 179:10,  
179:12, 179:18,  
179:21, 179:25,  
180:14, 180:15  
**less** [6] - 60:4, 60:7,  
105:23, 105:25,  
158:9, 186:11  
**letter** [3] - 50:4, 57:2,  
108:8  
**letting** [1] - 110:13  
**level** [6] - 55:9, 57:10,  
57:22, 62:13, 68:19,  
108:15  
**levels** [2] - 96:12,  
96:14  
**license** [1] - 112:23  
**licensed** [3] - 39:20,  
127:21, 161:20  
**Lichy** [2] - 111:21,  
112:7  
**lien** [1] - 32:6  
**liens** [1] - 32:2  
**life** [3] - 60:5, 99:13,  
99:15  
**lifetime** [2] - 153:13,  
153:20  
**lifted** [1] - 63:3  
**lifting** [1] - 175:11  
**ligament** [15] - 50:18,  
50:19, 50:20, 50:22,  
50:23, 50:25, 51:1,  
51:2, 51:4, 51:7,  
74:10, 97:19,  
105:12, 143:14  
**ligaments** [3] - 50:19,  
56:14, 129:5  
**likely** [15] - 29:16,  
32:12, 60:4, 60:7,  
60:8, 77:12, 99:8,  
99:10, 99:12, 99:13,  
105:23, 145:6,  
153:16, 185:2, 191:8  
**limited** [4] - 132:8,  
132:20, 133:6,  
153:15  
**limp** [1] - 132:3

**line** [7] - 29:4, 49:16,  
55:9, 72:4, 107:18,  
112:23, 114:3  
**lines** [5] - 32:4, 60:20,  
69:10, 71:14  
**list** [2] - 86:22, 162:1  
**literally** [1] - 29:4  
**litigation** [1] - 33:20  
**loaf** [1] - 49:10  
**local** [1] - 134:25  
**localized** [1] - 190:22  
**location** [1] - 191:24  
**locations** [1] - 85:10  
**logical** [1] - 119:21  
**look** [43] - 28:5, 31:15,  
43:7, 43:17, 44:10,  
44:13, 44:15, 46:7,  
47:14, 49:9, 53:9,  
54:9, 57:5, 62:5,  
62:6, 64:12, 72:5,  
81:2, 81:4, 81:25,  
82:3, 82:7, 82:16,  
82:20, 82:21, 82:23,  
95:11, 100:14,  
102:22, 106:6,  
108:4, 115:25,  
141:9, 141:10,  
145:19, 163:5,  
164:4, 166:21,  
169:4, 169:9, 176:3,  
184:7, 185:25  
**looked** [14] - 43:4,  
43:21, 55:12, 73:9,  
76:21, 82:25, 83:12,  
119:18, 142:17,  
142:19, 169:25,  
180:22, 187:20  
**looking** [49] - 45:10,  
45:11, 46:5, 46:6,  
46:11, 47:11, 48:22,  
49:7, 49:8, 52:21,  
53:12, 54:12, 56:10,  
56:24, 62:8, 62:13,  
66:11, 66:21, 66:22,  
67:10, 68:19, 69:21,  
71:17, 73:5, 74:20,  
74:21, 75:1, 75:8,  
82:6, 96:2, 97:21,  
100:4, 100:19,  
105:13, 141:4,  
141:5, 142:13,  
142:14, 142:21,  
145:19, 149:19,  
151:15, 151:20,  
168:14, 184:16,  
185:5, 187:23,  
188:1, 188:2  
**looks** [8] - 46:16,  
51:23, 62:14, 69:12,  
69:19, 75:10, 141:6,

169:9  
**lose** [2] - 76:24, 77:1  
**loses** [1] - 76:22  
**loss** [3] - 131:7,  
144:24, 145:7  
**lost** [1] - 131:19  
**loud** [4] - 36:17,  
38:19, 126:16,  
192:18  
**louder** [3] - 36:16,  
36:18, 170:4  
**low** [3] - 130:24,  
132:9, 134:12  
**lower** [3] - 131:8,  
131:9, 132:4  
**LP** [1] - 26:6  
**lumbar** [18] - 43:8,  
55:24, 56:11, 56:13,  
57:2, 60:15, 60:17,  
62:10, 66:15, 69:5,  
70:22, 71:18, 100:5,  
105:19, 109:12,  
115:8, 132:16,  
134:11  
**lunch** [2] - 124:21,  
124:23  
**Lutheran** [14] - 53:23,  
95:15, 99:23,  
100:21, 104:18,  
131:20, 167:7,  
183:24, 184:2,  
189:6, 189:20,  
190:13, 193:10,  
193:11  
**lysis** [3] - 107:13,  
107:15, 145:4  
**machine** [1] - 85:2  
**mail** [2] - 29:20, 29:21  
**main** [7] - 43:7, 43:11,  
48:11, 131:11,  
134:14, 135:2,  
136:23  
**maintained** [1] -  
109:17  
**maintains** [1] - 166:5  
**major** [5] - 41:10,  
43:9, 58:1, 70:9,  
75:13  
**majority** [2] - 123:15,  
142:22  
**male** [1] - 50:2  
**males** [1] - 59:21  
**mammograms** [1] -  
40:21  
**man** [3] - 59:17,  
174:25, 186:10  
**Manhattan** [2] - 39:16,  
126:19  
**manipulate** [3] - 48:4,  
48:6, 55:18

<p><b>manipulated</b> [1] - 76:7</p> <p><b>mapped</b> [1] - 52:19</p> <p><b>march</b> [1] - 187:11</p> <p><b>March</b> [26] - 53:14, 55:12, 88:3, 91:7, 94:15, 95:12, 100:12, 100:21, 102:8, 102:11, 102:21, 103:24, 106:20, 106:23, 130:20, 130:22, 143:22, 157:13, 158:5, 168:11, 184:8, 184:12, 184:13, 184:14, 186:13, 186:17</p> <p><b>marginal</b> [1] - 176:21</p> <p><b>mark</b> [15] - 28:7, 44:16, 53:18, 53:20, 65:5, 135:24, 140:18, 140:19, 145:16, 146:11, 148:3, 164:2, 166:16, 167:15</p> <p><b>marked</b> [7] - 27:7, 28:9, 65:3, 93:3, 138:14, 163:22, 167:11</p> <p><b>marker</b> [3] - 45:3, 56:17, 141:1</p> <p><b>marking</b> [2] - 28:22, 70:25</p> <p><b>match</b> [6] - 36:14, 37:8, 65:10, 65:19, 188:18, 188:20</p> <p><b>matched</b> [1] - 149:17</p> <p><b>material</b> [13] - 43:17, 43:18, 51:14, 51:21, 57:20, 62:19, 71:25, 72:8, 73:11, 75:7, 109:22, 110:5, 113:18</p> <p><b>matter</b> [5] - 35:22, 35:25, 125:17, 166:13, 191:21</p> <p><b>Mauro</b> [3] - 87:13, 87:17, 156:18</p> <p><b>mean</b> [20] - 48:6, 76:17, 77:11, 84:6, 88:6, 88:8, 98:4, 101:24, 103:17, 104:8, 108:22, 114:14, 114:15, 122:19, 122:20, 122:21, 133:14, 147:6, 165:23, 187:17</p> <p><b>meaning</b> [9] - 32:21, 63:1, 129:8, 132:14, 133:1, 134:7,</p>	<p>134:10, 171:11, 188:25</p> <p><b>means</b> [27] - 39:24, 40:19, 41:24, 62:22, 62:23, 101:17, 115:25, 127:25, 131:9, 132:3, 132:9, 133:15, 134:11, 134:25, 137:17, 141:7, 141:8, 144:23, 146:19, 165:24, 173:8, 176:11, 176:12, 180:19, 180:20, 188:12, 188:14</p> <p><b>meant</b> [2] - 180:12, 180:14</p> <p><b>meantime</b> [2] - 31:8, 193:20</p> <p><b>measure</b> [1] - 109:5</p> <p><b>medical</b> [35] - 32:2, 32:21, 33:19, 39:10, 43:14, 46:13, 63:3, 76:13, 84:14, 88:19, 88:24, 117:7, 118:6, 119:7, 127:13, 128:3, 130:5, 130:9, 133:9, 133:12, 138:2, 138:6, 138:7, 139:8, 139:9, 141:5, 153:3, 153:12, 154:3, 164:21, 173:2, 186:16, 186:25, 190:13, 193:3</p> <p><b>Medical</b> [6] - 39:16, 53:23, 55:25, 131:20, 167:7, 190:14</p> <p><b>medically</b> [4] - 82:11, 114:15, 177:22, 193:4</p> <p><b>medication</b> [1] - 164:8</p> <p><b>medications</b> [7] - 129:9, 134:22, 139:13, 139:14, 139:15, 145:2, 149:8</p> <p><b>Medicine</b> [2] - 39:13, 130:18</p> <p><b>medicine</b> [5] - 39:20, 127:21, 129:3, 129:24, 142:5</p> <p><b>meet</b> [1] - 158:6</p> <p><b>member</b> [3] - 40:5, 128:22, 128:23</p> <p><b>memory</b> [1] - 168:5</p> <p><b>Memphis</b> [1] - 127:16</p> <p><b>mention</b> [1] - 114:18</p> <p><b>mentioned</b> [5] - 130:21, 156:13,</p>	<p>173:3, 188:11</p> <p><b>mere</b> [1] - 108:21</p> <p><b>met</b> [3] - 79:9, 84:12, 158:7</p> <p><b>metal</b> [6] - 69:16, 69:18, 70:1, 70:22, 71:21</p> <p><b>Metropolitan</b> [1] - 41:9</p> <p><b>mic</b> [2] - 36:16, 170:3</p> <p><b>microtrauma</b> [2] - 123:17, 123:25</p> <p><b>mid</b> [1] - 50:7</p> <p><b>mid-back</b> [1] - 50:7</p> <p><b>middle</b> [4] - 49:3, 54:17, 71:23, 74:1</p> <p><b>midline</b> [1] - 132:9</p> <p><b>might</b> [7] - 31:6, 31:21, 35:22, 68:12, 94:10, 100:2, 102:15</p> <p><b>mild</b> [4] - 114:21, 175:9, 176:21, 181:8</p> <p><b>millimeters</b> [2] - 54:9, 54:16</p> <p><b>mind</b> [3] - 111:14, 145:11, 161:6</p> <p><b>mine</b> [4] - 130:19, 156:22, 156:25, 159:3</p> <p><b>minor</b> [1] - 46:24</p> <p><b>minute</b> [7] - 66:3, 78:15, 124:21, 155:17, 172:23, 173:5, 183:18</p> <p><b>MINUTES</b> [1] - 194:4</p> <p><b>minutes</b> [9] - 28:20, 35:7, 37:19, 116:12, 116:13, 123:1, 123:2, 126:3, 169:1</p> <p><b>minutiae</b> [1] - 93:20</p> <p><b>miss</b> [1] - 40:21</p> <p><b>missing</b> [1] - 83:13</p> <p><b>mistaken</b> [1] - 30:17</p> <p><b>modalities</b> [1] - 134:25</p> <p><b>model</b> [10] - 135:19, 135:22, 136:6, 136:10, 136:13, 136:21, 136:22, 142:13, 148:2, 148:6</p> <p><b>modified</b> [1] - 113:4</p> <p><b>modify</b> [1] - 112:15</p> <p><b>moment</b> [6] - 93:3, 94:11, 98:24, 108:6, 167:22, 177:15</p> <p><b>moments</b> [1] - 97:23</p> <p><b>Monday</b> [1] - 31:12</p> <p><b>money</b> [1] - 162:11</p> <p><b>month</b> [4] - 85:20, 86:4, 91:2, 157:21</p>	<p><b>months</b> [17] - 37:1, 91:6, 92:8, 122:13, 141:19, 141:21, 141:22, 141:23, 157:2, 157:3, 157:17, 159:9, 191:10, 192:7, 192:14</p> <p><b>MORA</b> [1] - 26:3</p> <p><b>Mora</b> [68] - 42:5, 47:23, 84:12, 85:5, 100:13, 116:20, 117:1, 117:4, 117:21, 118:2, 119:1, 123:21, 129:14, 130:13, 130:17, 130:23, 131:2, 131:21, 132:2, 133:9, 135:3, 135:13, 138:1, 139:3, 139:12, 139:25, 140:3, 140:8, 141:15, 143:22, 144:14, 145:3, 145:13, 146:1, 147:8, 147:16, 147:18, 147:22, 150:10, 152:20, 152:25, 153:6, 153:12, 153:19, 154:5, 159:25, 160:8, 161:11, 161:24, 162:14, 162:17, 164:19, 165:17, 166:20, 166:23, 166:24, 167:20, 173:10, 173:23, 181:18, 182:8, 182:12, 182:20, 186:10, 187:5, 188:6, 188:9, 189:10</p> <p><b>Mora's</b> [28] - 42:9, 42:21, 76:5, 93:10, 100:23, 105:6, 106:13, 118:6, 119:8, 129:18, 133:22, 138:7, 139:9, 145:9, 148:24, 150:7, 150:14, 152:11, 167:21, 168:8, 172:6, 177:24, 178:17, 183:3, 183:7, 185:1, 186:17, 187:13</p> <p><b>morning</b> [15] - 27:4, 27:5, 27:6, 29:3, 29:10, 30:6, 31:12, 32:17, 33:16, 34:14,</p>	<p>36:24, 39:3, 39:4, 65:11, 156:8</p> <p><b>Moro</b> [1] - 144:17</p> <p><b>most</b> [11] - 32:8, 36:18, 41:1, 54:21, 82:7, 119:21, 128:16, 136:22, 143:7, 148:13, 175:18</p> <p><b>motion</b> [14] - 27:17, 35:20, 38:3, 124:6, 131:7, 132:19, 132:20, 133:6, 137:24, 144:20, 144:25, 145:7, 148:24, 153:15</p> <p><b>motions</b> [5] - 27:16, 28:2, 30:23, 30:24</p> <p><b>mouth</b> [1] - 61:18</p> <p><b>move</b> [31] - 30:14, 31:4, 31:7, 44:20, 47:7, 49:4, 50:6, 50:8, 50:9, 50:11, 50:15, 50:17, 56:18, 61:20, 62:1, 68:15, 69:17, 86:24, 89:18, 90:16, 91:16, 91:23, 111:19, 113:8, 137:5, 139:21, 143:14, 149:14, 165:14, 166:2, 167:6</p> <p><b>moved</b> [3] - 127:18, 133:2, 142:19</p> <p><b>movements</b> [1] - 123:16</p> <p><b>moves</b> [2] - 69:16, 175:10</p> <p><b>moving</b> [6] - 90:8, 110:11, 122:1, 132:23, 143:12, 149:12</p> <p><b>MR</b> [280] - 27:5, 27:6, 27:8, 27:10, 27:12, 27:15, 27:17, 29:8, 29:14, 29:18, 29:20, 29:24, 30:3, 30:9, 30:13, 30:21, 32:4, 33:5, 33:24, 34:5, 34:16, 34:19, 34:23, 35:4, 35:5, 35:6, 35:8, 36:8, 36:12, 37:3, 37:11, 38:6, 38:9, 38:14, 39:2, 42:15, 42:17, 44:6, 44:12, 44:15, 44:18, 44:20, 45:6, 45:13, 45:18, 46:2, 48:14, 52:2, 52:4, 52:23, 53:1, 53:15, 53:19, 53:20, 53:21, 53:23,</p>
---	--	--	--	---

53:24, 54:1, 54:4,  
56:18, 58:8, 58:11,  
58:14, 58:18, 59:3,  
59:5, 59:9, 59:12,  
59:14, 59:18, 60:1,  
60:25, 61:5, 61:10,  
61:22, 62:1, 63:24,  
64:2, 64:6, 65:3,  
65:24, 66:3, 66:18,  
66:19, 66:20, 67:24,  
68:1, 68:5, 68:10,  
68:14, 70:19, 72:16,  
72:18, 73:2, 73:4,  
75:3, 78:9, 78:12,  
79:4, 79:6, 83:19,  
85:25, 86:24, 87:2,  
87:18, 89:4, 89:11,  
89:15, 89:17, 90:3,  
90:17, 91:4, 91:7,  
91:11, 92:16, 93:12,  
93:15, 93:18, 94:17,  
95:21, 97:5, 97:11,  
97:23, 100:1,  
100:17, 100:21,  
101:7, 101:9,  
101:23, 101:25,  
102:9, 102:19,  
103:12, 103:14,  
104:22, 110:11,  
111:8, 111:11,  
111:14, 111:22,  
112:1, 112:5, 112:9,  
112:13, 112:17,  
112:20, 113:1,  
113:17, 114:2,  
114:7, 114:13,  
114:24, 116:11,  
116:12, 116:14,  
116:16, 117:9,  
117:11, 117:13,  
118:1, 118:8,  
118:12, 118:16,  
118:19, 119:9,  
120:9, 120:11,  
120:13, 120:16,  
121:1, 121:17,  
121:25, 123:2,  
123:6, 123:19,  
123:22, 124:10,  
125:2, 125:5, 125:6,  
126:5, 127:1, 127:3,  
129:23, 129:25,  
130:2, 133:23,  
133:25, 135:21,  
135:24, 138:9,  
138:11, 138:14,  
138:18, 138:21,  
138:25, 140:15,  
140:17, 140:24,  
148:3, 150:2, 150:4,  
150:15, 152:8,

152:10, 155:9,  
155:13, 156:5,  
156:7, 157:23,  
158:10, 160:17,  
161:1, 161:4,  
161:18, 162:25,  
163:8, 163:10,  
163:11, 163:12,  
163:14, 163:18,  
163:21, 163:24,  
164:24, 165:14,  
166:15, 167:13,  
168:23, 169:12,  
170:9, 170:16,  
170:18, 171:9,  
174:2, 174:4, 174:5,  
174:11, 174:14,  
175:1, 175:3, 176:7,  
176:10, 177:11,  
178:1, 178:4,  
178:10, 178:15,  
178:24, 179:1,  
180:1, 180:3, 180:7,  
182:23, 183:18,  
183:22, 183:24,  
184:1, 184:4,  
184:14, 185:6,  
185:13, 186:4,  
186:7, 186:9, 187:1,  
187:3, 187:18,  
189:12, 189:14,  
189:16, 189:17,  
189:19, 189:23,  
191:18, 192:22,  
192:24, 193:13,  
193:17, 193:18  
**MRI** [107] - 41:21,  
45:23, 47:9, 47:25,  
48:1, 48:3, 48:5,  
48:16, 51:23, 51:24,  
53:9, 54:6, 54:21,  
54:25, 55:12, 55:24,  
56:11, 62:10, 63:22,  
64:24, 66:15, 69:5,  
69:19, 70:9, 70:21,  
71:18, 72:22, 73:7,  
75:8, 75:14, 78:2,  
80:1, 81:20, 81:21,  
81:25, 82:22, 85:1,  
85:25, 95:23, 95:25,  
99:23, 102:11,  
102:17, 102:22,  
103:17, 103:21,  
103:25, 104:15,  
104:21, 105:3,  
106:16, 108:11,  
108:21, 109:9,  
112:15, 115:8,  
116:24, 116:25,  
117:1, 117:18,  
118:24, 118:25,

122:10, 122:12,  
135:13, 135:14,  
135:15, 135:18,  
137:10, 137:19,  
147:24, 149:9,  
149:17, 151:11,  
167:21, 167:24,  
168:1, 168:24,  
169:2, 169:8,  
169:20, 169:23,  
170:7, 170:12,  
171:1, 171:24,  
172:13, 176:25,  
179:5, 181:7, 181:9,  
181:12, 184:24,  
185:12, 185:17,  
185:22, 187:15,  
187:16, 187:19,  
187:24, 188:5,  
189:6, 191:5, 191:6,  
192:8, 192:10,  
192:12  
**MRIs** [12] - 41:3,  
41:19, 41:20, 42:3,  
55:1, 63:22, 80:12,  
82:2, 113:9, 113:12,  
169:24, 188:15  
**multiple** [5] - 96:12,  
96:14, 122:23,  
141:10, 181:11  
**muscle** [6] - 47:4,  
47:15, 133:3, 133:4,  
137:1, 137:4  
**muscles** [5] - 46:25,  
132:9, 137:5,  
137:17, 139:20  
**muscular** [1] - 132:13  
**musculature** [1] -  
132:17  
**musculoskeletal** [1] -  
85:23  
**must** [1] - 80:6  
**mutters** [1] - 192:19  
**myofacial** [1] - 134:6  
**N.Y.** [1] - 130:18  
**name** [15] - 38:19,  
48:19, 65:17, 66:7,  
88:16, 110:22,  
126:17, 126:18,  
126:21, 148:11,  
156:17, 156:18,  
157:15, 157:20,  
158:3  
**named** [1] - 137:6  
**names** [6] - 46:13,  
46:22, 46:23, 88:5,  
88:6, 158:18  
**narrative** [3] - 35:15,  
35:17, 35:19  
**narrow** [1] - 67:6

**narrowing** [5] - 67:1,  
67:2, 67:15, 67:16,  
68:16  
**natural** [1] - 147:10  
**nature** [6] - 97:17,  
130:16, 140:13,  
144:1, 178:18, 187:8  
**near** [1] - 142:3  
**necessarily** [3] -  
136:11, 158:18,  
179:22  
**necessitated** [2] -  
154:9, 183:12  
**neck** [27] - 42:7, 43:8,  
49:8, 50:4, 50:5,  
50:8, 51:13, 52:17,  
53:5, 53:14, 54:11,  
54:12, 57:2, 64:18,  
74:17, 75:1, 75:17,  
75:23, 117:22,  
118:23, 129:16,  
130:24, 134:5,  
134:8, 142:4  
**need** [37] - 29:6,  
41:20, 44:15, 44:23,  
47:13, 48:10, 53:7,  
55:20, 60:14, 62:5,  
63:15, 65:1, 65:5,  
68:24, 70:15, 72:19,  
74:18, 75:24, 91:24,  
107:2, 124:20,  
125:22, 125:23,  
125:24, 126:10,  
130:5, 130:8,  
134:24, 152:16,  
153:14, 155:14,  
172:23, 183:16,  
183:22, 187:9,  
190:3, 190:17  
**needed** [1] - 35:2  
**needle** [1] - 73:22  
**needs** [1] - 90:9  
**nerve** [19] - 52:14,  
52:15, 52:16, 52:17,  
52:19, 60:19, 67:5,  
67:7, 67:9, 67:18,  
67:19, 68:22, 71:14,  
115:17, 115:20,  
116:5, 116:7  
**nerves** [14] - 51:11,  
52:5, 52:7, 52:9,  
52:10, 60:15, 60:17,  
67:3, 67:18, 142:4,  
144:3, 144:5, 144:6  
**neural** [6] - 52:13,  
67:2, 67:4, 67:6,  
115:16, 115:24  
**Nevada** [2] - 128:18,  
128:23  
**never** [7] - 30:6, 64:25,

139:3, 166:9, 170:7,  
177:18, 182:17  
**new** [2] - 128:15,  
180:17  
**NEW** [1] - 26:1  
**New** [21] - 26:10,  
26:17, 26:21, 38:22,  
39:9, 39:21, 41:9,  
42:13, 127:18,  
127:21, 128:17,  
128:18, 128:22,  
128:23, 129:21,  
159:14, 162:7,  
162:16  
**next** [10] - 44:18,  
47:12, 56:23, 57:11,  
66:12, 66:14, 72:22,  
82:15, 82:21, 125:1  
**nicely** [1] - 37:6  
**nine** [4] - 29:11, 34:7,  
34:9, 34:13  
**non** [1] - 98:21  
**non-traumatically** [1]  
- 98:21  
**none** [4] - 93:11,  
93:16, 96:15  
**nontraumatic** [4] -  
97:17, 97:18,  
123:12, 123:13  
**normal** [11] - 50:16,  
57:6, 93:22, 95:17,  
101:11, 109:8,  
110:4, 132:24,  
143:15, 148:19,  
175:9  
**normally** [4] - 59:21,  
109:17, 132:22,  
143:15  
**North** [1] - 41:8  
**notation** [1] - 88:7  
**note** [14] - 60:1, 96:18,  
96:20, 104:20,  
137:9, 140:19,  
161:22, 168:12,  
176:1, 185:11,  
190:17, 190:19,  
193:9, 193:11  
**noted** [11] - 60:2,  
131:11, 131:17,  
132:18, 132:25,  
133:2, 135:6,  
135:17, 149:5,  
150:22, 189:6  
**notes** [17] - 45:8, 80:4,  
100:18, 131:19,  
132:2, 132:7,  
132:10, 133:11,  
137:10, 176:2,  
185:7, 185:16,  
185:17, 185:19,

<p>185:23, 186:3  <b>nothing</b> [7] - 66:22, 98:1, 118:1, 120:9, 155:9, 189:12, 193:13  <b>notice</b> [2] - 34:20, 79:15  <b>Notice</b> [2] - 65:24, 145:17  <b>noticed</b> [1] - 176:2  <b>notified</b> [1] - 81:1  <b>November</b> [6] - 34:20, 88:13, 91:7, 157:4, 158:5, 158:21  <b>nowadays</b> [2] - 40:19, 55:2  <b>nowhere</b> [1] - 36:19  <b>number</b> [19] - 39:25, 50:4, 56:25, 57:1, 63:16, 70:17, 72:25, 78:6, 80:1, 86:2, 86:8, 125:22, 128:5, 140:21, 162:16, 163:7, 163:8  <b>Number</b> [7] - 45:20, 54:20, 56:1, 70:18, 72:15, 140:23, 150:1  <b>NUMBER</b> [1] - 26:4  <b>nutrients</b> [2] - 74:4, 74:5  <b>oath</b> [6] - 78:13, 79:2, 94:13, 111:2, 155:15, 156:4  <b>object</b> [7] - 30:11, 31:4, 180:3, 192:18, 192:20, 192:23  <b>objecting</b> [1] - 61:22  <b>objection</b> [10] - 29:14, 31:21, 42:17, 42:19, 52:2, 52:23, 58:8, 59:3, 59:9, 59:18, 60:1, 60:2, 60:25, 61:5, 61:10, 61:17, 61:18, 61:19, 61:23, 62:3, 62:4, 67:24, 68:5, 68:14, 83:19, 86:24, 87:18, 89:11, 91:4, 92:6, 92:16, 93:12, 93:18, 97:5, 100:1, 101:23, 102:2, 102:19, 103:12, 103:14, 104:22, 111:8, 111:11, 111:18, 111:22, 112:1, 112:5, 112:13, 112:17, 114:2, 114:24, 117:9, 118:8, 118:17, 119:9, 119:12,</p>	<p>120:16, 121:1, 121:17, 123:6, 123:19, 129:25, 130:1, 133:23, 135:23, 138:9, 138:10, 138:20, 138:22, 138:24, 150:15, 152:8, 157:23, 158:10, 160:17, 160:18, 160:23, 161:18, 163:21, 163:22, 163:24, 170:9, 170:18, 174:2, 174:18, 175:1, 176:7, 177:11, 178:1, 178:2, 178:24, 180:1, 182:23, 187:1, 191:18, 191:22, 192:19, 192:21, 192:22, 192:25  <b>objectionable</b> [1] - 68:13  <b>objections</b> [1] - 36:23  <b>objective</b> [3] - 55:17, 74:15, 76:4  <b>observation</b> [1] - 125:13  <b>obviously</b> [2] - 45:16, 85:17  <b>occupies</b> [1] - 57:14  <b>occur</b> [3] - 60:5, 123:5, 175:9  <b>occurred</b> [4] - 105:12, 130:22, 171:25, 173:21  <b>occurs</b> [2] - 151:10, 173:8  <b>October</b> [4] - 29:18, 141:17, 172:13, 172:16  <b>ocular</b> [2] - 133:13, 133:14  <b>oddly</b> [1] - 149:15  <b>OF</b> [5] - 26:1, 26:1, 194:3, 194:4  <b>offer</b> [3] - 42:15, 145:15, 163:18  <b>offered</b> [2] - 64:10, 84:14  <b>offering</b> [1] - 64:4  <b>offers</b> [1] - 129:23  <b>office</b> [26] - 34:11, 43:1, 77:17, 77:18, 77:23, 80:23, 84:25, 92:10, 126:19, 130:17, 135:4, 147:18, 147:22, 154:12, 159:1,</p>	<p>159:2, 160:25, 166:5, 166:6, 166:8, 166:9, 166:20, 166:23, 166:24, 166:25, 168:6  <b>OFFICER</b> [16] - 27:1, 37:21, 37:23, 44:9, 78:18, 78:23, 124:18, 124:25, 125:10, 155:20, 155:25, 163:13, 163:15, 165:10, 189:24, 193:24  <b>officer</b> [1] - 189:21  <b>offices</b> [1] - 80:23  <b>official</b> [1] - 166:5  <b>often</b> [12] - 40:22, 47:3, 74:17, 82:7, 82:16, 83:11, 99:4, 99:5, 99:6, 143:9, 157:1, 157:22  <b>older</b> [6] - 60:6, 60:8, 76:20, 77:11, 99:10, 106:1  <b>Olivera</b> [3] - 88:3, 89:9, 157:14  <b>Olivera's</b> [1] - 157:15  <b>once</b> [9] - 32:15, 48:9, 55:17, 144:10, 157:17, 158:4, 158:5, 180:9, 189:25  <b>one</b> [74] - 37:7, 40:13, 41:1, 45:14, 46:19, 48:9, 49:7, 50:1, 50:4, 52:7, 52:15, 52:16, 54:10, 54:11, 57:2, 57:11, 57:21, 63:19, 65:15, 65:16, 67:9, 67:10, 68:7, 70:25, 72:22, 76:4, 81:15, 81:17, 82:3, 82:15, 82:18, 82:21, 83:3, 84:10, 85:10, 92:20, 92:24, 96:18, 106:4, 106:6, 106:7, 106:9, 108:7, 109:11, 109:14, 109:20, 110:8, 112:20, 113:1, 113:5, 114:9, 122:11, 124:8, 132:15, 137:3, 148:20, 148:22, 156:14, 167:9, 167:10, 168:15, 168:20, 172:22, 176:10, 176:11, 176:12, 180:24, 183:18, 183:22, 185:21, 187:22,</p>	<p>192:1  <b>one-hour</b> [1] - 83:3  <b>ones</b> [1] - 41:10  <b>ongoing</b> [2] - 92:6, 177:23  <b>open</b> [3] - 49:11, 118:12, 171:3  <b>opened</b> [4] - 28:21, 118:10, 187:20  <b>opening</b> [2] - 28:20, 125:14  <b>operate</b> [2] - 175:21, 175:22  <b>operated</b> [3] - 175:20, 175:25, 189:5  <b>operating</b> [1] - 187:8  <b>operation</b> [1] - 176:24  <b>operative</b> [3] - 176:1, 176:3, 179:17  <b>opinion</b> [37] - 58:12, 97:8, 97:12, 98:9, 98:12, 98:20, 112:22, 117:6, 117:16, 118:5, 118:20, 119:6, 138:5, 138:8, 139:7, 139:10, 143:24, 150:13, 152:13, 154:2, 154:7, 154:8, 164:24, 170:15, 170:20, 170:21, 170:24, 172:1, 177:22, 182:20, 182:22, 186:15, 186:19, 193:7  <b>opinions</b> [6] - 35:12, 43:13, 130:4, 130:5, 130:8  <b>opposed</b> [5] - 54:6, 54:10, 99:15, 182:4, 192:14  <b>options</b> [1] - 91:15  <b>oral</b> [3] - 40:4, 101:8, 145:2  <b>orbit</b> [1] - 100:23  <b>order</b> [7] - 27:3, 31:5, 44:24, 82:23, 124:25, 141:11, 165:10  <b>ordering</b> [1] - 184:24  <b>orient</b> [2] - 54:5, 56:9  <b>original</b> [4] - 44:1, 44:4, 48:18, 95:2  <b>ORIGINAL</b> [1] - 194:3  <b>Ortho</b> [5] - 130:18, 159:14, 162:7, 162:17, 163:12  <b>orthopedic</b> [7] - 127:7, 127:15, 127:16, 128:9,</p>	<p>129:3, 129:24, 130:20  <b>Orthopedic</b> [3] - 128:7, 128:17, 128:25  <b>orthopedics</b> [3] - 128:14, 129:1, 129:4  <b>os</b> [19] - 148:16, 148:17, 149:20, 150:6, 150:22, 150:23, 151:4, 151:5, 151:11, 151:17, 151:21, 151:24, 152:4, 170:25, 172:9, 172:10, 191:3, 191:4, 192:2  <b>osteophyte</b> [14] - 103:2, 103:21, 175:21, 175:24, 176:2, 176:4, 176:6, 176:9, 176:21, 177:3, 177:6, 177:8, 177:16, 177:19  <b>osteophytes</b> [1] - 77:8  <b>otherwise</b> [2] - 59:17, 101:11  <b>ought</b> [1] - 158:1  <b>outside</b> [9] - 32:2, 32:4, 33:10, 67:18, 78:17, 92:17, 146:12, 155:18, 190:13  <b>outstanding</b> [1] - 27:9  <b>overheated</b> [2] - 125:23, 125:24  <b>overruled</b> [19] - 59:25, 60:2, 61:11, 61:23, 62:3, 68:6, 111:23, 114:25, 117:14, 118:9, 119:10, 120:17, 123:7, 139:1, 150:20, 161:19, 175:2, 175:4, 191:22  <b>overruling</b> [1] - 60:3  <b>overtime</b> [1] - 135:7  <b>own</b> [2] - 159:14, 162:9  <b>OWNER</b> [1] - 26:6  <b>P.C</b> [1] - 26:16  <b>page</b> [5] - 46:9, 46:13, 54:14, 81:17, 190:11  <b>pages</b> [9] - 29:12, 34:7, 34:9, 34:10, 34:12, 34:14, 81:18, 185:20, 186:2  <b>paid</b> [2] - 32:20, 112:22  <b>pain</b> [115] - 42:10,</p>
---	--	---	--	--

47:23, 51:12, 51:25, 52:19, 52:22, 52:24, 52:25, 53:1, 53:4, 55:15, 58:3, 60:10, 60:23, 61:4, 61:14, 63:10, 63:12, 67:20, 68:17, 68:21, 68:23, 70:11, 70:13, 72:10, 74:12, 74:14, 74:15, 75:19, 75:21, 108:23, 117:8, 117:17, 117:18, 118:21, 118:23, 119:5, 119:19, 119:20, 120:3, 120:8, 120:25, 121:8, 121:12, 130:25, 131:7, 131:8, 131:11, 132:9, 132:11, 132:14, 132:18, 133:20, 134:3, 134:5, 134:6, 134:8, 134:11, 134:12, 135:8, 137:20, 137:21, 137:22, 137:23, 138:2, 138:5, 139:4, 139:5, 139:9, 139:15, 144:8, 144:18, 144:24, 147:23, 149:1, 149:3, 149:4, 149:6, 149:10, 149:11, 149:15, 149:22, 150:10, 150:24, 152:6, 152:12, 152:13, 152:14, 153:15, 153:19, 153:22, 170:1, 182:5, 182:10, 182:13, 186:14, 186:15, 186:17, 190:20, 190:21, 191:11, 191:12, 191:19, 191:20, 191:23, 192:1, 192:6  
**painful** [7] - 50:12, 132:3, 132:15, 144:9, 144:10, 148:23, 151:8  
**panel** [1] - 128:5  
**paper** [5] - 37:5, 40:15, 40:16, 40:20, 190:7  
**papers** [7] - 41:1, 45:10, 128:15, 190:2, 190:5, 190:7, 190:16  
**parents** [1] - 36:15

**pars** [24] - 62:23, 63:5, 63:14, 68:25, 98:25, 99:2, 99:10, 99:22, 106:9, 106:13, 119:2, 119:16, 119:17, 119:23, 119:25, 120:5, 120:14, 120:15, 120:20, 120:24, 121:3, 121:5  
**part** [35] - 33:19, 36:4, 40:13, 40:14, 41:1, 41:2, 41:23, 46:9, 48:24, 53:25, 57:1, 75:15, 76:18, 82:19, 86:1, 97:15, 99:13, 105:18, 133:7, 143:15, 148:1, 157:17, 160:7, 161:16, 161:21, 165:24, 173:22, 182:8, 183:1, 183:2, 183:5, 186:12, 191:13, 191:15  
**Part** [2] - 27:1, 87:15  
**PART** [1] - 26:1  
**part-time** [1] - 186:12  
**partial** [20] - 47:17, 47:18, 47:20, 47:22, 51:2, 51:4, 51:18, 51:22, 57:19, 97:19, 98:1, 117:18, 117:19, 135:15, 135:16, 137:10, 137:21, 142:23, 182:1  
**partially** [2] - 55:8, 190:19  
**particular** [13] - 40:1, 51:17, 53:4, 67:8, 67:17, 71:3, 82:13, 83:2, 84:4, 107:12, 159:11, 173:10, 176:16  
**partner** [2] - 110:21, 111:20  
**parts** [8] - 40:13, 41:3, 42:10, 43:7, 43:11, 52:17, 54:10, 96:21  
**party** [1] - 36:4  
**pass** [2] - 40:4, 40:5  
**passed** [2] - 110:22, 112:12  
**past** [7] - 79:17, 86:15, 92:8, 92:12, 92:13, 128:13, 162:2  
**pathology** [2] - 179:7, 181:4  
**patient** [65] - 41:22, 48:4, 48:19, 49:24,

49:25, 52:1, 53:4, 55:15, 58:5, 60:8, 60:21, 61:4, 61:7, 61:8, 63:7, 63:13, 65:17, 65:18, 67:25, 68:22, 69:8, 69:11, 69:14, 69:16, 69:17, 69:19, 70:1, 70:8, 70:11, 70:13, 71:7, 71:20, 71:22, 71:23, 72:1, 74:15, 84:9, 84:19, 85:1, 88:19, 88:23, 102:8, 106:1, 113:25, 114:17, 115:23, 118:21, 118:23, 119:17, 122:9, 130:14, 131:14, 135:7, 142:2, 156:21, 156:22, 156:25, 161:21, 165:2, 166:6, 183:6, 185:8, 188:20  
**patient's** [6] - 54:18, 67:19, 88:15, 136:7, 136:11, 187:11  
**patients** [14] - 41:20, 42:10, 84:6, 89:7, 110:25, 114:18, 123:15, 129:12, 154:15, 155:8, 159:2, 188:16  
**pattern** [2] - 180:2, 180:16  
**Pause** [9] - 27:23, 37:20, 65:22, 66:6, 78:22, 165:9, 168:22, 183:21, 184:5  
**pay** [1] - 32:14  
**pediatrician** [1] - 39:12  
**pediatrics** [2] - 39:14, 40:2  
**Pedro** [3] - 89:19, 158:13, 158:14  
**peeking** [1] - 51:3  
**pen** [1] - 146:14  
**people** [17] - 32:8, 33:17, 85:10, 88:5, 97:25, 98:4, 98:12, 98:14, 148:13, 148:14, 160:3, 162:3, 175:17, 175:18, 186:23, 187:9  
**per** [4] - 31:4, 42:3, 79:16, 91:21  
**percent** [2] - 36:4, 90:22

**percentage** [1] - 124:2  
**perfect** [1] - 38:1  
**perform** [1] - 141:15  
**performed** [10] - 85:6, 100:6, 131:21, 135:14, 140:8, 145:12, 159:25, 168:1, 172:13, 172:16  
**perfusion** [1] - 70:7  
**period** [7] - 29:21, 83:3, 91:2, 101:20, 157:21, 158:24, 179:2  
**permanent** [11] - 69:22, 69:24, 76:10, 76:11, 147:11, 152:20, 152:22, 152:24, 153:8, 153:10, 154:9  
**permissible** [1] - 178:13  
**permission** [2] - 28:4, 135:21  
**persistent** [2] - 135:8, 148:25  
**persists** [1] - 70:7  
**person** [8] - 99:10, 108:22, 109:20, 114:22, 156:18, 161:16, 181:24, 187:8  
**person's** [1] - 136:13  
**personal** [1] - 114:5  
**phase** [1] - 77:9  
**phones** [1] - 36:17  
**photograph** [1] - 146:1  
**photographs** [2] - 176:3, 177:2  
**photos** [1] - 94:2  
**physial** [5] - 160:1, 160:2, 161:15, 161:23, 165:18  
**physical** [33] - 129:9, 131:21, 131:23, 131:24, 131:25, 139:16, 139:18, 139:19, 144:19, 145:1, 159:24, 159:25, 160:3, 160:14, 161:16, 161:20, 161:25, 162:3, 162:20, 162:22, 162:23, 163:2, 164:5, 164:11, 164:15, 164:16, 164:17, 164:18, 165:1, 165:17, 165:20,

165:22, 182:4  
**physician** [4] - 88:18, 133:25, 134:2, 159:12  
**physicians** [3] - 128:6, 135:3, 135:5  
**picked** [1] - 159:1  
**picture** [32] - 46:10, 47:9, 47:21, 48:8, 49:7, 49:9, 49:16, 49:17, 49:19, 54:12, 54:16, 55:6, 55:7, 62:11, 62:12, 64:15, 67:8, 70:22, 70:24, 71:3, 71:22, 75:6, 81:21, 104:12, 135:25, 136:14, 136:19, 142:14, 145:25, 181:14  
**pictures** [22] - 47:9, 48:9, 49:6, 49:9, 49:20, 55:19, 62:6, 66:22, 70:23, 71:23, 73:9, 73:25, 84:20, 84:22, 85:2, 93:5, 104:4, 104:6, 104:11, 177:6  
**piece** [9] - 62:23, 73:10, 80:9, 148:10, 148:12, 148:13, 149:13, 149:22, 151:2  
**pieces** [2] - 49:12, 172:11  
**pierce** [1] - 73:23  
**pinched** [1] - 137:19  
**pitchers** [1] - 123:18  
**place** [19] - 30:15, 46:20, 50:18, 50:21, 50:23, 51:1, 56:13, 105:6, 106:3, 108:1, 127:15, 146:25, 147:1, 152:1, 173:19, 176:16, 178:17, 191:16, 192:14  
**placed** [2] - 93:17, 111:2  
**places** [2] - 85:1, 162:1  
**Plaintiff** [9] - 32:7, 32:12, 32:14, 38:14, 59:11, 64:10, 112:16, 113:25, 129:23  
**Plaintiff's** [12] - 31:25, 32:11, 37:15, 54:3, 63:12, 81:20, 95:3, 136:18, 138:18, 138:22, 141:3,

<p>145:16  <b>Plaintiffs</b> [2] - 26:4, 26:16  <b>plan</b> [6] - 31:20, 134:16, 134:18, 134:19, 134:20, 135:2  <b>plantar</b> [1] - 149:11  <b>plastic</b> [1] - 136:10  <b>play</b> [1] - 33:17  <b>player</b> [1] - 123:21  <b>point</b> [10] - 34:6, 35:2, 35:8, 44:19, 96:16, 104:9, 123:22, 159:19, 164:11, 182:19  <b>pointer</b> [2] - 45:3, 141:1  <b>poking</b> [1] - 143:6  <b>poor</b> [2] - 153:5, 153:10  <b>population</b> [1] - 67:25  <b>portion</b> [2] - 147:25, 182:21  <b>position</b> [2] - 57:6, 137:6  <b>positioned</b> [1] - 142:2  <b>positive</b> [1] - 133:1  <b>possible</b> [10] - 110:4, 114:21, 120:23, 177:23, 178:3, 178:21, 182:6, 188:24, 191:8, 193:4  <b>possibly</b> [1] - 188:19  <b>posterior</b> [3] - 69:12, 150:24, 152:3  <b>postfusion</b> [2] - 115:10, 115:21  <b>postsurgically</b> [1] - 139:15  <b>posttraumatic</b> [5] - 134:6, 134:11, 152:23, 153:7, 153:8  <b>potential</b> [1] - 61:7  <b>potentially</b> [1] - 90:2  <b>practice</b> [20] - 39:20, 40:13, 41:12, 41:16, 41:18, 59:20, 76:17, 111:20, 112:12, 127:19, 127:21, 129:1, 131:3, 159:14, 159:15, 159:17, 159:20, 159:23, 160:1, 165:18  <b>practicing</b> [2] - 39:18, 58:24  <b>pre</b> [1] - 28:7  <b>pre-mark</b> [1] - 28:7  <b>preassigned</b> [1] - 37:1</p>	<p><b>preclude</b> [2] - 33:5, 100:7  <b>predate</b> [1] - 105:9  <b>predated</b> [1] - 102:17  <b>predates</b> [1] - 121:7  <b>predicting</b> [1] - 153:3  <b>predictive</b> [1] - 178:22  <b>predispose</b> [1] - 179:6  <b>predisposition</b> [1] - 181:25  <b>preexisted</b> [2] - 101:22, 121:6  <b>preface</b> [1] - 170:22  <b>prefer</b> [1] - 45:3  <b>prepared</b> [2] - 32:5, 146:24  <b>preparing</b> [1] - 147:1  <b>Presbyterian</b> [1] - 39:16  <b>prescribed</b> [1] - 139:16  <b>prescription</b> [1] - 161:23  <b>presence</b> [1] - 33:10  <b>present</b> [5] - 59:21, 60:4, 132:5, 175:24, 176:2  <b>presentation</b> [1] - 44:7  <b>presented</b> [1] - 131:3  <b>presents</b> [1] - 61:8  <b>presiding</b> [1] - 27:2  <b>presses</b> [1] - 67:8  <b>pressing</b> [3] - 108:16, 108:19, 108:22  <b>pressure</b> [1] - 143:6  <b>pressures</b> [1] - 51:11  <b>presurgical</b> [2] - 152:5, 152:11  <b>pretty</b> [4] - 32:18, 71:16, 145:25, 151:17  <b>prevent</b> [1] - 36:2  <b>previously</b> [7] - 34:22, 42:12, 67:9, 110:19, 129:20, 140:11, 145:16  <b>primarily</b> [1] - 188:8  <b>private</b> [6] - 32:13, 41:12, 41:16, 41:18, 127:19, 129:1  <b>probe</b> [2] - 146:14  <b>problem</b> [16] - 29:12, 33:5, 37:9, 56:23, 73:1, 91:25, 92:21, 121:5, 142:22, 146:9, 149:9, 149:14, 155:5, 163:6, 184:22, 187:25</p>	<p><b>problems</b> [6] - 42:9, 129:11, 129:18, 133:12, 139:22, 146:10  <b>procedure</b> [2] - 142:6, 142:7  <b>proceed</b> [1] - 53:17  <b>PROCEEDING</b> [1] - 194:4  <b>proceedings</b> [9] - 27:23, 37:20, 65:22, 66:6, 78:22, 165:9, 168:22, 183:21, 184:5  <b>process</b> [18] - 80:19, 81:10, 103:1, 103:13, 104:13, 105:5, 134:21, 143:16, 147:3, 148:11, 151:3, 177:9, 177:17, 177:20, 177:23, 179:4  <b>produce</b> [1] - 35:19  <b>produced</b> [2] - 58:7, 154:18  <b>producing</b> [13] - 47:22, 55:15, 58:2, 60:10, 63:9, 67:20, 68:16, 72:10, 74:12, 75:19, 133:20, 152:6, 152:12  <b>production</b> [1] - 31:9  <b>productive</b> [2] - 137:22, 137:23  <b>profession</b> [3] - 39:5, 98:9, 127:6  <b>professional</b> [13] - 39:7, 41:7, 42:8, 97:8, 97:12, 97:16, 98:20, 114:9, 127:8, 128:11, 128:20, 129:17, 177:22  <b>profound</b> [1] - 59:21  <b>prognosis</b> [6] - 152:25, 153:2, 153:3, 153:4, 153:10, 154:3  <b>program</b> [3] - 127:14, 127:17, 128:4  <b>projecting</b> [1] - 170:6  <b>promise</b> [1] - 36:19  <b>propose</b> [1] - 44:24  <b>protective</b> [1] - 31:5  <b>protruding</b> [2] - 72:1, 96:15  <b>protrusion</b> [1] - 115:13  <b>provide</b> [3] - 35:15, 35:17, 42:23</p>	<p><b>provided</b> [1] - 162:14  <b>providing</b> [1] - 111:5  <b>PT</b> [1] - 160:24  <b>publications</b> [1] - 128:12  <b>published</b> [5] - 40:8, 40:9, 40:15, 40:20, 41:1  <b>pull</b> [4] - 49:14, 49:20, 54:14, 149:22  <b>pulled</b> [2] - 57:13, 151:19  <b>pulling</b> [2] - 149:11, 175:11  <b>pulls</b> [1] - 146:24  <b>punch</b> [1] - 29:4  <b>purpose</b> [1] - 139:18  <b>purposes</b> [3] - 37:17, 44:7, 136:18  <b>push</b> [4] - 51:8, 51:10, 51:21, 146:23  <b>pushed</b> [1] - 57:14  <b>pushes</b> [4] - 51:5, 51:6, 57:16, 67:18  <b>pushing</b> [15] - 51:16, 55:8, 57:20, 62:19, 67:1, 67:6, 72:8, 73:11, 73:16, 74:9, 74:10, 96:22, 175:11  <b>put</b> [24] - 32:7, 44:14, 49:20, 65:11, 66:7, 69:14, 69:15, 73:1, 73:22, 74:25, 86:22, 104:1, 112:23, 113:23, 115:1, 115:2, 136:15, 138:14, 138:16, 141:11, 142:8, 146:25, 172:1  <b>puts</b> [1] - 35:23  <b>putting</b> [4] - 36:20, 147:1, 147:5, 180:24  <b>qualification</b> [1] - 128:3  <b>qualified</b> [2] - 42:12, 129:20  <b>quarter</b> [1] - 110:10  <b>quash</b> [2] - 30:14, 31:4  <b>Queens</b> [1] - 39:9  <b>questioning</b> [3] - 87:3, 114:3, 130:10  <b>questions</b> [8] - 36:22, 36:23, 78:9, 107:5, 116:11, 124:10, 180:11, 186:4  <b>quick</b> [3] - 56:19, 155:17, 165:6  <b>radiating</b> [6] - 61:4, 119:5, 130:25,</p>	<p>131:8, 134:8, 134:12  <b>radiculopathy</b> [1] - 134:7  <b>radiologic</b> [1] - 98:9  <b>Radiological</b> [1] - 41:8  <b>radiological</b> [2] - 97:16, 107:25  <b>radiologist</b> [21] - 36:5, 36:6, 37:17, 39:6, 41:2, 41:24, 42:16, 42:17, 58:22, 59:20, 90:22, 94:24, 103:10, 105:11, 106:3, 110:15, 112:16, 169:22, 176:14, 192:12, 193:8  <b>radiologists</b> [1] - 82:23  <b>radiology</b> [10] - 39:17, 39:18, 40:2, 40:8, 41:17, 41:18, 42:23, 58:24, 95:2  <b>Radiology</b> [21] - 31:19, 40:6, 45:24, 46:4, 48:17, 64:1, 64:5, 66:16, 72:23, 74:23, 74:24, 92:22, 110:18, 110:19, 110:24, 169:10, 169:14, 176:15, 176:17, 187:16  <b>Radiology's</b> [1] - 31:19  <b>raise</b> [3] - 46:18, 126:12, 137:17  <b>Ramirez</b> [3] - 89:20, 158:13, 158:14  <b>ran</b> [2] - 124:13, 192:8  <b>range</b> [2] - 132:18, 137:24  <b>rate</b> [2] - 32:14, 32:15  <b>rather</b> [5] - 31:9, 32:6, 32:10, 148:16, 180:12  <b>ray</b> [41] - 41:21, 48:1, 48:2, 54:7, 54:10, 54:11, 64:14, 64:23, 64:25, 80:5, 80:16, 82:22, 95:3, 95:6, 95:16, 95:17, 101:10, 104:17, 105:4, 105:9, 106:19, 106:23, 168:6, 168:18, 168:19, 168:24, 172:6, 172:8, 173:7, 173:10, 173:18, 173:25, 174:13, 174:23, 181:14,</p>
---	---	--	---	--

184:8, 185:1, 185:2, 185:12	134:25, 140:6, 149:18	<b>redness</b> [1] - 145:24	79:2, 126:12, 155:15, 156:4, 165:10	<b>Reporter</b> [3] - 150:19, 170:6, 194:8
<b>rays</b> [13] - 41:3, 42:3, 54:7, 54:22, 64:20, 65:25, 80:9, 95:14, 116:17, 116:18, 133:7, 168:7, 181:11	<b>record</b> [42] - 27:18, 27:21, 27:22, 30:5, 31:22, 31:23, 34:25, 37:11, 37:12, 37:13, 37:14, 38:20, 45:6, 55:22, 56:8, 56:21, 68:8, 92:18, 111:16, 121:23, 125:8, 126:17, 160:19, 160:21, 163:9, 164:21, 165:8, 166:4, 166:5, 166:6, 167:8, 167:16, 167:18, 167:19, 172:23, 174:16, 189:20, 190:8, 193:10, 193:12	<b>reduce</b> [1] - 125:19	<b>remember</b> [23] - 32:1, 46:12, 46:23, 57:19, 73:25, 79:10, 86:16, 87:8, 87:14, 87:22, 88:5, 88:15, 88:22, 88:23, 94:25, 95:2, 100:16, 104:19, 155:3, 156:13, 157:20, 158:1, 158:16	<b>REPORTER</b> [1] - 26:25
<b>reached</b> [1] - 128:8	<b>recorded</b> [1] - 139:10	<b>reduced</b> [1] - 137:24	<b>remind</b> [3] - 94:12, 136:1, 156:4	<b>reporting</b> [2] - 35:13, 137:19
<b>reaction</b> [2] - 183:11, 183:13	<b>records</b> [67] - 27:25, 28:1, 28:3, 28:5, 28:24, 28:25, 29:11, 30:1, 30:5, 30:8, 30:9, 30:16, 31:7, 31:10, 31:12, 31:21, 33:18, 34:3, 34:8, 34:25, 43:6, 56:2, 81:12, 86:17, 88:19, 88:24, 93:21, 109:2, 115:2, 130:11, 138:12, 138:13, 160:23, 160:24, 161:11, 161:12, 161:13, 161:21, 163:3, 163:5, 163:11, 164:7, 164:8, 164:9, 164:10, 164:15, 164:16, 164:17, 164:18, 164:22, 164:23, 165:20, 165:24, 168:3, 173:2, 182:14, 182:17, 182:19, 184:7, 184:19, 189:7, 189:22, 190:13	<b>refer</b> [6] - 43:6, 130:11, 140:20, 167:20, 172:12	<b>reminder</b> [2] - 38:2, 193:15	<b>reports</b> [27] - 30:3, 33:19, 33:20, 33:22, 34:21, 35:9, 35:16, 36:2, 37:3, 43:2, 43:4, 44:17, 77:23, 78:1, 80:1, 80:2, 81:6, 81:8, 81:15, 81:17, 83:3, 100:14, 113:20, 154:18, 168:19, 169:25
<b>read</b> [19] - 41:3, 54:14, 61:20, 69:7, 82:8, 85:3, 85:6, 85:21, 88:6, 95:6, 95:17, 150:16, 150:18, 170:22, 171:7, 171:11, 171:13, 171:14, 173:11	<b>recorded</b> [1] - 139:10	<b>referral</b> [3] - 41:22, 166:7, 166:9	<b>remembers</b> [1] - 157:25	<b>represent</b> [2] - 44:4, 103:10
<b>reading</b> [3] - 85:18, 169:24, 179:23	<b>records</b> [67] - 27:25, 28:1, 28:3, 28:5, 28:24, 28:25, 29:11, 30:1, 30:5, 30:8, 30:9, 30:16, 31:7, 31:10, 31:12, 31:21, 33:18, 34:3, 34:8, 34:25, 43:6, 56:2, 81:12, 86:17, 88:19, 88:24, 93:21, 109:2, 115:2, 130:11, 138:12, 138:13, 160:23, 160:24, 161:11, 161:12, 161:13, 161:21, 163:3, 163:5, 163:11, 164:7, 164:8, 164:9, 164:10, 164:15, 164:16, 164:17, 164:18, 164:22, 164:23, 165:20, 165:24, 168:3, 173:2, 182:14, 182:17, 182:19, 184:7, 184:19, 189:7, 189:22, 190:13	<b>referred</b> [7] - 91:6, 135:3, 135:5, 135:7, 166:23, 166:24, 167:1	<b>remind</b> [3] - 94:12, 136:1, 156:4	<b>representation</b> [4] - 76:4, 146:18, 160:22, 172:18
<b>ready</b> [4] - 37:21, 38:13, 125:1, 125:4	<b>records</b> [67] - 27:25, 28:1, 28:3, 28:5, 28:24, 28:25, 29:11, 30:1, 30:5, 30:8, 30:9, 30:16, 31:7, 31:10, 31:12, 31:21, 33:18, 34:3, 34:8, 34:25, 43:6, 56:2, 81:12, 86:17, 88:19, 88:24, 93:21, 109:2, 115:2, 130:11, 138:12, 138:13, 160:23, 160:24, 161:11, 161:12, 161:13, 161:21, 163:3, 163:5, 163:11, 164:7, 164:8, 164:9, 164:10, 164:15, 164:16, 164:17, 164:18, 164:22, 164:23, 165:20, 165:24, 168:3, 173:2, 182:14, 182:17, 182:19, 184:7, 184:19, 189:7, 189:22, 190:13	<b>referring</b> [3] - 88:18, 88:23, 111:7	<b>reminder</b> [2] - 38:2, 193:15	<b>request</b> [4] - 34:7, 34:25, 35:1, 80:20
<b>real</b> [2] - 34:2, 56:19	<b>records</b> [67] - 27:25, 28:1, 28:3, 28:5, 28:24, 28:25, 29:11, 30:1, 30:5, 30:8, 30:9, 30:16, 31:7, 31:10, 31:12, 31:21, 33:18, 34:3, 34:8, 34:25, 43:6, 56:2, 81:12, 86:17, 88:19, 88:24, 93:21, 109:2, 115:2, 130:11, 138:12, 138:13, 160:23, 160:24, 161:11, 161:12, 161:13, 161:21, 163:3, 163:5, 163:11, 164:7, 164:8, 164:9, 164:10, 164:15, 164:16, 164:17, 164:18, 164:22, 164:23, 165:20, 165:24, 168:3, 173:2, 182:14, 182:17, 182:19, 184:7, 184:19, 189:7, 189:22, 190:13	<b>refresh</b> [2] - 87:20, 168:5	<b>reminders</b> [1] - 157:25	<b>requested</b> [1] - 41:23
<b>realistic</b> [1] - 31:11	<b>records</b> [67] - 27:25, 28:1, 28:3, 28:5, 28:24, 28:25, 29:11, 30:1, 30:5, 30:8, 30:9, 30:16, 31:7, 31:10, 31:12, 31:21, 33:18, 34:3, 34:8, 34:25, 43:6, 56:2, 81:12, 86:17, 88:19, 88:24, 93:21, 109:2, 115:2, 130:11, 138:12, 138:13, 160:23, 160:24, 161:11, 161:12, 161:13, 161:21, 163:3, 163:5, 163:11, 164:7, 164:8, 164:9, 164:10, 164:15, 164:16, 164:17, 164:18, 164:22, 164:23, 165:20, 165:24, 168:3, 173:2, 182:14, 182:17, 182:19, 184:7, 184:19, 189:7, 189:22, 190:13	<b>refreshing</b> [1] - 161:7	<b>reminders</b> [1] - 157:25	<b>require</b> [2] - 86:22, 185:15
<b>really</b> [12] - 29:6, 35:7, 37:7, 41:10, 54:22, 55:4, 56:15, 66:12, 148:22, 173:1, 183:15, 190:21	<b>records</b> [67] - 27:25, 28:1, 28:3, 28:5, 28:24, 28:25, 29:11, 30:1, 30:5, 30:8, 30:9, 30:16, 31:7, 31:10, 31:12, 31:21, 33:18, 34:3, 34:8, 34:25, 43:6, 56:2, 81:12, 86:17, 88:19, 88:24, 93:21, 109:2, 115:2, 130:11, 138:12, 138:13, 160:23, 160:24, 161:11, 161:12, 161:13, 161:21, 163:3, 163:5, 163:11, 164:7, 164:8, 164:9, 164:10, 164:15, 164:16, 164:17, 164:18, 164:22, 164:23, 165:20, 165:24, 168:3, 173:2, 182:14, 182:17, 182:19, 184:7, 184:19, 189:7, 189:22, 190:13	<b>regard</b> [3] - 98:17, 153:2, 168:3	<b>reminders</b> [1] - 157:25	<b>required</b> [5] - 36:1, 139:15, 143:18, 145:3, 145:8
<b>reask</b> [1] - 180:9	<b>records</b> [67] - 27:25, 28:1, 28:3, 28:5, 28:24, 28:25, 29:11, 30:1, 30:5, 30:8, 30:9, 30:16, 31:7, 31:10, 31:12, 31:21, 33:18, 34:3, 34:8, 34:25, 43:6, 56:2, 81:12, 86:17, 88:19, 88:24, 93:21, 109:2, 115:2, 130:11, 138:12, 138:13, 160:23, 160:24, 161:11, 161:12, 161:13, 161:21, 163:3, 163:5, 163:11, 164:7, 164:8, 164:9, 164:10, 164:15, 164:16, 164:17, 164:18, 164:22, 164:23, 165:20, 165:24, 168:3, 173:2, 182:14, 182:17, 182:19, 184:7, 184:19, 189:7, 189:22, 190:13	<b>regarding</b> [2] - 144:17, 190:9	<b>reminders</b> [1] - 157:25	<b>requiring</b> [1] - 153:12
<b>reason</b> [10] - 46:19, 60:6, 62:4, 83:12, 112:11, 115:22, 116:1, 120:7, 180:24, 183:10	<b>records</b> [67] - 27:25, 28:1, 28:3, 28:5, 28:24, 28:25, 29:11, 30:1, 30:5, 30:8, 30:9, 30:16, 31:7, 31:10, 31:12, 31:21, 33:18, 34:3, 34:8, 34:25, 43:6, 56:2, 81:12, 86:17, 88:19, 88:24, 93:21, 109:2, 115:2, 130:11, 138:12, 138:13, 160:23, 160:24, 161:11, 161:12, 161:13, 161:21, 163:3, 163:5, 163:11, 164:7, 164:8, 164:9, 164:10, 164:15, 164:16, 164:17, 164:18, 164:22, 164:23, 165:20, 165:24, 168:3, 173:2, 182:14, 182:17, 182:19, 184:7, 184:19, 189:7, 189:22, 190:13	<b>regardless</b> [1] - 85:25	<b>reminders</b> [1] - 157:25	<b>research</b> [6] - 40:10, 40:25, 124:16, 128:11, 128:13, 193:21
<b>reason</b> [10] - 46:19, 60:6, 62:4, 83:12, 112:11, 115:22, 116:1, 120:7, 180:24, 183:10	<b>records</b> [67] - 27:25, 28:1, 28:3, 28:5, 28:24, 28:25, 29:11, 30:1, 30:5, 30:8, 30:9, 30:16, 31:7, 31:10, 31:12, 31:21, 33:18, 34:3, 34:8, 34:25, 43:6, 56:2, 81:12, 86:17, 88:19, 88:24, 93:21, 109:2, 115:2, 130:11, 138:12, 138:13, 160:23, 160:24, 161:11, 161:12, 161:13, 161:21, 163:3, 163:5, 163:11, 164:7, 164:8, 164:9, 164:10, 164:15, 164:16, 164:17, 164:18, 164:22, 164:23, 165:20, 165:24, 168:3, 173:2, 182:14, 182:17, 182:19, 184:7, 184:19, 189:7, 189:22, 190:13	<b>regards</b> [2] - 122:2, 177:23	<b>reminders</b> [1] - 157:25	<b>residency</b> [2] - 39:12, 128:4
<b>reasonable</b> [14] - 43:14, 117:7, 118:5, 118:24, 119:6, 119:21, 121:10, 130:5, 130:9, 138:5, 139:7, 154:2, 186:16, 193:3	<b>records</b> [67] - 27:25, 28:1, 28:3, 28:5, 28:24, 28:25, 29:11, 30:1, 30:5, 30:8, 30:9, 30:16, 31:7, 31:10, 31:12, 31:21, 33:18, 34:3, 34:8, 34:25, 43:6, 56:2, 81:12, 86:17, 88:19, 88:24, 93:21, 109:2, 115:2, 130:11, 138:12, 138:13, 160:23, 160:24, 161:11, 161:12, 161:13, 161:21, 163:3, 163:5, 163:11, 164:7, 164:8, 164:9, 164:10, 164:15, 164:16, 164:17, 164:18, 164:22, 164:23, 165:20, 165:24, 168:3, 173:2, 182:14, 182:17, 182:19, 184:7, 184:19, 189:7, 189:22, 190:13	<b>region</b> [1] - 131:9	<b>reminders</b> [1] - 157:25	<b>residual</b> [1] - 152:22
<b>reason</b> [10] - 46:19, 60:6, 62:4, 83:12, 112:11, 115:22, 116:1, 120:7, 180:24, 183:10	<b>records</b> [67] - 27:25, 28:1, 28:3, 28:5, 28:24, 28:25, 29:11, 30:1, 30:5, 30:8, 30:9, 30:16, 31:7, 31:10, 31:12, 31:21, 33:18, 34:3, 34:8, 34:25, 43:6, 56:2, 81:12, 86:17, 88:19, 88:24, 93:21, 109:2, 115:2, 130:11, 138:12, 138:13, 160:23, 160:24, 161:11, 161:12, 161:13, 161:21, 163:3, 163:5, 163:11, 164:7, 164:8, 164:9, 164:10, 164:15, 164:16, 164:17, 164:18, 164:22, 164:23, 165:20, 165:24, 168:3, 173:2, 182:14, 182:17, 182:19, 184:7, 184:19, 189:7, 189:22, 190:13	<b>regular</b> [2] - 38:3, 54:7	<b>reminders</b> [1] - 157:25	<b>resin</b> [1] - 136:10
<b>reasonable</b> [14] - 43:14, 117:7, 118:5, 118:24, 119:6, 119:21, 121:10, 130:5, 130:9, 138:5, 139:7, 154:2, 186:16, 193:3	<b>records</b> [67] - 27:25, 28:1, 28:3, 28:5, 28:24, 28:25, 29:11, 30:1, 30:5, 30:8, 30:9, 30:16, 31:7, 31:10, 31:12, 31:21, 33:18, 34:3, 34:8, 34:25, 43:6, 56:2, 81:12, 86:17, 88:19, 88:24, 93:21, 109:2, 115:2, 130:11, 138:12, 138:13, 160:23, 160:24, 161:11, 161:12, 161:13, 161:21, 163:3, 163:5, 163:11, 164:7, 164:8, 164:9, 164:10, 164:15, 164:16, 164:17, 164:18, 164:22, 164:23, 165:20, 165:24, 168:3, 173:2, 182:14, 182:17, 182:19, 184:7, 184:19, 189:7, 189:22, 190:13	<b>regularly</b> [1] - 129:12	<b>reminders</b> [1] - 157:25	<b>resist</b> [1] - 35:19
<b>reason</b> [10] - 46:19, 60:6, 62:4, 83:12, 112:11, 115:22, 116:1, 120:7, 180:24, 183:10	<b>records</b> [67] - 27:25, 28:1, 28:3, 28:5, 28:24, 28:25, 29:11, 30:1, 30:5, 30:8, 30:9, 30:16, 31:7, 31:10, 31:12, 31:21, 33:18, 34:3, 34:8, 34:25, 43:6, 56:2, 81:12, 86:17, 88:19, 88:24, 93:21, 109:2, 115:2, 130:11, 138:12, 138:13, 160:23, 160:24, 161:11, 161:12, 161:13, 161:21, 163:3, 163:5, 163:11, 164:7, 164:8, 164:9, 164:10, 164:15, 164:16, 164:17, 164:18, 164:22, 164:23, 165:20, 165:24, 168:3, 173:2, 182:14, 182:17, 182:19, 184:7, 184:19, 189:7, 189:22, 190:13	<b>rehabilitate</b> [1] - 144:20	<b>reminders</b> [1] - 157:25	<b>resolve</b> [1] - 76:13
<b>reasonable</b> [14] - 43:14, 117:7, 118:5, 118:24, 119:6, 119:21, 121:10, 130:5, 130:9, 138:5, 139:7, 154:2, 186:16, 193:3	<b>records</b> [67] - 27:25, 28:1, 28:3, 28:5, 28:24, 28:25, 29:11, 30:1, 30:5, 30:8, 30:9, 30:16, 31:7, 31:10, 31:12, 31:21, 33:18, 34:3, 34:8, 34:25, 43:6, 56:2, 81:12, 86:17, 88:19, 88:24, 93:21, 109:2, 115:2, 130:11, 138:12, 138:13, 160:23, 160:24, 161:11, 161:12, 161:13, 161:21, 163:3, 163:5, 163:11, 164:7, 164:8, 164:9, 164:10, 164:15, 164:16, 164:17, 164:18, 164:22, 164:23, 165:20, 165:24, 168:3, 173:2, 182:14, 182:17, 182:19, 184:7, 184:19, 189:7, 189:22, 190:13	<b>relate</b> [1] - 190:17	<b>reminders</b> [1] - 157:25	<b>resolved</b> [1] - 28:13
<b>reason</b> [10] - 46:19, 60:6, 62:4, 83:12, 112:11, 115:22, 116:1, 120:7, 180:24, 183:10	<b>records</b> [67] - 27:25, 28:1, 28:3, 28:5, 28:24, 28:25, 29:11, 30:1, 30:5, 30:8, 30:9, 30:16, 31:7, 31:10, 31:12, 31:21, 33:18, 34:3, 34:8, 34:25, 43:6, 56:2, 81:12, 86:17, 88:19, 88:24, 93:21, 109:2, 115:2, 130:11, 138:12, 138:13, 160:23, 160:24, 161:11, 161:12, 161:13, 161:21, 163:3, 163:5, 163:11, 164:7, 164:8, 164:9, 164:10, 164:15, 164:16, 164:17, 164:18, 164:22, 164:23, 165:20, 165:24, 168:3, 173:2, 182:14, 182:17, 182:19, 184:7, 184:19, 189:7, 189:22, 190:13	<b>related</b> [14] - 93:10, 120:1, 120:3, 134:3, 137:21, 145:10, 147:9, 147:13, 154:4, 154:10, 183:4, 183:9, 183:17, 186:21	<b>reminders</b> [1] - 157:25	<b>respect</b> [26] - 31:5, 32:11, 35:12, 43:17, 43:18, 43:23, 52:1, 52:6, 52:21, 53:3, 58:9, 58:11, 62:15, 67:13, 70:10, 74:7, 119:2, 133:9, 138:3, 141:3, 142:1, 152:25, 154:19, 188:6, 188:9, 188:10
<b>reason</b> [10] - 46:19, 60:6, 62:4, 83:12, 112:11, 115:22, 116:1, 120:7, 180:24, 183:10	<b>records</b> [67] - 27:25, 28:1, 28:3, 28:5, 28:24, 28:25, 29:11, 30:1, 30:5, 30:8, 30:9, 30:16, 31:7, 31:10, 31:12, 31:21, 33:18, 34:3, 34:8, 34:25, 43:6, 56:2, 81:12, 86:17, 88:19, 88:24, 93:21, 109:2, 115:2, 130:11, 138:12, 138:13, 160:23, 160:24, 161:11, 161:12, 161:13, 161:21, 163:3, 163:5, 163:11, 164:7, 164:8, 164:9, 164:10, 164:15, 164:16, 164:17, 164:18, 164:22, 164:23, 165:20, 165:24, 168:3, 173:2, 182:14, 182:17, 182:19, 184:7, 184:19, 189:7, 189:22, 190:13	<b>relationship</b> [2] - 111:25, 167:4	<b>reminders</b> [1] - 157:25	<b>respond</b> [3] - 31:12, 33:2, 33:4
<b>reason</b> [10] - 46:19, 60:6, 62:4, 83:12, 112:11, 115:22, 116:1, 120:7, 180:24, 183:10	<b>records</b> [67] - 27:25, 28:1, 28:3, 28:5, 28:24, 28:25, 29:11, 30:1, 30:5, 30:8, 30:9, 30:16, 31:7, 31:10, 31:12, 31:21, 33:18, 34:3, 34:8, 34:25, 43:6, 56:2, 81:12, 86:17, 88:19, 88:24, 93:21, 109:2, 115:2, 130:11, 138:12, 138:13, 160:23, 160:24, 161:11, 161:12, 161:13, 161:21, 163:3, 163:5, 163:11, 164:7, 164:8, 164:9, 164:10, 164:15, 164:16, 16			

<p><b>restaurant</b> [1] - 186:13</p> <p><b>result</b> [6] - 59:1, 99:24, 140:2, 146:6, 153:19, 189:10</p> <p><b>results</b> [2] - 102:5, 108:2</p> <p><b>results</b> [3] - 135:12, 152:3, 186:20</p> <p><b>resumed</b> [9] - 76:2, 78:25, 97:24, 110:14, 144:13, 147:15, 152:18, 165:11, 181:23</p> <p><b>return</b> [1] - 144:25</p> <p><b>revealed</b> [1] - 135:15</p> <p><b>review</b> [25] - 30:21, 35:11, 42:23, 43:1, 44:25, 70:3, 79:22, 80:17, 80:20, 80:25, 84:5, 84:16, 90:20, 90:23, 93:4, 93:16, 94:23, 100:12, 103:16, 104:2, 109:2, 135:9, 161:21, 184:18, 186:1</p> <p><b>reviewed</b> [22] - 43:25, 55:10, 58:14, 64:9, 80:8, 80:9, 93:7, 93:9, 94:24, 94:25, 95:1, 101:10, 102:24, 103:5, 110:18, 113:12, 135:10, 165:1, 176:18, 182:14, 190:13</p> <p><b>reviewing</b> [6] - 45:8, 45:12, 80:15, 83:23, 84:3, 111:4</p> <p><b>reviews</b> [1] - 32:19</p> <p><b>ribs</b> [1] - 114:17</p> <p><b>rid</b> [2] - 141:14, 179:16</p> <p><b>ring</b> [1] - 142:16</p> <p><b>rise</b> [9] - 27:1, 37:23, 78:18, 78:23, 124:18, 125:10, 155:20, 155:25, 193:24</p> <p><b>risk</b> [4] - 40:15, 144:4, 144:6, 144:7</p> <p><b>risks</b> [1] - 143:25</p> <p><b>roll</b> [1] - 61:18</p> <p><b>room</b> [2] - 124:14, 143:11</p> <p><b>root</b> [7] - 52:14, 52:15, 67:7, 67:9, 67:18, 67:19, 116:5</p> <p><b>roots</b> [6] - 60:19, 68:22, 71:14,</p>	<p>115:17, 116:7</p> <p><b>Rosales</b> [3] - 88:14, 157:5, 157:6</p> <p><b>rotator</b> [27] - 46:21, 47:19, 47:20, 47:22, 48:12, 48:14, 117:18, 117:19, 122:24, 123:4, 123:8, 123:16, 123:24, 132:25, 133:2, 134:23, 137:3, 137:5, 137:11, 142:23, 145:5, 145:8, 147:12, 152:21, 179:7, 182:1</p> <p><b>roughly</b> [2] - 80:17, 86:9</p> <p><b>round</b> [8] - 49:15, 49:16, 49:19, 49:24, 62:11, 73:25, 75:5, 75:6</p> <p><b>routine</b> [1] - 145:1</p> <p><b>row</b> [1] - 126:9</p> <p><b>rule</b> [3] - 61:19, 102:2, 192:21</p> <p><b>ruled</b> [2] - 30:13, 37:13</p> <p><b>rules</b> [1] - 93:22</p> <p><b>ruling</b> [4] - 30:25, 33:13, 36:22, 118:18</p> <p><b>rulings</b> [2] - 27:19, 29:6</p> <p><b>S1</b> [3] - 63:1, 69:15, 72:3</p> <p><b>sac</b> [16] - 57:17, 62:20, 67:1, 73:16, 73:18, 73:19, 73:21, 73:22, 73:23, 73:24, 74:5, 74:8, 74:11, 96:23, 108:20, 108:22</p> <p><b>sacrum</b> [1] - 57:2</p> <p><b>sagittal</b> [1] - 62:12</p> <p><b>sandwich</b> [2] - 49:11, 49:23</p> <p><b>sandwiches</b> [1] - 49:13</p> <p><b>satisfactory</b> [1] - 33:11</p> <p><b>save</b> [1] - 168:13</p> <p><b>saw</b> [13] - 55:10, 67:9, 101:21, 103:9, 106:9, 122:12, 130:23, 167:21, 167:24, 168:1, 181:2, 189:9, 190:3</p> <p><b>scan</b> [21] - 41:3, 41:21, 51:17, 51:18, 53:10, 53:11, 53:13, 54:2, 54:6, 54:8,</p>	<p>54:14, 54:15, 54:21, 74:21, 75:10, 78:2, 80:1, 94:22, 96:2, 96:4, 100:12</p> <p><b>scans</b> [9] - 41:19, 42:3, 54:7, 54:22, 64:24, 75:4, 80:12, 82:2, 85:25</p> <p><b>scapula</b> [1] - 137:9</p> <p><b>scar</b> [1] - 144:8</p> <p><b>schedule</b> [1] - 90:9</p> <p><b>scheduled</b> [1] - 90:3</p> <p><b>scheduling</b> [4] - 90:11, 90:12, 90:14, 126:7</p> <p><b>school</b> [3] - 39:10, 127:13, 128:3</p> <p><b>science</b> [1] - 193:4</p> <p><b>scope</b> [4] - 58:9, 58:11, 141:8, 142:19</p> <p><b>SCOTT</b> [1] - 26:22</p> <p><b>Scott's</b> [1] - 34:6</p> <p><b>scrambled</b> [6] - 168:13, 184:17, 184:20, 185:24, 186:2, 190:10</p> <p><b>screwed</b> [1] - 34:11</p> <p><b>screws</b> [7] - 69:11, 69:14, 69:15, 69:20, 70:1, 71:21, 71:24</p> <p><b>se</b> [2] - 31:4, 91:21</p> <p><b>seal</b> [1] - 31:14</p> <p><b>seat</b> [1] - 76:1</p> <p><b>seated</b> [10] - 27:3, 37:25, 38:23, 38:24, 79:1, 124:25, 125:12, 126:23, 156:2, 165:10</p> <p><b>second</b> [24] - 31:11, 46:16, 49:7, 49:18, 54:19, 64:18, 77:1, 77:4, 79:25, 100:10, 108:7, 110:8, 145:13, 147:8, 157:13, 167:6, 167:10, 168:15, 168:20, 172:20, 183:9, 183:10, 183:12, 183:14</p> <p><b>seconds</b> [2] - 29:4, 184:16</p> <p><b>secretaries</b> [1] - 80:23</p> <p><b>secretary</b> [5] - 81:2, 81:6, 81:7, 83:12, 83:14</p> <p><b>sedative</b> [1] - 144:3</p> <p><b>see</b> [137] - 29:19, 34:13, 42:1, 44:21, 44:23, 46:15, 46:25, 47:13, 48:2, 48:3,</p>	<p>49:17, 49:20, 51:15, 53:7, 54:25, 55:1, 55:4, 55:5, 55:7, 56:15, 57:15, 57:19, 57:24, 58:25, 59:1, 60:19, 60:20, 62:20, 62:21, 63:7, 63:8, 63:15, 64:16, 64:20, 64:21, 64:22, 64:23, 64:24, 64:25, 65:1, 66:23, 68:24, 69:10, 70:15, 71:3, 71:6, 71:19, 71:25, 72:2, 72:4, 72:19, 74:1, 74:18, 75:5, 75:6, 75:12, 75:24, 81:4, 81:5, 82:4, 82:8, 82:17, 95:6, 96:4, 96:6, 96:8, 96:9, 107:7, 107:10, 107:13, 109:5, 124:21, 129:12, 131:6, 133:5, 133:6, 136:9, 141:11, 141:21, 142:9, 142:13, 146:1, 146:4, 146:8, 151:16, 151:17, 151:18, 151:21, 151:22, 151:24, 152:16, 155:18, 164:7, 164:14, 164:16, 164:17, 165:23, 166:13, 166:21, 167:7, 167:16, 167:18, 168:10, 168:18, 168:19, 169:9, 171:15, 172:6, 176:11, 176:12, 177:1, 177:2, 177:6, 183:6, 183:22, 184:7, 184:20, 185:7, 185:8, 185:11, 185:23, 186:3, 186:24, 188:1, 188:4, 188:5, 189:3, 189:4, 189:6, 191:7, 193:23</p> <p><b>seeing</b> [8] - 62:16, 64:17, 71:7, 71:21, 118:21, 119:20, 154:15, 185:8</p> <p><b>seem</b> [1] - 159:1</p> <p><b>segment</b> [2] - 98:7, 98:8</p> <p><b>semantics</b> [1] - 177:5</p> <p><b>send</b> [9] - 41:21, 79:22, 79:23, 80:24, 82:17, 84:16, 84:19,</p>	<p>176:16</p> <p><b>sends</b> [1] - 161:22</p> <p><b>SENIOR</b> [1] - 26:25</p> <p><b>Senior</b> [1] - 194:8</p> <p><b>sense</b> [5] - 157:4, 174:21, 187:12, 188:15, 188:21</p> <p><b>sent</b> [7] - 43:17, 80:18, 84:4, 84:6, 84:9, 176:14, 192:10</p> <p><b>sentences</b> [1] - 54:15</p> <p><b>separate</b> [3] - 148:13, 151:17, 167:14</p> <p><b>separated</b> [4] - 62:25, 69:1, 150:23, 172:10</p> <p><b>separately</b> [1] - 167:11</p> <p><b>separation</b> [3] - 170:24, 172:11, 189:1</p> <p><b>sequelae</b> [1] - 147:10</p> <p><b>sequence</b> [1] - 69:19</p> <p><b>series</b> [1] - 128:4</p> <p><b>serious</b> [1] - 175:19</p> <p><b>server</b> [1] - 29:15</p> <p><b>server</b> [3] - 81:1, 81:3, 81:4</p> <p><b>service</b> [1] - 125:17</p> <p><b>services</b> [1] - 42:23</p> <p><b>session</b> [1] - 27:2</p> <p><b>set</b> [5] - 80:8, 102:24, 145:22, 155:14, 165:21</p> <p><b>sets</b> [1] - 92:23</p> <p><b>seven</b> [12] - 50:2, 50:3, 54:19, 54:20, 64:18, 73:9, 79:16, 86:9, 92:8, 141:19, 141:22, 141:23</p> <p><b>seventh</b> [1] - 64:19</p> <p><b>several</b> [1] - 134:5</p> <p><b>severe</b> [4] - 134:9, 146:18, 146:20, 153:16</p> <p><b>severely</b> [1] - 151:8</p> <p><b>shaped</b> [1] - 148:9</p> <p><b>shave</b> [1] - 143:12</p> <p><b>shaved</b> [1] - 142:17</p> <p><b>shavers</b> [1] - 141:12</p> <p><b>shaving</b> [1] - 143:18</p> <p><b>sheet</b> [5] - 166:10, 166:12, 166:13, 166:19, 190:15</p> <p><b>shin</b> [1] - 151:23</p> <p><b>shock</b> [3] - 50:10, 50:15, 76:23</p> <p><b>shooting</b> [2] - 36:14, 37:8</p> <p><b>shopping</b> [2] - 93:20, 164:21</p>
---	--	--	--	---

<p><b>short</b> [4] - 29:20, 50:3, 78:20, 155:24</p> <p><b>shorter</b> [1] - 110:5</p> <p><b>shortly</b> [1] - 167:24</p> <p><b>shot</b> [1] - 178:14</p> <p><b>shoulder</b> [110] - 42:7, 43:9, 43:10, 45:15, 45:17, 45:23, 46:8, 46:10, 46:11, 46:17, 46:21, 47:1, 47:3, 47:6, 47:7, 95:4, 95:14, 95:17, 101:11, 101:19, 101:21, 102:3, 102:5, 102:11, 105:6, 116:18, 117:5, 117:8, 122:2, 122:5, 122:14, 122:23, 123:10, 129:16, 131:7, 132:20, 133:4, 133:10, 134:9, 134:11, 134:24, 135:8, 135:13, 135:14, 136:7, 136:11, 136:13, 136:21, 136:22, 137:3, 137:6, 137:7, 137:13, 138:2, 138:3, 138:5, 139:4, 139:5, 139:11, 141:6, 141:11, 142:3, 142:10, 142:11, 142:12, 142:14, 142:15, 143:19, 144:4, 144:17, 144:20, 144:22, 144:24, 145:4, 145:23, 147:23, 153:2, 153:7, 153:19, 153:20, 154:3, 154:8, 160:12, 160:15, 172:20, 173:5, 173:6, 173:14, 174:23, 175:13, 175:14, 175:16, 175:17, 177:24, 177:25, 178:5, 178:17, 180:25, 181:11, 181:25, 182:2, 182:13, 183:7, 185:22, 186:14, 186:17, 188:7</p> <p><b>shoulders</b> [4] - 53:6, 123:5, 136:22, 188:8</p> <p><b>show</b> [22] - 30:18, 54:22, 54:25, 66:4, 69:9, 71:23, 95:25,</p>	<p>104:8, 104:9, 116:18, 117:1, 136:24, 148:2, 150:3, 161:11, 163:3, 163:9, 164:19, 168:13, 172:9, 180:18, 181:16</p> <p><b>showed</b> [8] - 55:6, 55:7, 69:8, 73:9, 146:10, 147:24, 176:25, 187:24</p> <p><b>showing</b> [3] - 53:2, 152:19, 173:11</p> <p><b>shown</b> [17] - 47:20, 48:1, 61:2, 61:9, 69:22, 72:9, 74:7, 76:9, 77:10, 93:8, 93:14, 93:25, 94:8, 94:10, 116:21, 164:20, 171:23</p> <p><b>shows</b> [7] - 34:9, 54:12, 70:24, 116:21, 149:24, 172:10, 187:25</p> <p><b>shrinking</b> [1] - 77:2</p> <p><b>shuffled</b> [1] - 185:20</p> <p><b>sic</b> [1] - 88:2</p> <p><b>side</b> [19] - 44:23, 47:10, 49:8, 49:17, 52:12, 52:13, 67:3, 67:7, 75:4, 95:11, 113:5, 132:11, 146:12, 165:6, 174:15</p> <p><b>sides</b> [4] - 62:22, 69:15, 71:22</p> <p><b>sign</b> [1] - 133:1</p> <p><b>significance</b> [2] - 67:16, 73:15</p> <p><b>significant</b> [10] - 55:14, 70:3, 71:4, 133:9, 140:6, 144:18, 176:4, 176:10, 181:5, 182:21</p> <p><b>similar</b> [3] - 136:23, 147:7, 149:18</p> <p><b>simple</b> [1] - 34:13</p> <p><b>simply</b> [4] - 33:21, 65:20, 128:2, 175:10</p> <p><b>single</b> [1] - 132:14</p> <p><b>sit</b> [5] - 44:23, 82:3, 97:22, 155:22, 181:22</p> <p><b>site</b> [1] - 107:14</p> <p><b>sitting</b> [1] - 28:15</p> <p><b>situation</b> [6] - 33:12, 40:1, 61:2, 61:8, 116:4, 182:8</p>	<p><b>six</b> [6] - 54:20, 73:8, 79:16, 118:3, 119:3, 191:6</p> <p><b>sixth</b> [1] - 64:19</p> <p><b>size</b> [1] - 136:13</p> <p><b>skeptical</b> [1] - 187:8</p> <p><b>skill</b> [1] - 129:18</p> <p><b>skills</b> [1] - 42:9</p> <p><b>skin</b> [5] - 143:9, 144:6, 147:5, 147:6</p> <p><b>skip</b> [1] - 65:25</p> <p><b>SLAP</b> [9] - 179:10, 179:12, 179:18, 179:21, 179:24, 180:14, 180:15, 180:24, 182:1</p> <p><b>sleep</b> [2] - 142:5, 142:6</p> <p><b>slice</b> [3] - 49:14, 54:9, 71:8</p> <p><b>slices</b> [1] - 54:8</p> <p><b>sliding</b> [1] - 143:5</p> <p><b>slight</b> [1] - 133:5</p> <p><b>slip</b> [1] - 107:18</p> <p><b>slippage</b> [24] - 63:1, 63:2, 63:4, 69:2, 69:13, 70:5, 70:6, 70:10, 71:5, 72:2, 72:7, 100:6, 106:13, 106:16, 106:23, 107:16, 107:17, 108:2, 116:1, 119:17, 119:18, 120:5, 121:3, 121:7</p> <p><b>slipped</b> [7] - 63:2, 71:7, 72:4, 72:5, 107:19, 107:20, 107:22</p> <p><b>small</b> [12] - 63:4, 73:10, 73:12, 73:14, 78:5, 106:19, 141:9, 147:25, 157:16, 172:2, 172:3</p> <p><b>smaller</b> [4] - 70:8, 77:2, 77:3, 77:5</p> <p><b>snap</b> [1] - 136:14</p> <p><b>snippers</b> [1] - 141:12</p> <p><b>societies</b> [1] - 41:7</p> <p><b>Society</b> [1] - 41:8</p> <p><b>soft</b> [18] - 47:25, 54:24, 55:1, 64:21, 116:18, 116:21, 129:6, 143:4, 149:22, 171:21, 171:22, 173:23, 174:8, 178:6, 181:16, 188:2, 188:7, 189:1</p> <p><b>Sol</b> [2] - 87:16, 157:5</p> <p><b>solely</b> [1] - 97:18</p>	<p><b>solid</b> [1] - 149:21</p> <p><b>someone</b> [7] - 92:22, 149:14, 171:7, 171:12, 179:6, 179:23, 181:21</p> <p><b>sometime</b> [1] - 91:6</p> <p><b>sometimes</b> [9] - 79:16, 82:7, 125:14, 125:15, 145:1, 153:16, 153:24</p> <p><b>somewhere</b> [2] - 104:9, 181:10</p> <p><b>soon</b> [1] - 72:25</p> <p><b>sorry</b> [41] - 35:1, 46:1, 48:12, 53:11, 53:25, 54:1, 57:22, 60:9, 60:15, 67:13, 68:8, 75:15, 84:19, 90:5, 95:9, 97:6, 100:14, 100:15, 102:21, 103:24, 105:18, 111:13, 127:20, 132:12, 137:12, 141:22, 142:13, 146:5, 148:17, 162:21, 167:9, 167:10, 168:12, 170:22, 180:8, 184:6, 184:12, 184:15, 184:16, 185:24</p> <p><b>sort</b> [3] - 132:7, 136:12, 175:7</p> <p><b>sorts</b> [1] - 175:4</p> <p><b>sought</b> [1] - 152:2</p> <p><b>sounds</b> [2] - 31:20, 32:17</p> <p><b>source</b> [1] - 100:20</p> <p><b>space</b> [11] - 57:14, 72:1, 109:8, 110:20, 110:24, 137:11, 137:14, 137:15, 143:13, 176:5, 177:4</p> <p><b>spasm</b> [3] - 132:9, 132:10, 132:13</p> <p><b>speaking</b> [3] - 118:14, 148:25, 165:2</p> <p><b>special</b> [2] - 50:20, 141:7</p> <p><b>specialize</b> [1] - 40:14</p> <p><b>specialty</b> [1] - 128:1</p> <p><b>specific</b> [12] - 52:24, 87:19, 100:4, 105:12, 136:13, 149:9, 188:19, 191:13, 191:16, 191:24, 192:5, 192:9</p> <p><b>specifically</b> [10] - 35:10, 88:25, 128:14, 130:25,</p>	<p>133:10, 144:17, 147:23, 149:5, 149:12, 191:11</p> <p><b>specifics</b> [1] - 92:4</p> <p><b>speculate</b> [4] - 157:24, 157:25, 164:22, 180:6</p> <p><b>speculating</b> [1] - 114:11</p> <p><b>speculation</b> [1] - 180:3</p> <p><b>spell</b> [1] - 52:20</p> <p><b>spend</b> [1] - 83:22</p> <p><b>spent</b> [2] - 65:10, 128:16</p> <p><b>spinal</b> [29] - 49:1, 49:2, 49:3, 49:4, 49:22, 49:23, 51:6, 51:10, 51:11, 51:21, 51:22, 52:8, 52:11, 52:12, 52:14, 57:9, 57:17, 71:13, 71:15, 73:17, 73:19, 73:22, 74:1, 74:3, 74:5, 74:6, 76:19</p> <p><b>spine</b> [43] - 43:8, 48:16, 48:25, 50:2, 50:5, 51:18, 52:7, 52:12, 54:2, 54:17, 55:24, 56:11, 56:13, 60:15, 60:17, 62:6, 62:10, 66:15, 67:4, 69:5, 70:22, 71:10, 71:11, 71:12, 71:18, 72:23, 73:7, 74:21, 75:9, 75:17, 76:18, 77:9, 94:22, 98:23, 105:19, 106:14, 108:6, 108:7, 109:12, 109:15, 137:7</p> <p><b>spines</b> [1] - 41:4</p> <p><b>sports</b> [1] - 59:23</p> <p><b>Sports</b> [4] - 130:18, 162:7, 162:17, 163:12</p> <p><b>sprained</b> [1] - 191:5</p> <p><b>spring</b> [1] - 50:15</p> <p><b>spurs</b> [1] - 77:8</p> <p><b>spurt</b> [1] - 50:17</p> <p><b>square</b> [2] - 49:15, 63:6</p> <p><b>squares</b> [1] - 50:1</p> <p><b>stab</b> [1] - 178:11</p> <p><b>stable</b> [1] - 148:18</p> <p><b>stage</b> [7] - 76:25, 77:1, 77:4, 77:6, 177:9, 177:16</p> <p><b>stages</b> [2] - 76:21, 177:20</p>
---	---	--	---	--

<p><b>stance</b> [1] - 132:14</p> <p><b>stand</b> [32] - 32:25, 36:20, 38:16, 45:2, 45:5, 76:2, 78:21, 78:25, 94:14, 97:22, 97:24, 103:20, 110:14, 126:11, 132:15, 138:24, 140:20, 140:22, 144:12, 144:13, 145:21, 147:15, 147:17, 150:5, 152:18, 165:11, 169:6, 170:3, 170:5, 174:20, 181:23, 192:18</p> <p><b>standing</b> [5] - 30:14, 31:4, 126:12, 163:24, 178:18</p> <p><b>standpoint</b> [1] - 108:1</p> <p><b>stands</b> [1] - 155:22</p> <p><b>start</b> [12] - 29:10, 45:14, 51:3, 52:10, 77:1, 77:7, 83:1, 85:18, 109:23, 146:8, 150:6, 156:10</p> <p><b>started</b> [9] - 29:6, 29:7, 65:11, 148:25, 149:1, 149:7, 172:24, 173:1, 192:8</p> <p><b>starting</b> [3] - 45:17, 51:21, 63:7</p> <p><b>starts</b> [2] - 45:12, 49:1</p> <p><b>state</b> [7] - 38:19, 61:17, 61:19, 126:16, 164:19</p> <p><b>STATE</b> [1] - 26:1</p> <p><b>State</b> [3] - 39:21, 128:17, 128:22</p> <p><b>statement</b> [2] - 115:22, 192:11</p> <p><b>States</b> [1] - 127:17</p> <p><b>statistically</b> [1] - 59:4</p> <p><b>stay</b> [3] - 73:20, 93:25, 172:12</p> <p><b>stays</b> [1] - 70:2</p> <p><b>Stein</b> [1] - 87:16</p> <p><b>step</b> [5] - 92:17, 94:10, 94:13, 140:20, 169:4</p> <p><b>steroids</b> [1] - 145:2</p> <p><b>stick</b> [2] - 146:14</p> <p><b>Stieda</b> [2] - 148:11, 151:3</p> <p><b>STIEDA</b> [1] - 151:3</p> <p><b>stiffness</b> [1] - 144:7</p> <p><b>still</b> [19] - 29:2, 35:16, 35:25, 59:6, 70:5, 70:6, 70:7, 71:5, 71:25, 72:2, 72:7, 72:8, 92:2, 107:18,</p>	<p>138:24, 159:9, 174:18</p> <p><b>stimulates</b> [1] - 139:19</p> <p><b>stipulate</b> [1] - 32:6</p> <p><b>stipulation</b> [1] - 32:9</p> <p><b>stitch</b> [2] - 146:12, 146:22</p> <p><b>stitches</b> [1] - 147:5</p> <p><b>stood</b> [1] - 132:15</p> <p><b>stop</b> [7] - 35:21, 49:7, 51:15, 57:6, 141:13, 180:10, 192:16</p> <p><b>stopping</b> [1] - 71:14</p> <p><b>stops</b> [3] - 51:1, 57:8, 92:25</p> <p><b>story</b> [1] - 188:21</p> <p><b>straight</b> [3] - 42:6, 129:15, 155:12</p> <p><b>Street</b> [4] - 26:9, 26:17, 38:22, 126:19</p> <p><b>strength</b> [3] - 132:25, 139:20, 144:20</p> <p><b>strike</b> [2] - 62:1, 86:24</p> <p><b>stripe</b> [5] - 48:25, 49:6, 49:23, 51:6, 51:16</p> <p><b>structure</b> [2] - 142:11, 142:15</p> <p><b>structures</b> [5] - 51:8, 129:5, 129:7, 136:12, 143:19</p> <p><b>studied</b> [1] - 97:2</p> <p><b>studies</b> [18] - 42:24, 43:1, 43:23, 44:1, 44:4, 82:18, 82:25, 93:4, 93:8, 128:13, 134:20, 134:25, 135:6, 135:9, 135:10, 135:12, 177:1, 187:10</p> <p><b>study</b> [8] - 55:14, 56:9, 69:7, 70:25, 73:5, 83:14, 85:11, 129:4</p> <p><b>stuff</b> [5] - 34:15, 38:10, 71:15, 161:5, 164:2</p> <p><b>subacromial</b> [11] - 103:2, 104:25, 137:14, 175:21, 175:22, 175:24, 176:2, 176:5, 176:20, 176:21, 177:4</p> <p><b>subdeltoid</b> [2] - 104:25, 105:1</p> <p><b>subject</b> [6] - 58:16, 134:1, 138:19, 160:22, 163:25, 193:6</p>	<p><b>subpoena</b> [7] - 30:15, 31:4, 31:5, 33:7, 33:10</p> <p><b>subpoenaed</b> [7] - 28:1, 28:24, 31:6, 31:10, 31:12, 34:25, 93:20</p> <p><b>subpoenas</b> [1] - 34:8</p> <p><b>subscapularis</b> [4] - 46:24, 135:16, 136:25, 137:8</p> <p><b>subsequent</b> [1] - 150:24</p> <p><b>substance</b> [1] - 58:12</p> <p><b>suffer</b> [1] - 173:24</p> <p><b>suffered</b> [3] - 116:20, 138:3, 139:4</p> <p><b>suffering</b> [1] - 153:19</p> <p><b>suggest</b> [1] - 162:2</p> <p><b>suggested</b> [1] - 31:10</p> <p><b>Suite</b> [1] - 26:17</p> <p><b>summary</b> [1] - 35:20</p> <p><b>superior</b> [1] - 135:16</p> <p><b>supplemental</b> [1] - 29:15</p> <p><b>supporting</b> [1] - 129:5</p> <p><b>suppose</b> [1] - 191:8</p> <p><b>supposed</b> [6] - 47:8, 47:19, 57:5, 57:6, 62:25, 72:4</p> <p><b>supraspinatus</b> [7] - 46:23, 46:25, 47:11, 47:18, 135:15, 136:24, 137:7</p> <p><b>Supreme</b> [2] - 26:9, 26:12</p> <p><b>surface</b> [8] - 42:7, 117:5, 118:4, 119:4, 129:16, 138:4, 139:5, 154:4</p> <p><b>surgeon</b> [3] - 115:25, 127:7, 130:20</p> <p><b>Surgeons</b> [1] - 128:7</p> <p><b>surgeries</b> [5] - 149:25, 152:19, 154:9, 165:3, 165:4</p> <p><b>Surgery</b> [1] - 128:25</p> <p><b>surgery</b> [51] - 69:9, 70:2, 70:23, 72:7, 115:25, 119:20, 127:15, 128:9, 133:13, 133:14, 139:22, 140:6, 140:8, 140:11, 140:13, 141:15, 142:1, 143:17, 143:25, 144:5, 144:9, 144:10, 144:14, 144:18, 145:3, 145:13,</p>	<p>145:20, 145:22, 146:1, 147:8, 147:11, 151:14, 152:14, 172:9, 172:16, 172:18, 181:9, 183:9, 183:10, 183:11, 183:12, 183:13, 183:14, 183:15, 183:16, 186:24, 187:14, 188:19, 190:18, 191:24</p> <p><b>surgical</b> [5] - 128:15, 129:10, 133:13, 147:2, 186:21</p> <p><b>surgically</b> [1] - 101:4</p> <p><b>suspect</b> [2] - 133:24, 166:25</p> <p><b>suspected</b> [1] - 34:24</p> <p><b>suspenders</b> [1] - 32:24</p> <p><b>sustained</b> [31] - 59:19, 61:1, 61:6, 83:20, 83:21, 87:1, 87:19, 89:12, 93:13, 93:19, 102:20, 103:15, 104:24, 111:9, 111:18, 112:2, 112:6, 112:14, 123:20, 157:24, 158:11, 160:19, 170:10, 174:3, 174:7, 174:9, 174:18, 182:25, 193:1</p> <p><b>sustaining</b> [1] - 92:6</p> <p><b>sutures</b> [1] - 146:16</p> <p><b>swelling</b> [1] - 133:2</p> <p><b>sworn</b> [2] - 38:17, 126:14</p> <p><b>symptomatic</b> [2] - 151:9, 153:14</p> <p><b>symptoms</b> [13] - 77:13, 117:5, 134:7, 140:5, 149:9, 150:23, 151:7, 153:14, 178:22, 182:3, 188:16, 188:17</p> <p><b>syndrome</b> [1] - 135:19</p> <p><b>synovitis</b> [2] - 146:20, 181:5</p> <p><b>tabulate</b> [1] - 81:9</p> <p><b>tailbone</b> [1] - 57:1</p> <p><b>TAKEN</b> [1] - 194:4</p> <p><b>tall</b> [1] - 50:3</p> <p><b>talus</b> [13] - 148:1, 148:8, 148:11, 148:14, 151:1, 151:4, 151:5,</p>	<p>151:12, 151:22, 170:25</p> <p><b>tap</b> [1] - 73:22</p> <p><b>targeted</b> [1] - 128:15</p> <p><b>teach</b> [1] - 41:12</p> <p><b>tear</b> [36] - 47:17, 47:19, 47:20, 47:22, 48:13, 48:14, 50:22, 51:2, 51:4, 57:13, 97:19, 105:12, 117:18, 117:19, 122:12, 122:14, 122:24, 123:25, 135:15, 135:16, 142:11, 142:23, 143:17, 145:5, 145:7, 146:22, 147:12, 152:21, 173:17, 173:18, 179:13, 179:21, 180:16, 182:1</p> <p><b>tearing</b> [2] - 137:10, 137:21</p> <p><b>tears</b> [11] - 50:23, 51:7, 51:18, 51:22, 57:19, 98:1, 122:5, 123:8, 123:16, 182:1</p> <p><b>techniques</b> [1] - 128:15</p> <p><b>technologist</b> [2] - 85:1, 85:5</p> <p><b>technology</b> [1] - 187:11</p> <p><b>teenage</b> [2] - 99:15, 99:17</p> <p><b>teenager</b> [1] - 99:14</p> <p><b>telescope</b> [3] - 141:8, 142:7, 151:14</p> <p><b>ten</b> [4] - 80:9, 131:18, 155:1, 156:12</p> <p><b>tenderness</b> [3] - 132:6, 132:19, 133:5</p> <p><b>tendon</b> [28] - 47:5, 47:8, 47:11, 47:12, 47:13, 47:14, 47:15, 47:18, 135:16, 135:17, 136:24, 136:25, 137:21, 142:21, 142:23, 143:4, 143:14, 143:18, 146:7, 146:11, 146:15, 146:16, 146:22, 146:24, 149:13</p> <p><b>tendons</b> [11] - 46:22, 47:6, 48:2, 54:24, 129:6, 136:25, 137:1, 137:10, 137:16, 139:20, 142:18</p>
--	--	---	--	--

<p><b>Tennessee</b> [1] - 127:16</p> <p><b>teres</b> [1] - 46:24</p> <p><b>term</b> [4] - 63:3, 136:2, 179:20, 179:24</p> <p><b>TERM</b> [1] - 26:1</p> <p><b>TERMINAL</b> [1] - 26:6</p> <p><b>terms</b> [2] - 41:19, 135:20</p> <p><b>test</b> [9] - 41:21, 41:22, 41:23, 41:25, 53:13, 54:23, 55:2, 75:22</p> <p><b>testified</b> [26] - 79:11, 79:13, 80:7, 86:19, 86:21, 86:23, 87:5, 87:25, 89:13, 90:18, 91:13, 91:20, 92:1, 92:7, 102:13, 156:11, 157:13, 157:21, 158:4, 158:14, 158:17, 158:25, 159:2, 177:8, 177:16</p> <p><b>testify</b> [29] - 29:25, 32:13, 64:9, 79:15, 79:19, 86:9, 86:12, 86:17, 87:9, 88:2, 88:12, 89:19, 89:23, 92:4, 100:17, 112:3, 112:11, 156:23, 157:1, 157:2, 157:5, 158:12, 160:5, 160:6, 160:7, 161:6, 161:9, 161:10, 177:13</p> <p><b>testifying</b> [8] - 77:15, 87:11, 91:14, 158:23, 159:7, 160:12, 160:19, 178:9</p> <p><b>testimony</b> [8] - 37:18, 59:10, 78:14, 103:20, 121:15, 155:16, 158:3, 158:19</p> <p><b>tests</b> [2] - 79:22, 85:6</p> <p><b>testy</b> [1] - 37:10</p> <p><b>THE</b> [345] - 26:1, 26:20, 27:4, 27:7, 27:9, 27:11, 27:13, 27:16, 27:20, 27:24, 29:13, 29:17, 29:19, 29:23, 30:2, 30:7, 30:12, 30:20, 30:22, 32:5, 33:9, 33:25, 34:6, 34:17, 34:22, 34:24, 35:7, 35:14, 36:11, 36:13, 37:4, 37:12, 37:15, 37:22, 37:25, 38:7, 38:11,</p>	<p>38:19, 38:21, 38:23, 38:24, 42:19, 44:8, 44:10, 44:13, 44:22, 45:9, 45:17, 45:19, 46:1, 46:3, 48:12, 52:3, 52:24, 53:3, 53:17, 53:22, 53:25, 54:3, 56:1, 56:20, 56:23, 57:22, 57:23, 58:9, 58:13, 58:16, 58:19, 59:4, 59:6, 59:10, 59:15, 59:19, 59:25, 60:2, 61:1, 61:6, 61:11, 61:16, 61:23, 62:3, 63:16, 63:23, 63:25, 64:3, 64:7, 65:5, 65:9, 65:14, 65:15, 65:16, 65:19, 65:23, 66:2, 66:5, 66:7, 66:9, 67:25, 68:2, 68:6, 68:8, 68:11, 68:15, 70:17, 70:18, 70:20, 72:15, 72:17, 72:24, 73:3, 78:11, 78:13, 79:1, 83:20, 84:8, 85:23, 87:1, 87:3, 87:19, 88:21, 88:22, 89:3, 89:12, 89:16, 89:18, 90:1, 90:6, 90:8, 90:12, 90:13, 90:15, 90:16, 91:5, 91:8, 91:13, 91:20, 92:12, 92:14, 92:17, 92:20, 92:24, 93:1, 93:13, 93:19, 94:5, 94:12, 95:10, 95:19, 95:20, 97:6, 97:7, 97:10, 97:21, 98:6, 98:11, 100:16, 100:19, 101:6, 101:24, 102:1, 102:7, 102:20, 103:15, 104:24, 107:3, 109:15, 109:16, 110:9, 110:13, 111:9, 111:13, 111:15, 111:18, 111:23, 112:2, 112:6, 112:8, 112:10, 112:14, 112:19, 112:21, 113:4, 113:7, 113:8, 113:15, 113:18, 113:21, 114:3, 114:8, 114:15, 114:17, 114:25, 116:13, 117:10, 117:12, 117:14, 117:25, 118:9, 118:14, 118:17,</p>	<p>119:10, 119:25, 120:2, 120:10, 120:17, 121:18, 121:20, 122:1, 122:25, 123:3, 123:7, 123:11, 123:14, 123:20, 123:23, 124:11, 124:20, 125:1, 125:3, 125:7, 125:12, 126:6, 126:12, 126:16, 126:18, 126:21, 126:22, 126:23, 126:24, 126:25, 130:1, 134:1, 135:23, 136:1, 136:4, 136:5, 136:8, 136:9, 136:17, 138:10, 138:12, 138:16, 138:19, 138:22, 139:1, 140:19, 140:23, 140:25, 146:4, 146:5, 148:5, 150:1, 150:3, 150:16, 150:20, 152:9, 155:11, 155:15, 155:22, 155:23, 156:2, 157:24, 158:11, 160:18, 161:2, 161:5, 161:19, 162:24, 163:1, 163:7, 163:16, 163:20, 163:22, 164:1, 164:20, 165:5, 165:12, 165:16, 166:18, 167:10, 167:14, 168:25, 169:11, 169:13, 170:2, 170:4, 170:5, 170:10, 170:15, 170:19, 171:4, 171:6, 171:11, 171:16, 171:19, 171:20, 174:3, 174:6, 174:13, 174:15, 174:18, 175:2, 175:4, 175:6, 175:7, 176:8, 177:12, 178:2, 178:8, 178:11, 178:25, 179:2, 180:5, 180:8, 180:15, 180:17, 182:25, 183:5, 183:20, 183:23, 183:25, 184:2, 184:13, 185:4, 185:10, 185:14,</p>	<p>185:15, 185:17, 185:18, 185:20, 185:21, 186:2, 186:6, 187:2, 187:16, 189:13, 189:18, 189:21, 191:21, 192:16, 192:23, 193:1, 193:14, 193:19, 194:3</p> <p><b>thecal</b> [11] - 73:16, 73:18, 73:19, 73:22, 73:23, 74:5, 74:8, 74:11, 96:23, 108:20, 108:22</p> <p><b>theirs</b> [1] - 155:8</p> <p><b>theory</b> [1] - 123:24</p> <p><b>therapeutic</b> [1] - 135:1</p> <p><b>therapist</b> [6] - 160:1, 160:2, 160:3, 161:15, 161:23, 165:18</p> <p><b>therapy</b> [28] - 129:9, 134:22, 139:16, 139:18, 139:19, 144:19, 145:1, 159:24, 159:25, 160:14, 161:16, 161:20, 161:25, 162:3, 162:20, 162:22, 162:23, 163:2, 164:5, 164:11, 164:15, 164:16, 164:17, 164:18, 165:1, 165:17, 165:20, 165:22</p> <p><b>thereafter</b> [2] - 120:3, 138:4</p> <p><b>therefore</b> [3] - 30:15, 35:12, 119:4</p> <p><b>thick</b> [2] - 54:17, 143:16</p> <p><b>thickening</b> [4] - 176:4, 177:7, 178:17, 178:19</p> <p><b>thickness</b> [2] - 145:7, 146:13</p> <p><b>thigh</b> [1] - 131:11</p> <p><b>thighs</b> [2] - 71:6</p> <p><b>thin</b> [7] - 46:10, 54:8, 54:9, 54:16, 60:20, 143:2, 177:3</p> <p><b>thinks</b> [1] - 157:25</p> <p><b>third</b> [9] - 51:19, 56:16, 64:19, 77:6, 77:9, 100:10, 119:12, 177:9, 177:16</p> <p><b>THIS</b> [1] - 194:4</p>	<p><b>Thomas</b> [3] - 38:14, 38:17, 38:21</p> <p><b>thousand</b> [1] - 86:3</p> <p><b>thousands</b> [2] - 42:3, 42:4</p> <p><b>three</b> [28] - 39:12, 40:1, 54:9, 54:20, 56:25, 73:8, 75:2, 75:11, 76:21, 78:4, 88:17, 89:1, 89:5, 108:12, 121:2, 121:9, 137:4, 148:8, 155:1, 155:3, 156:11, 156:13, 157:2, 168:25, 177:20</p> <p><b>threshold</b> [1] - 35:20</p> <p><b>threw</b> [1] - 135:20</p> <p><b>throughout</b> [1] - 41:13</p> <p><b>thumb</b> [1] - 81:22</p> <p><b>Thursday</b> [6] - 38:5, 38:10, 38:12, 126:6, 126:7, 126:8</p> <p><b>tibia</b> [3] - 148:8, 151:1, 151:23</p> <p><b>tight</b> [1] - 47:7</p> <p><b>timeframe</b> [1] - 91:23</p> <p><b>timestamp</b> [2] - 171:1, 172:1</p> <p><b>tissue</b> [26] - 47:25, 116:18, 137:15, 141:14, 142:25, 143:1, 143:2, 143:4, 143:6, 144:8, 146:21, 149:22, 151:8, 151:13, 151:16, 171:21, 171:22, 173:23, 174:8, 178:6, 181:16, 188:2, 188:4, 189:1</p> <p><b>tissues</b> [4] - 116:22, 129:6, 143:3, 188:7</p> <p><b>TO</b> [1] - 194:3</p> <p><b>today</b> [19] - 29:3, 30:18, 30:19, 33:1, 38:2, 77:15, 77:19, 80:6, 93:5, 93:11, 103:20, 110:18, 111:1, 125:16, 154:12, 154:15, 162:19, 169:16, 182:15</p> <p><b>toe</b> [3] - 149:12, 149:14</p> <p><b>toes</b> [1] - 60:18</p> <p><b>together</b> [12] - 28:19, 50:15, 62:24, 77:4, 78:3, 86:22, 101:17, 110:6, 147:5, 147:7,</p>
--	---	---	---	---

<p>148:14, 154:25  <b>tolerable</b> [1] - 153:16  <b>tomorrow</b> [2] - 38:3, 125:16  <b>took</b> [14] - 38:16, 54:11, 65:15, 65:16, 85:5, 108:1, 126:11, 133:7, 142:16, 142:17, 143:1, 169:8, 177:7, 180:23  <b>tool</b> [4] - 40:24, 141:7, 142:24, 146:20  <b>tools</b> [1] - 141:12  <b>top</b> [16] - 47:1, 47:3, 47:10, 49:12, 49:19, 49:24, 67:1, 137:1, 137:2, 137:12, 137:13, 142:3, 142:10, 144:3, 146:10  <b>topics</b> [1] - 165:15  <b>tops</b> [1] - 81:18  <b>torn</b> [5] - 142:16, 142:17, 179:16, 180:19, 180:23  <b>total</b> [2] - 31:24, 162:16  <b>totally</b> [1] - 94:1  <b>touch</b> [2] - 50:11, 71:13  <b>tough</b> [2] - 33:1, 102:2  <b>toward</b> [1] - 112:16  <b>towards</b> [1] - 63:6  <b>track</b> [3] - 93:25, 165:12, 165:13  <b>trade</b> [1] - 181:20  <b>trained</b> [1] - 169:24  <b>training</b> [6] - 39:15, 40:1, 40:3, 127:14, 127:17, 128:4  <b>Trama</b> [1] - 130:18  <b>TRANSCRIPT</b> [1] - 194:3  <b>transferred</b> [1] - 85:2  <b>Trauma</b> [1] - 128:24  <b>trauma</b> [39] - 59:1, 59:22, 96:25, 97:3, 97:13, 98:1, 98:10, 98:13, 98:18, 117:17, 117:19, 118:25, 119:24, 120:4, 121:6, 121:7, 121:10, 122:15, 122:16, 122:20, 122:22, 122:23, 123:8, 123:17, 123:25, 124:7, 143:22, 143:23, 148:18, 171:10, 171:15, 181:15,</p>	<p>192:13, 192:14, 193:5  <b>traumatic</b> [4] - 95:16, 172:3, 181:12, 189:3  <b>traumatically</b> [2] - 58:6, 98:21  <b>travel</b> [3] - 41:13, 61:14, 61:15  <b>travels</b> [1] - 52:7  <b>treat</b> [1] - 165:24  <b>treated</b> [2] - 37:17, 145:1  <b>treating</b> [23] - 32:18, 32:22, 32:23, 35:3, 35:13, 35:15, 35:16, 35:18, 35:21, 35:24, 36:1, 36:3, 36:5, 36:6, 36:7, 37:16, 133:25, 134:1, 149:2, 149:7, 159:11  <b>treatment</b> [49] - 29:1, 31:25, 32:19, 33:18, 33:21, 76:13, 89:10, 117:6, 117:22, 117:23, 118:22, 119:2, 129:7, 129:11, 134:16, 134:18, 134:19, 134:20, 138:2, 139:12, 139:23, 139:24, 139:25, 140:2, 140:4, 147:19, 147:21, 147:22, 150:11, 160:8, 161:11, 161:16, 161:21, 162:13, 162:17, 164:19, 164:25, 165:5, 167:20, 179:12, 179:13, 182:18, 186:20, 187:10, 188:6, 188:9, 188:19, 188:22  <b>trend</b> [2] - 153:23, 153:25  <b>Trial</b> [1] - 26:6  <b>trial</b> [5] - 35:21, 38:3, 112:3, 193:16, 194:1  <b>triangle</b> [1] - 46:16  <b>tries</b> [1] - 147:4  <b>trigone</b> [19] - 148:17, 149:20, 150:6, 150:22, 150:23, 151:4, 151:5, 151:11, 151:17, 151:21, 151:24, 152:4, 170:25, 172:10, 191:3, 191:4, 192:2</p>	<p><b>TRIGONE</b> [1] - 148:17  <b>trimming</b> [2] - 142:16, 142:24  <b>trouble</b> [1] - 37:7  <b>true</b> [6] - 59:13, 84:11, 88:1, 88:8, 155:2, 179:20  <b>TRUE</b> [1] - 194:3  <b>truth</b> [1] - 111:2  <b>try</b> [3] - 28:7, 125:25, 165:13  <b>trying</b> [19] - 27:8, 33:5, 34:6, 61:23, 65:10, 82:19, 87:2, 92:3, 93:25, 104:8, 116:3, 123:22, 134:20, 151:5, 161:2, 161:6, 164:13, 171:12, 192:24  <b>Tuesday</b> [2] - 30:18, 85:9  <b>turn</b> [4] - 33:16, 59:15, 85:17, 190:10  <b>turns</b> [1] - 34:1  <b>twice</b> [3] - 114:12, 157:21, 158:4  <b>twisting</b> [3] - 120:15, 120:19, 120:20  <b>two</b> [40] - 28:12, 29:3, 35:7, 37:1, 37:5, 37:19, 40:13, 49:6, 49:12, 54:9, 60:6, 62:21, 66:22, 67:11, 81:18, 116:12, 116:13, 121:9, 122:13, 123:2, 126:9, 137:3, 137:10, 143:5, 146:16, 148:15, 154:9, 155:3, 156:11, 156:13, 157:2, 159:9, 172:11, 184:16, 193:17, 193:18, 193:19  <b>tying</b> [2] - 183:15, 183:16  <b>type</b> [10] - 80:21, 82:10, 122:12, 122:13, 124:6, 174:24, 175:11, 181:18, 181:21, 181:24  <b>Type</b> [15] - 104:13, 178:23, 179:4, 179:8, 179:17, 179:20, 179:24, 180:14, 180:19, 180:20, 180:21</p>	<p><b>typed</b> [1] - 82:11  <b>types</b> [2] - 122:21, 174:21  <b>typical</b> [1] - 136:11  <b>typically</b> [1] - 141:6  <b>ultrasound</b> [2] - 40:23, 40:24  <b>um-hum</b> [6] - 90:19, 95:24, 102:25, 134:17, 172:21, 184:25  <b>uncertainty</b> [1] - 27:25  <b>unchanged</b> [1] - 69:2  <b>uncomfortable</b> [1] - 144:11  <b>uncommon</b> [1] - 190:22  <b>under</b> [10] - 31:14, 34:25, 78:13, 79:2, 94:13, 111:2, 155:15, 156:4, 165:22, 192:19  <b>underneath</b> [2] - 47:4, 137:8  <b>understood</b> [1] - 111:1  <b>undersurface</b> [1] - 143:13  <b>undertake</b> [1] - 139:25  <b>unfavorable</b> [1] - 113:25  <b>unfortunately</b> [5] - 76:20, 110:22, 145:3, 184:20, 186:1  <b>union</b> [3] - 148:15, 148:20, 151:5  <b>United</b> [1] - 127:17  <b>University</b> [2] - 127:12, 127:13  <b>unless</b> [5] - 64:23, 114:4, 122:10, 160:23  <b>unlike</b> [1] - 99:7  <b>unremarkable</b> [2] - 102:23, 115:17  <b>unstable</b> [3] - 77:7, 148:24, 152:1  <b>unusual</b> [2] - 110:2, 110:6  <b>up</b> [57] - 28:16, 30:18, 33:16, 34:9, 34:11, 38:4, 46:14, 49:11, 49:20, 50:11, 52:11, 54:13, 65:10, 65:19, 66:8, 70:24, 72:4, 73:1, 74:25, 80:21, 82:10, 87:8, 92:9, 92:10, 93:24, 94:2, 102:10, 102:12, 104:4, 104:6, 104:9,</p>	<p>107:18, 119:13, 136:15, 136:16, 136:20, 144:10, 144:14, 145:3, 145:5, 145:6, 145:22, 146:21, 147:18, 148:7, 148:9, 155:14, 159:19, 175:16, 179:14, 185:10, 185:17, 190:4, 190:9, 190:15, 190:25, 192:18  <b>upload</b> [1] - 81:1  <b>upper</b> [1] - 53:6  <b>ure</b> [1] - 187:10  <b>utilize</b> [2] - 45:4, 135:22  <b>varies</b> [1] - 77:11  <b>variety</b> [1] - 110:7  <b>vast</b> [1] - 178:5  <b>Velardi</b> [4] - 88:3, 88:12, 157:7, 157:9  <b>versus</b> [4] - 40:17, 89:25, 132:15, 171:1  <b>vessel</b> [1] - 144:7  <b>vessels</b> [1] - 144:5  <b>view</b> [6] - 75:5, 75:7, 151:25, 152:2  <b>views</b> [1] - 63:8  <b>visceral</b> [1] - 67:6  <b>visible</b> [2] - 173:7, 173:25  <b>visit</b> [1] - 185:9  <b>voice</b> [3] - 38:19, 126:16, 170:6  <b>voir</b> [1] - 59:14  <b>volume</b> [1] - 37:2  <b>wait</b> [3] - 82:24, 147:16, 192:24  <b>wakes</b> [1] - 144:10  <b>walk</b> [2] - 132:3, 141:25  <b>wants</b> [3] - 155:13, 191:19, 191:21  <b>warmer</b> [1] - 125:20  <b>waste</b> [2] - 166:17, 168:24  <b>water</b> [5] - 47:8, 76:22, 76:24, 77:1, 125:24  <b>ways</b> [3] - 37:7, 49:10, 91:15  <b>weakness</b> [1] - 132:16  <b>wear</b> [3] - 173:17, 173:18, 179:21  <b>wears</b> [1] - 32:24  <b>week</b> [1] - 38:5  <b>weekend</b> [1] - 34:12  <b>weeks</b> [4] - 144:11, 171:25, 191:5, 191:6</p>
---	--	---	--	--

<b>Weinstein</b> <sup>[1]</sup> - 89:10	171:20, 175:6,	116:18, 133:7,
<b>West</b> <sup>[1]</sup> - 38:21	180:15, 183:5,	168:7, 181:11
<b>whereas</b> <sup>[1]</sup> - 151:24	185:15, 185:18,	<b>Yale</b> <sup>[1]</sup> - 127:12
<b>whichever</b> <sup>[3]</sup> - 41:23,	185:21	<b>year</b> <sup>[19]</sup> - 42:4, 69:7,
45:3	<b>witness's</b> <sup>[2]</sup> - 87:21,	75:9, 79:16, 86:10,
<b>white</b> <sup>[9]</sup> - 47:17,	161:7	86:15, 87:7, 88:4,
47:19, 49:5, 51:6,	<b>witnesses</b> <sup>[6]</sup> - 29:3,	91:6, 92:13, 92:23,
51:16, 55:5, 57:4,	33:1, 38:2, 38:9,	149:1, 156:14,
57:9, 71:15	126:8, 193:19	159:5, 172:24,
<b>whole</b> <sup>[1]</sup> - 82:20	<b>women</b> <sup>[5]</sup> - 40:15,	185:18, 186:11
<b>William</b> <sup>[1]</sup> - 26:17	40:16, 40:17, 40:22	<b>years</b> <sup>[24]</sup> - 36:16,
<b>willing</b> <sup>[4]</sup> - 92:1,	<b>word</b> <sup>[5]</sup> - 91:22, 92:1,	37:5, 39:12, 39:15,
112:23, 123:23	97:7, 114:13, 179:2	39:16, 39:25, 40:1,
<b>wish</b> <sup>[1]</sup> - 138:15	<b>words</b> <sup>[12]</sup> - 34:8,	40:2, 40:3, 41:14,
<b>withdraw</b> <sup>[2]</sup> - 52:4,	51:20, 52:9, 54:13,	58:23, 58:24, 67:11,
89:4	54:14, 61:18, 96:15,	68:7, 79:17, 91:9,
<b>withdrawn</b> <sup>[13]</sup> - 68:1,	97:19, 104:11,	99:15, 99:17,
75:18, 89:20, 96:3,	110:3, 116:6, 136:24	110:21, 128:5,
113:10, 115:12,	<b>Worker's</b> <sup>[4]</sup> - 31:24,	155:2, 156:12,
131:13, 139:6,	32:20, 32:23, 36:9	159:19
152:10, 169:7,	<b>works</b> <sup>[2]</sup> - 80:19,	<b>yes-or-no</b> <sup>[1]</sup> - 170:16
181:17, 188:10	159:17	<b>yesterday</b> <sup>[12]</sup> - 28:4,
<b>witness</b> <sup>[55]</sup> - 27:18,	<b>world</b> <sup>[1]</sup> - 41:13	28:6, 28:7, 28:14,
28:25, 29:7, 32:25,	<b>worry</b> <sup>[2]</sup> - 68:15,	28:15, 28:18, 29:11,
34:1, 34:20, 36:20,	168:25	33:14, 33:15, 38:1,
36:21, 36:24, 37:4,	<b>worse</b> <sup>[1]</sup> - 153:24	125:15
38:8, 38:13, 38:16,	<b>worsen</b> <sup>[1]</sup> - 153:22	<b>yield</b> <sup>[1]</sup> - 137:24
42:12, 45:2, 45:5,	<b>worsening</b> <sup>[3]</sup> -	<b>YORK</b> <sup>[1]</sup> - 26:1
59:10, 64:4, 64:9,	153:11, 153:23,	<b>York</b> <sup>[19]</sup> - 26:10,
76:2, 78:21, 78:25,	153:25	26:17, 26:21, 38:22,
89:12, 89:24, 91:20,	<b>worsens</b> <sup>[1]</sup> - 153:8	39:9, 39:21, 41:9,
91:25, 94:14, 97:22,	<b>wraps</b> <sup>[1]</sup> - 149:13	42:13, 127:18,
97:24, 110:14,	<b>wrist</b> <sup>[3]</sup> - 131:8,	127:21, 128:17,
112:22, 121:20,	132:18, 134:15	128:23, 129:21,
125:1, 126:4,	<b>write</b> <sup>[1]</sup> - 161:23	159:14, 162:7,
126:11, 126:25,	<b>written</b> <sup>[4]</sup> - 40:3,	162:17
129:21, 129:24,	40:4, 104:7, 128:15	<b>young</b> <sup>[2]</sup> - 40:14,
135:22, 140:22,	<b>wrote</b> <sup>[2]</sup> - 35:25,	153:6
144:12, 144:13,	103:10	<b>younger</b> <sup>[1]</sup> - 158:8
145:21, 147:15,	<b>X-ray</b> <sup>[41]</sup> - 41:21,	<b>yourself</b> <sup>[1]</sup> - 193:20
150:5, 152:18,	48:1, 48:2, 54:7,	<b>yourselves</b> <sup>[1]</sup> - 78:16
163:1, 164:20,	54:10, 54:11, 64:14,	
164:22, 165:7,	64:23, 64:25, 80:5,	
165:11, 169:6,	80:16, 82:22, 95:3,	
174:20, 181:23,	95:6, 95:16, 95:17,	
186:5	101:10, 104:17,	
<b>WITNESS</b> <sup>[38]</sup> - 38:21,	105:4, 105:9,	
57:23, 65:14, 65:16,	106:19, 106:23,	
66:7, 88:22, 90:12,	168:6, 168:18,	
90:15, 92:14, 92:24,	168:19, 168:24,	
95:20, 97:6, 98:11,	172:6, 172:8, 173:7,	
102:7, 109:16,	173:10, 173:18,	
112:8, 113:7,	173:25, 174:13,	
113:21, 114:17,	174:23, 181:14,	
120:2, 123:14,	184:8, 185:1, 185:2,	
126:18, 126:22,	185:12	
126:24, 136:4,	<b>X-rays</b> <sup>[13]</sup> - 41:3,	
136:8, 146:5,	42:3, 54:7, 54:22,	
155:23, 170:4,	64:20, 65:25, 80:9,	
171:6, 171:16,	95:14, 116:17,	