A. Guy
#24879

THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS : CIVIL TERM : PART 30

RENEE TOON,

Plaintiff,

-against-

McDERMOTT & SON CONSTRUCTION CORP., and

NIALL RATTIGAN,

Defendants.

April 19, 1996

B e f o r e :

HONORABLE

Justice and a jury

(Appearances same as previously noted.)

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(Whereupon, the jury entered the courtroom.)

THE COURT: Good morning, ladies and gentlemen.

We haven't completed cross-examination of the witness, of the person that was on the stand. However, we will interrupt that because there is a scheduling problem with respect to the next witness, and we will call him out of turn.

MR. LaSPINA: I call Dr. Ali Guy.

A L I G U Y, M.D., a witness called on behalf of the

Plaintiff, after having been duly sworn by the Clerk of the Court, took the witness stand and testified as follows:

COURT CLERK: Your full name, please?

THE WITNESS: Dr. Ali Guy.

COURT CLERK: Would you please spell that, for the record?

THE WITNESS: A-l-i. G-u-y.

COURT CLERK: And what is your address, Doctor, please?

THE WITNESS: My office address is Seven Gramercy Park, New York, New York, 10003.

COURT CLERK: Thank you.

THE COURT: You may inquire.

MR. LaSPINA: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. LaSPINA:

Q Good morning, Dr. Guy.

A Good morning.

Q Dr. Guy, what is your occupation?

A I am a medical doctor.

Q Are you licensed to practice medicine in the State of New York?

A I am.

Q And how many years have you been licensed?

A I was licensed in 1985, 11 years.

Q Doctor, where did you do your undergraduate training?

A I wrnt to Queens College.

Q And what year did you graduate?

A I believe it was in 1977.

Q And did you then attend medical school?

A Yes.

Q What medical school did you attend?

A University of the Northwest in the Dominican Republic.

Q Yes?

A Graduating in June of 1981.

Q And you received a degree from that school?

A That's correct.

Q Did you do an internship?

A There is no longer internships. I went straight into a residency.

Q Where did you do the residency?

A Mt. Sinai School of Medicine, Mt. Sinai Medical Center.

Q When you went to Mt. Sinai and were in their residency program, did you specialize in any area of

medicine?

A I did three residencies. The first, internal medicine, 18 months. Then I did one year of general surgery at Cabrini Medical Center. Then I completed three years of physical medicine and rehabilitation at Mt. Sinai Medical Center. I am board certified in this field.

Q What are the requirements for being board certified in your field?

A First of all, you must satisfactorily complete two years of prerequisite training in another specialty, either internal medicine or general surgery. You must then complete satisfactorily a three years residency training program in the field of physical medicine and rehabilitation. You must pass the yearly examinations they give you from the hospital. You must score at least 70 per cent or higher each year.

After you complete your training program, having had good evaluations throughout your training program, you must then sit for an eight-hour examination. You get tested on all the skills, knowledge which you should known as a doctor in physical medicine and rehabilitation.

Then you must be in private practice for at least 18 months. Must be sponsored by two other doctors in the same specialty as you, who know of your qualifications and

know of your clinical experience, and know of your medical practice.

Then there must be no complaints against you in any capacity, legal or ethical.

Then you fly to the Mayo Clinic in Minnesota where all the research is done. That's where the textbooks are written. You get tested orally by a battery of doctors. It is a half-day examination, four-hour examination. You get tested on orthopedics, neurology, physical medicine and rehabilitation, electro diagnostics, muscle problems, et cetera. You must prove to these examiners that your knowledge is equal to theirs, if not higher.

And once yo do that, you pass the examination, and you become board certified, having completed the highest degree of training and qualifications within that particular specialty.

Q Doctor, did you complete all of those requirements?

A Yes, I did.

Q And by which board are you certified?

A I am board certified by the American Board of Physical Medicine and Rehabilitation.

Q The term diplomate, can you tell us what that term indicates?

A Diplomate means you have satisfactorily completed every requirement within your specialty, and you have satisfactorily completed all the examinations, and you are board certified.

Q Is that the highest certification that can be achieved in physical medicine and rehabilitation?

A Diplomate or board certified is the highest that can be obtained in any specialty.

Q How long have you been board certified now?

A Since May of 1989.

Q Doctor, presently are you on the staff of any hospitals?

A Yes.

Q Can you tell us which hospitals?

A I am on staff at Cabrini Medical Center, which is now a major affiliate of Mr. Sinai Medical Center.

I am on staff at the Hospital for Joint Diseases Orthopedic Institute, which is a major affiliate of NYU Medical Center.

I am also the director of the Neuromuscular Equipment Clinic at the same hospital, Hospital for Joint Diseases.

I am also clinical instructor to the residents from the NYU Medical Center at the same hospital.

Q Are you a member of any medical associations, Doctor?

A Yes, i am a member of the New York County Medical Society. I am a member of the New York State Medical Society. I am a member of the American Academy of Physical Medicine and Rehabilitation.

Q Are you engaged in practice, as well, Doctor?

A I am.

Q Can you tell us what your practice consists of?

A My practice is primarily in the field of physical medicine, rehabilitation. What this field deals with, deals with trauma rehabilitation, treating patients with multiple accidents, whether it is from a car accident, whether it is from a fall injury, whether it is from a stroke, whether it is from a clot or birth defect, like cerebral palsy, cleft palate.

Our job is to rehabilitate a patient, to try and bring him or her to the optimal level of care prior to their injuries.

And we are trained in orthopedics, neurology, physical therapy, and all the other sciences that helps us to use the sciences to help promose the patient's restoration to the optimal level of function. We are not called orthopedic surgeons nor neurologists. We are called

physiatrists, p-h-y-s-i-a-t-r-i-s-t-s, not psychiatrists, physiatrists.

Q In your practice have you come across traumatic injuries to the various parts of the body, including the spine, shoulders, limbs, extremities?

A Yes. We are considered, I am considered a trauma specialist, trauma from head to toe.

Q Approximately how many patients have you treated for traumatic injuries since being board certified?

A Well, most of my practice is trauma. Because the field of physical medicine, rehabilitation, deals with trauma. So, I would say 19 per cent or better of my practice is, deals with trauma of some capacity, whether it is from an accident, whether it is from a sports injury, whether it is from stress situations, whether it is from carpal tunnel, from repetitive use of the hands, whether it is from bad posture, neck, back problems, knee problems, shoulder problems.

Q Doctor, prior to today have you had an opportunity to come into courts before and share your expertise with jurors?

A Many times.

Q And, Doctor, are you being compensated for your time today, by that I mean from your professional

services and the time, that would include coming to court.

A Yes, I am.

Q Did there come a time Doctor, when a patient came under your care by the name of Renee Toon?

A Yes.

Q And can you tell us when that was for the fist time, Doctor?

A The first time was on September 5, 1991.

Q And did this patient come to your office, or was she referred to you by someone?

A She was referred by a chiropractor by the name of Dr. Benson.

Q And where did you see Ms. Toon in the, at the first visit?

A In my New York City office.

Q And when she came to your office did you conduct a medical history?

A I did.

Q Doctor, just for us lay folks, medical history, can you describe what a medical history is?

Q A medical history is what you obtain from the patient as to exactly what happened to her, what parts of her body hurt her. Then I elaborate further on those injured areas.

Q How critical is a medical history to your ultimate diagnosis, Doctor?

A Basically it guides you as to which way to go. If a patient comes to a doctor complaining of a chest pain, you probe into all the questions pertinent to the heart. If a patient comes to you complaining of a neck problem or back problem, you zoom in your focus to the area of injury. You ask the patient if there is radiation of pain, if there is numbness or tingling, what makes the pain better or worse. If the patient has complaints of knee problems, again, what makes it better, what makes it worse. So, you focus on the area that has been injured.

Q When Renee Toon first presented herself to you did you, in fact, follow that procedure, take a medical history?

A Yes.

Q And do you have a specific recollection of her in terms of being an historian, when you took that medical history?

A I have a vivid recollection.

Q What was that recollection?

A The first time I saw Ms. Toon, and on multiple other occasions, she was always in a lot of pain.

She is a very poor historian. Sometimes she would

forget things. She would leave the office, and came back and say, "I forgot to mention this and that."

During examination it is very difficult to examine her. As soon as you touch the neck and back there was so much spasm and trigger points she cries, and it makes it difficult for the doctor to complete a thorough examination.

Q What was the medical history that you were provided with on the first visit with Ms. Toon?

A That she had a prior history of a prior car accident in 1982, without any significant injuries.

That she was well until 7/9/91 when she was working on her job riding a bus. She became involved in a car accident. She actually saw the accident literally happening, so she tried to brace herself by holding on tight, and she sustained injuries to her neck, her lower back, her left shoulder, and both knees.

She was seen at Brookdale Hospital emergency room where she was treated and released. Then she saw a chiropractor, Dr. Benson, who took x-rays and found no fractures.

When she came to me she complained to me of neck pain with radiation down the left arm, with numbness and tingling in the left arm. Also complaining to me of lower

back pain radiating into both lower extremities or legs, the left side worse than the right, with occasional numbness and tingling in the legs. Also complaining of pain in both knees.

Q Doctor, did the history include any preexisting medical conditions beyond what you have described?

A Past medical history consisted of history of a prior asthma, ulcerative colitis. I have down a septic ulceritis of the, but it is ulcerative colitis. That's basically it.

Q What significance, if any, Doctor, would there be on the prior health conditions?

A Well, you want to know what prior problems the patient has. You know, what precautions to take just in case a patient is an asthmatic, and they get very anxious, that can exacerbate an asthmatic attack, requiring more medications for the asthma, depending on what the patient has been taking.

You also want to know what medication the patient is on so that you don't give medications that are contraindicated with that combination.

And, also as much past medical problems that you can obtain so you know what measures to take, or not to take with reference to her treatment.

Q Did the medical history includes any facts that led you to believe that there was a prior spinal injury prior to July of 1991, her bus accident?

A Well, the history that she gave me was in 1982 she had a back strain from a prior accident, which resolved on its own, required little treatment. No diagnostic tests were required.

In 1987 she cut her right shin, which healed on its own without any significant problems.

Q Doctor, did you examine Ms. Toon on that particular day?

A I did.

Q And just tell us what your examination consists of, Doctor?

A The patient was disrobed, given a gown to put on.

I checked her neck, her back, checking for spasm, range of motion, doing a neurological examination, checking for sensation, muscle power, and the way she walked, called the gait.

Q And what findings, if any, did you make with respect to the trauma?

A Well, the neck was diffusely tender. Diffuse means where you touch it was tender. There was diffuse spasm. Diffuse meaning the whole area. Spasm is a pro-

longed involuntary contraction of a muscle fiber, which means the patient has no control over it. When you touch a normal muscle it is soft, and it is not hard. A muscle that's in a spasm becomes extremely hard, and the normal fibers within the muscle fibers, they shorten, so you lose range of motion and also includes a tremendous amount of pain from the spasm.

Also, I found multiple trigger points present in her neck. A trigger point is defined as an area of muscle destruction. When you touch it it is extremely, extremely painful. Some patients literally hit the ceiling when you touch them.

If I may be allowed, I can demonstrate it on a patient to show to them what trigger points are?

Q Would it assist you in explaining what a trigger point is in demonstrating with a patient?

A Yes.

MR. GAMBINO: Just note my objection.

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

Q If you would demonstrate on me, what you were indicating about trigger point places.

A Fine.

Q Go gently.

(Whereupon, the witness approached Mr. LaSpina.)

A The most common area of the trigger point with injury to the neck or the back is a spasm triangle in this area.

THE COURT: Would you say it, because the record can't take down that area that you pointed to. Say, "This area," and tell us what.

A This area, or the upper back above the shoulder blade area known as the trapezius muscle. When you are looking for trigger points the patient is disrobed, the clothes are off. With your fingers you palpate for spasm. You palpate for a palpable knot. Sometimes you actually feel like a golf ball inside or a marble. When you press on it the patient literally hits the ceiling. When I do it to the patient she almost always cries. I can't really examine her because that's how bad they are.

I have tried to treat them with trigger point injections with Novocaine, which is a local anesthesia. It gives a partial relief, and is painful to a point I don't want to do it anymore. It hurts me more than it does her.

If I can draw a picture on the board, what a trigger point looks like when you take a biopsy --

THE COURT: Yes, you may. Why do you press it?

THE WITNESS: The criteria to finding a trigger point, you must press. You must feel a palpable nodule and pinpoint tenderness, not diffuse tenderness, pinpoint tenderness.

THE COURT: Does it, the pressing, relieve the pain?

THE WITNESS: No, the pressure finds the trigger point, the area. You must know where it is so you know where to inject with lidocaine to break up the surrounding pain, and needle it through to break up the area of destruction, so the surrounding muscles, by sprouting, form new improved muscle fibers, so that area where the muscle has been degenerated, and all the lactate and waste products have been trapped. Lactate is the equivalent of when a runner runs, you get a charley horse or cramp in the calf muscles, which is extremely painful, and that pain goes away only when the lactate is relieved or squeezed from the muscle, either by rest or by squeezing the muscle.

In these areas you cannot squeeze it, and you cannot relieve the lactate because it is trapped.

It is an area of entrapment.

(Whereupon, the witness drew on the blackboard.)

A If you were to take a biopsy specimen, cut it out with a knife, and put it under a microscope magnified 500 times or more, you will see the following thing.

In a normal muscle, muscle appears pink under a microscope. You see thousands and thousands and thousands of straight strands of muscle fibers. That's a normal tissue.

However, in a trigger point you see all that, but you see these large circles in an oval shape called nuclei, which indicates an area of inflammation and destruction within the muscle fibers. These areas that have been present for six months or longer are considered permanent and irreversible destruction to the muscle. And then it starts to heal with further scarring, causing further problems with surrounding inflammation. That's basically what a trigger point is.

Q With reference to your findings in the situation of this patient, Renee Toon, can you just describe for us the correlation of what you have demonstrated, against what you actually found in Renee Toon's situation?

A Basically, in the neck there was diffuse tender-

ness with spasm and trigger points.

I showed you what it looks like under a microscope, why it is so painful, and why it doesn't respond to normal conservative treatments, and why injection is the only method that has a fifty-fifty chance of improvement. Because with the injection of a needle you inject Lidocaine, a local anesthetic, numbs the area. The patient feels very little pain afterwards. Then with a needle you probe it around with a long two inch needle, 20 gauge, which is thick, to break up these knotted muscle fibers. You try to break it up. You go, one o'clock, three o'clock, six o'clock, nine o'clock, 12 o'clock. Then you go around one more time. You want to break up all these areas of destruction so that the surrounding muscle can form new ones.

This must be done repeatedly two to three months on a weekly basis, followed up by physical therapy to improve it again. It only works in 50 per cent of the patients that have had this problem for six months or longer.

Q Now, Doctor, on this first visit with Renee Toon, which was September of 1991, did you reach, based on the history, your examination, and any other medical reports or records that you then had, a tentative diagnosis?

A Yes.

Q What was your diagnosis at that time, Doctor?

A Internal derangement of the cervical and lumbar spine, rule out cervical and lumbar radiculopathy. Left shoulder bicipital tendinitis. Rule out cervical or lumbar disk herniation.

Q Doctor, just -- we are not doctors. We have to go back a little bit.

You mentioned a couple of terms. I ask you to define them. The term radiculopathy, can you tell us what a radiculopathy is?

A The word radiculopathy is derived from the Latin term radic, r-a-d-i-c, means a nerve root. Opathy, o-p-a-t-h-y, means any kind of a pathological condition relating to a nerve root, and the word cervical means neck. So, you have a nerve root problem relating to the neck.

Q The bicipital --

A Biceps.

Q Can you define what that is, doctor?

A The biceps is the muscle that is in this portion of your upper arm, which is attached to the shoulder. The tendon for the biceps is up here. When I say tendinitis, it means an inflammation of the tendon to the biceps in

the upper portion of the arm.

Q And the term internal derangement, define that, please, Doctor.

A Internal derangement is a very loose, nonspecific term that indicates that there is something that has happened to the patient's neck, deranged, a spasm, there are problems, the dysfunction. It is a very nonspecific term. You have to prove it with further testing.

Cervical radiculopathy, a pinched nerve in the neck, is a form of internal derangement. The trigger points in the spasm is a form of internal derangement. A disk bulge or herniation is a form of internal derangement.

Q After that first visit did you have the patient undergo any further diagnostic studies?

A Yes.

Q And before you answer that question, as to which diagnostic studies, can you tell us very generally what a diagnostic study is?

A A diagnostic study helps to confirm or disconfirm a doctor's working initial opinion as to what he thinks is wrong with a patient.

Q In this particular instance, which diagnostic studies did you have the patient undergo?

A EMGs and MRIs.

Q For what, these diagnostic studies, was this something that you ordered following that September of 1991 visit?

A Yes.

Q What happened next after September of 1991?

A Well, I then had top obtain authorization. By law, any time you have Workers Compensation laws, New York State law, before you can initiated therapy or diagnostic study you must first obtain --

THE COURT: Counsel, step up, please.

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

THE COURT: We will take a very short recess. Don't discuss the case.

(Whereupon, the jury left the courtroom.)

THE COURT: Would you remind me, every future witness, I want you to instruct every witness.

Doctor, you may not mention anything about any insurance. You may not mention Workers Compensation. If you have to talk about it, just say that there was a delay. But you may not mention Workers Compensation. There are certain rules that I have to follow, and that is one of them.

THE WITNESS: If I am asked why there was a delay, it looks like there was a delay on my part.

THE COURT: The plaintiff's counsel won't ask you that. If defendant's counsel asks you that, he is opening the door, then you may answer.

Are we agreed?

MR. GAMBINO: Yes, your Honor.

THE COURT: If he opens the door, walk in. But if he doesn't open the door, you can't.

MR. LaSPINA: Yes.

MR. GAMBINO: We have had -- this is the third time we had it.

THE COURT: Do you have any suggestions? I am not inclined to grant a mistrial.

MR. GAMBINO: I would like to reserve my rights.

THE COURT: If it keeps up, I will.

MR. GAMBINO: I would like to reserve my rights to make an application, to get a little bit of thought --

THE COURT: Yes.

MR. GAMBINO: -- as a possible remedy.

THE COURT: Yes, I am open to any suggestion. My reason for not granting a mistrial is a selfish

one I want to go forward, but I don't want it to go forward and make it a reversible error.

MR. LaSPINA: At the beginning of the trial I raised this because I knew it was a problem.

THE COURT: There is a way of handling everything and --

MR. LaSPINA: There are gaps, your Honor, that are ostensibly due to a cumbersome Workers Compensation process. The City of New York is self insured.

I don't know if the courts have had any direct contact with what it is like to have them authorize a test. And it was a problem in the management and care of this particular patient.

I know what the law is about the reference to Workers Compensation, but it is not a glaring error, and I think, frankly, I am sure it is lost upon the jurors.

THE COURT: That's why I handle it without going crazy when it is mentioned. I try to seem calm. I don't want the jurors to think that I was distressed by it.

MR. GAMBINO: One of the problems we are having with this situation, just there was a second

accident, subsequent to the accident of July of 1991. The plaintiff was also being treated, and there was also availability of the no-fault carrier, which does not require waiving of time for clearance and so forth. So, saying that it is being --

THE COURT: I want to discuss something else.

(Whereupon, the jury entered the courtroom.)

DIRECT EXAMINATION

BY MR. LaSPINA: (Continued)

Q Doctor, we had asked you what you did next. Did there come a time when this patient, Renee Toon, did, in fact, have those diagnostic studies that you ordered?

A Yes.

Q You used the term before, EMG, and can you tell us what an EMG is?

A EMG stands for electromyography. It is a test where a doctor performs a test to see if there is any problems within the muscle or the nerves within the body.

You have a machine that weighs about 30 pounds. It is about three feet long, about two feet wide. It has an oscilloscope screen, which is four inches by four inches big.

The test has three parts. The first two parts is

the motor and sensory conduction studies, which takes the movement. The motor checks the movement portion of the patient's function. The sensory --

MR. GAMBINO: May we approach the bench, your Honor?

THE COURT: Yes.

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

Q Doctor, you were telling us about the procedures involved in conducting an EMG. Was an EMG conducted of Renee Toon?

A Yes.

Q What difficulties, if any, were encountered in conducting the EMG on this particular patient?

A Well, the last part of the test involves inserting the tip of a small sterile needle into several muscles in the patient's neck and arms. Needle like this. It hurts when this goes in. The patient couldn't tolerate it. I couldn't do the test properly. In fact, one portion of the test I had to redo it at a later date because she was in a lot of pain. It hurt her a lot. It had to be rescheduled.

Q Was that, in fact, done? Was the EMG completed at a subsequent day?

A Yes, it was.

Q And, Doctor, if you can tell us in the practice, your particular practice of medicine, how important is record keeping?

A It is very important.

Q And do you keep records in the ordinary course of your practice as a board certified rehabilitation medicine practitioner?

A Yes.

Q And are these records kept contemporaneously or at about the same time that you make your findings, or make your history?

A The answer is yes.

Q And is it part of your practice to keep these records for some period of time in the normal course of business?

A The law requires me to keep it for at least six years from the time of the evaluation.

Q Did you do that in the case of Renee Toon?

A Yes.

Q And have you brought your records with you today, Doctor?

A Yes.

Q And does it refresh your recollection to refer to

those records, if necessary, if you don't have a specific recollection of something?

A Yes.

Q Do your records indicate the results of the EMG studies?

A Yes.

Q Would it assist you in refreshing your recollection with the files?

A Yes.

(Pause.)

Q Please give us the dates of the findings, Doctor.

A The first EMG was performed on Ms. Toon on 1/16/92, which revealed abnormal findings suggestive of a left C-5, C-6, cervical radiculopathy.

I have the tracing also, which might help me explain what it is, if I may be allowed?

Q And other than the cervical EMG, was there a lumbosacral EMG conducted?

A Yes.

Q Doctor, when you say lumbosacral, just tell us what lumbosacral involves.

A The lumbosacral region is the portion of the lower back. The lumbar means the lower back. Sacral is the tail bone. Lumbosacral means the lumbar region with the

tail bone region.

Q The records that you kept from the EMG were they important to your diagnosis and treatment of Renee Toon?

A Yes.

Q And the records of the EMG findings, were they made at the same time that the test was administered or shortly thereafter?

A Yes.

Q Can you give us all your EMG findings, and put them all together?

A Yes.

Q And please tell us the dates over which the EMGs were administered?

A An EMG of the lower back was performed on 1/27/92. I did half the test. I could not complete the other test because the patient had a lot of difficulty cooperating because of pain, and it was completed on 2/12/92, and it revealed abnormal findings suggestive of a left L-5 radiculopathy. L-5 is a nerve root which comes from the lower back at the level of the fifth, or the last lumbar vertebrae. When that's pinched you get shooting pain down the legs. That's what the EMG showed, a pinched nerve at this level.

Q So the record is clear, all of your EMG studies

were completed by February 12, 1992?

A I did more EMGs in 1994 because of worsening of symptoms.

Q So, the first set were done February 12, 1992.

A Yes.

Q After reviewing your EMG findings what did you do next with respect to Renee Toon?

A I started on a course of physical therapy, and tried to give her some trigger point injections, but she could not tolerate them. I had to stop with the trigger point injections.

Q When did your therapy begin, and over what period of time did you have a course of treatment?

A The physical therapy started approximately three months after, due to delay. The first therapy session that was given by me was 1/20/92, approximately three and a half months from the time of the initial visit.

Q Doctor, from the time that you first saw Renee Toon in September of 1991, which would have been two months after her accident, up until the end of January of 1992, had her condition changed in any way?

A It was getting worse.

Q Can you tell us how it was getting worse?

A On 1/16/92 I reevaluated her. Her neck pain was

getting worse. It was increasing. Her left shoulder pain was worse. She was having decreased range of motion with her left shoulder. At that point I gave her an injection of Lidocaine and cortisone into the left shoulder. At that point the range of motion was only one half normal, and there were numerous trigger points and spasm and decreased range of motion to the neck. That's when I performed the EMG of her neck.

Q Doctor, did you have an occasion to refer Ms. Toon to any other medical specialists?

A Yes, I referred her to an orthopedic surgeon, Dr. Ergas, E-r-g-a-s.

Q For what physical complaints, or what findings did you refer her to an orthopedist?

A For an overall orthopedic evaluation, but more specifically, because she went, we sent her for MRI of her lower back, as well as x-rays. It showed a lesion, an abnormality that had to be studied further with a bone scan.

We sent her for a bone scan, and the bone scan revealed the possibility of a fracture in her right knee. That's when I referred her to Dr. Ergas, and he evaluated her, sent me a report, discussed the case with me on the phone, and he found a fracture on an x-ray. That's when

he got involved, and the patient underwent two surgeries to her right knee.

Q Where were the surgeries conducted?

A At the Hospital for Joint Diseases, the same hospital I am on staff at.

Q From your knowledge, Doctor, did Renee Toon begin a course of treatment with Dr. Ergas after your referral?

A Yes.

Q And that would include, not only the surgeries, but also office visits?

A That is correct.

Q Did he report his findings to you as the principal medical practitioner?

A Yes.

Q And, Doctor, those types of reports that are generated and sent from one physician in one specialty to another doctor, are they reliable to you, and important to your diagnosis and treatment?

A Yes.

Q Why?

A Basically, when another doctor examines the patient, you want to know what his findings were, because his expertise is a little bit different than yours, and in more specific areas. If you refer a patient to a doctor,

naturally, you want to know what his expertise opinion was about that injury, if he did any testing, to see what those findings were, and what plan he has for that particular patient. So, these are all important. And if he did any major surgery, that also is important to know.

Q Have you had occasion to examine Ms. Toon within the last year, year and a half, concerning her medical condition?

A Absolutely.

Q Can you just tell us when you last saw her and -- let me withdraw that.

Did there come a time when Renee Toon was hospitalized for the injuries we have been talking about?

A Yes, she was hospitalized at the same hospital again where I am on staff at, the Hospital for Joint Diseases, Orthopedic Institute, for a period of, I think, about 10 to 14 days.

Q And what role, if any, did you have in that admission?

A I was the referring doctor.

Q And what physical complaints, what symptoms, did she present to you that led you to make that admission?

A Chronic, intractable pain, that I could do nothing with, neck pain, back pain, bilateral knee pain, right

side worse than left.

Q You used the term bilateral knee pain. Tell us what bilateral means in a medical sense.

A Unilateral means one side, bilateral means both sides.

Q Now, Doctor, the September 5, 1991 visit, the first visit with Renee Toon, did you make a record of your findings on that day?

A Yes.

Q Do you have that record with you?

A I do.

Q And is that a two-page document?

A Yes.

Q May we have it?

THE COURT: Yes.

(Handing.)

Q Doctor, I ask you to refer to --

MR. LaSPINA: Actually, that should be Plaintiff's exhibit --

COURT CLERK: Oh, I am sorry.

(Whereupon, Plaintiff's Exhibit Number 1 was so marked for identification.)

Q Doctor, I ask you to refer to Plaintiff's Exhibit 1, which has been marked for identification purposes. How

many pages does that consist of?

A Two pages.

Q What is it?

A It is my, it is my report of my first evaluation of Ms. Toon on 9/5/91.

Q That would be the first visit?

A Yes.

Q Can you read to us from the history portion of the document?

MR. GAMBINO: Objection, your Honor. Not in evidence.

THE COURT: Sustained.

Q Doctor, this particular document, did you keep this in the regular course of your business as a physician?

A Yes.

Q Was this record made either at the same time or soon thereafter when the findings and the history was presented?

A Same time, yes.

Q And is it part of your practice to keep these particular records in the regular course of your business as a physician?

A Yes.

Q And did you do that in this particular situation?

A Yes.

Q And this document was generated from the file that you brought with you, the file pertaining to Renee Toon as a patient.

A Yes.

MR. LaSPINA: Your Honor, I move this document be admitted into evidence.

MR. GAMBINO: No objection.

THE COURT: Marked in evidence.

(Whereupon, Plaintiff's Exhibit Number 1 was so marked in evidence.)

Q Doctor, I refer you to the first page of the document. Can you read for us the medical history taken on September 5, 1991?

A Yes. May I begin?

Q Yes.

A "I had the opportunity to evaluate the above patient for the first time on consultation on 9/5/91. History obtained is that patient is 31 years of age, black female, caseworker for the Human Resources Administration, with history of asthma, history of peptic ulcer disease, with bleeding episode in 11/90. No history of any known

allergies. Denies any other prior motor vehicle accident, except for the 1980, 1982, without any significant injuries.

"Patient states that she was well until 7/9/91, when she was working on her job riding a bus. She became involved in a motor vehicle accident, sustaining injuries to her left shoulder, neck, both knees, and later on had onset of lower back pain.

"She went to Brookdale Hospital emergency room. Was treated and released. She then saw a chiropractor, Dr. Benson. X-rays were taken and no fractures were detected. Patient states her doctor has requested authorization for MRIs of the cervical and lumbar spine, but the results are still pending.

"Currently patient is experiencing neck pain with radiation into the left upper extremities and headaches. Also, patient is experiencing lower back pain radiating into the lower extremities bilaterally, left greater than right, with occasional numbness and tingling in the legs."

Q In the history you used the term "both knees." Earlier we had a discussion about bilateral. When you tell us bilateral, is that one and the same as both knees?

A Bilateral means both.

Q What is Renee Toon's present condition?

A She is classified as a permanent partially disabled patient.

Q And when had you last examined her?

A The last time I examined her was in court this morning, and prior to that on 3/13/96 in my New York City office.

MR. LaSPINA: Your Honor, may I approach the bulletin board?

THE COURT: Yes, you may.

MR. LaSPINA: I think we will need this marked, the document back here. I want to admit it. It is a blowup of the items in evidence.

THE COURT: The report that's in evidence?

MR. LaSPINA: Yes.

THE COURT: That will be Plaintiff's 1-A.

MR. LaSPINA: It will be marked for identification.

THE COURT: Well, it is the same document.

MR. LaSPINA: I will ask him foundational questions, unless it is stipulated to.

THE COURT: Will you stipulate?

MR. GAMBINO: I haven't seen it. I have no problems.

THE COURT: 1-A in evidence because, ladies and gentlemen, it is the same document that Dr. Guy was just referring to.

However, counsel has had it blown up and placed on the bulletin board.

(Whereupon, Plaintiff's Exhibit 1-A was so marked in evidence.)

THE COURT: The problem is you placed it where the jury can't see it.

MR. LaSPINA: I will move the board but --

THE COURT: It is not a board. That's attached to a wall.

MR. LaSPINA: Only for purposes of we couldn't put it anyplace else.

THE COURT: Can you see if we can move the wall?

MR. LaSPINA: The State would have to authorize that.

DIRECT EXAMINATION

BY MR. LaSPINA: (Continued)

Q Now, Dr. Guy, do you have an opinion, based on a reasonable degree of medical certainty, whether the conditions that you observed during your last examination are

temporary or permanent?

A They are permanent.

Q What is the basis of your opinion, Doctor?

A Well, the patient underwent two surgeries for her right knee. She had a right knee meniscectomy, a shaving contraplasty on 12/3/92, and on 8/17/93 she had a second surgery with bone debridement.

Cartilage, the space between the knee joint, is the only part of the body that does not have the ability to repair itself once it gets damaged. If a bone breaks, it can repair itself and become the strongest part of your body, what with callus formation. Whenever part of your body breaks, that part will never break again. Muscle has the ability to repair itself, but not cartilage.

In the knee joint, meniscus is cartilage. This patient's meniscus, the medial meniscus, which is the inner part of the knee, was torn or ruptured. And as a result of that complication, it went to bone necrosis. The bone was destroyed inside and required a second surgery. So, this is a permanent surgery, permanent condition. No repeat surgery will be able to correct this problem. That's why this condition is permanent.

The cervical radiculopathy is considered permanent. The trigger points are permanent. The lumbar

radiculopathy is permanent because I repeated it, a second EMG on the patient in 1994, and it still showed a pinched nerve, as well as it did in the neck area. That's considered permanent. Once you have EMGs testing the area at least one year or longer, and it still shows a never problem, it is considered permanent.

These are the reasons why, and also based on a failed hospital admission to improve this patient's problem. Based on years and years of rehabilitation to try to improve this patient's condition, and has also failed. The patient is still left with these problems. In fact, some of it is getting worse.

Now, the right knee problem has made the left knee problem worse by compensation. When somebody is in a lot of pain they try to unload the right side, and shift the weight, placing it all on the left side. So, the left side, the left knee, takes all the stress, and gradually starts to become decompensated and have problems. This is what's been happening to Ms. Toon.

Q In terms of permanency, Doctor, are you familiar with the term traumatic arthritis?

A Yes.

Q With respect to Renee Toon, will she have traumatic arthritis?

A Yes. Traumatic arthritis is a condition that almost always follows trauma. Trauma is defined by Webster's Medical Dictionary as any condition that disrupts the normal integrity of the body's system, a blow, an accident, is considered trauma.

When you have trauma to an area, the body undergoes a very rapid accelerated rate of arthritis. We all undergo the natural aging arthritis. We have rheumatoid arthritis which affects the joints, as well as the heart and the lung.

MR. GAMBINO: Note my objection. There has been no claim of arthritis in this case.

THE COURT: Yes, sustained.

Don't talk about arthritis.

If there has been no claim, do not -- the jury is to disregard it.

MR. LaSPINA: May I have a moment the, your Honor?

THE COURT: Yes.

(Pause.)

THE COURT: I know it is hard to disregard something that you have heard, but there are certain matters which, all the issues of the trial are set before the trial, and you cannot have

surprise issues coming in that counsel has not been apprised of before.

So, you may not consider it. You may not discuss it. This may not come into, may not come into your, you have to try to put it out of your minds in discussing this vase.

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

Q Doctor, as part of your records you told us earlier you had received records or reports from Dr. Ergas.

A Yes.

Q And Dr. Ergas was the orthopedic surgeon who conducted the surgeries.

A Yes.

Q What were Dr. Ergas' findings concerning the post surgery injuries and conditions of Renee Toon?

A He performed arthroscopic surgery on 8/12/93. I think I earlier, I said by mistake 8/17/93. It is 8/12/93.

And he mentioned internal derangement of the right knee with osteonecrosis of the lateral femoral condyle. And on subsequent records there is one report I think you may have taken by mistake this morning, Dr. Ergas' full narrative report. I think you may have it.

Q Doctor, while I am looking I will ask you a question.

You used the term osteonecrosis. In your training in rehabilitation medicine, are you familiar with that term?

A Yes, I am.

Q What is it?

A Osteo means bone. Necrosis means dying off of, sloughing off of. It means a part of the bone has died off.

Q And how, if at all, would this relate to arthritic changes?

A Well, again, it is caused by trauma. And when you go into shave around the area that has been died off, you are causing further trauma to the area. That causes further traumatic changes, traumatic arthritis changes.

Q In your opinion, Doctor, will Renee Toon have, in the future, arthritic changes in the knee joint, particularly the one that was operated on twice?

A Yes.

Q Doctor, I want you to assume a certain set of facts which have been testified to by Ms. Toon on direct examination. That on July 9, 1991, while riding as a passenger on a bus, I want you to assume that upon evasive

action on the part of the bus operator, in veering to the right, and then braking, and colliding with another vehicle, Ms. Toon was caused to come into contact with a metal portion of the left side of the bus, and also upon braking and impact with the vehicle, she was thrown forward on the seat that she was seated on, and --

MR. GAMBINO: Objection to the hypothetical question. It is assuming facts that are not in evidence. There is no contact. There is no testimony as to any contact between the two vehicles.

MR. LaSPINA: I will delete that fact.

THE COURT: Delete the fact.

MR. LaSPINA: Let the record speak for itself.

Q Assume, upon braking, we have had testimony by Ms. Toon that she was thrown forward from the seat and impacted both her knees on the seat in front of her.

I want you to also assume that she left the bus under her own power, and subsequently got medical treatment with Dr. Benson on the day of the incident.

I also want you to assume that he treated various parts of her body, and then made a referral to you.

With those facts, assuming those facts, do you have an opinion within a reasonable degree of medical certainty whether the plaintiff's injuries you have de-

scribed and treated were caused by that bus accident of July 9, 1991?

A The answer is yes.

Q What is the basis of your opinion, Doctor?

A Based on a history that was obtained. Based on the results of the diagnostic studies, based on the operative report of Dr. Ergas, and his telephone conversations with me regarding the case, and based on my EMG studies, as well.

Q Doctor, did there come a time when you learned that Ms. Toon had an accident nine months after this bus accident, specifically on February 25, 1992?

A Am I aware of that accident?

Q Yes.

A I am aware of that accident, yes.

Q Knowing about that accident, Dr. Guy, does that change your opinion about what the competent producing mechanism of injury was for the injuries you diagnosed and treated.

A No.

Q And would that be the bus accident of July of 1991?

A That's right. The accident of February of 1992 only made the neck and the back slightly worse. Did not

hit the knees, based on my information.

Q Doctor, with respect to this patient, did you submit bills for professional services rendered to Ms. Toon as a patient?

A Yes.

Q And what was the amount of those bills?

A Approximately --

MR. GAMBINO: Objection. All bills were paid.

THE COURT: Yes. Sustained.

MR. LaSPINA: May I approach on this, your Honor?

THE COURT: Come up.

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

Q Based on your opinion, will Renee Toon require medical treatment in the future?

A Yes.

Q Tell us what her medical treatment will consist of, not its cost.

A Yes. The most important thing, she has had two surgeries to the right knee, has not corrected the problem.

As I indicated to you earlier, a cartilage that's torn will never be corrected, even with arthroscopic

procedure. She is going to need a total knee replacement. That whole knee joint has to be changed.

MR. GAMBINO: Note my objection. There is no claim for total knee replacement. It is purely speculation, anyway.

MR. LaSPINA: That's an objection? We have a bill of particulars.

THE COURT: I will permit that.

Your opinion, not as an orthopedist, because you are not an orthopedist.

A As a doctor of rehabilitation medicine, I feel that all future rehabilitation to that right knee has failed, and the next step is a total knee replacement. And she is going to need physical therapy after the knee surgery for about six to nine months, three times per week.

And also because of her neck and back problems, also permanent, she will need life long physical therapy on an as needed basis approximately two to three times per week, three to four months out of a 12-month period per year.

And, of course, once a month follow up visits by a treating doctor to supervise how her progress is going on.

Q Doctor, your discipline, rehabilitation medicine,

is any part of that discipline involved with rehabilitating persons who work?

A Yes.

Q Based on your opinion of permanent injury in this case, what opinion, if any, do you have with a degree of medical certainty concerning Ms. Toon's ability to do the job that she had?

A I feel that Ms. Toon will not be able to hold any type of a job for any length of time for the following reasons.

She cannot travel on the regular basis to a job daily. Many times she has had to cancel appointments to my office because of inclement weather, the weather was cold or snowing. She can't travel on slippery grounds.

She cannot stand for a length of time. She cannot sit for a length of time. When she has constant pains it aggravates the muscles. She will never be able to hold down any type of a gainful occupation.

MR. LaSPINA: No further questions.

THE COURT: Mr. Gambino?

MR. GAMBINO: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. GAMBINO:

Q Doctor, did you bring your records with you?

A Yes.

Q Can I see them?

MR. GAMBINO: I have to look at these records, Judge.

THE COURT: Let's take five minutes.

(Whereupon, the jury left the courtroom.)

(Whereupon, a recess was taken.)

(Whereupon, the jury entered the courtroom.)

THE COURT: Please continue. Be mindful that -- just step up.

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

CROSS-EXAMINATION

BY MR. GAMBINO: (Continued)

Q Dr. Guy, you told us that you first saw the plaintiff on September 5, 1991, correct?

A That's correct.

Q Now, you told us it was very important for you to take past medical history, correct?

A Yes.

Q And you made notes on that, right?

A Yes.

Q And every time she comes into your office you take notes as far as what treatment is rendered, correct?

A Yes.

Q And in those notes that you take you also put down what complaints they make, what treatment they have given.

A Generally, yes.

Q Doctor, you want to find your office notes for the first time you saw Ms. Toon?

A September 5th?

Q Yes.

A Yes, it is right here.

Q The report?

A This is my first report. I dictated it.

Q Well, do you have office notes for 1993, 1994, 1995? Do you have those?

A Yes.

Q Now, you have, the last one you have is 1996.

A In the order 3/28/96.

Q What's the first office notes that you have? Go back chronologically?

A 3/28/96, 3/26/96, 3/13 --

Q I am sorry. Just, you can, that's the last time you saw her?

A Right.

Q What notes do you have showing the first time you saw her with those office notes? Go to the first page.

A You mean back in 1993 or 1991?

Q My question is, look at your office notes that you have in your hand. What's the first, the earliest record you show that those records --

A Okay. 11/11/91.

Q Next one?

A 12/19/91.

Q Can I see them?

A Sure. (Handing.)

Q Now, Doctor, I ask you to look at that record. The top one is what?

A 11/11/91.

Q 11/11/91. Anywhere in there does it say anything about knees?

A No.

Q Anything about treatment to knees?

A None in that note.

Q How about the next one, which is what date?

A 12/19/91.

Q And on that one do you have knees?

A No. The knees come into the picture in 1992. To save a lot of time, May 5, 1992.

Q May of 1992?

A Yes, in the beginning --

Q That's the first time she --

A The first time. The note is right here. That's the first time, September. I was concentrating on her major area of complaint. That was the neck, the back, and the left shoulder.

Q Well, Doctor, when a patient comes to you complaining of pains, you write down every pain. You want to make sure you cover everything?

A Yes.

Q In your 1991 records, in the November and December records, are there any records saying complaints of pains in the knees?

A Other than the first visit, no.

Q So, would it be fair to say by November and December she wasn't complaining to you about knees anymore, correct?

A All I have documented in the records is, the knee is not mentioned in the records.

Q Now, with regards to your report, that written one that's been blown up, is that accurate?

A Yes.

Q And it covers everything you were dealing with?

A Except, there is no examination of the knees on that date.

Q Now, Doctor, she told you in your report she went to Brookdale Hospital emergency room, was treated and released. Can you find me that record, please? It is important you get all the records.

A She told me that she stayed there, but was not seen. She was in pain and left.

Q I am sorry, Doctor, maybe I misread this. Let me read it again.

A No, you don't have to read it again, counselor.

Q If I may, Doctor, let me ask you. It says here it is, she went to, under the history area, she went to Brookdale Hospital emergency room, was treated and released.

Now, that's what you wrote on your report, correct?

A That's correct.

Q And now you are telling us something different, that she didn't go, she left, she went, but in your report, which you said was accurate, you said she was treated and released.

A Initially what I have down is what I obtained from the patient's history, as my understanding of the history.

Q Well, do you have, you had records for November of 1991, and December of 1991. How about the September 5th

visit? Do you have your notes you wrote what she complained of, what the pains were?

A I just told you. I just told you. It was dictated. All my initial visits are always dictated immediately after the exam.

Q Let's go back to the report. But, you don't keep any written reports?

A I dictated it.

Q And you only dictate on the first visit?

A When I am asked to do a narrative report, then I do another dictation, or if a company asked me to write a progress report, again, I dictate that. My handwriting is not --

Q Let's take this report first. You examined her, gave her a pretty thorough examination.

A Except I don't have recorded the knee examination findings.

Q Doctor, let me ask you this question. You gave her a thorough examination on her first visit.

A Following the areas of main complaints, which was the neck and back at the time, yes.

Q All right. So, you are telling us that she didn't complain about her knees, or she did complain about her knees?

A She most definitely did complain about her knees. I am saying I have nothing recorded in terms of my examination of the knees.

Q Let's not be so quick. Did you get it in there? One of the things you told her, her gait. What is a gait?

A The way she walks.

Q And you said she walks normally, right?

A That's correct.

Q So, that the knees would affect the way you walk, correct? If you are in pain you will walk a little different than if they are not in pain?

A Depending on the severity of pain, yes.

Q And let's see what else you did. You did a range of motion, correct?

A Yes.

Q And you did manual, muscle, power testing; is that correct?

A That's correct.

Q And you did that to what, all four extremities, correct?

A That's right.

Q And what were your results?

A It was normal.

Q Everything was normal, as far as her arms and

legs?

A That's correct.

Q So, you did examine the legs?

A Leg is different than the knee, counselor. A knee is a joint. A knee is a joint.

Q I see. So, when you said assessment and plan, that's the things you find the problem with, correct?

A Yes.

Q Those are the things you were going to help get better; is that fair to say?

A Assessment and plan is my diagnosis.

Q So, just you are saying these are the things you will work on.

A That's correct.

Q Okey-dokey. The first thing you will work on was the neck and back, internal derangement.

A Right.

Q That was kind of important to you, right?

A Yes.

Q To check that all out?

A Right.

Q And, in fact, the internal derangement, that's kind of a nebulous term. That means you think there is something wrong there.

A Right.

Q You didn't find anything. You said, "I think there is something wrong."

A Internal derangement is a very nonspecific term meaning there is something wrong, not that there isn't. There is, and you want to see exactly what it is.

Q It is fair to say it is a catch phrase, for "You have to look at this area."

A Catch phrase?

Q Internal derangement you are saying, "I find something here, I think. We will look at this and treat it."

A You are strongly mistaken, counselor.

Q Tell me what it is.

A Internal derangement means there is something abnormal with the normal biomechanics of that area, whether it is from spasm, from loss of proper range of motion, from a possibility of a pinched nerve, or any other similar abnormality.

Q Doctor, I missed something here. Did you give a test to find these things?

A Yes.

Q And I believe you said there were trigger points.

A Yes.

Q And a trigger point, you said it was a knot.

A Area of muscle damage. Palpable --

Q You described it as a knot.

A Yes.

Q And when you say a knot, it is like a marble underneath the skin.

A Yes, pinpoint tenderness with a palpable nodule.

Q And, Doctor, are those knots permanent?

A If they are present after six months or more they can become permanent, yes. If they are present now after five years passing injury, yes, they are considered permanent.

Q And, Doctor, we can have people, myself, Mr. LaSpina, the jury, they can have knots, not from accidents?

A There are two knots, tenderness points and trigger points. Trigger points are much different than tender points. Okay? Tender points are not areas of irreversible permanent muscle destruction with nuclei forming inside the muscle fibers.

Q And you know that because you told us if you take a biopsy you see this diagram here.

A I know that because of my vast experience with treating trigger points and teaching it, and also palpat-

ing it with my fingers.

Q Well, this diagram you made is really of no value unless you had a biopsy you can say, "This is what I found." This is what you are saying it could show.

A If you want, I have a biopsy in my briefcase I can show you.

Q I don't want generally. I want to know about this particular plaintiff.

A Fine.

Q I am saying you didn't take any biopsy on Ms. Toon.

A No.

Q This trigger point we are talking about that you found, they were knots, because I believe you told us earlier that to have a trigger point you have, you had to have a knot.

A Pinpoint.

Q And you have to have pinpoint tenderness, correct?

A Yes.

Q That's the way you described trigger points before?

A Pinpoint tenderness with a palpable nodule.

Q But now my question is, when we have knots in our back from just normal everyday wear and tear, working

around, getting up tight, you get knots in your shoulder, your back. That happens too, doesn't it?

A You get tenderness points. Trigger points come from trauma. You can have tenderness points. It may not even hurt when you press on it. That's the difference between a trigger and tender point. A trigger point, when you press on it, the pain travels to the pain-referred zone area, and it is much more painful than a tender point. Most tender points are not painful.

Q There are people who get knots in their neck and back, not from an accident, but just from tension, normal, everyday work.

A Tender points, yes, not trigger points.

Q Tender points are, if your wife or girlfriend massaged those points, they relieve it a little bit, but the nodule stays there.

A You are referring to tender points or trigger points?

Q You say tender are tender. Trigger point is if they go "Ouch." Is that fair?

A That's not what I said.

Q I am sorry.

A The difference between the two is trigger points, when you press on it, the pain gets referred to the pain-

referred zone area. In other words, if you press the trigger point in the trapezius, the pain travels to the chest, the arm, the side of the face, the neck, and to the head.

Q So, that's one of the tests you gave to see if there were trigger points. You gave some other tests, correct?

A EMG, MRI.

Q We are talking about the first visit.

A The first visit? It was just an examination, not a test.

Q Okay, you did an examination. You also examined her back, her neck. You examined her back. You did a straight leg raising.

A Yes.

Q Straight leg raising, that's to test the back problem.

A Yes.

Q And pains.

A For nerve root irritation.

Q That's by lifting the leg up, correct?

A Lifting the patient's foot and ankle in your hand, going straight up, all the way up to normally should be 90 degrees or better.

Q Now, down there by the leg did you test anything with the knees, because you told us there were complaints of the knees.

A I already answered you, counselor. I said I have no record in my report of 9/5/91 about my knee examination.

Q And when was the first time -- I am sorry.

I believe you said earlier the first time anything about knees came up was in May of 1992.

A On my records, yes.

Q How many times did you see her from September of 1991 to May of 1992?

A Six times.

Q Okay. On those six times --

A Approximately six times.

Q Those six times, you don't have any record of her complaining about her knees, correct?

A That is correct.

Q By the way, she was referred to you by Dr. Benson.

A Yes.

Q Did you talk to Dr. Benson?

A I did.

Q The first day when she was there, or after she left, or --

A The exact time I don't know. I had a conversation with him about the patient's condition. He was concerned, as well as I was.

And, my main concern was she was always in pain and agony. As soon as I touch her, the slightest amount of touch, she becomes very anxious. I wanted to see what his opinion was, and he had a similar opinion, as well.

Q Oh, I am sorry, Doc.

Can you find me in your notes where it shows you spoke to Dr. Benson, and what he said to you, and what you said to him?

A That's not something I record in a normal practice of practicing medicine, unless there was some proper medical information was conveyed that I didn't know, and vice versa.

Q You have a pretty good memory of what happened back in 1991 from Dr. Benson.

A Yes.

Q You have a lot of patients?

A Yes.

Q He refers you a lot of patients, too?

A Some.

Q But you remember that telephone conversation -- I know what I wanted to ask you.

Did she bring any medical things with her when she first saw you --

MR. LaSPINA: Objection.

Q -- any medical reports or anything from Dr. Benson --

THE COURT: Overruled.

Q -- on her first visit to you?

A The first time?

Q Yes.

A No.

Q How about the second time?

A No.

Q Well, isn't good medical practice to get any prior medical records or findings from the referring physician?

A Not when the referring doctor is a chiropractor, and all he is limited to doing is adjustments, and he can't do diagnostic tests, other than x-rays. I already know there is no fracture here on the x-rays that came back, and the chiropractor doesn't treat knees.

Q That's right. I am sorry, I almost forgot that. Chiropractors aren't allowed to treat knees, correct?

A As far as I can tell they are only limited to the spine.

Q And, Doctor, so it is fair to say you didn't give her any treatment for her knees. Dr. Benson, sure as heck couldn't give her any treatment.

A I think there were treatments for the knee.

Q You did give her treatment?

A I did.

Q In May of 1992?

A After, afterwards.

Q After May of 1992?

A Yes.

Q I am talking, all my questions are up to, let's take April of 1992.

A Okay.

Q So, I am saying up to that point Dr. Benson, who we know, as a chiropractor, is not treating her knees because he can't, by law. And you are not treating her for her knees.

Do you have any other doctors that are looking at her knees from September of 1991 to April of 1992?

A As far as I know, no.

Q And on your first visit you said she was walking normally, correct, gait is normal?

A Yes.

Q And the other things I want to make sure I got

right, you said active range of motion. What is the range of motion for the legs?

A Straight leg raising?

Q It says active range of motion and manual muscle power testing --

A You are asking --

Q -- within normal limits for all four extremities. What does that consist of? What is range of motion for the leg or the extremities?

A Counselor, you are asking a very vague question.

You do range of motion of the joint, not of a leg. You have three joints in the leg.

Q Okay.

A They are all normal. They are all normal.

Q Wait. My question to you was, when you wrote active range of motion, and manual muscle power testing, what did you do? What did that consist of? What does that mean?

A Active is what the patient does, and passive is what a doctor does. The range of motion through the normal joints that the patient was able to do was normal, except for her neck and her lower back.

Q The three joints you mentioned, which ones are you referring to?

A Sorry?

Q For the extremity.

A Active range of motion is what the patient does.

Q Slow down. My question is, you mentioned that there were three joints that you tested, correct?

A The hip, the knee, and the ankle.

Q So, how do you test the hip? You tell me. How did you test the hip?

A I asked the patient to flex it, bring it up, bring it backwards, to the side, outside and inside.

Q Doctor, maybe you can give us a little demonstration over here. Show us what that test is.

(Whereupon, the witness approached the jury.)

Q What is the range of motion test you gave for the hip?

A Hip flexion, up to 90 degrees. Hip extension, 45 degrees. Abduction. Abduction, 90 degrees. Adduction is approximately 30 degrees. Then you have internal and external rotation, each of 30 degrees.

Q Now, what did you do for the knee?

A Knee flexion and extension.

Q And the ankle joint?

A Same thing, flexion, extension, inversion and eversion.

Q And in addition to that, you had also, did you put any restraining power, when you say lift, did you hold her knee at all, that she lifts against it?

A With reference to muscle power testing, you don't put pressure on the knee. You put pressure on the thigh.

Q You test all four --

A Yes.

Q You put pressure on her knee, and made her push against you?

A I just said I don't put pressure on the knee. You put pressure on the thigh.

Q And she has to lift it up against your hand?

A She brings it up. You exert full pressure to see if it gives. You compare that side to the other side. If they are both equal, you call it normal.

Q Now, you told us about trigger points. I want to get back to that for a second. You said there are two ways of treating that, one, you squeeze the muscle and you said the other one was rest.

A I don't believe I said that, counselor. You can have my testimony reread.

Q We will find it and --

A I don't recall I said that. If I said that, first, I would like to hear exactly how it was phrased.

MR. GAMBINO: Mr. Reporter, can we find that so the Doctor can be enlightened as to what he said?

(Whereupon, there was readback.)

Q Trigger points. What are some of the ways you treat trigger point problems?

A You treat it first with physical therapy.

Q Wait, wait, wait, wait. Slow down. Physical therapy. What does the physical therapy consist of?

A Heat, electrical stimulation, massage, myofacial release techniques and special therapeutic exercises such as stretches.

Q Any other way?

A Trigger point injections on a weekly basis, followed up by the same regimen.

Q And can you also treat it by rest?

A Trigger points do not, I repeat, do not go away by rest.

Q You saw the plaintiff six times from September of 1991 to, I believe it was May of 1992.

A Approximately six times, yes.

Q Now, on those six times what did you do for her? First of all, I am sorry, let me go back.

When you saw her six times over those eight or

nine months, how often would you see her, once a month, once every two months?

A Well, I think the record speaks for itself.

Q We don't have the records in there. That's why we are asking you the questions.

A Let's say sometimes once a month, sometimes once every two to three months. It varied.

Q When you saw her, you were giving her what, physical therapy?

A No.

Q What were you doing for her?

A I am not allowed to say why I couldn't do the physical therapy yet.

Q My question is, when you did see her --

A Evaluations.

Q -- what did you do?

A Evaluations.

Q So, those six times you didn't treat her at all?

A No.

Q When you saw her those occasions --

Let's go back to April of 1992.

A Okay.

Q I believe you saw her that month -- did you see her in April? No trick questions.

A Yes, April 20, 1992.

Q When you saw her at that time, now, she has been under Dr. Benson's care.

A Yes.

Q And have you been getting progress reports?

A No.

Q You and Dr. Benson work hand in hand. He does chiropractic. You do rehabilitation.

A We don't exchange progress reports.

Q You don't?

A No.

Q Not progress reports. You get any reports, like, do you have anything "Hi, Doc. How is she doing?" What progress is she making?" Anything like that? You compare notes at all?

A He my have gotten some of my notes by mailing to him or by way of the patient, but I certainly didn't ask him for any of his notes.

Q Do you have anything to show you sent him anything?

A I don't know. Maybe.

Q Well, if you want, you can look. I didn't see anything. If you want, please.

THE COURT: Why don't we go ahead. Time is

getting a little short.

Q Now, in May of 1992 I believe you said that's the first time you had anything about the knees.

A Correct.

Q By the way, do you have anything in your records that shows on your February, let's take your March visit. In March did the plaintiff tell you she had another accident?

A March of 1992?

Q Of 1992.

A She may have told me, but it is not in my records.

Q And -- I am sorry. I apologize.

In January of 1992, and in February of 1992, you were still worried about the neck and back, right?

A The neck, the back, and the left shoulder.

Q What is an MRI?

A It stands for magnetic resonance imaging, a test to see if there is any damage within the soft tissues, the tendons, the ligaments, the cartilage, and other soft tissues.

Q And you were kind of worried about the plaintiff in this case, and you sent her for two MRIs, correct?

A Yes.

Q And you had the MRI of the neck, and MRI of the

back.

A Yes.

Q And they were both normal.

A No, the MRI of the neck was normal. The MRI of the back was negative for any disk herniations, however, it showed a suspicious lesion at L-3, requesting, requiring us recommending a bone scan.

We ordered a bone scan, and they found a possible fracture in the fight knee near the femoral condyle. That's when the right knee problem became evident, and that's when I referred her to Dr. Ergas.

Q Doctor, maybe you can, we can go a little slower her. Tell me, what is the date of the MRIs?

A Okay. MRI of the cervical spine is 2/1/92. MRI of the lumbar spine is 2/1/92. It says, "A defect in the lamina and the spinal process of what is believed to be L-3. Recommend further plain films."

Plain films were taken on 2/12/92, suggesting to evaluate further. Then the bone scan was ordered. The bone scan was done --

Q Wait, Doctor, let's slow down a little.

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

Q Well, Doctor, after all the MRIs of the neck, they

are all normal?

A One MRI, not all the MRIs, normal, yes.

Q And MRI of the back, does that show anything?

A Other than --

Q After all the MRIs, it was two more after that, correct?

A No. I only ordered MRI of her neck and back. That's it.

Q Those are both normal?

A Yes.

Q Now, when you saw her in March she didn't tell you anything about the accident in February of 1992?

A I said she may have told me. I don't have it in my records.

Q And, Doctor, since that time, at any time did you learn that she had an accident in February of 1992?

A Yes.

Q And, in fact, Doctor, did you get records from 1992?

A Yes.

Q You got hospital records?

A Yes.

Q And did you grab those hospital records -- that's Kings County Hospital. At any time did you ever get the

emergency room record for the day of the accident of February 25, 1992?

A Yes.

Q Do you have it?

A Yes.

Q May I see it?

A Kings County Hospital Center, 2/27/92.

Q I said 2/25, emergency room admission. That's 2/26.

(Pause.)

Q Leave that yellow piece of paper for a reason. We will talk about those.

Is it fair to say you haven't found it?

A Yes, it says over here, date of accident, 2/25/92. Date of initial accident, 3/16/92. Right here.

Q That's Kings County Hospital? That's Dr. Shields. I glad you remembered Dr. Shields.

A I don't see it here.

Q So, you don't have the records for that day of the accident, what you complained about, as a result of that accident, right?

A That's correct.

Q In fact, you have no idea what she injured in that accident?

A I do.

Q You do?

A By history.

Q By history. Her history or somebody else's history?

A Her history. Neck and back.

Q She didn't hurt her knees in that --

A I am sorry?

Q She didn't hurt her knees?

A No.

Q She didn't hurt her shoulders?

A As far as I know, it was just reinjured her neck and back.

Q Isn't it strange, remember that last piece of paper, that yellow piece of paper? Go back there. The one you thought was the hospital record. That's Dr. Shields' notes. You got his records?

A Yes.

Q Who is Dr. Shields?

A He is a neurologist.

Q What accident was he treating her for?

A 2/25/92.

Q And he saw her when, in March of 1992?

A Yes.

Q And did you read her current complaints? I am sorry. Let's go back one.

MR. LaSPINA: Your Honor, I have an objection. May I approach?

THE COURT: Yes.

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

Q Doctor, you got a copy of Dr. Shields' report, of his examination of 3/16/92; is that correct?

A Yes, that's correct.

Q And is it also correct Dr. Shields treated the plaintiff for her injuries of 2/25/92; is that correct?

A That's correct. That's what the record says.

Q And you read this, this is, you got it. So, it was important to you, right, that's why you have it in your file.

A I got this shortly today.

Q Just today?

A Today.

Q The patient never told you she was being treated by Dr. Shields?

A No.

Q Okay. Well, let me direct your attention to the first page, and under history, where it says, "Injury sus-

tained in accident." Can you tell us what injuries she complained about?

A Yes.

MR. LaSPINA: Objection.

THE COURT: Overruled.

MR. LaSPINA: Hearsay objection.

THE COURT: Oh, all right. I thought it would be part of history, that's why --

MR. GAMBINO: It is the history.

MR. LaSPINA: May I approach, your Honor?

THE COURT: Yes, you may.

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

THE COURT: I will sustain the objection.

Q Doctor, how did you get that report in your file?

A This is a report that was provided to me by Mr. LaSpina this morning.

Q And, Doctor, the patient that Dr. Shields was treating, what name is that?

A You ask me to read from this record?

A Yes.

Q It says Renee Toon.

MR. GAMBINO: Your Honor, we are getting short on time. I will offer that record into evidence.

MR. LaSPINA: I object.

THE COURT: Step up and tell me why.

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

Q Looking at Dr. Shields', that report you were just looking at, without reading it out loud, look under current complaints.

A Okay.

Q Now, under current complaints, in March 16, 1992, is there an indication that she made complaints of right knee pain?

MR. LaSPINA: Objection.

THE COURT: Yes, this is the other doctor's report?

MR. GAMBINO: Yes.

THE COURT: Yes, sustained.

Q Now, Doctor, these records, does, Dr. Shields' record was in your folder with the notes from Ms. Toon, and you brought them with you today, correct?

MR. LaSPINA: Objection.

THE COURT: I will permit that.

A These records were given to me this morning. They were placed outside my records like this. They are not part of my records.

Q And was there, they were given to you today, the first time you received them was today?

A Yes.

Q You put them with all your other records of the plaintiff?

A I put them underneath my records. They are not part of my records.

THE COURT: Go on to something else.

You had no contact with Dr. Shields?

THE WITNESS: No, absolutely not.

Q Did the plaintiff ever tell you she was treated by Dr. Shields?

A No.

Q Did the plaintiff ever tell you she was treated by a psychologist, Dr. Laschewer?

A She told me.

Q Do you have his report, or was that just given to you?

A I don't have his report. It was given to me, if it is in this batch, it was given to me this morning.

Q How about your regular record?

A No, I don't have his report.

Q Well, now, we have two doctors that were treating this patient for similar injuries.

MR. LaSPINA: Objection, your Honor.

THE COURT: Yes, sustained.

MR. GAMBINO: I withdraw the question.

THE COURT: Sustained.

MR. GAMBINO: Withdrawn.

Q Doctor, while -- prior to February 25, 1992, to the best of your knowledge, was the plaintiff receiving any psychological treatment for the injuries that she claims she sustained in the accident of July of 1991?

A I am not 100 per cent sure. I don't have it in my records. I do remember the patient telling me at one point she was treating with him. When that was for the first time I don't recall, and I don't have it in my records.

Q Well, if I show you this report, would that help you refresh your recollection as to when, if at all, the plaintiff ever told you that she was under psychiatric treatment?

A This will not help me to refresh my memory at all. How would this help to refresh my memory?

Q As far as the date she told you.

A I don't know.

Q You heard something about it?

A I don't know when she told me. If you showed me

five reports with five different dates, the answer is still the same.

Q You did another examination, another report on March 25, 1992, didn't you?

A That is correct.

Q You have that report?

A I do.

MR. GAMBINO: Do we have a blowup of the March 25, 1992?

MR. LaSPINA: Fax.

Q Do you have that one?

A I do.

Q And, Doctor, that was in March 25th. That was after examination of the plaintiff.

A Yes.

Q Well, can you look at that record, that office visit, and ask you at that point did she tell you anything about the accident of a month before, February 25th?

A This is, the purview of this report is limited only to the accident of 9/5/91.

Q So, we are separating. You only deal --

A I did not get involved with the accident of 2/25/92. I am taking care of her for the 9/5/91 accident.

Q Well, do you think it is important to know if she

had another accident, and what parts of the body she injured.

A Yes.

Q And did you inquire about what parts of the body she injured in this other accident whenever you found out about it?

A Yes.

Q And what parts of the body did she tell you?

A Basically the neck, the back, the left shoulder, and anterior chest.

Q And, Doctor, when you examined her on March 25, 1992 for this accident, you wrote a report.

A This is not an examination, counselor. This is not an examination.

Q This is an update?

A Yes.

Q Okay. So, it is now September to March, so we are talking six months later.

A That's right.

Q And at that point in time you reached a diagnosis.

A Yes.

Q What was your diagnosis?

A Internal derangement of the cervical lumbar spine, left L-5 radiculopathy, left shoulder bicipital tendin-

itis.

Q Okay.

MR. GAMBINO: I offer that into evidence.

MR. LaSPINA: No objection.

THE COURT: In evidence. We will mark it as --

(Whereupon, Defendant's Exhibit D was so marked in evidence.)

THE COURT: I am sorry that we are working into lunch. I am trying to conclude this witness, because we have some scheduling problems.

Q Doctor, you gave us, you were given a hypothetical question, and you told us that based upon the injuries, the course of treatment, you related all plaintiff's injuries to the accidents of September of 1991.

A That's correct.

Q I mean, July of 1991, excuse me.

Now, Doctor, would your diagnosis, prognosis, or answer to the hypothetical be different if we add in the severity of the second accident to include plaintiff was driving in a vehicle, struck, in the rear, struck her chest against the steering wheel, and bruises or injured her right knee. Was taken to the emergency room, treated,

released. The next day was admitted to the hospital for two days. And also include upon that the severity of the impact was so great that the, to the rear of the plaintiff's car, that it was totaled.

Would those facts affect your answer to the hypothetical about what caused those injuries?

MR. LaSPINA: Objection.

THE COURT: Overruled.

MR. LaSPINA: Your Honor, may I be heard on this?

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

Q Would your answer be different if you assume those other facts?

A Let me be sure that I understand your question. Are you referring to this particular patient, or are you referring to anything?

Q It is a hypothetical referring to this patient. The same question that you answered for Mr. LaSpina. I am adding a little more facts to it.

THE COURT: Let me just say this to you. Counselor, is entitled to give you a hypothetical. You have to determine whether these are the facts

that were adduced at trial. If they were, you determine that, and that would affect the weight that you give to the answer. If they weren't, again, it would affect the weight you give to the answer. It is up to you to determine that.

THE WITNESS: That's, I am having difficulty understanding the question, your Honor. If it is referred to this particular patient, the way that the question is phrased, I can't answer it. I don't have all the facts you put forth into the question.

If you are asking me with reference to her neck and back, and the accident of 2/25/92, yes, the accident of 2/25/92, made her neck and back worse. Okay? Did not cause the problem. Made it worse.

I have no knowledge, no information about that accident causing any injuries to her knees. I believe they came from the first accident, because it is in my first report.

Q When you said she injured her knees --

A Yes?

Q -- Doctor, would it be fair to say that, and the intervening, or subsequent accident, subsequent severe

accident, can cause to the same parts of the body, can cause additional injuries to the same parts of the body, make an injury worse?

A Are you asking me is it possible, or did it happen?

Q Is it possible.

A Let me make sure.

Q My question is, is it possible.

A In medicine anything is possible. Yes. Anything is possible. Is it likely in this situation? The answer is no.

Q So, all this plaintiff's injuries came only from the accident of July of 1991?

A That's right, because the EMGs were performed before this accident.

Q After the EMGs you had MRIs were performed, and it showed everything normal, correct?

A With reference to the disks, yes.

Q With reference to her neck and back?

A Yes, they were normal.

Q My question is, if I tell you that the plaintiff was treated by Dr. Guy, I mean, Dr. -- excuse me -- Dr. Shields, and made complaints that, as a result of that accident of February 25, 1992, she hurt her neck, her

back, her chest, her left ribs, her abdomen, her groin, her left shoulder, and her right knee, would that help you saying that maybe it was a competent producing cause for making injuries worse?

A Counselor, that was as very clever thing that you did.

THE COURT: Don't comment, just answer the question.

A There is no mention of a knee here.

Q You want to look over this? Third line down.

MR. LaSPINA: Objection.

THE COURT: He can use anything to refresh his recollection.

Q She has pain, back pain bilateral to her right leg.

MR. LaSPINA: Objection. He is reading the document.

THE COURT: You can't read from the record.

MR. GAMBINO: He is saying it is not in there.

MR. LaSPINA: Speaking objection.

MR. GAMBINO: I withdraw the question.

Q Doctor, when you were given this batch of papers before testifying here today, did you look to see what papers you were being given?

A Yes.

Q And did you read any of those papers to see what's this, what's that?

A Briefly, yes.

Q And you read Dr. Shields' report?

A Briefly.

MR. GAMBINO: Now I offer it in evidence. It was read in preparation of testifying today. We offer it into evidence.

MR. LaSPINA: Objection.

THE COURT: It still doesn't qualify. Because he read it, doesn't make it --

MR. GAMBINO: If he read it in preparation of testifying, then it is admissible.

THE COURT: You know what? I will reserve, and you can both give me any type of memoranda or cases, and then if I admit it, the jury can see it.

Q Doctor, from September, July of 1991 to February 25, 1992, did Ms. Shields (sic) go to the hospital for any asthma problems or asthma conditions?

MR. LaSPINA: Objection. I don't know who Ms. Shields is.

MR. GAMBINO: I apologize.

Q Did the plaintiff ever tell you that she went to the hospital for asthma problems from July of 1991, July 9, 1991, to February 25, 1992?

A She did tell me that she had gone to the hospital for asthma. I don't recall exactly during which period.

Q Okay. You want to look at your records. Do you remember those Kings County Hospital records of February 26th to February 27th? Wasn't that for the plaintiff's being admitted for asthma, treated for asthma condition?

THE COURT: Please go on to something else.

MR. LaSPINA: Objection. They are not his records.

THE COURT: Please go on to something else because I gave you, already it is close to 1:30. I know it is not your fault, but we do have to break at sometime. I apologize, Mr. Gambino, you are doing your job, but there are some scheduling problems that I can't help.

MR. GAMBINO: May we approach the bench, your Honor?

THE COURT: Yes.

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

Q Doctor, on direct examination you spoke about, as

a result of a trauma the patient can have a flare up of her asthmatic condition, correct?

A Yes.

Q And if it is severe it has to be a pretty severe trauma to have an asthmatic flare up.

A That depends. Anxiety can cause a flare up of her anxiety. Many things can cause a flare up of her asthma.

Q Do you have any records that show that the plaintiff was in the hospital for asthmatic flare up between July of 1991 to February of 1992?

MR. GAMBINO: You know what, your Honor, with your admonition in mind, I will do that with the plaintiff.

Q You don't have any notes about her asthmatic conditions or flare up?

A During that period of time, no.

MR. GAMBINO: I have no further questions of the doctor.

THE COURT: Thank you, Doctor.

Ladies and gentlemen of the jury, we are going to recess until about 2:30, maybe a few minutes later. Let's make it 2:40.

Don't discuss the case. I am sorry that I kept you through lunch, but we had some scheduling

problems, and I apologize. So, enjoy your lunch, and I will see you at 2:30.

(Whereupon, the jury left the courtroom.)

THE COURT: Have a very good trip, Doctor.

THE WITNESS: Thank you.

(Whereupon, the witness was excused.)

THE COURT: Did you want to say anything? Because I am about to run.

MR. GAMBINO: Are we going to have any more witnesses that have time constraints where I kept getting my cross-examination cut short?

THE COURT: I hope not.

MR. GAMBINO: Because, your Honor, I would state on the record at this particular time, based upon your Honor's directions to cut it short, and to let the doctor get on his flight, I cut the cross-examination short on this particular doctor.

THE COURT: But you won't on any others.

MR. GAMBINO: Yes.

THE COURT: I appreciate your cooperation. I am in a terrible quandary. I don't know quite how to handle it. I hate to admit that on the record, but I think you were able to get an effective cross-examination in, in not as much time as you

wanted.

(Whereupon, a luncheon recess was taken.)

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

R E N E E T O O N, the Plaintiff herein, having been previously duly sworn, resumed the witness stand and testified further as follows:

THE COURT: I remind you that you are still under oath.

MR. GAMBINO: Can you admonish the jury that they are supposed to pay attention and --

MR. LaSPINA: There were a couple who were reading a book.

THE COURT: Are you kidding?

MR. LaSPINA: It started like sort of one of these, and it escalated.

THE COURT: If it continues, we have to admonish them.

MR. LaSPINA: The other thing is, they tend to yak during breaks. A couple of times they have been overheard talking about things --

THE COURT: I will admonish them they are not to talk about it, from now until tomorrow.

(Whereupon, the jury entered the courtroom.)

THE COURT: We are about to continue with the