SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CIVIL TERM : PART - Labor Law 1
----------X
JHON CONTRERAS,
Plaintiff,
- against -
831 QUINCY STREET, LLC.,
Defendant.
----------X
Index No. 504105/18
360 Adams Street
Brooklyn, New York
June 13, 2023

B E F O R E : HONORABLE DEVIN COHEN,
Justice (and a jury)

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

GORAYEB & ASSOCIATES, P.C.
AttorneyS for the Plaintiff
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By: FRANK KELLY, ESQ.

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Bellmore, New York 11710
By: JEFFREY B. GOLD. ESQ.
By: JOHN CALABRO, ESQ.

ALSO PRESENT:
Wendy Blauman (Spanish Interpreter)

Sylandia Brock
Senior Court Reporter

THE COURT: All right, we are on the record.

I just want to make a note, juror number four, Angelique Williams has had something come up, a family matter, and so she is not going to be present. She needs to be excused. We have also been advised that number three, number three, James --

THE COURT ATTORNEY: Four.

THE COURT: No, not today.

THE COURT OFFICER: Travel plans, three.

THE COURT: Three is the one that has a trip out of town. So number three, we lost on June 21, I believe it is. It says that he was told at the time of jury selection that it was a six-day trial. It has obviously been several weeks now, and so he has plane tickets on June 21. I have been told, excused on that date, but I think we need to be mindful if he was actually told six days, that it is tough, going over at that point. So that means we have two alternates into our three alternate group. We need to be mindful about that as well in terms of our ability to complete the trial.

All right, I understand there were some concerns about subpoenaed records. You gentleman took sometime to go over the subpoena record room this morning?

MR. GOLD: We went over the subpoena record room. We know for a fact it was received on Thursday.

THE COURT: I don't -- my only question was I asked my staff to remind you to go check subpoena record room this morning. I just wanted to know if you had the opportunity to do that?

MR. GOLD: We did and the records we want to put in that are somewhere floating around --

THE COURT: Are not in court --

MR. GOLD: They are not in court, but we served with a notice of intent to use.

THE COURT: Okay, question was do we understand from subpoena records that they are not -- we believe they are in the building, but we don't have them available to us yet?

MR. GOLD: We have a FedEx receipt showing they are in the building, but we do not have the mail room sending them to subpoena records.

THE COURT: They would be -- could be anywhere. They might be in the mail room, they take time to be logged. Again, I don't want to spend a lot of time, colloquy on that, but it is not -- this isn't a country courthouse somewhere where things come in and next day they are in the files. Here things come in, and it takes sometime. So in any event, okay, perfect, you have your witnesses for this morning?

MR. KELLY: I do, Your Honor.

THE COURT: Great, let's get started.

Great, can we have the jurors?

THE COURT OFFICER: So we will move alternate one to number four to juror --

THE COURT: Yes.

THE COURT OFFICER: Okay, on consent, right?

MR. KELLY: That's correct.

If I may, I am going to use the easel?

THE COURT: Yes, that's all right.

THE COURT OFFICER: Okay, Your Honor?

THE COURT: All right, ready for the jurors.

THE COURT OFFICER: All rise, jury entering.

(The jury entered the courtroom and the following occurred:)

THE COURT: Good morning, all. You can all be seated, thanks.

I just note on the record, and this was discussed with counsel just a minute ago that juror number four has had something come up, and so I thank our alternates as always for your attention and service and alternate number one has been substituted in as juror number four. We wish them the best regarding what has happened.

At this point, does plaintiff have a witness?

MR. KELLY: Yes, Dr. Fred Goldman on behalf of

the plaintiff.

THE COURT: Thanks.

THE COURT OFFICER: Remain standing, face the clerk.

THE COURT CLERK: Raise your right hand please.

Do you swear or affirm that the testimony you are about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: Yes.

F R E D G O L D M A N , PhD, called as a witness, upon being duly sworn by the Court Clerk, was examined and testified as follows:

THE COURT CLERK: In a loud, clear voice, please state your name, address for the record.

THE WITNESS: Sure, my name is Fred Goldman, Fred, FRED, Goldman, GOLDMAN, 10 west 66th Street, New York, New York 10023.

THE COURT CLERK: 10023?

THE WITNESS: Yes, that is correct.

THE COURT: Thank you so much. That is correct.

Doctor, thanks, and if you would be seated? Just check the mic to make sure it is to the extent possible pointing at your face.

THE WITNESS: Hello, yes, yes, does that work?

THE COURT: Perfect, thanks, Doctor.

All right, your witness.

MR. KELLY: Thanks, Your Honor.

DIRECT EXAMINATION BY MR. KELLY:

Q Good morning, Dr. Goldman.

A Good morning.

Q Tell the jury, what is your profession?

A I am an economist.

Q Describe for the jury, if you would, what is an economist, and what does an economist do?

A Sure, I do economics as a subset of psychology. Basically, it is the study of behaviors, and while there are lots of different kinds of behaviors with psychologists -- certainly, that is not my field. A behavior, for example, would be the amount of work we do, when we by apples. In other words, it is behaviors where we look at variables such as prices, and we look at how is that affects the behavior of what we would do in our purchases. We look at wages that are being paid, and it has an impact on how much more we will work, what kinds of work we will do and those behaviors are at the individual level.

Then at economics, we tend to aggregate so that the same kind of experiences we are looking at for the individual, we will look at as a household or we will look at maybe a geographical unit like a census tract or it could be

international. We will look at how countries act?

What economists do is they focus on a particular set of variables that are of interest to them. So, for example, prices, income, wages, and we look at organizations, how entities come together to become goods producing companies or service producing companies. So all of the output you see -- if you want, walk into a supermarket, you see an apple, it has been produced. If you buy an automobile, it has been produced. Then there is the whole process taking place with the producers, the people who make the cars, grow the apples.

So what is economics? Economics is a study of behaviors, and we pick out areas that are of interest to us. One of my specialties is health economics. It is in issues that affect health, the goods and services of health and health outcomes. So and there are not equitable disclosure on this, so for example, one of my studies with some colleagues was for the Environmental Protection Administration, the impact of -- and this would be current, particulate matter on the death rate of neonates, of newborns, does it have an impact. Of course the answer to that is yes. We explain about how much or studies such as the costs of the capital that built hospitals.

So economists study behaviors. They focus on a particular area of interest in the field of economics which has been spreading because now there are studies of marriage. There are studies of virtually other kinds of variables. I

will just leave it at that.

Q Dr. Goldman, tell us a little bit about your educational background.

A Sure.

I have a Bachelor's degree in economics from Queens College of the City University of New York. I have a Masters degree from Brown University. I have a doctoral degree from the Graduate School of the City University of New York, and the only other education I've had is I did a postdoctoral fellowship, National Endowment for the Humanities, and I was in residence at Bio Ethics Institute called the Hastings Center.

Q Tell us a little bit about your research and publications you may have.

A Sure.

My work has tended to be empirical, meaning I study data, sometimes check micro data. Sore times I use sources of data such as Census Bureau statistics. So I do empirical work. Sometimes the empirical work is expensive, and I look for research grants to do it so my work has been funded by the National Science Foundation, National Health Services, any number of different organizations.

Now, when we finish work, what economists generally do, when they finish up their research, they carve-out what they think is of interest, and it goes off to publications, send it off to journals. So I published that research in

journals such as the American Journal of Public Health, the Journal of Political Economy, the National Tax Journal, any number of different journals, and that's the way I generally handle my professional career, the teaching end, the research end and here I am in the courtroom, so.

Q Doctor, can you tell us a little bit about professional affiliations, societies, associations --

A The American Economic Association, I have been a member of for decades and the National Association of Forensic Economists, economists who would specialize in areas such as the area we are interested in today.

Q Okay.

MR. KELLY: I offer Dr. Goldman as an expert in the discipline of economics.

MR. GOLD: No objection.

THE COURT: Without objection, sir.

Q Did there come a time, Doctor, that in your professional services you were retained for Mr. Contreras' case?

A Yes.

Q Were you given certain materials to review?

A Yes.

Q And, Doctor, throughout the course of your testimony, feel free to refer to any of your records or file -- files that you brought with you to the court today?

A I have my file materials that I was provided with me. I can tell you what they are.

Q Will you please?

A Well, I brought two reports that I authored for this matter, and I received, and I will -- a report by a Dr. Matthew Grimm, and it is dated August 31, 2022; a verified will of particulars which is dated, which is dated June 22, 2018; a report by Dr. Paul Brisson which is dated August 22, 2022; a report by a Dr. Jonathan Vapnek which is dated --

MR. GOLD: Objection, not in evidence.

THE COURT: Oh, okay.

Q Okay, don't read anything you say when you refer to --

A Skip it?

Q That's fine.

A That's it.

Q In your practice, do you refer to government resources and other resources in the field of economics in order to make evaluations?

A Yes, I needed to in this case.

Q Tell us a little bit if you would about those government resources and other resources that you use?

A Well, sure.

I mean, if I just limit it to this case?

Q Sure.

A The methodology that I used in order to arrive at a -- at conclusions is, and -- and what I am doing is estimating the cost of the treatment plan, medical care that would be needed over a lifetime. So I need to know what is the current cost of each item of care, how will that cost likely change overtime and how long is the duration of that period of time in life expectancy. So the first government item that I used, I used the United States Lifetime Rates for the current tables, most recent for the year 2020. It takes a few years to gather the data and turn out the results. So the most current published I believe in 2022, the life tables --

Q Let me just ask you, Doctor, sorry to interrupt, but just for those that don't know, what are the government life tables, what do they show?

A Okay, well, the U.S. life tables look -- they are -- point tables at a period in time. So the ones for the year 2020 are directed to the life expectancy of the population in the year 2020. And then, of course, there are life tables for 2019, life expectancy of the population in 2019, and they are based on death certificates. The government gathers that data, and then on the basis of information in there such as dates of birth, dates of death, they produce the life expectancy of the population, and they break it out into various categories. So there is one for the United States population as a whole. There is one just for the males. There is one just for female.

Then they do it by ethnicity and so forth. So those are the U.S. Government life tables.

Now, they are not the only life tables. For instance, the Social Security Administration produces similar life tables. The distinction being the U.S. Life Tables are for the United States population. The Social Security life tables are for anybody receiving Social Security benefits or who is a member of the Social Security program. So you would find people in France or in Germany or elsewhere who are members. So you are not -- this is an explanation that barely moves the needle but nevertheless.

So I used the U.S. Life tables, the most current, the current life expectancy, okay.

Now, that takes for me the answer to the question, if we need something for a lifetime, what should I use as a measure of life table, that answers that question.

Then there is the question of well, what do I -- what items are needed and what is the cost of the item. There I relied on a report of Dr. Grimm. I am not a medical expert. Dr. Grimm provided a treatment plan. They indicated the various items. He indicated what their costs were.

MR. GOLD: Objection, Your Honor, can we have --

MR. KELLY: Subject to connection, Judge.

MR. GOLD: It is beyond subject to connection,

Judge.

THE COURT: Okay.

(Discussion held outside the courtroom, off the record.)

(The discussion off the record concluded, and the following occurred in open court:)

THE COURT: Objection is overruled subject to connection.

Q Sorry for the interruption, Doctor.

Sir, you looked at Dr. Grimm's projection, future medical needs for Mr. Contreras; is that correct?

A He didn't project. He indicated what the current cost was at the time it was rendered in his report, or he will tell you what period of time he relied on, but from his report, I took the items that he specified and their costs.

Q All right.

A So now we have the first item in what is in the calculation. We have what items are needed and how much does each individual item cost. Then we have the last item, we have how long will we need them and that is the life tables. My principal contribution in this is how do we expect it to change over time. Now, there, we are making the projection into the future, so I have a period of time for, I believe, it is 32.7 or 32.9 years. I will get the exact for you, that I am going to be projecting, so remaining life expectancy of 32.9 years.

So Dr. Grimm has given me the costs currently, and I need to say how those costs are likely to change over 32.9 years.

So the government data sets out with the entry of your question, there I rely on the United States Bureau of Labor Statistics, Consumer Price Index, that is one item. The second is the projections, economic projections of the Congressional Budget Office. Those are the principles, statistics I use.

Now, for the United States Bureau of Labor Statistics, they are historical statistics. Once a statistic is written, because it is historical, it has happened, it is done. So if I look at how the price of physician services changed in the year 2020, it is finished, in 2019, it is finished.

So when I look at the Consumer Price Index and I look at data which goes all the way back to the turn of the century, actually the last century before this one, it has been around for a long time, and I look at it, I am looking at historical data. That is like driving a car and looking in the rearview mirror. You see everything that has happened, what you passed, but I am projecting into the future.

So to do that, I look at the relationship between changes in the Consumer Price Index at large, how it has changed and prices, the expectation of prices going on into the future so I use their, the projection, and I have to have

something I am comfortable with of how consumer prices will change. There, I -- I relied on the Congressional Budget Office. Once a year, the Congressional Budget Office makes projections on economic variables that cover a 30-year period of time. In 2022, they had projections for inflation over the next 30 years.

One other agency does something similar, the Social Security Administration makes projections about economic variables, and actually, their projections will be in 2100. So they are even going out further. I like to rely on the Congressional Budget Office for reasons I do not think you would want to hear. I mean we would really spend a lot of time on that.

So I rely on the Congressional Budget Office. I have projections of inflation over the next 30 years. That is looking out the windshield. So I make statistical relationships between the overall Consumer Price Index and the individual items that you have for medical care and the projections about where inflation is going. So now we have the three things we need. We have the starting annual amount. We have projections of how those individual items are likely to change in price over time, and we have how long it is going to go on.

The end of my analysis is I am supposed to take the starting amount, increase it year by year by year to the end

and add it all up, and what I get is a total. It's a total starting to try to do it from the day I was going to be in the courtroom so it goes from today over that life expectancy.

Q Doctor, based on the materials you've given and the materials you just told us you relied upon, did you make any calculations to within a reasonable degree of economic certainty as to what Mr. Contreras' future medical costs would be?

A Yes, I did.

Q And, Doctor, we've taken that projection and put it into a demonstrative aide, blow up. Would the blow up aid you in describing for the jury your calculations --

A Without question. They get to see, and I even have a pointer.

MR. KELLY: Your Honor, may I --

THE COURT: You may.

That was premarked, right?

MR. KELLY: Yes, it is seven.

MR. GOLD: Your Honor, may we move to a spot where we can see?

THE COURT: Yes, of course.

MR. GOLD: Thank you.

Q I have a little gadget if you want this one?

A Yes.

Q You can come down please, sir?

A So I think you've heard how I approach this, what I do. And so the columns that you see are columns that are based on what Dr. Grimm -- well, something, you guys are calling subject to connection, what was in the report of Dr. Grimm that I reviewed. Then there are the growth rates that I explained, and I have a little bit more to say. Then there are the future costs where I take the starting annual amount, increase it by growth rate for the period of years that I get from the U.S. -- just so we are very clear on that, and it has been done for 32.9 years which is life expectancy, based on the last life table that I saw that was produced, the one for 2020.

There is a provisional table, provisional for 2021, but it is not official yet, so I didn't use it.

All right, so starting with medications, the annual amount currently is $240. The increase, the growth rate is at 3 percent a year. The future cost of that over the life expectancy, that is 32.9 years, will be $13,157.

The next item is pain management visits. Now, those are physician visits. They are a thousand dollars currently. The growth rate that I have for physician services is 2.6 percent around over the life expectancy, it is $51,031.

The next is orthopedic surgeon visits, 1200 currently. The growth rate, the same physician growth rate for physician services, 2.6 percent and it is $61,237.

The next is the orthopedic spinal surgery visits.

Current annual amount $500. Again physician services growth rate, 2.6 percent. It's a total of life expectancy of $25,516.

Trigger point injections, the physicians growth rate for current annual amount of $2,400 leads to a life expectancy of 32.9 years, $122,475.

Then there is physical therapy, and that current annual amount of $3,000. The growth rate for that is 2.5 percent. The total is $150,401.

Now, there just a brief explanation, the medical care indexes that I am using are broken out to individual items so there is one for hospitals. There is one for the outpatient department of a hospital. There is another for the inpatient portion of the hospital. There are various items. Well, there is one item that is called services by other medical professionals. It has a very specific definition -- by the way, I have all the materials with me now.

Anyway, it has a very specific definition. It includes, it says, the services of non physicians, and then it says such as, and it says such as physical therapists, such as psychologists, such as -- now, in addition to those services of such as psychologist or a physical therapist, it also has imaging and laboratory studies. Why? Because technicians, non physician technicians do the lab studies and the technical work such as imaging. And so, the services by other medical professionals growth rate was 2.5 percent. I used it for

physical therapy.

And there is a surgical procedure which is kyphoplasty. It's a one time item. Doesn't change. It is done once and that is what I saw and so that is the price I put down.

Then there are MRI's, that is imaging, just like physical therapy, it is those lab studies and imaging. So for MRI's and X-rays, I used the 2.5 percent. For the EMG and NCV of lower extremities, 2.5 percent.

So let me come to the MRI's. Current annual amount, $1040, growing at 2.5 percent for a total of $52,139.

Then there are X-rays at four different sites for current total of $3,200, growing at 2.5 percent for a total over a lifetime, life expectancy of $160,428.

Then there is the EMG/NCV's, upper and lower extremities, current price $800. Growth rate 2.5 percent for a total over life expectancy of $40,107.

Then finally, there is a category of equipment and supplies. It is various items which I added up. They total $693. The growth rate on equipment and supplies is 1.5 percent. Over a life expectancy is $29,215. There added up, the total, future costs of these items at these starting amounts, at these growth rates, at these individual future costs is $725,455.

Q Thank you.

And Doctor, the numbers that you derived from your calculations based upon a reasonable degree of economic certainty?

A Oh, yes.

Q Doctor, I have no further questions of you.

Thank you very much.

THE COURT: Thank you.

Cross-examine?

MR. GOLD: Your Honor, if I may, I would like to see the August 22 report?

THE COURT: Okay, who has it?

THE WITNESS: I have it, I've got it.

(Handed)

CROSS-EXAMINATION BY MR. GOLD:

Q Good morning, Doctor.

A Good morning.

Q Doctor, you have the report that you relied on that was served, brought to you by Dr. Grimm?

A Say again.

Q Do you have the report that was provided to you by Dr. Grimm?

A I have it, yes, in my hand.

Q May I see that please?

A Of course.

You will find the last page, next to last page have

the treatment plan.

Q Good morning.

A Good morning.

Q Doctor, you are not a medical physician, correct?

A That's correct.

Q You have no medical training?

A That is correct as well.

Q Now, when you checked, reviewed the United States life tables, what did you know about the plaintiff?

A I knew his date of birth and that was the only thing that was necessary for me to use.

Q Did you know his national origin?

A I may have at one time. Of course, I did look at a deposition, but I didn't use it, and I can't tell you what it is.

Q Does national origin affect life tables?

MR. KELLY: Objection.

THE COURT: Affect life tables --

MR. GOLD: Affect the numbers on a life table?

THE COURT: Same objection, sustained as to form.

Q Does the fact that the plaintiff was born in Venezuela and lived in Venezuela until 2018 have any effect on the life tables that you reviewed?

MR. KELLY: Same objection.

THE COURT: Sustained, yes.

Q Assume for a moment the plaintiff lived in Venezuela until --

THE COURT: That is not -- I apologize for interrupting, but I am just trying to keep you from having to do it five more times. The first part of the question isn't the part you are struggling with. The tables don't change. The tables themselves don't change.

Q Do the numbers on the tables change based on where the person was born and where they were raised?

MR. KELLY: Objection.

THE COURT: Sustained.

Q Did you know the plaintiff was born in Venezuela when you created your analysis?

A I may have. I can't tell you that I remember.

Q Would that have affected your analysis based on the chart you reviewed?

A No, not at all.

Q And did you review any of the plaintiff's health records personally to determine the state of his health?

A I am not qualified to determine the Plaintiff's state of health.

Q Were you aware that the plaintiff was a liver transplant, had a liver transplant?

A I doubted that I was aware of it. It wouldn't have

made any difference to my work.

Q Life chart would have been the same if he had a liver transplant?

A The table that I used was a life table of the population of people with death certificates. I am sure some were liver transplants, some of every conceivable type of cause of death. It plays no role in what I do.

Q So you would of come up with a 32.9 years as an expected life regardless of what his health was --

MR. KELLY: Objection.

THE COURT: Sustained, witness has already testified, and I think you point out counsel that he not an M.D., he is not a MD physician so therefore he is not qualified to assess what is the usual plaintiffs, health, life span only to do the economics work of determining based on the life tables applicable to him, what his statistic life expectancy is.

The jury will be charged about the meaning of statistical life expectancy charts.

Q Do you know what factors the U.S. Government uses when they create their U.S. Life Expectancy Chart?

A Yes, I mentioned that. It is based on the data on death certificates, and then there are tables that they produce, and I don't do any discrimination, discrimination among the tables by gender, by raise, ethnicity or country of

origin. I simply take the life tables, and in this case, it's a man, and I look at his age, what his life expectancy was on the life tables.

Q Now, you are being compensated today; is that correct?

A I hope so.

Q What are you being compensated?

A For quarter periods $3,500.

Q And you previously wrote reports on this case?

A I wrote two of them.

Q And what were you compensated for writing those reports?

A Those are life year plan tables, and I bill two, $2,100 each.

Q Do you know how the two reports differ?

A Yes, and they differ in two regards. One is that time had passed from when I wrote my first report, from when I wrote my first report, time had passed and so the life expectancy declined. And the second was that when I wrote the second report, there were additional statistics that I had available on inflation and so I incorporated the additional statistics on inflation, and I incorporated the change in the amount of life expectancy, and so you will see two different totals for my two different reports, and they barely -- I think they are like -- they are like a $10,000 difference.

Q Your initial report was $722,558, correct?

A He is holding -- he is holding the report, I mean.

THE COURT: He is holding --

Q The reports did not change significantly, correct, the reports did not change significantly, correct?

A Yes, that's correct.

Q Now, did you look to see -- can we put the chart back up please?

Perhaps if you can stand up to go through it easier if you are standing?

A Standing, fine.

Do I need my pointer?

(No response)

A Okay.

Q Now, looking at the total medications, annual amount --

A Yes.

Q Do you know any of the specific medications that the plaintiff was taking?

A No, I do not.

Q How is it that you can calculate the cost of medications without knowing the medications?

A Because the individual medications are not important to me. I use the growth rate of prescription medications which has a mechanism built in by the Bureau of Labor Statistics that

when medications become off patent, and they can reproduce as a generic, that gets incorporated.

THE COURT: Meaning a reduction in cost gets incorporated?

THE WITNESS: Yes, the reduction in cost gets incorporated.

Q So you are able to calculate the cost of his medications without knowing the specific medication?

A Precisely.

Q Do you know how much Ibuprofen 800 costs for 100 tablets?

A I can't -- I have no idea.

Q Do you know what medications -- you don't know any of the medications he was taking?

A I relied on what Dr. Grimm placed in his report.

Q So Dr. Grimm provided you with medication information, the costs?

A You have that report.

Q I have, right.

Dr. Grimm provided you with the medication costs --

A Yes, yes.

Q Did you ask to see any back up with respect to what medications the plaintiff was taking at that time?

A No, because we are projecting the future, and I have no idea what he is going to take in the future.

Q Let's go to the next item, let's go to kyphoplasty procedure, drop down one step.

A I see.

Q You received that from Dr. Grimm?

A It is in the report, yes.

Q You have no idea whether he needed a kyphoplasty?

A I didn't even know how to pronounce the term.

Q You don't know what a kyphoplasty is?

A That's correct.

Q Are you aware that Dr. Brisson testified last Tuesday that he would not perform a kyphoplasty on the plaintiff, and the plaintiff is not a candidate for a kyphoplasty?

MR. KELLY: Objection, mischaracterization of testimony, at this time.

THE COURT: Well, at this time, so what I will say is first of all that it is the recollection of the jury and not counsel and the Court that relates your understanding of the testimony.

Secondly, at least for the purposes of ruling on this objection, I believe that plaintiff's counsel is correct, that Dr. Brisson said he wouldn't perform it at this time.

Q Do you know if the plaintiff had a second opinion as to whether kyphoplasty would be performed on this plaintiff?

MR. KELLY: Objection.

How would he know unless the plaintiff told him? How would he know?

THE COURT: Hypotheticals, agree. So if you want to ask him what impact -- if that were the case, it would impact his economic analysis, that is fine.

Q Would it impact your economic analysis if a second orthopedic surgeon said that he would not perform the kyphoplasty --

A Yes, the way you described it, yes, it would have an impact in that the price would actually be higher. You said that it would not be at this time. If it's a further time into the future, then it is going to have a growth rate. Then I underestimated it because this is what the current costs would be. So all I am doing is taking the pages that you have in front of you from Dr. Grimm, and I am presenting them as he presented them in his report, and I can't tell you what is in medication, I can't tell you what procedures he needed. I can't tell you how they would change with the exception of their costs changing overtime.

Q Are you aware that the plaintiff -- I am sorry, Matthew Grimm is a pain management doctor?

A I imagine he is. I do not know what his specialties, subspecialties are.

Q Do you see where it says pain management visits?

A I do.

Q Do you know how many visits a year Dr. Grimm said that was for?

THE COURT: In his report or oral?

A Well, if you are holding the report, I believe, let's see the report.

(Handed)

A Okay, I will read it.

Q Did you verify -- can you tell me how many visits a year --

A Of course.

Okay, pain management office visits $250 per visit, once per few months so it is four of them a year at $1,000.

Q That is how you arrive at $1,000?

A That's correct.

Q Do you know whether Dr. Grimm has seen the patient since 2020?

A It makes no difference in my work, and I am projecting the future and not looking at what somebody did in the past.

Q So you don't know whether pain management visits are necessary? You personally --

MR. KELLY: Objection, argumentative. He said --

A I am just not a physician.

MR. GOLD: To his report.

THE COURT: Well, one of the first questions, Counsel, that you asked this witness presumably to make the point was for the witness to confirm to you that he is not a physician and that he does not the have medical expertise. You asked him those questions early on in your questioning. At this point, I think you have to accept that the witness is going to have to answer every question about what he knows about what the patient actually needs in medical care in the negative, and that if you keep asking, you can only be asking as counsel points out for an argumentative purpose because as you correctly pointed out, this witness is here with a doctorate in economics, with a PhD, and he is not here to prescribe treatments or medications. He is here only to do economic analysis from the perspective of current costs and future cost projection, and I would not accept this witness' testimony incidentally with his educational background if he purported to do otherwise. Meaning if he purported to tell me or the jury or counsel what treatment the plaintiff needed or what medications the plaintiff would take when some medication becomes generic or any number of things, I wouldn't -- he is not accepted as an expert in medical care other than health care economics; and, therefore, I wouldn't accept his opinion on those questions.

I think, I hope, you stipulated to the limits of this witness' expertise as an expert witness.

Q Sir, looking at your next two items on your chart, orthopedic surgery visits and orthopedic spinal surgeon visits, do you know the difference between the two or is there a difference?

A As an expert, I do not -- my answer is I do not know. As, I think, an educated guess, yes, but the answer is no, I do not know.

Q And the cost next to each of those individuals or the annual amounts, those came from Dr. Grimm?

A Yes, in this report that I --

Q And you don't know when he last saw an orthopedic surgeon, correct?

A That I don't know. If it was in the past -- and I am now making projections as he put in his report for the future.

Q Solely based on Dr. Grimm?

A That's correct.

Q Did you see any bills or receipts or invoices showing that an orthopedic surgeon charges those sums?

A I did not see any information concerning --

Q Are there charts available to you from the Federal Government that show what doctors charge for specific visits in the State of New York?

A There may be, and it would be irrelevant because I am

using what Dr. Grimm indicated the costs would be, and I don't know why he chose those costs. You will have an opportunity to ask him.

Q But it is his -- I guess what I am getting at is if Dr. Grimm's reports are inaccurate or values are inaccurate, then your report is inaccurate, correct?

A Well --

MR. KELLY: I am just going to object, Judge.

THE COURT: Calls for speculation.

Q Let's say, for example, that Dr. Grimm previously charged $100 for trigger point injections, but you are calculating it at $2,400, your report would be inaccurate?

MR. KELLY: Same objection.

THE COURT: Same objection, the witness has already testified that he can only estimate based on estimated future costs, and I don't remember if Dr. Grimm was being called or not, but if he is, you should ask Dr. Grimm where he is getting those numbers.

MR. GOLD: I plan to, thank you.

Q And with respect to physical therapy again, that came from Dr. Grimm?

A That's correct.

Q With respect to the MRI's, four sites, that came from Dr. Grimm?

A That's correct as well.

Q Did Dr. Grimm tell what you those four sites were?

A I did not speak to Dr. Grimm. I have never spoken to Dr. Grimm.

Q Did you speak to the plaintiff at all?

A This -- is this the plaintiff? I saw him outside. I didn't even say hello. I will say hello now.

Q Again, if Dr. Grimm gave you values for X-rays, that would be you are calculating the X-ray plus based on what Dr. Grimm told you?

A That's correct, that's correct.

Q You didn't check any individual charts?

A I am sorry, I made a mistake, not what he told me, but what I read from a report that he wrote. Now, I guess I will say, I assume, I don't know the level with which I have to say -- I relied on a report that I received which contains a treatment plan under the authorhship of Dr. Grimm.

Q Does your report take into account that at a certain age in the United States, medical rates are determined not by doctors?

MR. KELLY: Objection.

THE COURT: Sustained.

Q Does your --

MR. KELLY: I ask for a cautioning, Judge.

THE COURT: Yes, I have already given this caution with respect to the collateral source information

and the rates -- anyway, I've already given that caution.

MR. KELLY: Thank you.

Q Do you know what an EMG is?

A No idea.

Q Do you know what -- if EMG's were every performed on the patient?

THE COURT: In the past?

MR. KELLY: Objection, if he doesn't know what they are, how would he know?

THE COURT: Sustained, yes.

MR. GOLD: It is in Dr. Grimm's report.

THE COURT: Okay, I am going to cut off this line of questioning because I think I have already now explained this several times. I think we are going to accept, in fact, I am going to direct that we accept that this witness was not called here as a medical expert. I would not accept his testimony if he reported to be a medical expert. That he is here, I apologize, sir, because you are a PhD, and I don't mean to minimize what you do -- he is here to do math, to do math based on projections of inflationary factors over statistical period of time. That is what he is here for. That is the purpose for which I've accepted this expert, as an expert. I have not brought him here -- withdrawn.

I have not accepted him as an expert to

determine what billing rates ought to be -- what care ought to be, what kind of medications will exist in the future, whether or not given the patient -- in this case the plaintiff -- will have the treatments that have been projected. I think we can assume, and I think that the doctor would agree with the proposition that if any given item on this list were not to take place in the future, that that item's cost would either decrease or disappear depending on how much of it didn't take place in the future because that is, you know, math.

But as to whether or not this doctor can project the accuracy of Dr. Grimm's treatment plan, that would be outside of an expertise for which I will allow this witness to testify.

MR. GOLD: I would like to adopt the Court's question then.

Q If any procedure on this chart was not to take place, would that decrease your estimated value?

MR. KELLY: Objection, there --

THE COURT: Overruled, it is my question, obviously not objectionable.

Meaning if Dr. Grimm comes in next week and says there is certain treatment or this week and says there is certain treatment that isn't going to happen, or if in the hypothetical, the patient has or doesn't have some element

of your expense chart, right, just doesn't do it, can we assume that the cost for that item on the chart exits the chart?

THE WITNESS: Of course.

THE COURT: Right, math.

Q Also going to assume that if the value of a certain treatment is not proven or is proven to be less, that would also enter your chart?

MR. KELLY: I am going to object here. There is no -- we didn't get notice of any -- by the defense --

THE COURT: Sustained.

Q Sir, you can take a seat?

A Do you need this?

Q I don't need it?

THE COURT: Feel free to be asked to assume, to try to clarify so we can get past this objection and move on. You were asked to assume a set of inputs, correct?

THE WITNESS: That's correct.

THE COURT: Is it fair to say that what you did with those inputs was use statistical life expectancy tables, not this individual Plaintiff's personal life expectancy, but statistical life expectancy tables for males in America as well as -- as well as historical rates of inflation that have been projected out by the Congressional Budget Office, for approximately plaintiff's

life expectancy.

THE WITNESS: Yes, that's correct.

THE COURT: Other than that, have you made any assumptions about what care the plaintiff will actually get other than the treatment plan you were asked to use as inputs?

THE WITNESS: No other assumptions.

THE COURT: Okay.

Q Doctor, you've qualified and served before in New York Courts?

A I am sorry.

Q You qualified as an expert previously in New York Courts?

A Yes, that's correct.

Q On how many occasions?

A Well, over the last three or four years, I think I testified and had, I think, two depositions, a total of about eight times.

Q And over the last three decades?

A I have absolutely no idea.

Q You've testified over 100 times in New York Courts, right?

A I would say most likely about a hundred -- well, you know what, I will simply say most likely.

Q And for every time you are retained to testify in

court, you are also retained to issue a report, correct?

A No, there were many times that in the State of New York, I don't -- I don't want to project my knowledge of law, but you don't need to have a report. You need to have a disclosure which would indicate the subject matter of my testimony and what I would be prepared to testify to --

THE COURT: The Court will stipulate there is a provision of CPLR that provides for -- a provision of the Civil Practice Law and Rules of the State of New York that provides for expert disclosure, and this witness, while he is describing accurately what the rule is, is not a legal expert and his legal expertise is not questioned by the Court.

Q In this case you did issue reports, correct?

A That's correct.

Q And you charged for those reports?

A Yes.

Q What did you charge for those reports?

THE COURT: I think we asked.

MR. KELLY: Objection.

THE COURT: Sustained.

MR. GOLD: What I charged for the records?

THE COURT: You did ask, $2,100 a report, that is how good my memory is.

Q 2100 a report?

A Yes, that's correct.

THE COURT: Oh, asked and answered.

Q How many times a year in the past two years have you been retained as an expert by a law firm?

A I have no idea. Sometimes I would receive a telephone call, and I spent an hour on the telephone and that is the extent of what I do. Other times I've spent days preparing information. So I have no idea of what -- retained, I just wake up in the morning, the phone rings, I get an email and begin to do my work.

Q Would you agree you have been retained more than 50 times in the past two years as an --

A Most likely.

Q More than 500 times in the last ten years?

A I will simply say I have no idea, but I think it is likely.

Q More than a thousand times in the last 30 years?

A I have no idea. I am just guessing. I have no idea since as I said I answer the telephone, and the extent of what I do might last an hour, it might last two hours or it could last weeks.

MR. GOLD: No further questions, thank you.

THE COURT: Any redirect?

REDIRECT EXAMINATION BY MR. KELLY:

Q Dr. Goldman, over the last ten years, how many times

per year do you think you have been retained?

THE COURT: Retained or testified?

MR. KELLY: Testified.

A Oh, on average maybe six times a year, seven times a year.

Q And, do you do that for both people bringing a lawsuit and people defending a lawsuit?

A The majority of my cases are defense cases.

MR. KELLY: I have nothing further, thank you so much.

THE COURT: Thank you.

MR. GOLD: Nothing further.

THE COURT: Thank you, Doctor, thanks for your time. Nice to see you. Careful getting up, because the chair sticks.

THE WITNESS: I will be careful.

THE COURT: Does plaintiff have another witness to call?

MR. KELLY: Yes, I do. Have a minute for the restroom?

THE COURT: Sure, let's take five-minute bathroom break, let the doctor get out and everybody else take a break.

Doctor, nice to see you.

THE COURT OFFICER: All rise, jury exiting.

THE COURT: I remind the jurors not to do any research, not to discuss the case amongst yourselves, don't hang out with the people I asked you not to contact.

(The jury exited the courtroom and the following occurred:)

(Witness excused.)

(Whereupon, a recess was taken.)

(After the recess the following occurred:)

THE COURT OFFICER: All rise for the jury.

THE COURT: Have a seat, thanks.

Plaintiff ready to call your next witness?

MR. KELLY: Yes, plaintiff calls John Contreras.

THE COURT: Do we have an interpreter for Mr. Contreras? Did you call for an interpreter for Mr. Contreras?

I thought you were doing Grimm first and then Mr. Contreras.

MR. KELLY: Grimm is available at 1:30.

THE COURT: I understand. Give us a minute, make a phone call to see if we can get an interpreter down.

THE COURT CLERK: Five minutes.

THE COURT: Perfect. See that. That is customer service, my friends.

(Discussion off the record.)

(The discussion off the record concluded and the following occurred in open court:)

THE COURT: Christine, literally just a couple of minutes?

THE COURT CLERK: Yes.

THE COURT OFFICER: All right, she is here.

THE COURT: Okay.

THE COURT CLERK: I am just giving her the caption.

THE COURT: Yes, all right, ready to call the plaintiff.

MR. KELLY: Calling John Contreras.

THE COURT: Calling the plaintiff John Contreras.

THE COURT CLERK: Ms. Wendy, can we put the interpreter appearance on the record?

THE INTERPRETER: Wendy Blauman, Spanish interpreter.

THE COURT CLERK: BLAUMAN?

THE INTERPRETER: Correct.

THE COURT: Okay, raise your right hand please. Do you swear or affirm that the testimony you are about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: I swear it.

THE COURT CLERK: In a loud clear voice, please state your name, address for the record.

J H O N C O N T R E R A S, called as a witness, upon being duly sworn by the Court Clerk, was examined and testified as follows:

THE WITNESS: John Contreras, 58-30 85th Street.

THE COURT CLERK: Fifth street?

THE INTERPRETER: 58-30 85th Street.

THE COURT: Okay, so it is 58-30.

THE INTERPRETER: 58-30 85th Street, Queens, 11379.

THE COURT CLERK: Thank you so much.

You may be seated.

THE COURT: Your witness.

MR. KELLY: Thank you, Your Honor.

DIRECT EXAMINATION BY MR. KELLY:

Q Good morning, Mr. Contreras.

A Very good day.

Q We are going to jump right into it since you already talked to the jury on the liability phase.

Mr. Contreras, how old were you on the day of the accident?

A 38.

Q And on the day of the accident or at any time prior, had you ever had any spinal problems or problems with your back?

A No, never.

Q Had you ever received any medical treatment for any back complaints, specific spine complaints?

A At no moment.

Q Did you ever prior to the day of the accident, receive a physical injury to your spine?

A No.

Q I am going to invite your attention back to February 4, 2018, the day of the accident?

A Repeat once again please.

Q Yes.

I am going to invite your attention back to the day of the accident, February 4, 2018.

I would like to have you paint a picture for the jury of your perceptions as this Sheetrock was falling on you.

MR. GOLD: Objection.

THE COURT: Overruled.

A Well, it was something that was very painful. I felt like my respiration went. I felt asphyxiated. It was a lot of pain. It was a lot of weight, and I was also very afraid. For me that moment was an eternity while I waited for them to take those pieces of Sheetrock off me.

Q Where did you feel the pain?

A In my back, moreover, more than anything my back and also in my hip.

Q When you said you felt as though you were going to be asphyxiated, how long did you feel like that?

A I don't know because for me it was a long time.

Q And how did your co-workers go about getting the Sheetrock off of you?

A Because of the way the Sheetrock was, they were taking them, the sheets off one by one.

Q When you were hit by the Sheetrock, did your back strike anything?

A Yes, against the wall and some electrical boxes that are against the wall.

Q When you said you were scared, why in your opinion were you scared -- why particularly were you scared when you were trapped under 1400 pounds of Sheetrock?

A Well, I felt asphyxiated. I felt a little bit dizzy, and I just wanted them to take those sheets off me.

Q After they got the last sheet off of you, what happened?

A Mr. Nelson took me by one of my arms, and he helped me to go to one of the rooms that were in the back. They sat me down or I sat down on, I don't know, like a big pail of paint or something.

Q How long did you stay there?

A I don't remember, perhaps ten or 15 minutes.

Q Okay, and how were you feeling while you sat there?

A I felt very badly. I was in a lot of pain.

Q And what happened, what happened next?

A Well, they gave me an order that I should do some exertion, that I should sweep some things up, but the pain was very strong and I sat down once again.

Q How long were you at the work place after the accident until you left?

A I was there for approximately 45 minutes to an hour. I left just a few minutes before it was time to finish, to leave for work.

Q And how did you get home?

A I went to the train station, and it is pretty far away. It is approximately an hour away from my home. I remember that somebody helped me go up the stairwell to the train. I sat down, but -- I sat down but only for a minute or two because the pain was so strong that I had to stand up once again, and I had to go riding, standing, holding myself up by the train poles.

Q Where did you feel the pain when you were sitting?

A In my back.

Q Can you describe for the jury the pain you were feeling at that time?

A The pain was -- I felt something that was very hot. I don't know if I can demonstrate for you, this back part. I felt a lot of heat, and I was sweaty. It was something that was very strong.

Q Did you indicate the middle of your back just now?

A Yes.

Q Middle of your lower back?

A Yes.

MR. GOLD: Objection.

MR. KELLY: Just describing for the record.

THE COURT: Describing what the witness' gesture was now.

Q Had you ever had any pain there before?

A No, never.

Q What happened when you got to your stop that day?

A Before I made a phone call, I called my son, and I called him to help me go from the train to the house because it was cold, it was very cold, and it was also a little bit snowy, so sometimes I call my brothers because they are pretty big, and they can help me out, but they weren't home so my son really was the one that helped me then to get home.

Q How old was your son when you called him?

A Perhaps 16 or 17 years old.

Q How did you feel about having to call him to help you?

A Well, in reality, I felt a little bit bad about that because there were a lot of women around me, and I was in a lot of pain. In that moment, really, I wanted to cry.

Q Did your son come to assist you at the train station?

A Yes.

Q And did he help you get home?

A Yes. I leaned on him, and I did get home.

Q And did he help you up the stairs when you got home?

A Yes, yes, he served as I guess a type of cane.

Q What did you do when you got home?

A I laid down. I took some pain medication. My mom was there at that time, and she put some kind of cream on me. I don't remember what kind of cream it was, but she put on some kind of pain cream.

Q Did you go to sleep after that?

A I didn't really get to sleep for a long time because I couldn't figure out a way that I could be comfortable.

Q So what happened the next morning?

A During the night, I wrote a lot to Mr. Aldo, and he didn't respond to my messages, and really I needed to work. I needed the money. I dealt with the pain as best I could, and I got to my job the next morning the best way that I could. I was worried because he didn't respond to my messages, and I didn't want to lose my job.

Q Did you know how to get medical care at that time?

A No, I didn't know.

Q Do you know who was supposed to pay for your medical care at that time?

MR. GOLD: Objection.

THE COURT: I am going to interrupt for a second --

Q How long did you stay at work the next day?

A Perhaps an hour.

Q Did you return home after the hour?

A Yes, I returned home.

Q Did there come a time when you sought medical care?

A Yes. I never had a response from my boss. My son basically played the role of a father. He kind of chewed me out for not taking care of myself. I was a migrant. I didn't know the part of that, migrants and in the hospital. My brothers told me that it was very costly to get medical attention here, and I didn't have money to do that.

Q Did there come a time when you did go to the hospital?

A Yes, I did go to the emergency room.

Q What hospital did you go to?

A Elmhurst Hospital.

Q Elmhurst.

And did they speak English to you, speak Spanish to you, something else?

A In English.

Q And what did they do for you when you went to Elmhurst?

A They gave me morphine for the pain, and they did some exams on me, and they took some X-rays and some MRI's.

Q And did they tell you what was going on with you?

A Yes. The doctor told me that I had multiple fractures in my spinal column.

MR. GOLD: Objection.

THE COURT: Hold on, isn't the Elmhurst record in evidence?

MR. KELLY: It is.

THE COURT: Overruled.

Q And did you talk to the doctors at Elmhurst about your liver transplant?

A Yes, I let them know that I had a liver transplant.

Q Tell the jury if you would when you had the liver transplant?

A I was around ten years old when I had a liver transplant in Venezuela.

Q And have you been taking medications for the liver transplant since that time?

A Yes, I have some suppressing medication.

Q Immunosuppressing?

A Yes.

Q Did the people at Elmhurst talk to you about how that could -- would complicate the treatment?

A Yes. They gave me morphine, and at that time, I told them that I was transplanted with a liver. The doctors were very surprised, and they took out the morphine because the liver is what processes all that kind of medication.

Q So what did they do for you at Elmhurst?

A They gave me some medication. They gave me ibuprofen. They put this on my back, which is rigid, and they recommended to me to find a specialist because at that moment, I didn't have a specialist, and I also needed treatment for the liver because that was very delicate.

Q And you identified -- that piece of equipment that they gave you and you are holding it now. Do you mind if we mark that?

THE COURT: For identification only?

MR. KELLY: For identification only.

THE COURT: For I.D.

Have you shown it to defense counsel?

MR. GOLD: I don't have a problem.

THE COURT: What is that, you don't have a problem?

MR. GOLD: For I.D.

THE COURT: For I.D., yes.

Can we mark that?

(Whereupon, Above Referenced Exhibit was received and marked for identification at this time.)

Q Thank you.

Mr. Contreras, that item of equipment, that is a back brace, is it not?

A Yes.

Q Is it possible that you can demonstrate to the jury how that is worn?

A Yes, of course.

MR. KELLY: With your permission, Your Honor?

THE COURT: Without objection, I assume, without objection?

MR. GOLD: I don't have an objection to him trying it on.

A This makes sure that the back part picks up, and there is more rigidity on the back.

Q Sir, is that the third piece of equipment that you have gotten, a back brace?

MR. GOLD: Objection.

MR. KELLY: I will withdraw and rephrase it.

Q Sir, did you have to get subsequent back braces?

THE COURT: From the first one you received?

MR. KELLY: From the first one.

THE COURT: Okay.

A This is my third device because the other two became

damaged.

Q Okay.

And so the first device was similar to that one, was it not?

A Yes, only that the first one was similar, but it had something like, you know, it was like a T shirt.

Q Put it over your shoulder; is that correct?

A Yes, but it wasn't the most correct for that moment, so then they changed it to this one.

Q For how long a period of time after you left Elmhurst, did you have to wear that back brace?

A The use in the first two years was almost permanent.

Q After you left -- withdrawn.

How long were you in Elmhurst Hospital the first day you went there?

A Seven, eight hours perhaps.

Q And after they released you from Elmhurst Hospital with a recommendation to the specialist, did you return to Elmhurst Hospital?

A Yes, I returned several times.

Q Why?

A For the pain I had to return, emergency.

Q When you left the Elmhurst Hospital on the first day, did you go home?

A Yes.

Q What, if anything, were you able to do at home?

A No, no, it was practically impossible to do any kind of activity.

Q Did there come a time when you sought help in a Dr. Kaplan?

A Yes, I went to Dr. Kaplan.

Q Do you know about how many weeks after the accident that was?

A I don't remember exactly, but perhaps two weeks.

Q What complaints did you make with Dr. Kaplan, do you recall?

A I had a lot of back pain. I told him I had pain in my neck. My left arm hurt a little bit, my legs.

Q And what, if anything, did Dr. Kaplan do for you?

A He sent me to do an MRI.

Q Did he tell you what the MRI showed?

MR. GOLD: Objection.

THE COURT: I am so sorry, read back the question. Did he tell you what the MRI --

MR. KELLY: Showed.

THE COURT: Is the MRI in evidence?

MR. KELLY: I believe it is, Dr. Kolb's records.

THE COURT: Is it in evidence or not?

MR. GOLD: I don't which MRI, Dr. Kolb, one

film in evidence and the other one --

MR. KELLY: There are three MRI's, and Dr. Kolb -- two CAT scans from Elmhurst Hospital. Dr. Kolb's entire record is in evidence if you want to go through it, Judge.

MR. GOLD: But he is not the one to testify as to --

THE COURT: If it's in evidence -- the hearsay concern only matters if the -- withdrawn.

Your hearsay concern matters if the item is not already in evidence. If it's already in evidence, he is commenting on something that is also already in evidence. As long as what he was told matches up with the record, right? Do we know? You said you believe that all of Dr. Kolb's MRI's are in evidence?

MR. KELLY: Yes.

THE COURT: All right, then subject to connection the objection is overruled.

MR. KELLY: Right, Dr. Kolb's records --

THE COURT: Subject to connection, the objection is overruled because I assume this is heading someplace in terms of impact it had on his behavior and not just for him to testify to the records.

MR. KELLY: No, no, talking about his treatment.

THE COURT: Got it.

Q So, sir, did Dr. Kaplan tell you what the MRI showed?

A Yes, he told me that I had a severe lesion, multiple fractures.

Q What did he do for you after that --

THE COURT: I am sorry, let me just ask you to put the mic between you since it is -- I want to hear him, but I want to make sure they hear you, too. I am losing some information in the echo.

Q What did Dr. Kaplan do for you after that? Did he refer to you another doctor, something else?

A Yes, he referred me to Dr. Green (ph.) and Brisson.

Q Grimm, sorry?

A Grimm and Brisson.

Q Brisson, BRISSON.

Did you go see Dr. Brisson?

A Yes.

Q Did Dr. Brisson evaluate you for surgery?

A Yes.

Q And did you not have the surgery?

A Dr. Brisson after reviewing my medical history --

MR. GOLD: Objection.

THE COURT: Overruled, first of all -- overruled.

A He told me that I needed to do a surgery to correct

the wounds and the fractures, but because of the transplant, it was very risky to do that surgery.

Q What does that mean, risky?

THE COURT: Just clarify, overruled because it is not for the truth of the matter asserted but for the impact it had to the plaintiff's decision making.

MR. KELLY: That is correct.

THE COURT: I don't need you to tell me I am correct in my ruling.

MR. KELLY: I am sorry, I apologize.

THE COURT: Clarifying the ruling for defense counsel.

MR. KELLY: Sorry.

THE COURT: That's okay.

Q Did you follow up with Dr. Brisson?

A Yes.

Q And just to clarify, the risk to you for the surgery would be that you would die, right?

MR. GOLD: Objection, sustained, leading.

Q What risks were told to you by Dr. Brisson?

MR. GOLD: Objection.

THE COURT: Overruled, for the impact that it had on his decision making.

A There were many risks, hemorrhage, infection because I am immunosuppressed and very possibly I could die.

Q So when you followed up with Dr. Grimm -- withdrawn.

When you followed up with Dr. Brisson, what did he do for you?

A Dr. Brisson tried to do with Dr. Grimm, you know, to look for a solution.

Q All right.

And did you go to Dr. Grimm?

A Yes.

Q And what did you complain to Dr. Grimm of?

A Pain.

Q All right and where was the pain?

A Pain in the back, a lot of pain in my back.

Q Okay.

Was there pain anywhere else, did it radiate to your leg, did it go anywhere else?

A Yes, I told him the same thing that I told Dr. Brisson and Dr. Kaplan. It was pain in my legs, and every day, the pain was a little bit sharper.

Q Okay, describe the pain in your legs to the jury.

THE COURT: At that time?

MR. KELLY: At that time.

A It was a sharp pain. It was in my the glutes, and it grabbed into my leg.

Q When you saw Dr. Grimm, what did Dr. Grimm do for you?

A Well, about the pain, he is a doctor that treats pain.

Q Okay, so what did he do to treat the pain? Did he give you injections, electrical treatments, send you for the therapist, what?

A First we started with electro shock or current treatment. I went to PT. I got massages. They did not help me at all. Then he put an injection in me.

Q What happened when you got the injection?

A With the injection, my pressure went up. I was really dizzy. I had headaches. It was a bad experience.

Q Did that prevent you from getting anymore injections?

A Yes, there was not a lot to be done regarding injections or medications.

Q Tell me if you would, what did the physical therapy do, PT as you call it, what did the physical therapy consist of?

A Stretching. They put hot things and cold things on me, massages and some stretching.

Q How long did each session last?

A I went twice a week.

Q Okay, and how long were you at the physical therapist each time you went twice a week?

A Approximately two hours.

Q And for how long a period of time did you go to

physical therapist?

A Perhaps four months. I don't remember very well.

Q Did any of these treatments help your pain, physical therapy, injections --

A No, not much.

Q Did you return to try and work with Dr. Grimm to find a solution to your pain?

A Yes.

Q Has a solution been found?

A A solution, solution, no, but we've tried some methods, massages, certain types of stretches, certain types of physical therapies that are helping.

Q Has any doctor told you you are permanently disabled?

MR. GOLD: Objection.

THE COURT: Sustained.

MR. KELLY: Withdrawn.

Q Has any doctor found you to be permanently disabled?

MR. GOLD: Objection.

THE COURT: Sustained.

Q Are you permanently disabled?

MR. GOLD: Objection.

THE COURT: Sustained, I think, but let's take a quick step outside.

THE INTERPRETER: Judge, can the witness stand up?

MR. KELLY: Judge, can the witness stand up?

THE COURT: Yes.

(Discussion held outside the courtroom, off the record.)

(The discussion off the record concluded, and the following occurred in open court:)

THE COURT: All right, so just to clarify, the objections have been sustained for foundation, just to clarify. Can't get the information, for foundation.

Q Tell us, Mr. Contreras, what are -- what a typical day for you was like within the first couple of years after the accident?

A After the accident?

Q Yes, since the accident, tell us what a typical day -- and I don't mean up to currently -- I will say within the three years after the accident?

A They were very hard because I couldn't do anything. I couldn't even work, and the things with my wife, it was very hard for me because it was difficult for me to see my wife lifting up very heavy things. Everything got complicated. I couldn't do sports. I played softball, and I did many, I did many things that I now I cannot do.

Q Tell us about that, before the accident, what type active man you were before the --

A Like I said, before the accident, I was very active.

I played softball. I played volleyball. I could work at anything. I would go to the park. I could walk. I had a life with my children. I was always considered to be a very happy, fun person for them.

Q How old -- you told us how old your son was. How old was your daughter before the accident?

A My daughter was perhaps ten years old.

Q And before the accident occurred, you played with your kids?

A Yes, of course. It was my pastime to play with them.

Q What about after the accident?

A I am sorry, I've been embittered. My life completely changed. Perhaps I don't know if my children see me the same way. I have been irritated, bad humored.

Q Is that due to pain after the accident --

A Yes, yes, yes, it has not been the same because when you are the pillar of your home, it has been very frustrating, and sometimes, sometimes I feel like a bother, and I've tried to do everything. I've tried to work, and it has been impossible.

Q Sir, as you sit here today, tell the jury your physical complaints?

A Well, my pain is maintained, it is permanent. I have to take daily medications. Sometimes I avoid taking the medication because I think that maybe by taking them, it will

affect my liver and that will make me worse. It is that -- bad humored. It is irritating. It is constant.

Q What about sitting and standing, how do you feel when you sit and stand?

A I have to be standing up. I can't walk for long periods of times. I have to support myself on things. Also, when I am lying down, I am also uncomfortable. I don't sleep a lot. I just don't sleep a lot.

Q Describe for the jury where the discomfort is.

A In my back, always in my back, and even when I am sleeping, I tried to remain on my side, but even with that, it's impossible to sleep.

Q Did you have these kind of complaints before the accident?

A No, not at all.

Q Are you limited in what you can do around the house in terms of lifting, shopping, things like that?

A Yes, I am very limited. Practically my children and my wife have to do everything around the house. I am very limited.

Q Sir, how do you feel about the future?

MR. GOLD: Objection.

THE COURT: Overruled.

A Well, well, I had a lot of expectations for the future because I always considered myself intelligent and a

working man, but now, what I think of is expenses, now what I produce are expenses. The doctors tell me that at some point in time, I am going to have to do some kind of surgery because my situation will get worse.

MR. GOLD: Objection.

THE COURT: Overruled.

A And that is difficult because -- that is difficult for me because I don't have the means in order to do any kind of surgery or treatment or whatever. So, sir, when you ask me about my future, I think that it has -- it has -- maybe I don't have an adequate word. It is not the best one.

Q Sir, do you try to clean around the house at all --

A Yes, I do it but not often at all.

Q Do you do any kind of work?

A No, I don't do any kind of work.

Q Sir, I have no further questions for you. Thank you very much.

THE COURT: Thank you.

Cross?

MR. GOLD: Yes, Judge, but it is significant, so I think I could go --

THE COURT: We have 40 minutes to lunchtime. We are 38 minutes to lunchtime. I am concerned, you have another expert coming --

MR. KELLY: I do, I have a Dr. Grimm in the

afternoon.

MR. GOLD: I am not going to finish.

THE COURT: You don't have to finish. We have 40 minutes.

Meaning I am not trying to restrict you to finishing in 40 minutes at all. I just want to make sure we make good use of the hours we have.

MR. GOLD: Can we take a quick side bar?

THE COURT: Let's just do the 40 minutes you have, and we will let you pick back up as soon.

MR. GOLD: A side bar please?

THE COURT: Okay.

(Discussion held outside the courtroom, off the record.)

(The discussion off the record concluded, and the following occurred in open court:)

THE COURT: All right, let's take five, we are going to take five, ladies and gentlemen. Make sure you don't discuss the case or do any research. Sorry, I remind you the that you are still under oath.

THE COURT OFFICER: All rise, jury exiting.

(The jury exited the courtroom and the following occurred:)

MR. GOLD: Thank you, Your Honor.

THE COURT: Sure, no problem.

(Whereupon, a recess was taken.)

(After the recess the following occurred:)

MR. GOLD: We served, we obtained doctor -- we submit that it is not our burden to obtain records from their treating physicians, but we did get records --

THE COURT: Did you get liver treatment related to this accident?

MR. KELLY: Not related to the accident.

MR. GOLD: It is in here.

THE COURT: The fact that there are liver treatment records doesn't mean they are related to the accident, and it is not the plaintiff's burden to get liver treatment records if he is not making any claims related to his liver.

MR. GOLD: Your Honor?

THE COURT: Yes.

MR. GOLD: In this record, okay, he does treat for kidney stones. They are making claims for kidney stones as per the Bill of Particulars. He also treats for back pain and a fracture, and it is in his record.

THE COURT: Hold on, he treats for back pain and a fracture, the liver doctor or he just mentions --

MR. GOLD: No --

THE COURT: I am sorry, I am talking.

Or he mentions in his relevant medical history

he has back pain and --

MR. GOLD: Two separate records. This is his PCP.

THE COURT: Okay.

MR. GOLD: This is his liver doctor. Both do full exams on him, physicals. When they go through his back, they go through his range of systems. They go through whatever pain he has.

THE COURT: Right, but the question is are any of those things, are any of those things treatment for his conditions, or are they just the standard exam?

MR. GOLD: He sends him for a bone scan. He sends --

THE COURT: He, who?

MR. GOLD: The primary care doctor, Dr. Ortiz, he sends him out for a bone scan.

THE COURT: Okay.

MR. GOLD: Dr. Ortiz then discusses his back condition with him. There are answers.

THE COURT: The records under subpoena?

MR. GOLD: They are under subpoena. They are somewhere floating around the courthouse.

THE COURT: Oh, those are some of the records that are not log --

MR. GOLD: These are in the courthouse

somewhere logged in. These are exactly what they are. They are certified in the courthouse. He does physical exams where he contradicts their experts. He does neck exams. He does back exams. He tests for midline pain, and it is also in these records.

THE COURT: Are you calling him?

MR. GOLD: I have him under subpoena, but I don't --

THE COURT: Okay.

MR. GOLD: -- but I don't need him to come in if I have his records. That is why the rules were changed that we can now get certified records --

THE COURT: There are two separate questions. I just asked if he was an orthopedist, since he is not an orthopedist, pain management specialist; he is a family practice doctor or internist, right?

MR. GOLD: He is an internist. So in any event, I think we are going to go ahead and take that recess for two reasons. I want you to go, look over the records you need to; two -- off the record.

(Discussion off the record.)

(The discussion off the record concluded and the following occurred in open court:)

THE COURT: But, two, I am mindful of your need if you need to have a rest, some medicine. So we will go

ahead and recess for lunch. Let's just let the jurors know we are recessing for lunch. We will be back at two o'clock since we are breaking early and pick it up from there.

MR. GOLD: Your Honor, may I make a record on the second one?

THE COURT: I just said we will take a break, forgive me saying, you pointed something out about yourself that I am noting, and I want to let you go and handle your blood sugar.

MR. GOLD: Thank you, Your Honor.

THE COURT: Sure.

(A luncheon recess was taken.)

(After the luncheon recess, the following occurred:)

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

(The trial continued.)

MR. KELLY: So I am briefly went through the records handed to me, reportedly the records of Dr. Ortiz, the records include a number of pages of Dr. Ortiz, but it seems to be made up of massive other records of a doctor named Giselle Vasquez and Deray, DERAY, Herdia, HERDIA. Also the records handed to me also include substantial number of reports of diagnostic studies by a radiologist,

Shafali, SHAFALI, Kothary, KOTHARY, and Dima, DIMA, Tietlebaum, TIETLEBAUM. The radiology reports, diagnostic reports were not subject to a 4532A disclosure by defense counsel. And there is no affidavits from these radiologists concerning any of these documents, so I cannot consent to their being entered into evidence.

THE COURT: As to radiology, it has to be straight forward. As to the questions with respect to the internist, notes and findings, I guess I am asking what it is you want to offer them for, Counsel, and what is it that you think that you can -- in what way do you think there is appropriate cross-examination for plaintiff with respect to those records?

MR. GOLD: Your Honor, Jose Ortiz is part of the practice. The practice includes PA's and, yes, two PA's, both who speak Spanish. The entire records were certified by the manager --

THE COURT: But they still have to be admissible, the contents of them have to be admissible.

MR. GOLD: They are admissible because statements were made to the plaintiff regarding treatment of the doctors, regarding treatment. The physical records, exams were done, you know, neck pain, neck, supple neck, you know, physical exams were actually done by the physician. And as far as there being a -- there is

a report done by his cardiologist, because they were referred to, and they put them in the file.

THE COURT: The fact that they put something in a file, make it a part of the business record, but it doesn't make it independently admissible. Meaning the certified records can be admitted, but it is still subject to all of the -- sorry, let me back up. A certified record is sort of on its face may be admitted because it is certified, but the contents of that record are not also admissible unless they also satisfy requirements for admissibility, right? Certainly statements, witness statements, the incorporation of other people's radiology records, these sorts of things all have to be independently made admissible to get it in. It is not just because you subpoenaed something or the plaintiff subpoenaed something that it is automatically an admissible document for its contents.

MR. GOLD: Under the statute, if we serve with notice of intent which we have, and we have the certification, it is prima facie admissible. So the doctor that checked for kidney stones and sent the records to the primary care physician --

THE COURT: Do you have an authorization from a nephrologist or someone who is going to come and testify about kidney stones?

MR. KELLY: No.

THE COURT: Are you -- kidney stones at this point because honestly I don't think this is the point he is trying to make, but he is inadvertently making a correct point which so far I don't hear you are calling this doctor that diagnosed kidney stones. I still have not heard testimony, and I know there are other people coming, but I have still not heard testimony from any doctor that ties in the incidence of kidney stones to this incident, and your client didn't testify about any kidney stones on his direct exam. So are you prepared to withdraw any claims regarding kidney stones?

MR. KELLY: Yes, we are not making claims about kidney stones.

THE COURT: Hold on, you were making claims at the beginning of the trial. You made them to the jury. There was certainly intake notes about the case that you had this claim about kidney stones. Counsel and I think his associate made an issue out of them. You said we have these claims. So now your client is finished testifying on direct. You have not made out a, I think, a prima facie case about kidney stones so unless there is some extra witness coming that I don't know about.

MR. KELLY: No, Judge, there is nothing --

MR. GOLD: This is the problem, Judge, he

opened with, that my client went -- his client went to the hospital complaining he needed morphine because of his extreme back pain. It is in the opening.

THE COURT: Yes.

MR. GOLD: The records that are now in evidence are, you know, there are ten, 12 hospital visits for incredible off the charts back pain.

THE COURT: Yes.

MR. GOLD: All kidney stone related.

THE COURT: Says who?

MR. GOLD: Says my doctor.

THE COURT: Is your doctor a nephrologist?

MR. GOLD: Yes, yes, he is a urologist.

THE COURT: I thought you were not sure he is coming.

MR. GOLD: He is coming.

THE COURT: The kidney stone claim is withdrawn so if you want to bring a nephrologist as a rebuttal witness to say we don't think any of this is back pain but instead kidney pain, you are welcomed to bring the guy. I won't stop you from presenting an alternative theory as to plaintiff's symptoms. But if it's to rebut plaintiff's affirmative claim about kidney stones, the answer is that claim is withdrawn.

MR. GOLD: Thank you, no, it is to say that the

pain was caused by kidney stones.

THE COURT: Okay, so that is an affirmative defense, that there is some other source besides this accident for the plaintiff's symptoms or complaints. You are entitled if you think it is in the records to bring it.

If he went to the emergency room all these times and was diagnosed with kidney stones, that is a big deal, but if he wasn't, then you are going to have to prove to me that it is somewhere in the records and not just -- because by the way, you can have an aortic aneurysm and have severe back pain. Unless there is some record that the plaintiff, God forbid, had an aortic aneurysm, he would not be allowed to present the testimony that he did.

MR. GOLD: Judge, you see that big pile of exhibits we have there, the Elmhurst records?

THE COURT: What about it?

MR. GOLD: The Elmhurst records.

THE COURT: Yes.

MR. GOLD: 80 percent of it is kidney stones.

THE COURT: Okay.

MR. GOLD: That is why I will have the doctors here.

THE COURT: Great, but anyway, his affirmative claim with respect to kidney stones being related I think

have been withdrawn, right?

MR. KELLY: Correct.

THE COURT: That is correct.

MR. GOLD: Served Bill of Particulars four days ago that said the kidney stones are --

THE COURT: Okay, but plaintiff, I am not go to go repeat myself. His client has now finished testifying on direct. Plaintiff has not offered a urologist, nephrologist, anybody who is qualified to make out a claim that he has kidney stones and that those kidney stones are somehow related to this accident. He is prepared to withdraw the claim. That is the end of the conversation about it, that is the end of the conversation about it.

If you have an affirmative defense in which you believe there is an alternative basis -- can we shut the door by the way in case the jurors are out in the hall -- if you believe there is a claim as affirmative defense, that there is an alternative basis for plaintiff's complaints, you will bring that as part of your case, your rebuttal case, that is fine.

In the meantime, I don't see a basis for this internal medicine records to come in on plaintiff's cross, and I don't see a basis, particularly because they report to have -- they seem to have some factual, demonstrative factual errors about the guy's age, some other things, and

if you want to say that a doctor or PA or something in this practice did exams, or that the claims say certain things, then you will need to bring a witness to try to, an indication of it, whatever. You can't just admit all these records, routine physical and say do you see how these conflict everything the plaintiff has said. This is not the appropriate usage.

All right let's get the jury in.

MR. GOLD: I would like to be heard further on the record.

THE COURT: Not now, on what?

MR. GOLD: On the record.

THE COURT: We are on the record.

MR. GOLD: I meant on the medical records. Also I need to call my office. I have to go tell the doctor he has to come. He doesn't want to come in.

THE COURT: That is not my problem. We are not doing that now. The jurors are coming, it is 2:30. We were supposed on the record at two o'clock with this doctor that you said you will need an extensive, extensive amount of time to cross.

MR. GOLD: I will.

THE COURT: That was supposed to happen, and your conversation about the records were supposed to happen before two o'clock so we can be up on the record at

2:00. We had all the jurors now for about 20 minutes, and we have got to get moving.

THE COURT OFFICER: Okay, Your Honor, ready?

THE COURT: Yes.

THE COURT OFFICER: All rise for the jury.

THE COURT: All right, you can all be seated, please, thanks.

Plaintiff, call your next witness.

MR. KELLY: Thank you.

The plaintiff calls Dr. Matthew Grimm to the stand.

THE COURT: Thank you.

Call Dr. Grimm, and I just remind the jurors and counsel and that Mr. Contreras is still subject to cross-examination. He remains under oath, but we are accommodating the schedule of the expert witness who is scheduled to come in this afternoon.

THE COURT CLERK: Please remain standing, you can put your stuff down. Just raise your right hand for me. Do you solemnly swear or affirm under penalties of perjury that the testimony you are about to give this Court will be the truth, whole truth, nothing but the truth?

THE WITNESS: Yes.

THE COURT CLERK: Will you please state your

name, address for the record.

THE WITNESS: Matthew Grimm, 160 East 56th Street, New York, New York 10022.

M A T T H E W G R I M M, M. D., called as a witness, upon being duly sworn by the Court Clerk, was examined and testified as follows:

THE COURT CLERK: You may be seated, thank you, sir.

THE COURT: Thank you, Doctor, you are an M.D., DO or something else?

THE WITNESS: M.D.

THE COURT: Thanks.

Your witness, sir.

MR. KELLY: Thank you.

DIRECT EXAMINATION BY MR. KELLY:

Q Good afternoon, Doctor.

How are you?

A Good.

Q Tell us if you would --

A Pardon.

Q -- what is your profession?

A I am a physician.

Q Tell us your educational background.

A I did my undergrad at Pennsylvania State University in electrical engineering. I did medical school at Jefferson

Medical College in Philadelphia. I did my internship at Graduate Hospital in Philadelphia. Then I did residency at University of California Irvine as well as William Beaumont (ph.) Hospital in Michigan. Then I did a fellowship in interventional spine in Georgia at Nonsurgical Orthopedics.

Q Can you tell us what your residency was in at the University of California?

A Yes, in physical medicine and rehabilitation.

Q What is physical medicine, rehabilitation?

A I sort of describe it as sort of treatment of orthopedic issues in a nonsurgical manner.

Q And you talked about an internship or residency in interventional spine, pain management. What does that consist of?

A So it is trying to treat usually spinal conditions utilizing injections, sometimes utilizing physical therapy, medications, just sort of nonsurgical manners of treating conditions of the spine.

Q Have you published any articles?

A I did some general articles, journal articles when I was in residency.

Q Do you belong to any associations?

A I am a member of the American Board of Physical Medicine Rehabilitation, New York County Medical Society and then I am the director of pain management at Fifth Avenue

Surgical Center, the east side.

Q Are you Board Certified?

A Yes, in physical medicine, rehabilitation.

Q Tell us what that entails to be Board Certified in physical medicine rehabilitation?

A So it is being Board Certified is sort of -- it is some tests that you take to sort of just make sure you are proficient in your field. So with mine, we started with a written test that was taken over a few days. When you pass that, then you would go to take an oral test in, I believe, it is in Rochester, Minnesota. Then you are evaluated by a panel of experts in the field. Then you get graded. It is just to make sure that you are sort of good at what you do.

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

A Yes.

Q Do you engage in the private practice of medicine?

A Yes.

Q And tell us about your private practice of medicine?

A I work for a practice called New York Ortho Sports Medicine & Trauma. It is owned by Jeffrey Kaplan.

Q Do you regularly see patients?

A Yes, I see patients every day.

Q In our case, Mr. Contreras contends he suffered a spinal fracture as a result of a work place accident and has

had ongoing pain as a result. Do you have experience in applying your professional skills to Mr. Contreras' type of problems?

A Yes.

Q Doctor, have you previously been qualified as an expert witness in the State of New York?

A Yes.

MR. KELLY: I offer Dr. Grimm as an expert witness.

MR. GOLD: No objection.

THE COURT: Without objection.

Q Dr. Grimm, did there come a time when you encountered Mr. Contreras for treatment?

A Yes.

Q And you can refer to your notes any time you feel the need to?

A Okay.

Q Tell us the nature of that encounter if you would, Doctor?

A He was referred to me by Dr. Jeffrey Kaplan who is an orthopedic surgeon in my practice for treatment of his neck and back. My first visit was on March 15, 2018.

Q Did you take a history at that time?

A Yes.

Q Can you tell us briefly what that history entailed?

A Just briefly, he reported he had an accident at work on February 4 when it was described as large amount of Sheetrock fell on to the patient, causing injury to his left hip, mid back, lumbar spine and right leg.

Q Did the history include any prior back or spine pains?

A No. He relayed to me that he had no prior history of injuries to any of these areas.

Q Did you perform a physical examination of Mr. Contreras?

A Yes.

Q Tell us, if you would, what you found upon physical examination?

A He was ambulating with an antalgic gait. It means, just means painful walking pattern favoring his spine. He was wearing a thoracolumbar or on that day, so a big brace. It was removed for examination. He had tenderness over his spinous processes which are these processes here, these bony elements in the back of your spine. He had decreased range of motion. He had pain with extension to five degrees and normal spine would normally go to 25 degrees, pain with flexion to 60 degrees. Normal is 85 to 90 degrees. Left, right lateral flexion of 15 to 20 degrees with pain. Normal is about 25 degrees. He did have a positive straight leg raise to his right. Straight leg raise is keeping, placing a patient flat

on a bed, lifting the leg up and that starts to stretch their nerves in the back. If they have irritation of the nerves, when you stretch it, it will cause pain, it will shoot down your leg. It is just an indicator of disk and nerve condition of the spine, and he had muscular spasm present in his para-spinal musculature. His strength was intact.

Q Describe for the jury the significance of these findings on physical examination for Mr. Contreras?

A For him, the tenderness of the spinous processes can indicate the bone pain that he suffered from, his compression fractures in his spine. When you are putting pressure on it, that would irritate, would cause pain due to that pain from the fractures. Then the straight leg raise which I just described, stretching the nerves is a sign of nerve irritation or inflammation.

The spasm is caused from everything tensing up, the pain tensing up from both probably the compression fractures as well as the nerve disk issues.

Q Were you given any diagnostic studies or reports?

A At that visit, I do not have any diagnostic studies. I sent him for MRI's.

Q What was the purpose of sending him for MRI's?

A He was complaining of significant pain. He was displaying spinal findings on examination so I wanted further evaluation for confirmation or evaluation of my findings on the

exam and for --

Q Doctor, I am going to ask you for a series of opinions. All the opinions I ask you for can be to a reasonable degree of medical certainty, is that okay with you?

A Yes.

Q Doctor, did your opinion upon examination of Mr. Contreras and your examination with findings and his history that Mr. Contreras' complaints were the result of a traumatic event?

A Yes.

Q And is it your opinion, Doctor, that Mr. Contreras' complaints were consistent with a 1400-pound mass of Sheetrock falling on him, thrusting his back against the wall, some protruding electrical boxes?

A Yes.

Q Doctor, was Mr. Contreras complaining of any symptoms as a result of his condition?

A Yes. I mean that at his initial visit, he was complaining of mid to low back pain with a radiation into his anterior thigh on his right leg. He was complaining of ten out of ten pain to his mid spine, six out of ten pain to his lumbar spine, and then he reportedly had been utilizing ibuprofen for his pain control.

Q Doctor, you said something, you said radiation. Can you describe to the jury what does radiating pain mean and what

is that from?

A The different forms of pain, axial pain is a form of pain where it just stays in the spine. That is usually pain that can be from joints or fractures, something that is just staying where the injury is.

Radiating pain is pain from nerve related pain which generally will follow a sort of pattern or map, depending on which nerve is involved which means it will travel to one, your leg or your arm or somewhere in your body depending on which nerve is irritated.

Q All right, and does radiating type of pain -- withdrawn.

In this situation with Mr. Contreras, is his radiating pain a result of a traumatic event?

A Yes. It likely can be caused two fold. It can be because if you have a compression fracture somewhere, that can narrow the region where the nerves can come out. The nerves can become inflamed and cause some pain in addition to pain from a compression fracture. Then also if you have a disk issue, that can cause -- when the disk protrudes or pushes out, causes irritation on the nerve, and that can cause the radiating pain as well.

Q Would we see radiating pain in something like kidney stones?

A No. Kidney stone is usually sort of upper, upper

pain in this area right here where your kidneys are located that forms from the ureters that can be blocked, kidneys become irritated and you will have pain in that region.

Q I believe you said Mr. Contreras reported pain of ten out of ten. Can you describe for us first what that means, ten out of ten?

A So it is just a scale that on patients, it is called the visual analogue pain scale. Zero is no pain at all. Ten is the most severe pain you have ever felt. Then five out of five is sort of pain that affects you on a regular basis.

Usually I say what does your pain get up to, like what is the most severe it is. If they say ten out of ten, it doesn't mean right at that moment. I will say what is the most severe it is getting at this juncture.

Q Mr. Contreras was seeing you for treatment; is that correct?

A Yes.

Q So generally when patients see you for treatment, they tell you what is really going on with them, don't they?

A Yes.

Q And do you have an opinion, Doctor, that the ten out of ten pain report and the radiating pain was the result of a traumatic event?

A Yes, in my opinion.

Q Is that traumatic event consistent with 1400 pounds

of Sheetrock striking Mr. Contreras at work and thrusting him into the wall and protruding electrical boxes?

A Yes.

Q And was his complaints consistent with suffering fractures to the spine?

A Yes.

Q Did you form an assessment or diagnosis with respect to Mr. Contreras?

A Initially, I mean I had him diagnosed with lumbar radicular pain which would be the pain shooting into the leg, fractures of his thoracic vertebra and lumbago which is just a term for back pain.

Q Did you form a treatment plan at that time?

A Yes.

Q Can you tell us what the treatment plan was?

A I was recommending an MRI. He was following up with a spinal surgeon, Dr. Paul Brisson, and then generally he was recommended to continue use of the thoracolumbar brace.

Q And for what purpose was the thoracolumbar brace utilized?

A It's a brace that is used to immobilize the spine for treatment of the compression fractures. Generally you wear it for a minimum of three months, usually general recommendation, but if you continue to have symptoms, patients will often wear it longer, usually at the direction of a spine surgeon.

Q Mr. Contreras has already testified that he wore this back support device for a number of years, including the fact that he is on the third one. Is that consistent with your evaluation of Mr. Contreras' condition?

A Yes. I generally make sure I tell patients not to wear them all the time. I usually tell them maximum of about five hours a day because using the brace is too much, can cause weakness in the muscles, the erector spinae of your low, just sort of the back muscles, and you need to be able to support your body without the brace. If you wear the brace too long, those will get weak, so but yes, it is consistent and it is okay to wear.

Q Did there come a time when you reviewed the results of the diagnostic tests that you sent Mr. Contreras for?

A Yes.

Q Can you tell the jury please what were the findings as a result of your review of the diagnostic test?

A Yes, sir.

He had the thoracic spine MRI. It was read as a T8, biconcave fracture deformity with associated marrow edema indicating acute, subacute fracture. T7 there is a fracture deformity of the superior end plate. T12, L1, L2, fractures and a complete fracture of right paracentral aspect of the L2 vertebra, T7-T8, posterior disc bulge. Then T11, T12, disc bulges were noted.

Then the lumbar spine, it did note an L1 superior end plate fracture. The disc herniation spanning the entire extent of the L1 vertebra. Then it showed narrowing of the inferior aspects of the T12-L1 neuroforamina as well as a large intrabody disc herniation of the T12 end plate, and those are -- and disc bulging at L4-L5.

Q And Doctor, you said a lot of things there that I think we will probably need an explanation on. So when you say something is an acute fracture or subacute fracture, what does that mean?

A So, if the fracture from the downward force -- so in the spine, the thoracic spine is often very firm and rigid and straight without a lot of curvature. When you get down to the lumbar spine, that is when you will start to see it curve. So generally, if there is a fracture that is chronic and old, you would see it in the lumbar spine. If it is new, acute fracture, you are generally not going to see anything that is not traumatic in the upper thoracic region of the spine.

So with the T8, there was some marrow issues, bone marrow, edema which is generally indicative of an acute fracture and also a T7 fracture, and you will generally not see that without any trauma to the spine.

The lower lumbar ones, sort of hard to tell the age of them as much or the T12, L1-L2, but in a patient without any history of pain there, it could certainly be acute as well.

Q Sir, you talked about disk pathologies. You talked about disc herniation and disc bulging. Tell the jury, what does that mean and what are its causes?

A So that in his -- specifically his MRI that goes along with his symptoms at sort of T12, L1 and L2, they were talking about disc herniations which means the disk kind of has a soft inside, hard outside. If there is trauma or if there is pressure, uneven pressure on it, that soft inside can push out and then that can cause narrowing with the nerves coming out.

Specifically in his case, he was having symptoms, talking about the anterior thigh. Earlier when I was talking about the pattern that pain will go from nerve issues or disk issues, L1-L2 nerve issues is usually pain that will come around the anterior thigh which corresponded to his pain complaints.

Q Based upon your history, examination, review of the records, do you have an opinion as to whether or not Mr. Contreras' symptoms that you just described were caused by the accident of February 4, 2018?

A Like I said, he reported to me no prior history of pain in those regions. I didn't have the MRI at his initial evaluation. His pain complaints were consistent with MRI findings when we did get it for review, so I think, yes, the issues that -- the fractures would be consistent with an acute injury as well as the disk issues radiating down to the front

as well.

Q Doctor, the findings that you told us about, are they the competent producing cause of pain?

A Yes.

Q And did Mr. Contreras follow up with you for treatment?

A He did follow up on multiple occasions.

Q All right, just generally if you would, describe for us please the treatment you rendered to Mr. Contreras?

A Due to his co-morbidities, we were sort of limited on some of the treatments --

Q I am sorry, when you say co-morbidities, what does that mean?

A I don't know if he has testified about it, but he has a history of liver transplant so we are sort of limited on medications we can use. He also has history of osteoporosis which is brittle bones, damaging the bones so usually in cases like his, I would do epidural injections with steroids, but we were limited on that under the guidance of his treating doctors for those issues. So he was treated with some anti-inflammatory medications, some topical medications that don't go through the liver. He is also given occasional muscular trigger point injections which is just, when you have muscle spasm and muscle tightness, they will form small, tight bands that are quite painful at times. It is a secondary issue

to his underlying causes. So trigger point injections is just taking a needle, needling that muscle to try to get it relax and release.

He is also prescribed some physical therapy and therapeutic exercises for his condition.

Q And these limited modalities or these limited treatments, are they less successful at, in lessening --

THE COURT: Less successful than what?

Q -- less successful than the epidurals that you prescribed previously?

A Yes, it would have been nice to be able to do treatments like that, but they can be quite helpful, and you sort of work with what you are able to.

Q Okay, and this what it known as conservative treatment for --

A Yes.

Q And the conservative treatment -- withdrawn.

Are Mr. Contreras' injuries permanent?

A Yes, it's a permanent condition that will progress.

Q When you say it will progress, does that mean negatively, positively, how will it progress?

A Negatively. He has got osteoporosis. He has got weak bones. He has got disk issues. He has muscular issues and all that over time as he ages, I would say there is a decent chance he will suffer either more compression fractures

or worsening of the ones he already has, the disk issues as his spine becomes more compressed, and it will probably become worse. Then the muscular issues are generally secondary to all the other underlying causes which will persist.

Q Can we expect Mr. Contreras to continue having pain in his lifetime?

A Yes.

Q Do we expect Mr. Contreras' pain to worsen?

A Yes.

Q Will Mr. Contreras require medical care for his lifetime?

A In my opinion, yes, he will require it.

Q And will Mr. Contreras require monitoring, medications, diagnostic testing for his lifetime?

A Yes.

Q Is there a cost associated with that kind of --

A Yes.

Q Doctor, I am going to show ask you a number of items that were identified earlier in your testimony, and ask you if you prescribe these treatments for Mr. Contreras' lifetime. The first being did you prescribe certain medications including anti-inflammatories, muscle relaxants, neuropathic pain medication, topical medications?

A Yes.

Q And is there a cost of $20 per month for his lifetime

duration --

MR. GOLD: Objection to form.

THE COURT: I think he asked -- in general I would agree with you except I think he asked the doctor whether based on the chart that was previously shown to the jury so that is why I think in terms of leading, I think it is just referring to a chart that has already been put in evidence.

MR. KELLY: I can do it another way.

THE COURT: That is fine.

Q Dr. Grimm, did you reduce to writing your treatment plan?

A Yes.

Q Can you tell the jury or you can read it if you wish the list of future medical interventions that are on your treatment plan, including the costs of some?

A Yes.

Q Please do.

A Okay, so for medication, I think, reasonable proximate cost for medications would be $20 a month for a lifetime. He is using the back brace. I think the back brace at a cost of $450 to be replaced approximately every five to ten years depending on wear for a lifetime.

I did prescribe a cervical pillow, just specialized pillow for the spine to keep his spine sort of more neutral

while he sleeps at the cost of $100 to replace every five to ten years.

He was prescribed a Tens unit, muscular stimulation for the spine for a cost of $150 with replacement pads at $50 a month with replacement of the Tens unit every five to ten years. Then the pads would be monthly, they are sticky pads that lose their stick.

I recommend pain management office visits at a cost of $250 a visit every three months for monitoring for lifetime duration. Orthopedic surgeon visits, the cost of $300 per visit, four times a year for lifetime duration. Orthopedic spinal surgeon, office visits at a cost of $500 a visit, once a year for lifetime duration. The trigger point injections, I think he would benefit from a set of injections, approximately every three months at a cost of $300 per set of injections for lifetime duration. Benefit from maintenance physical therapy at a cost of 100 to $150 per visit twice a month for maintenance of strength, range of motion as well as to help with pain management during -- for lifetime duration.

In the future, should he suffer a painful compression fracture, I believe he would be candidate for a kyphoplasty, two or more vertebra at a proximate cost of $19,749 which is inclusive of the hospital equipment fees and surgeon fees if that fracture occurs. Monitoring, MRI of the lumbar spine at a cost of $1,300 once every five years for lifetime duration.

MRI of the thoracic spine, cost of $1,300 every five years for lifetime. MRI of the cervical spine at a cost of $1,300 every five years. His right knee had been bothering him so just monitoring for traumatic arthritis, so an MRI every five years at a cost of $1,300 for lifetime --

THE COURT: That is every five years you said?

THE WITNESS: Yes, every five years.

A X-ray films of the lumbar spine, for worsening or new compression fractures every six months at a cost of $400 for lifetime. Thoracic spine X-rays once every six months at a cost of $400 for lifetime. X-ray films of the cervical spine once every six months at a cost of $400 for lifetime.

The knee is not bothering as much --

Q We can skip.

A Yes, I don't think he would necessarily need the X-rays for that.

Then we were talking about the nerve issues earlier so EMG, nerve conduction studies is just a test. When the nerve becomes irritated and inflamed, you will start to see damage to the muscles downstream. I always liken it to a hose being kinked. You start to see whatever is downstream to -- from the post, it would start to die, and this is from the nerve so put a pen in the different muscles, and you will start to see muscular degeneration if the nerve is inflamed, worsening, so this test monitoring, monitor that for the upper,

so the arms and the legs at a cost of $2,000 every five years for each upper and lower for lifetime duration, every five years.

Q And, Doctor, just briefly, the rationale for this lifetime plan, can you tell the jury?

A I think it is good for monitoring for someone with his condition and then especially combined with his co-morbidities, his other medical issues. What is really bad would be his osteoporosis, his brittle bones, so I think it should be checked periodically to make sure things are not getting worse because the worse thing you would want is for the spine to become unstable, and then you can see some more catastrophic issues occurring if more nerve or spinal issues get worse.

Q Doctor, your office is charging a fee for your time away from patient and --

A Yes.

Q Do you know how much that is?

A My office, paying my office $7,500.

Q If you were not with us today, what would you be doing?

A I was at the surgical center this morning. I had to cancel my afternoon cases to be here.

Q You've written, I think, you've issued -- you've issued a written report in this case, have you not?

A Yes.

Q Did you charge for that?

A Yes.

Q Do you recall what the charge is?

A My office charges it. Don't quote me on it. I think it is $750, but it could be couple hundred dollars either way.

Q And, Doctor, you and I have never worked together before, have we?

A No.

Q Have you done some work for my office in the past?

A Yes, I have done some.

Q Doctor, thank you for your time.

I have no further questions.

THE COURT: Thank you.

CROSS-EXAMINATION BY MR. GOLD:

MR. GOLD: Your Honor, I would like the Court reporter, if I may, I would like to mark, sorry, plaintiff's medical exchange dated January 21, 2022.

THE COURT: For identification?

MR. GOLD: Excuse me.

THE COURT: For identification?

MR. GOLD: For identification.

THE COURT: Sure.

MR. GOLD: It will be B.

THE COURT OFFICER: Defendant's F.

MR. GOLD: Sorry, because we marked, yes, you have --

THE COURT OFFICER: Yes, F.

MR. GOLD: Defendant's F.

(Whereupon, Defendant's Exhibit F was received and marked for identification at this time.)

Q Good morning, Doctor.

May I see the file you brought with you?

A Pardon.

Q May I see the file you brought with you please?

A Yes.

MR. GOLD: Your Honor, there is a report here I have not seen before. If we can just take a minute so I can read it?

THE COURT: Okay, I don't know what the contents of the file are, but I wouldn't describe those contents to everybody. If you want to take a minute, that would be fine.

MR. GOLD: Thanks.

(Discussion off the record.)

(The discussion off the record concluded and the following occurred in open court:)

THE COURT: Are you going to give it back to the doctor since he was reading from there?

MR. GOLD: There are things in there we need to

mark, but I don't think we need to mark it right away.

THE COURT: Great, so can we give them back. Give them to the officer, don't be approaching the witness without permission.

Q Dr. Grimm, you've acted as an expert on other cases?

A Yes.

Q In how many have you testified?

A I couldn't give you an exact number. I have been doing it, I have been practicing since 2011. I would say I've averaged maybe one to two a year so it is not something I do on a regular basis. It is just something I would offer my patient is in the course of treating them.

Q And are you partners with Dr. Kaplan or you actually work for him?

A No, I am an employee.

Q Dr. Kaplan does testify as well, correct?

A Yes.

Q And Dr. Kaplan was the first doctor to have contact in your office with the plaintiff; is that correct?

A Yes.

Q And Dr. Kaplan -- do you know how Dr. Kaplan got this file?

A Pardon, what is the question?

Q Do you know how Dr. Kaplan got Jhon Contreras as his patient?

A I do not.

Q Are there any other records -- I know that your file doesn't have any intake sheets, medical history. Did you have those back at the office and just not bring them?

A I do not know what we have at the office. I do have Dr. Kaplan's report.

Q That is Dr. Kaplan's report of March 1, 2018?

A Yes.

Q Can you read to me from -- again this report is in evidence. It is part of plaintiff's Exhibit -- what is it?

THE COURT: Mr. Kelly, do you acknowledge that Dr. Kaplan's report from that day is in evidence?

MR. KELLY: I assume so. He said there was a report that he didn't see yet so I don't -- I assume it is. I assume Dr. Kaplan's report is in evidence.

THE COURT OFFICER: That one?

MR. GOLD: No, oh, here it is. It is Plaintiff's Exhibit 6 in evidence.

THE COURT: Great, okay.

MR. GOLD: Dr. Kaplan's records.

THE COURT: What was the question?

Q Okay, can you read the doctor's objective translation, transcription?

A Physical examination today reveals marked tenderness in the mid-thoracic region. I am not having him do range of

motion. He does have spasm. He is complaining of numbness on exam and posterior and lateral aspect of the right thigh and buttock. He has positive straight leg raising. He does have some bruising above the left buttock. X-rays are taken of the thoracic lumbar spine which shows fractures of possibly T8, possibly T7.

Q Does it say, does the report indicate where the plaintiff was feeling pain?

A Just what I read.

Q What about on his objective transcription?

A Objective transcription, Mr. Contreras is seen for orthopedic evaluation on 3/1/18 for injuries sustained in a work-related accident of 2/4/18. Mr. Contreras was struck by some Sheetrock while working. He worked one day following the accident with increasing back pain. He eventually went to Elmhurst Hospital where he was told that he had a fracture in the mid back. He was placed in a thoracolumbar or those is --

Q And the assessment note?

A Assessment note, thoracic spine fracture T8, possibly T7 as well, post traumatic lumbar spine with symptom of lumbar radiculopathy.

Q So he initially came in with pain in the mid-thoracic region, T7, T8?

A I just -- what was read here, it says he was having pain mid thoracic with lumbar pain and symptoms of lumbar

radiculopathy.

Q Were any complaints made of the cervical spine?

A No.

Q Were any complaints made of the knee?

A No.

Q Now, you indicated that he sent them out for -- to see if he had lumbar radiculopathy, correct?

A I said sending for MRI of the lumbar spine to rule out disc herniation due to numbness.

Q You eventually, you can check for a lumbar radiculopathy with an EKG; is that correct?

THE COURT: EKG?

MR. GOLD: EMG, your medicine is better than mine.

Q EMG?

A That is one of the devices used to test, yes.

Q Your office does EMG's, correct?

A Yes.

Q Your office included, did an EMG on the plaintiff?

A Yes.

Q Your office included he did not have lumbar radiculopathy, correct?

A That would not be what the EMG, EMG came back, did not show radiculopathy at the time. EMG's are not precise. It does not detect mild to moderate radiculopathy. It detects

radiculopathy if the muscles have started to deteriorate, become damaged. You can have pain radiating to the muscle, signal still going, and you will not see the muscular damage yet. So the EMG does not rule out an EMG. It would rule it in if it showed it, but it could be a mild to moderate. It just hasn't yet started to damage the muscle.

Q When did you do the EMG?

A The EMG was done December 17, 2019.

Q So a year later did not have lumbar radiculopathy according to the EMG that he took, correct?

MR. KELLY: Objection, not the testimony.

THE COURT: Reread the question please.

(The testimony as requested was read by the reporter.)

THE COURT: It assumes a false premise. You can say that the EMG is negative. I don't think you can say he didn't have -- radiculopathy based on the doctors --

Q EMG he took a year after the accident -- I am sorry, year and a half after the accident, was negative, correct?

A Yes.

Q You never sent him for another EMG, did you?

A I did recommend further EMG's. They were never able to be done. I don't know if resources were available to have them done. I am not sure why.

Q Your office has the resources to do them, correct?

MR. KELLY: Objection.

THE COURT: Sustained, that is not the resources he is referring to.

Q Now, what percentage of your cases have you acted as an expert for the plaintiff?

A Pardon me.

Q What percentage of the cases that you have testified have you acted as an expert for your plaintiff?

A For a plaintiff, for my patient, yes, all of them.

Q All of them, so you've never testified for a defendant?

A This is not really a part of my practice. I don't advertise my testimony as trying to have it be something I do. I just offer it for my patients as part of my treatment.

Q Now, you referred Mr. Contreras to Dr. Brisson, correct?

A Yes, I believe Dr. Kaplan did.

Q You didn't refer him, Dr. Kaplan did?

A Yes, in Dr. Kaplan's first note, he just wrote he is referring to myself and Dr. Brisson.

Q Dr. Kaplan is an orthopedic surgeon, correct?

A Yes, he deals with joints and shoulders and ankles.

Q So that is why he referred him out?

A Because he doesn't do the spine.

Q Did either you or Dr. Kaplan -- and Doctor, I am sorry, strike that.

Dr. Kaplan also referred to Dr. Kolb, correct?

A I believe he was referred for an MRI.

Q To Kolb Radiology?

A That's where it was done, yes.

Q Do you know what radiological exams he asked for?

A I believe he had the -- overtime he has had -- the initial one was the low back and thoracic spine. Then later points in time I believe he has had his neck and his knee done.

Q Did you -- let's talk about the initial one. Did you send him out for a cervical MRI?

A Let me look and see what the initial -- the initial MRI's that I have in my chart are for lumbar MRI on March 8, 2018, thoracic spine MRI on March 21, 2018, and then he got an MRI of his right knee on August 3, 2018, and then he had an additional thoracic spine MRI on March 19, 2019 and lumbar repeat MRI on March 25, 2019 and a cervical MRI on March 25, 2019.

Q So didn't send him out for cervical MRI for your --

A Correct.

Q And when does Mr. Contreras first note in your office visits that he has cervical pain?

A Bear with me here. My first visit where we discussed the cervical spine was December 3, 2018.

Q So about six months after the accident at least he complained about cervical pain?

A Yes.

Q Is that related to the accident?

A I think it is reasonable to find it related to the accident.

Q But he never had prior complaints?

A Uhm, in my discussions with him later, he said he had the neck pain initially, but it was not as painful as the other areas of the spine, and it progressed over time to the point that we did discuss it starting in December as it was becoming more severe.

Q Did you send the plaintiff for chiropractic treatment?

A I would never send someone with osteoporosis for chiropractic treatment.

Q I agree with you.

MR. KELLY: Objection, move to strike, ask for an instruction.

THE COURT: Sustained with respect to counsel's agreeing or not agreeing.

Q And why would you not send somebody with osteoporosis for spinal, for treatment?

THE COURT: Chiropractic.

Q Chiropractic treatment.

A Reiterate, I am thinking of chiropractic adjustments. Some chiropractors will do just modalities where they are using heat, ice, Tens units, not actually adjusting the spine. If they are doing that, I would be okay with it. If they are doing spinal adjustments, I would never do that.

Q Spinal adjustments do more damage than good?

A Yes.

Q Did you ever ask Mr. Contreras if he was having spinal adjustments done?

A I did not.

Q Would spinal adjustments on someone with osteoporosis cause pain?

A If it caused damage.

Q Now, there were disc bulges and herniations picked up on later MRI's but not on the earlier MRI, is that correct?

A Pardon.

Q Were there disc bulges and herniations on later MRI's that were not picked up on earlier MRI's?

A Let me compare the two studies.

Yes, it looks like there was an issue of T8-T9 on the later MRI. It was not picked up on the earlier MRI in the interval appearance of a herniation at T2-T3.

Q So, assume for a moment that Mr. Contreras testified in his deposition that he went to a chiropractor who adjusted his back, cracking his back. Would the new injuries that you

just noticed be caused, could they be caused by the spinal adjustment?

A It is hard for me to comment on that without knowing exactly what the spinal adjustment would be, is it massage, is it putting him in a traction machine, is it manual traction?

Q If he testified -- assume that Mr. Contreras testified at his deposition that a chiropractor would crack his back as part of his treatment. Would that cause the new injuries?

MR. KELLY: Objection, same question, he just answered it.

THE COURT: Correct, sustained.

Any allegations that the plaintiff testified that he went to a chiropractor following this accident?

MR. GOLD: In his deposition, yes, there are.

THE COURT: Following the accident, not before?

MR. GOLD: Yes.

THE COURT: So allegedly related to the accident?

MR. GOLD: Yes.

THE COURT: Okay, we can talk about afterwards, why that doesn't matter.

Q So you were unaware that the plaintiff was going for chiropractic treatment?

A No, I don't recall being notified of chiropractic

treatment. I didn't send him to it.

Q Did you receive physical therapist notes at that point --

A Getting those from the therapist is difficult.

Q Do you know what physical therapist he went to?

A I do not. Patients often go to somewhere close to home. If they are from far away and --

Q Is there a reason you sent plaintiff -- you knew the plaintiff resided in Queens, correct?

A No.

Q You didn't know?

A I could have found that out, but I wouldn't have been able to tell you that.

Q Do you know why he was sent to Kolb Radiology rather than to any of the radiology places in Queens?

A I do not.

Q Have you worked with Kolb Radiology in the past?

A I mean I have worked with probably most of the radiology places in New York.

Q Have you referred other patients to Kolb Radiology?

A Yes.

Q How many?

A I couldn't tell you now.

Q Hundreds?

A I -- probably in the hundreds, yes.

Q And you received the reports from Kolb Radiology, and you then plan your treatment, correct?

A I review often times the images if they are of the neck and the back. We have an on-line portal where we can look at the images, and so I will correlate those sometimes with the reports.

Q Did you look at the Kolb Radiology reports that you received?

A I looked at the reports and the images.

Q Let's talk about just the reports in 2018. Did those reports ever mention osteoporosis?

A No.

Q Osteoporosis though is something you would need to know to treat a patient, correct?

MR. KELLY: Objection.

THE COURT: Sustained.

Q If a patient had osteoporosis, is that something that you would need to treat a patient?

MR. KELLY: Same objection, same question.

THE COURT: Sustained.

Q If a patient has osteoporosis, is that a relevant factor in your treatment plan?

A Yes.

You wouldn't see that on an MRI.

Q You would not see osteoporosis on an MRI?

A No.

MR. KELLY: Objection.

THE COURT: Hold on, stop, he just asked him to repeat so he could hear it. He is not re-asking a question.

Q Would you see it on a CAT scan?

A You would see it on a DEXA scan, the treatment for osteoporosis.

Q Did you review the records that came from Elmhurst Hospital of --

A I did not. I have a, I have a DEXA scan from Elmhurst Hospital. It was done on 3/6.

THE COURT: Of what year?

THE WITNESS: 2018.

Q I ask that you take a look at Defendant's F for identification?

THE COURT: He just said he did read the DEXA scan for --

MR. GOLD: Okay, I --

THE COURT: All right.

A Okay.

Q Did you prepare this report?

A Yes.

Q Is this report signed by you?

A Yes.

Q Is this report something you prepared in anticipation of --

A Yes.

Q Is this report something you anticipated that the jury would get this?

A Yes.

MR. GOLD: Your Honor, I move Exhibit F into evidence.

MR. KELLY: No objection.

THE COURT: Without objection. So subject to redaction if there is anything you can't get from the jury.

(Whereupon, Exhibit F was received and marked for evidence at this time.)

Q I am going to ask you to go to the second page, review of records.

A Yes.

Q What records did you review on two -- what record did you review dated 2/20/2018 that you provided a record --

A You asked if I had reviewed it in preparation for court today?

Q No, I asked if you ever reviewed --

A Okay, I apologize.

The discharge instructions from Elmhurst Hospital.

Q Did you review the records from Elmhurst Hospital

dated 3/6/2018?

A Show me where I am looking --

THE COURT: He is asking --

A Yes, report right here, report from Elmhurst, that is the DEXA scan.

Q Did you review the records of Elmhurst Hospital dated 4/9/2018?

A Yes.

Q Did you review the records of Elmhurst Hospital dated 7/16/2018?

A Yes.

Q None of the fractures are in your file --

A I believe it was multiple -- hundreds of pages --

Q I am going to ask if you reviewed the initial records of Elmhurst Hospital from 2/13/2018?

A Yes, but not in preparation for today.

Q But you didn't approve --

THE COURT: Don't walk up to the witness again without permission.

MR. GOLD: Sorry, Your Honor.

THE COURT: I have been trying to tell you about it, but you can't just wonder back and forth in the well.

Can you --

MR. GOLD: I am sorry, but there is a lot of --

THE COURT: Okay, that is fine, just don't approach the witness out permission.

A My assistant did tell me.

THE COURT: Hold on. These are all documents in evidence, and they are now strewn about in piles on the shelf so I want to make sure we keep them in order, and we keep track of what papers people have. Then if something goes wrong, it is Haggerty's fault, and I don't have to blame it for you. Don't worry, Haggerty, it's not your fault.

MR. GOLD: Can you please hand that to the witness?

THE COURT: You can give it to the witness.

THE COURT OFFICER: Yep.

THE COURT: You can give it to the witness.

THE COURT OFFICER: Okay.

MR. GOLD: Judge, would you like these marked separately?

THE COURT: Can we do one thing at a time? Honestly, I am not at all happy about the condition of the exhibits that are now sitting on the jury bench, shelf, so let's deal with one set so please don't commingle the documents. Please don't commingle the documents. Please leave that where it is and keep the other documents that just came off your desk.

MR. GOLD: I will not commingle.

THE COURT: If you have a question about this document then just ask the officer to hand the witness and that would be great.

MR. GOLD: I do.

Q Did you review that record?

A When I made the report, I reviewed the record. I did not review it for today. I just found out I was coming to court, I think, last Friday.

Q Do you know if when you reviewed that record, you noted that on 2/13/2018, that the radiologist at Elmhurst Hospital diagnosed the plaintiff with osteoporosis?

A Okay.

Q Did you know that?

A I mean I have seen his DEXA scan where he was --

Q Is there a reason --

MR. KELLY: Objection, can he finish the answer?

THE COURT: Yes, why don't you let him finish answering the question?

A I have seen the DEXA scan.

Q The DEXA scan was done on what date?

A I believe it is 3/6.

Q So it was done after the initial report, correct?

A Yes -- which initial report?

THE COURT: After the Elmhurst initial report?

MR. GOLD: After the Elmhurst initial report.

THE COURT: But before the first time the plaintiff saw this witness?

MR. GOLD: Yes.

THE COURT: So I think the witness' point is, what he said was I had already seen the DEXA scan when I saw the plaintiff so, right, I am not sure what the question is.

MR. GOLD: But he said that you can't diagnosis osteoporosis by --

THE COURT: MRI --

MR. GOLD: By CAT scan.

THE COURT: Hold on, I am actually speaking now.

This is part of this business about staying at the podium, that it is actually a courtroom that I control and not a courtroom you can control so I am not going to have you wonder about in the well. I am not going to have you toss exhibits around, and I am sure as heck not going to have you talk over me anymore.

The witness again, the jury is instructed that it is the jury's recollection of the testimony and not mine that controls, but unfortunately or for better or worse, for the purpose of ruling on the objections, I am

obligated to give my recollection of the testimony understanding that it doesn't, shouldn't change your opinion of what the testimony is.

The Court believes that I heard the witness to say that you cannot diagnosis osteoporosis with an MRI, not that you cannot diagnosis it with a CT scan, but that you cannot diagnosis it with an MRI and that a DEXA scan is the better scan. That is what I think I heard him say. I think I have heard other witnesses in this trial say that, but so I think it's a mischaracterization.

MR. GOLD: I apologize, Your Honor.

Q Can you diagnosis osteoporosis with an MRI, with a CT scan?

A You can see signs of osteoporosis with X-rays, CT scans because you will see bony degeneration, but then the gold standard would be to send for the DEXA scan to evaluate the severity.

THE COURT: Which is what Elmhurst did at some point?

THE WITNESS: He -- I believe had the DEXA scan on 3/6/2018.

THE COURT: So two weeks after the record that counsel just asked you about?

THE WITNESS: Yes.

THE COURT: Okay.

Q And so when he first came to you, did he tell you he had osteoporosis?

A Yes, I was aware of it which is I noted that I was going to be conservative regarding steroid injections due to it.

Q Did he note -- did Elmhurst note there what hypertrophic changes at L1 --

A Where am I -- which document? I am sorry, I don't know where I am looking or what.

Q There was a radiology report?

A Which document you are referring to? Do you know which?

THE COURT: You are asking him to look at his report or Elmhurst records?

Q On the DEXA report, DEXA scan, did they note hypertrophic changes at L1?

A DEXA scan is a bone density scan. I mean I read the impression. It says, "T score for the lumbar spine, L4 more than L2. L3 is in osteoporotic range while the T scores for femoral neck are osteopenic." Then it says, "Although the scans suggest decreased bone density in L2 to 4 and hypertrophic changes at L1, only the values for L4 will be reported since they are the most involved."

Q What is hypertrophic changes?

A Sort of bony swelling.

Q Swelling?

A Yes, bony changes.

Q New bone growth?

A Yes.

Q How long does it take for new bone to grow?

A It depends. It could be months, years.

Q Months or years.

So the changes at L1 were months or years old?

A The bony growth would be, yes.

Q So that would have predated this accident, correct?

A Yes.

Q Because this was only taken less, a month, six weeks after the accident, correct?

A Anybody over the age of 50 -- anybody over the age of 50 probably has it. I probably have hypertrophic changes.

Q Does that reference on the DEXA scan indicate to you that the plaintiff had an old injury?

A No.

Q Does it indicate that the L1 was damaged at an earlier date?

A No.

Q Would you have bony growth without an injury?

A You can.

THE COURT: I think the witness just testified that anybody over a certain age is likely to have it.

Q You indicated some doubt before as to whether the L1-L2 were injured at the same time as the T7?

MR. KELLY: Objection to form.

THE COURT: Sustained, yes. He is characterizing the witnesses's testimony --

Q I can ask you --

THE COURT: Let's just -- why don't you just ask the question the way I think you are about to ask it?

Q Is it your opinion that the T1 and the T2 -- I am sorry, L1 and the L2 were injured at the same time as the T --

A I think it is feasible that they were injured at the same time, but my -- what I was stating earlier just saying that I can say with greater confidence that the higher thoracic ones were more of an acute injury caused from acute trauma. It is harder to tell with the transitional ones because these are -- he is a patient with osteoporotic conditions, condition and that is where most commonly chronic injuries can happen, but he did not have any prior history of pain there so I think it is reasonable to think that they could have happened at the same time, but if you can am I 100 percent certain, I would not say that, but I think there is a reasonable degree of medical certainty that they could have happened at the same time, but the upper thoracic were acute in my opinion based on journal articles that I did review in preparation for today and the lower ones I can say with less confidence.

Q So with less confidence, you are saying with less confidence that it happened on February 4, 2018?

A Less confidence than the upper thoracic ones.

Q Do individuals with osteoporosis ever experience compression fractures without having pain?

A Yes.

Q So they can experience compression fractures without knowing that they have compression fractures?

A It happens.

Q Did any of the medical professionals at Elmhurst when the plaintiff was first treated on 2/13/2018 note that these were all -- lower spine were all -- appeared to be all fractures?

A I don't know.

Q Did you review the record?

A I reviewed it for the report. I don't remember exact details of the 400 to 500-page report.

Q Is there a reason that you don't mention the three -- I am sorry, 2/13/2018 injury -- no, I am sorry, the February 13, 2018 medical treatment in your expert report that has been marked as Exhibit F which you testified you anticipated --

MR. KELLY: Objection, Your Honor. I believe he didn't talk about the film taken on 2/13/18.

THE COURT: I don't have the report in front of

me, so I will have to take everyone's words as to what the contents are.

A I don't quite understand the question.

Q Is there a reason that you prepared an expert report --

THE COURT: There has already been an objection so what I said is since Mr. Kelly's recollection is that there is a reference to it in the report, I am asking you to look at the report together, get your stories straight and then ask the question again if it's appropriate. If it is in the record, withdraw the question.

MR. GOLD: It is not under the record review, Your Honor.

MR. KELLY: The question he asked was did you review the Elmhurst Hospital record, did you look at the report of 2/13/18 where the radiologist at Elmhurst said that the patient was osteoporotic. He answered the question and said yes.

MR. GOLD: That is not the question I asked. I asked when he prepared Exhibit F which is the expert report which he expected the jury to see, if there is a reason he didn't mention the 2/13 --

THE COURT: Specifically within the Elmhurst record that he already said he read, reviewed when he wrote the report?

MR. GOLD: He prepared a record review, Your Honor.

THE COURT: Which includes the Elmhurst Hospital record?

MR. GOLD: Which did not, which mentions Elmhurst records directly, specifically, and summarizes them, but he did not summarize the initial report.

THE COURT: I apologize, I am going to ask the witness myself now.

Is there a reference to the February 13, I am sorry, what was it, initial report or to the findings --

MR. GOLD: Initial.

THE COURT: -- I am sorry, I am speaking now -- to the findings anywhere in your report, just so I can make sure?

THE WITNESS: I am trying to look through it.

THE COURT: Why don't you take a minute to look through it?

THE WITNESS: I mean I don't see anything specifically with that date on it in my report, no.

Q Is there a reason why you prepared an expert report without discussing his first visit to Elmhurst Hospital?

MR. KELLY: I am going to object to that. It appears to be speculation.

THE COURT: Sustained.

Q Does the first report of Elmhurst Hospital indicate the radiologist's belief that these are old fractures?

A Can you direct me to where it says that?

Q I could if I could get to the page. I am not allowed to --

THE COURT: That is just not my rule. That is everybody's rule, right, that you cannot just approach the witnesses. It is not something that I am doing to you.

A I guess it kind of references to the CAT scan that were done during.

THE COURT: During that same visit?

THE WITNESS: Because it's a 2/20 discharge from, I think, that visit.

THE COURT: Okay, can you tell us what page that is on, just tell us what page that is on in your record?

THE WITNESS: Page two, page two. I mean I think it is the discharge from that hospital visit, but I am not 100 percent sure, but I referenced the CAT scan, and this exam is done in the emergency room, CAT scan, CT lumbar spine, CT thoracic spine, X-rays lumbar spine, flexion, extension.

THE COURT: Page two of his report is directing you to that.

MR. GOLD: But that is not --

THE COURT: Respectfully that is what he's doing.

MR. GOLD: Page two, the report he mentioned on 2/20 is not the discharge. It is 2/14.

THE COURT: Okay.

MR. GOLD: I am sorry, I thought it might have been.

Q Plaintiff went to the hospital on 2/13. When was he discharged?

A 2/14, sorry. I did not realize there was a second.

Q So this note on your page about 2/20 discharge is not related to the first visit, correct?

A Yes.

Q So two pages, tabbed two pages with little highlights on -- do you see that?

A Yes.

Q Do you see the radiologist comment about the fractures in the back?

A Under the impression here?

Q Yes.

A Multiple thoracolumbar spine compression fractures as described, most severe L1. These are of indeterminate age.

Q What does indeterminate age mean?

A You can't tell what the age is.

Q Can you turn to the next page? What is the

impression there?

A Assessment, CT scan of the thoracic lumbar spine, revealed what appears to be old compression fractures.

Q Now, when you got the report from Dr. Kolb, did Dr. Kolb mention the marrow signal at the location on one and two, L1 and 2?

A Yes.

Q What did he say it was?

A I think he said that it was normal.

Q Normal?

A I believe, I am not reading it so not the exact terminology.

Q Does -- the phrase unremarkable be the same as normal?

A Yes.

Q Now, would unremarkable marrow signal be consistent with old fractures?

A Yes.

Q Did you actually read the films yourself?

A I looked at the films. We have a portal where we can review them.

Q Let's go back to Exhibit F for a minute.

THE COURT: This is --

Q It is the report --

THE COURT: Just make sure again that we keep

the Elmhurst records separate.

Q Go to your reference, your review of records 3/1/2018.

A Okay.

Q Second line, Dr. Kaplan, can you read that in please?

A Dr. Kaplan noted that the patient sustained fracture to the mid back and was placed in thoracolumbar ortho. Dr. Kaplan performed X-rays at his initial consultation of the thoracolumbar spine showing fracture of T8, possibly T7.

Q Thank you.

Do you have those X-rays with you?

A No.

Q Do you have reports of those X-rays with you?

A No.

Q So Dr. Kaplan found one fracture at that time?

A I would ask Dr. Kaplan.

Q Now, let's go to 3/6/2018. You reviewed MRI of the lumbar spine?

A Yes.

Q And then it said the T1, L2 vertebra is unremarkable?

A Yes.

Q Go to 3/6/2018, report from Elmhurst Hospital on a bone dense -- DENSITOMETRY?

A Okay.

Q And that is the test that found or confirmed

osteoporosis, right?

A Yes.

Q Had you done any injections on the plaintiff as of that date?

A No.

Q Had you sent him for therapy as of that date?

A When was this? This is 3/6. I don't believe he had been sent for therapy yet, but I am not 100 percent sure.

Q Now, you then sent on 3/21, you reviewed the report of Dr. Kolb, thoracic spine, correct?

A Yes.

Q That confirmed that the thoracic spine fracture was acute, correct?

A Yes.

Q Did you, do you know if a marrow signal was different, meaning acute location as in the lumbar?

A I think he did make reference to the marrow in his report.

Q Now, go to 3/28, you received initial consultation by Dr. Paul Brisson, correct?

A Yes.

Q Did Dr. Brisson recommend any surgeries?

A No.

Q Did Dr. Brisson recommend any treatment?

A I think he recommended -- let me bring up his report,

X-rays and treatment with his primary care doctor.

Q Did Dr. Brisson -- do you know how many times Dr. Brisson actually saw the patient?

THE COURT: After we get an answer for this question, let's take a side bar.

A One, two, three, four, I think approximately six times.

Q How many reports do you have from him?

A I have six.

Q Six?

A That is what I --

THE COURT: Hold on, side bar.

(Discussion held outside the courtroom, off the record.)

(The discussion off the record concluded, and the following occurred in open court:)

THE COURT: You were getting ready to ask the next question. We get a read back of the last question and answer just to get Mr. Gold back on track.

(The testimony as requested was read by the reporter.)

Q What are the dates of those reports?

A I have a narrative report from Dr. Brisson that is -- this is received 3/5/2020, but it is not sure -- there's not an actual date of when he performed it.

I have a visit of Dr. Brisson, follow up, consultation July 3, 2019. I have an initial consultation report from Dr. Brisson March 28, 2018. I have a follow-up consultation report, June 6, 2018, follow-up consultation report of July 18, 2018, a follow-up consultation report August 8, 2018.

Q So you have four reports following the accident in the same year of the accident, correct?

A Yes.

Q And at that point, Dr. Brisson stopped seeing the patient for another eight months; is that correct?

A Yes.

Q And on the visit in 2019, he was there to discuss the MRI, 2019 MRI?

A Yes, July 3, 2019 he had a follow-up.

Q Did Dr. Brisson tell you that he would not operate on the plaintiff?

A He -- I mean Dr. Brisson does not generally discuss things with me or call me, so he did not talk to me.

Q Did he discuss it with Dr. Kaplan?

A No.

Q Do his reports indicate that he does not intend to perform surgery on the plaintiff?

A Yes, I believe he does, was not recommending the surgery.

Q Did Dr. Kaplan report -- I am sorry.

Did Dr. Brisson's reports indicate that the spinal fractures were stable and in good alignment?

A I don't see it on here, but I am assuming they do if you are telling me that. Let me look for it. Can you direct me to where it is?

THE COURT: Is Brisson's record in evidence? Let's let the record speak for itself and not ask him to comment on somebody else's record.

MR. KELLY: It is --

MR. GOLD: That's fine.

Q You sent the plaintiff out for a second opinion on surgery, correct?

A Yes, to Dr. Frazier.

Q Why?

A I believe the patient was requesting it.

Q When did the patient request it?

A I have it in my chart. I can find the date for you. I mean he saw Dr. Frazier on November 8 of 2019 so I will try to find the exact date --

Q So he saw Dr. Frazier eight months, ten months, nine months after the accident?

A Yes, saw Dr. Brisson, Dr. Frazier on looks like November 8, 2018.

THE COURT: So approximately nine months after

the accident?

THE WITNESS: Yes.

Q By that time, you were aware that Dr. Brisson was not going to operate?

A Yes.

Q Can you read Dr. Frazier's report into the report please, it is not in evidence?

A The whole report?

Q Dr. Frazier's report.

MR. KELLY: Objection.

THE COURT: It is not in evidence. He can't read it into the record.

Q It's a note that you reviewed in making determinations in connection with the case, correct?

MR. KELLY: Same objection.

THE COURT: Yes, because that doesn't make the document, itself, admissible. It only means he is allowed to rely on it, refer to it.

MR. GOLD: May I mark it for identification, please?

THE COURT: Mark Brisson record for identification.

MR. GOLD: Frazier's, I apologize, Frazier's record for identification, sure. Is it here under a subpoena.

MR. GOLD: It is brought by him in anticipation of his testimony.

MR. KELLY: No.

MR. GOLD: We requested, we subpoenaed his file.

THE COURT: Hold on, we don't do that in front of the jury, right. If it's not currently here under subpoena, you can certainly mark it for I.D., but I don't know what else we are going to do.

For a time check, we are at 4:03 so we have about a half hour.

MR. GOLD: I won't be finished.

THE COURT: You will be finished today with this witness.

MR. GOLD: I have his report -- strike that. Can we have a side bar please?

THE COURT: Beg your pardon, side bar, please.

(Discussion held outside the courtroom, off the record.)

(The discussion off the record concluded, and the following occurred in open court:)

THE COURT: Next question, Counselor.

Q Did you ever evaluate the plaintiff for kidney pain?

THE COURT: Kidney failure?

MR. GOLD: Kidney pain.

THE COURT: Kidney pain.

A He came in at one visit and had notified me at the interval from his prior visit, he had had kidney stones.

Q And --

A I did not diagnosis it.

MR. GOLD: May I have the Frazier report please?

THE COURT: The what?

MR. GOLD: Frazier report please.

THE COURT: Sure, which is not in evidence, right?

MR. GOLD: No.

Q Does your expert report, Exhibit F discuss the Frazier report, November 8, 2018?

A Which, my most recent one?

Q Yes.

June 3, 2020 expert report, Exhibit F.

A Yes, 11/8, it says initial consultation report by Dr. Daveed Frazier, New York Spine -- City Spine, surgeon.

Q And Dr. Frazier would not operate either, correct?

A Yes, he just noted that -- I think he just -- he was not recommending surgery at that time. He just said kyphoplasty in the future may be an option.

Q If there was another fracture, right?

A Yes.

Q Plaintiff had another fracture unrelated to this accident, correct?

A Yes.

Q Just because he has osteoporosis?

A Yes.

Q So kyphoplasty wouldn't necessarily -- related to this accident, correct?

A May or may not, yes.

Q Now, we were talking a moment ago about kidney pain?

A Yes.

Q Did the patient suffer from kidney pain?

A He had --

MR. KELLY: Objection.

THE COURT: Asked and answered. The witness already testified that the patient came in at one point, reported that he had a kidney stone and reported pain related to it.

Q When did you -- when did he report that?

A Let me find it. I remember seeing a report, he reported interval treatment for kidney, and he had a procedure done to remove it. The date was -- 10/4/19 visit, and he reported to me in the interim since his last visit, he has had kidney stone removal surgery. Then my previous visit before that was 8/21 so somewhere between 8/21 and 10/4/2019.

Q Do you know if he had any kidney stones pass in 2018?

A I don't know.

Q Are kidney stones associated with back pain?

A They can be associated with lateral upper back pain, not midline.

Q And you mentioned in your report that the patient went to the hospital in July 2018, correct?

A Yes.

Q He was given morphine for his pain?

A Yes.

Q Do you know how long after that appearance he passed kidney stones?

A From what I understand, he had surgery for removal of the kidney stones and not passing.

Q Did he pass kidney stones before 2018?

A I don't --

THE COURT: Before 2018.

Q Before the surgery in 2019, did he pass kidney stones?

A I don't know.

Q Did you evaluate him in July of 2018 or thereabouts for kidney stones?

A No, I am not a renal doctor.

THE COURT: I apologize before you get to the next question. I have to remind all the jurors that you cannot look at your phones, apple watches, any other

electronic devices while you are in the courtroom for any purpose. If you need a recess because you have an emergency, ask for a recess, and we will give it to you.

A JUROR: I need a recess.

THE COURT: What?

A JUROR: I need a recess.

THE COURT: Great, let's take five.

THE COURT OFFICER: All rise, jury exiting.

(The jury exited the courtroom and the following occurred:)

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

(The jury exited the courtroom and the following occurred:)

(Whereupon, a recess was taken.)

(After the recess the following occurred:)

THE COURT: All right, ready to go.

THE COURT OFFICER: All rise for the jury.

THE COURT: You can all be seated, thanks. Everything okay?

A JUROR: Yes, thank you.

THE COURT: Sure.

Q Sir, you issued that you wrote in your report that the patient went to Elmhurst Hospital complaining of pain and was given morphine on or about July 16, 2018; is that correct?

A Yes.

Q Did you rule out kidney pain as a cause of that visit?

THE COURT: Sorry, is the allegation he gave the patient morphine?

MR. GOLD: No.

MR. KELLY: No.

THE COURT: Only that he made a note.

MR. GOLD: (Nodding)

A No, I did not.

Q Did you ever prescribe morphine to the patient?

A No.

Q Did you ever see back pain in the patient that would require you to give him morphine?

A No, I never gave him morphine.

THE COURT: Not just in this patient or in any patient?

MR. GOLD: In this patient.

A I never provided this patient morphine, no.

Q Did you ever observe pain in this patient for back pain that was sufficient for you to prescribe morphine?

A I never deemed it necessary to provide morphine. Generally I avoid opioids at all costs, especially in today's -- I am not saying morphine would not be helpful for a short time, but I general -- generally do not prescribe that

for patients.

Q I am going to ask that you take a look at the 8/23/2018 Elmhurst records that you referred to in your expert report?

THE COURT: Make sure we keep the exhibit -- the exhibit marked for I.D. separate from the Elmhurst record please.

THE COURT OFFICER: Sure.

THE COURT: And separate from Exhibit F.

A Okay.

Q Now, what is your comment, that report in your expert report?

A I mean, okay, records of Elmhurst Hospital clinical, clinic records. The patient was seen for initial evaluation on this date after his ER visits. The patient was referred to Mount Sinai Hepatology Clinic for post transplant care. He was also referred to urology for pain and dysuria.

Q What is dysuria?

A Painful urination.

Q What is that caused by?

A It can be caused by kidney stones.

Q Now, assume if you will that the patient told you on or about 9/20 that he passed kidney stones. Would you assume that that hospital visit on August 3, 2018 was the result of kidney stones?

MR. KELLY: Objection, speculation.

THE COURT: Well, yes, sustained as to the form of the question for sure.

Q Do you have an opinion as to whether the August 3, 2018 hospital visit that you mentioned in your report is the result of kidney stones?

A I am not a renal doctor. I am not sure. I have not really reviewed much kidney stones since residency since it is not my general treatment so I would ask a renal doctor what the timing would be so I can't really give an opinion --

Q On the --

A On the different specialty.

Q On the document that I have just placed in front of you, there is a blue tag, and it is highlighted language on that blue tag. Can you read it to me?

A Where?

Q Not highlighted -- black, in bold.

A History of extraction of renal calculus or ambulatory referral to urology.

Where?

THE COURT: Counsel, just stay at the podium.

MR. GOLD: Sorry.

THE COURT: Stay at the podium.

MR. GOLD: Sorry.

Q Under the history of extraction, there is "order

comments." Can you read that please, "order comments?"

A Okay, patient with history of kidney stones, status post lithotripsy in Venezuela. Complained of pain in kidneys and dysuria times one month. Please evaluate.

Q After reading that, do you believe that the July and August hospitalizations were the results of kidney stones?

MR. KELLY: Objection.

THE COURT: Sustained.

The witness has already said that this is outside of his area of expertise and specialty, and the fact that he made an office note mentioning that the patient went to the hospital or to the doctor for something unrelated to his specialty doesn't qualify him to comment on the treatment -- same as if he went and said he had a hang nail, that would not qualify him to be an expert on hang nails. I don't know that you are not -- I am not saying you are not.

MR. GOLD: But this --

THE COURT: If we are now at 4:30 in the afternoon going through every time he went to the hospital, if you want to take note of what the record says, the record, itself, speaks for itself. The fact that the expert, the witness who is here today who has already expressed that kidney stones and renal or hepatic issues are outside of his area of knowledge or expertise

and that he won't speculate about them means that you need to move on.

Q When you wrote -- now, this wasn't an office note, Exhibit F, right, this was an expert report, correct?

MR. KELLY: Objection, he is a treating physician, Judge.

THE COURT: Sustained.

Q You expected the jury to see that, correct?

THE COURT: As it relates to another record that is also in evidence? Meaning if you are relating to things that weren't in evidence, I wouldn't let the jury see it.

Q Is there a reason you don't mention kidney stones in any of your reports or any of your history notes, in your expert report?

A There's not a reason. I just -- I talk about being referred to urology for pain, dysuria and I mention kidney stones in my records. I don't treat kidney stones. I guess it wasn't on the top of my mind.

Q Did you tell the plaintiff he needed to get treatment for his kidney stones?

A He got treatment for his kidney stones. I didn't refer him to get treatment for his kidney stones; the hospital did.

Q Now, do you know whether plaintiff had surgery for

kidney stones?

A I don't know the exact date, no.

Q Do you know if it was August 26, 2019?

A Direct me to this. I am assuming there is a report regarding that. I wasn't treating him for the kidney stones so I wasn't -- I just made a mention of it that it happened.

Q You were treating him for pain?

A I was treating him for his spinal pain.

THE COURT: For back pain -- is flank pain the same as back pain, Doctor?

THE WITNESS: Kidney stone pain would be lateral up high to the sides.

THE COURT: The question is when --

THE WITNESS: Flank pain is something different.

THE COURT: I apologize. When you hear a reference to flank pain in your note, in your report, are you trying to connect the flank pain to this patient's injuries, alleged injuries that he is seeing you for --

THE WITNESS: No.

THE COURT: -- or are you just making note of the fact that he has pain in another -- another type of pain in his body?

THE WITNESS: Yes.

THE COURT: Can we -- I will ask that for any

reference where the doctor made a reference in his expert disclosure to pain that is not related to the injuries, that we just get straight which of those injuries that it is now so we can move on?

Q I am not sure that helps, but can you tell us -- can you tell us which entries in your report mentioned pain that is not related to back pain, that is not related to this accident?

MR. GOLD: There you go.

A Flank pain is to the side. Compression fracture pain would be centralized so then it would be characterized differently if the patient was describing, coming to treatment for me.

Q I am going to show you the report dated September 13, 2018. There is an orange page, tagged in bold language.

THE COURT: Again, I will just ask that we keep the document for I.D. and doctor's report separate from the pages from the Elmhurst records which are now out, I think, out of order anyway.

Q What does that report indicate?

A From the Elmhurst record, they are reported no midline spinal tenderness, mid lower para-spinal tenderness, ambulatory, able to walk, heels, toes, sorry --

THE COURT: Just put it on the desk in front of you.

A Five out of five strength bilaterally, no pronator

drift.

Q Does that indicate to you that he is there for kidney pain, no midline back tenderness?

A No.

Q Did he pass kidney stones within a week --

A I don't know.

Q Do your notes reflect that he passed kidney stones within two weeks of that visit?

A My notes --

MR. KELLY: Objection, Your Honor.

THE COURT: Sustained. I think I asked now two or three times that we move on from records that speak for themselves, namely the Elmhurst records and stop asking this doctor to explain for you records related to a specialty outside of his area of expertise for which I am -- I've accepted him as an expert witness.

If you want to bring somebody to interpret on your case-in-chief to interpret Elmhurst Hospital kidney records, nephrologist, urologist, hepatologist, somebody else, you are welcomed to do that on your case-in-chief -- but at 4:30 something in the afternoon, to use physical medicine and rehabilitation -- withdrawn -- spine management, pain management doctor to try to explain records that are outside of his area of accepted expertise by me, that is not the appropriate use of the Court's

time, witness' time, the jury's time. You are welcomed to bring an expert to talk about kidney stones, but this is not that expert.

MR. GOLD: We will be bringing an expert.

THE COURT: This isn't that expert so let's move on with this expert so we can get this case -- withdrawn -- so we can get this witness done during business hours today.

MR. GOLD: Where is the chart on his medical -- the exhibit on medical costs that was here this morning?

THE COURT: Oh, the big blow up? Was it in front of the -- it is in front of the bench.

Q Sir, what medications was the plaintiff taking, or did you anticipate that he would be taking for the rest of his life when you put these damages in?

A One he utilized most regularly was nonsteroidal anti-inflammatories so like ibuprofen, but he does have muscular spasm. I feel he could utilize that on an occasional basis. He has topical, muscular pain; topical anti-inflammatory cream would be beneficial as well. The most useful one which is the ibuprofen probably on a fairly regular basis for pain.

Q How often was he taking ibuprofen?

A I don't have it most recently, but I wouldn't find it uncommon if he was taking it regularly, every day, every few

days.

Q But did you in your notes reflect how often he took ibuprofen?

A I could see when the last one was. I think I just noted in my notes that he was utilizing ibuprofen for pain control. I don't know exact time.

Q Was his pain constant or intermittent?

A I think his pain waxed and waned. Some visits he reported it was getting better with therapy, other visits he said it was worse.

Q In any of those varieties, did you evaluate whether the pain might be coming from the -- a source other than his spine?

A No.

Q On any of those visits, did you note whether he was reporting pain in a new area that may have been caused by chiropractic treatment?

A No.

Q Now, pain management visits, that is your specialty, correct?

A Yes.

Q And the 250 per visit, that is what you charge?

A That is cash price to visit, with just the visit only, no injections, anything like that.

Q 250?

A Yes.

Q Orthopedic surgeon visits and orthopedic spinal surgeon visits, what is the difference?

A The orthopedic spine would be Dr. Brisson. Orthopedic visits, he probably would not need that off of his joints. He wasn't complaining as much.

Q So the orthopedic spinal visits -- the orthopedic spinal visits $25,516, you assume he doesn't need --

THE COURT: No, the other way around.

A Other way around.

Q Orthopedic surgeon visits for $61,237?

THE COURT: He does not need as often.

Q Perhaps you can step around?

THE COURT: What the witness said, he wouldn't need as often because he does not have as many complaints.

A He has the issue, I think, but if I see him, I can monitor most everything globally on a regular basis, and then the spinal surgeon, spine surgeon once you -- it would be adequate. If he started to develop increased joint issues, then I would refer him to the orthopedic surgeon.

Q So one spine orthopedic spine visit is $500?

A Yes.

Q And pain management, you are recommending that he sees you four times a year?

A Yes.

Q Have you ever seen him four times a year since 2020?

A Since 2020.

Q When was the last time you saw him?

A I saw him, I believe in August of 2022.

Q And before that, when did you see him?

A I saw him --

THE COURT: Twenty-two you said?

THE WITNESS: Twenty-two.

A October of 2020.

Q So he went 18 months without any visits to a pain management doctor, correct?

A Without any visits to me.

Q Do you know if he went to see any other pain management doctors?

A I don't know.

Q So did his pain increase during that time that he didn't see a pain management doctor?

A He did report that he was complaining of increase in neck pain and numbness to his arm.

Q And that is as a result of -- what was causing that pain?

A He has a herniation in his neck.

Q And he reported that first, I think it was eight months after the accident?

A Yes.

Q And when was the last time that the plaintiff saw -- oh, after the plaintiff had kidney stone surgery in August of 2019, how many visits did he make to you total?

A I saw him October of 2020, March of 2020, January of 2020, November 2019.

THE COURT: Two to three months over the --

THE WITNESS: Right.

A Then October of 2019.

Q Did he report improving pain at any point after the kidney stone surgery?

THE COURT: Ongoing improvement or just on any visit?

MR. GOLD: Improvement.

A My notes, I reported he just -- was continued mid, low back pain, continued radiating pain so I think it was -- I mean a chronic issue, continued back pain. It looks like he was having chronic pain. I don't have any notes that it was increasing or decreasing.

Q Was the chronic pain from the lumbar spine?

A Thoracolumbar spine, mid and lumbar spine and now at this point his neck.

Q You mentioned trigger point injections?

A Yes.

Q I am sorry, when was the last time the plaintiff saw any orthopedic surgeons as far as you know?

A I believe that would have been the Dr. Frazier consultation.

Q When was that?

A I believe it was November of 2018, I think.

Q So he had not seen an orthopedic surgeon in four years?

A I don't -- I think he saw Dr. Brisson for a report, for -- but I don't know when that was exactly.

Q Roughly four years ago --

A Yes.

Q And you think he needs to see a surgeon five times a year, once a year?

A No, once a year, I think for monitoring, someone with osteoporosis and his co-medical issues, I would recommend it.

Q But the osteoporosis is not related in anyway to this accident, correct?

A No, but his bones can become damaged, and I think they should be monitored for new fractures or instability.

Q Because he has osteoporosis?

A Yes.

Q And the trigger point injections, that is something you do?

A Yes.

Q How many trigger point injections did you do on the plaintiff?

A I think he has been given it two to three times or so.

Q When were those times that you gave him trigger point injections?

A I mean I can go find the exact date, but at some point in 2018, 2019.

Q They were for muscle pain, correct?

A Muscular pain, yes.

Q Was one of those on August 21, 2018, I am sorry, August 21, 2019?

A Let me look, yes.

Q That was six days before he had kidney stone surgery, correct?

A Yes.

Q And the other -- the other time you gave him stones was in -- I am sorry.

The other time you gave him trigger point injections was in September 2018?

A Possibly; muscular trigger points are lower, kidney stones are up high so different areas.

The other time --

Q What is the other time?

A Well, what is the date?

Q I think it was September 2018.

A Okay.

THE WITNESS: Can I just briefly --

THE COURT: No, no.

THE WITNESS: Sorry.

A September 2018, I have one from October of 2018.

Q Is that an injection?

A Yes, trigger point injection.

Q Was that right after he reported to you that he passed stones? I think you said the date he passed stones was around September 20.

A I don't have anything in this report regarding stones.

THE COURT: If he passed stones -- withdrawn, you do not have --

Q Let's, we can move on because everybody wants to go home.

MRI's at four sites?

A Yes.

Q One of those sites was for the knee?

A Yes, the knee I don't think he would need it.

Q We can knock out 12,000, 14,000 of that right away?

A Yes, 12 to 14,000 of that right away.

If the knee started to get worse then possibly re-evaluate it.

Q The other three sites were the MRI of the cervical spine?

A Cervical, lumbar, thoracic.

Q The okay, the cervical spine was -- he didn't report that until eight months after the accident?

A Yes.

THE COURT: That is asked and answered. Let's keep moving.

Q So why does he -- is the MRI of the cervical spine related to the accident?

A Yes.

Q How do you know that?

A I think it's a reasonable, with reasonable degree of medical certainty. He never had a prior history of it. He reported that it progressed over time, and the way in which the accident struck his spine, I feel can cause symptoms that he is exhibiting.

Q If the medical history provided was inaccurate then you might think differently?

MR. KELLY: Objection, speculation.

THE COURT: Sustained, it has already been -- well, the medical history has not been proven, but the happening and mechanism of the accident --

MR. GOLD: But we --

THE COURT: I am speaking -- has already been found by the jury. It is not open to the --

MR. GOLD: We don't question the mechanism of

the injury to the thoracic spine.

THE COURT: Well, it does not matter about you questioning it. The happening of the accident has already been found by the jury. If this doctor has an opinion about that accident, the jury testified was a competent producing cause of these injuries, then that is his opinion. You and I don't get opinions about it.

Q The reason he needs an MRI is annually, any of that have to do with the fact he has osteoporosis?

A I think his co-morbidities make it more likely for his other -- his other medical issues make it more likely he can have an injury so I think it makes it more important. But even without the osteoporosis, I would recommend it. I just think that makes it even more important.

Q Do you do kyphoplasty?

A I do not.

Q Where do you get that value?

A There is -- you can go on line, type in any type of zip code, CPT code, and it will give you the average cost for various procedures.

THE COURT: CPT code is the procedure code?

THE WITNESS: Yes.

Q Did you bring those codes with you?

A I don't have this CPT code specifically for kyphoplasty.

Q Do you have CPT codes for any --

MR. GOLD: Other than the ones -- other than the ones performed.

A They are not memorized. They are on my billing sheet.

Q Did you review -- you are not an orthopedic spine surgeon, correct?

A No.

Q So you don't have -- know the code for that, correct?

A For an office visit?

Q Yes.

A I think it -- that would be like -- that would be whatever they charge. I know Dr. Brisson, he used to charge $500. My associate, Dr. Weinstein charges $650. I believe Dr. Frazier, orthopedic spine surgeon so I mean that is just an average cost -- I know many orthopedic spine surgeons, what they charge.

Q Have you reviewed any of the medical bills for any of the treatment that plaintiff has had to take other than your --

A No.

Q X-rays, four sites, again, can we take out the knee?

A Yes.

Q So that is another 40,000 off?

A It would be somewhat, but I think the knee, he has traumatic arthritis.

Q If he has -- he doesn't have?

THE COURT: He said he thinks.

MR. KELLY: Objection.

A He has a knee issue that will progress. Traumatic arthritis just means he has got knee issues that it just sort of ages your knee due to having trauma. I think it should be monitored. Maybe once a year would be adequate rather than twice a year.

Q Did the MRI that you saw of the knee show that he had a tear?

A Let me find it. He had an effusion, popliteal cyst, moderate size effusion, moderate side popliteal cyst, extending far superior with loculated appearance, a mild patella alta with edema at the supra lateral aspects of Hoffer's (ph.) peg consistent with a patella tendon lateral femoral condyle friction syndrome; meniscus and ligaments are intact.

Q So, the meniscus and ligaments, ACL are not torn?

A Correct.

Q So you performed no treatment, correct?

THE COURT: What is the question? I am sorry.

MR. GOLD: So you performed no treatment?

A I believe he had physical therapy.

Q And the --

A And the anti-inflammatory medication and topical anti-inflammatory cream.

THE COURT: Doctor, you treated without a tear?

THE WITNESS: Yes.

Q Do any of your notes reflect you treated a knee?

A I think he was sent for therapy. I mean I think it is --

MR. GOLD: Objection.

A The Voltaren gel, topical gel would be utilized for the knee.

Q Have you ever reviewed the therapy records?

A I do not have the therapy records in my chart.

Q Now, EMG/NCV upper and lower extremities?

A Yes.

Q That is something you can do in your office?

A Yes.

Q You have done that?

A I have done that for the lower. I recommend it for the upper. We have been unable to do it, I believe. Just our resources, we have been unable to get it done.

Q You have never done it in the five years since he became a patient, you have never done an upper EMG?

MR. KELLY: Objection.

THE COURT: Asked and answered.

A I have recommended it, has not been able.

THE COURT: You don't have to answer.

A I am sorry.

Q When did you get it done?

A After I get an MRI, I always recommend.

Q And why did you only do one lower extremity?

THE COURT: One lower extremity, you mean one set?

MR. GOLD: One EMT for the lower extremities.

A We did the initial. I think again with the resources that were available, we have not done another. I would recommend additional studies.

Q And then the equipment and supplies for the back brace?

A Yes.

Q What else?

A I believe Tens unit.

THE COURT: For the Tens unit, pads?

THE WITNESS: Pads.

Q Was he using the Tens?

A Yes.

Q Did any of your reports indicate he uses the Tens at home?

A I prescribed it for him.

Q Prescribed it, but you don't know if he uses it?

MR. KELLY: Objection, argumentative.

THE COURT: Sustained.

Q Do you know if he uses it?

A I believe he uses it. He might not now if he doesn't have the pads, but --

Q When did he cease physical therapy?

A I don't have the records. I am not sure.

MR. GOLD: I have no further questions.

THE COURT: Yes.

REDIRECT EXAMINATION BY MR. KELLY:

Q Doctor, is kidney pain qualitatively different than stabbing, radicular pain from traumatic accident?

MR. GOLD: Objection.

THE COURT: Overruled.

A Yes.

Q Trigger point injections do anything with respect to kidney stones?

A No.

Q The traumatic fractures to the T spine, the T spine requires trauma to have a fracture, does it not?

A It is more common for the -- for it to be formed from trauma.

Q Why is that?

A Because the T spine is more rigid and straight than the lower -- the transition where it starts to curve and the thoracic to lumbar region so this is straight. There is not a lot of bending so you are not, you are not going to generally get something chronic in the T spine. It is more likely to be

from trauma, not saying 100 percent, but it is most likely.

Q You do not expect spontaneous compression fracture in the T spine; is that correct?

A I don't expect it.

Q Okay, and when you say no resources, Doctor, does that just mean he doesn't have any money?

A It could be -- yes.

Q Is that why he is not getting treatment, because he doesn't have money?

MR. GOLD: Objection.

THE COURT: Overruled.

A I think that's likely.

MR. KELLY: Thank you.

RECROSS-EXAMINATION BY MR. GOLD:

Q The T spine was described, the T spine injury, can you point to where it would be?

A That would be from here up. (Indicating)

Q So about between the shoulder blades?

A No.

THE COURT: No.

Q Little low below the shoulder blades?

THE COURT: I apologize, I didn't mean to say that.

A It would start from the base of the neck. You can feel the C7 prominence so that is the last cervical, and then

it would go down to like --

THE COURT: Indicating a space --

THE WITNESS: Five is probably up in here.

THE COURT: Your jacket.

A The mid part of your back.

Q The fracture, T8 is between your shoulder blades?

A No, T10 is approximately at your navel so it is -- so your nipples are T4, so I would say T4, T3 is roughly near shoulder blades.

Q Now, the T7, was that described as mild in any of the radiological reports that you see?

A It says low grade compression fracture formed central to level paracentral end plate of T7.

Q Low grade, is that mild?

A Low grade, I think it is low, medium, high.

Q Does it anywhere does it state that the T7 fracture is a mild fracture?

A Not -- I will look at the other report.

Q What is the treatment, how do you -- if you are not doing kyphoplasty, how do you treat -- strike that.

If you don't do a kyphoplasty, will a T7 fracture heal on its own?

A That is why he was given the brace to immobilize the spine.

Q How long does it take for the vertebra to heal?

A Usually patients are advised to wear a minimum of three months. I believe Dr. Brisson at some point had recommended he cease the brace in one of his reports.

Q So absence treatment, the bone will heal in three months, correct?

A Absent treatment, the bone could heal, or it could continue to be damaged or it could get worse.

Q Did his bone heal, or did it get worse?

A I really -- it likely healed to the point where it is stable. Stable fractures can still cause pain.

THE COURT: All right, thanks very much. Ladies and gentlemen, thanks for your patience today.

Thursday morning, correct, gentleman?

MR. GOLD: Yes.

THE COURT: Thursday morning.

Please in the meantime don't discuss the case amongst yourselves or with anyone else. Please don't do any research, don't have any contact with the people who you are not supposed to contact. We will see you Thursday morning. Thanks very much, regular time.

THE COURT OFFICER: All rise, jury exiting.

THE COURT: I will ask everyone else to clear the courtroom.

MR. GOLD: He has a piece of evidence that was --

THE COURT: I think marked for I.D. isn't evidence. He gets it back.

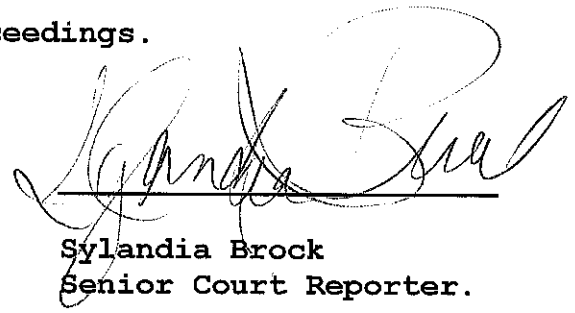
A JUROR: Ten o'clock.

THE COURT: Ten o'clock to start so 9:40, something like that to be here.

All right, guys, we need you to clear the courtroom, we are off.

REPORTER'S CERTIFICATION

I hereby certify that the foregoing is a true and accurate transcript of the proceedings.



Sylandia Brock
Senior Court Reporter.