In The Matter Of:

Inocencio Martinez v.
Yeshiva Kehilath Yakov, Inc. Yeshiva Headstart, et al

Dr. Matthew Grimm
January 15, 2025

Siobhan Lyons
851 Grand Concourse - Room 807
Bronx Civil Supreme
Bronx, New York 10451

Original File 1-15-25 Inocencio Martinez v. Yeshiva Kehilath Yakov_Inc._Yeshiva Headstart_et al.txt
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CIVIL TERM: PART IA-5

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INOCENCIO MARTINEZ,

Plaintiff,

-against- Index No: 21590/2018E

YESHIVA KEHILATH YAKOV, INC.,
YESHIVA HEADSTART,
NY DIMENSION BUILDERS, INC. TRIAL

Defendants.

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Bronx Supreme Court
851 Grand Concourse
Bronx, New York 10451
January 15, 2025

B E F O R E:

HONORABLE ALISON Y. TUITT,
Justice of the Supreme Court

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COURT OFFICER: All rise. The Honorable Alison Y. Tuitt presiding. Come to order.

THE COURT: Madame Reporter, good morning. Counsel, please be seated. Okay. I know, before we begin, that we had something we wanted to put on the record, am I correct?

MR. VARGAS: I have a motion, Defendants have a motion and then we're gonna allocute the Plaintiff.

THE COURT: Yes.

MR. VARGAS: And we needed an interpreter, which I don't know if we got yet.

THE COURT: We still don't have the interpreter?

THE CLERK: No. I made a call. He was supposed to have been here.

MR. VARGAS: And, as far as experts, it looks like my spinal surgeon can't make it until Wednesday, the 22nd, instead of the 24th. I wanted to let you know. I think Wednesday was open, right, in the morning?

THE COURT: I'll have to take a look at my schedule.

MR. ZIZZAMIA: I have one question regarding scheduling and lining up my doctors, because it's kind of been in flux since it's contingent on when we get the Plaintiff's witnesses on. I have one expert who is saying that their availability is essentially limited to --

THE COURT: Is what?

MR. ZIZZAMIA: Is basically limited to the afternoon on Monday, the 27th. I know that's your conference day. I was wondering whether or not it's possible to start him at 2:15 and try to get him done.

THE COURT: We'll see if he's -- we'll see if we can fit him in. Okay, let me see what we're going to do, since we have a jury. What's going on? You had a motion?

MR. VARGAS: I have a motion, they have a motion.

MR. ZIZZAMIA: Yeah, we go on first.

THE COURT: Which one are we talking about? The motion about same fault or --

MR. ZIZZAMIA: That we already dealt with. We came to an agreement and we're all set there.

THE COURT: Okay. So, there's an additional motion?

MR. ZIZZAMIA: Yeah, we both have.

THE COURT: You have papers for them?

MR. ZIZZAMIA: He has two more, I have one more. We submitted papers on them all, yes.

THE COURT: Okay. I thought we were finished with those things.

MR. VARGAS: We addressed his.

THE COURT: Right, and he wanted to put in papers.

MR. VARGAS: And then I had given my papers, so we

didn't talk about it, and I think they e-filed their opposition last night.

MR. DANIELSEN: I made courtesy copies for Your Honor.

THE COURT: Okay. Let us mark those things. And then you have additional motions?

MR. ZIZZAMIA: I do, yes. A motion to preclude a particular line of testimony.

THE COURT: Okay. Now, does any of these motions deal with something that we can do after we do openings? Do we have to do them now?

MR. ZIZZAMIA: Mine can wait.

THE COURT: Okay.

MR. VARGAS: Mine deals with them cross examining my expert in the afternoon.

THE COURT: Well, we can do that later, after we finish with openings. So, nothing has to be right now? I don't like to keep the jurors waiting.

MR. VARGAS: Okay.

THE COURT: I really don't. They've been here for, now, twenty minutes. So, I'd like to really start.

MR. VARGAS: And then allocute the Plaintiff after we open?

THE COURT: If we have the interpreter, sure.

MR. VARGAS: Okay. I'll tell my client to come in?

THE COURT: Absolutely.

MR. ZIZZAMIA: Just for what it's worth, I can represent that there's nothing in either of the Plaintiffs motions that I intend to discuss during openings, so we're in the clear there.

MR. VARGAS: You know what? I'm sorry, Your Honor. His motion, it does effect my opening.

THE COURT: What motion is that?

MR. ZIZZAMIA: Okay, so --

THE COURT: Let's have those motions marked, Jordan, if we haven't marked them already.

MR. DANIELSEN: Your Honor, would the Court -- I can hand it up.

THE COURT: Thank you. Give it to the officer.

COURT OFFICER: This is to be marked?

THE COURT: Let's mark it Court's I, Plaintiff's motion.

MR. VARGAS: There's two Plaintiff's motions.

THE COURT: Yes.

MR. VARGAS: So, Court's I and II?

THE COURT: And then the opposition will be A, I-A.

MR. VARGAS: Okay.

(Whereupon, the document was marked as Court Exhibit I by the Reporter)

(Whereupon, the document was marked as Court

Exhibit I-A by the Reporter)

(Whereupon, the document was marked as Court Exhibit II by the Reporter)

(Whereupon, the document was marked as Court Exhibit II-B by the Reporter)

(Whereupon, the document was marked as Court Exhibit III by the Reporter)

(Whereupon, the document was marked as Court Exhibit IV by the Reporter)

(Whereupon, an off-the-record discussion was held)

THE COURT: You can stand and put your mic on and then, now, you can make your argument.

MR. ZIZZAMIA: And now repeat everything I just said?

THE COURT: Hopefully not everything.

MR. ZIZZAMIA: Okay. I'll try to do it as succinctly as I can, Judge.

My motion is to preclude testimony from the Plaintiff regarding a post-accident conversation that he had with his employer on the day of the accident before he went to the emergency room. The gist of the conversation is that his employer told him that he should go to the hospital, not to tell anyone he got hurt on the job, say he was doing the job for himself and also that the employer was too busy to take him to the hospital.

There is no grounds for omission of that statement made by -- made out of court and offered by a party who was not a party to this case who's not appearing to testify at this trial and for the truth of the matter asserted. It's not probative. Any probative value is substantially outweighed by the prejudice it would cause, right, because it imputes, right, that this negative statement can reasonably be imputed by the jury from the employer who made it to my client, who is not the employer and who did not make the statement. Therefore, I request it be precluded.

THE COURT: Thank you, Counsel.

MR. VARGAS: Yes, Your Honor. I argue that it does meet one of the exceptions, present sense impression. First of all, the Defendants have made a big deal out of it took him four hours to get to the hospital all through this case and I expect them to do the same in front of the jury. It's like, well, if you got hurt there, why didn't you just go right to Woodhall and the jury would be left speculating as to, why didn't he go to Woodhall, why did it take him four hours to get up there an they're gonna try to say that he wasn't hurt on the job and that the reason it took four hours is because he's making the whole thing up, right?

So, I brought some cases where it talks about the state of the mind of the person, we're not offering these statements for the truth of the matter, and I'll say for the

record that I have hard copies for the Court if they want.

Court of Appeals, 5 N.Y.2d 16, Eleanor Fererra versus Anthony Galluchio, and that's 1958, still good law, and on page three, the Plaintiff's statement that the dermatologist told her she should have the shoulder checked every six months because there is a possibility that cancer might develop was not adduced to establish the fact that the site of the burn might become cancerous. It was a med-mal case.

They go on to say, we are going -- since the statement to the dermatologist was introduced not for the purpose of proving that the Plaintiff would develop cancer, but merely for the purpose of establishing that there was a basis for her mental anxiety, such testimony was not objectionable hearsay.

The next case is another Court of Appeals, 1975, the People of the State of New York versus Leonard Felder, 37 N.Y.2d 779. The testimony was offered not to establish the truth of the falsity of the statement, but simply the purpose of showing that the statement was made, clearly relevant and it served to explain Brunson's otherwise irrational conduct in jumping on the table and running away from the premises. The testimony was that Brunson was the victim of an assault and attempted robbery. To the effect that a bystander stated, when the Defendant approached

Brunson, that, quote, this Joe is going to take your money, was not hearsay.

Another case, 2nd Department, Garsten versus MacMurray, 1987, 133 A.D.2d 442. The trial court erred in precluding the appellants from eliciting certain testimony from respondent Garsten on the grounds the testimony constituted hearsay. Garsten sought to explain why he stated on a form he filled out soon after an automobile accident that the car he was driving skidded on an oil slick. He would have testified that his wife heard a report on the radio that an oil slick was involved and she told him this.

So, again, not offered to prove the truth, but only to establish his state of mind.

Your Honor, do you want copies?

THE COURT: Yes. And do you have copies for your adversary?

MR. VARGAS: I do.

THE COURT: Thank you.

Well, let's say this, are you gonna say something about his timeframe in your opening statement.

MR. ZIZZAMIA: Nope, and I wouldn't cross examine him on that either. I'll happily stipulate that I have no intention of questioning him on why he went to the hospital or the timeframe that it took him to get there.

MR. VARGAS: I still think it's relevant.

THE COURT: Well, if he does not open the door to that particular fact, what's the relevance to it?

MR. VARGAS: Because it establishes why he went to that hospital, why there was a delay in getting to the hospital, it establishes why he didn't go directly to the hospital by ambulance. Because they discouraged him, they wouldn't call an ambulance for him. These are questions the jury is gonna have. Like, why didn't you just go to the hospital right from the accident?

MR. ZIZZAMIA: Judge, if I may, there's -- it's damages only. There's not gonna be any testimony as to when the accident happened, there's not gonna be any testimony or evidence as to the gap in time between when the accident happened and when he arrived at the emergency room. As far as they know, the case starts when he got to the emergency room.

THE COURT: Well, there is an inference, I believe, that did the accident happen. I think that's what you're saying, that you don't believe the accident happened at all, and it certainly didn't happen the way that Plaintiff said.

MR. ZIZZAMIA: Correct. There's --

THE COURT: That is your theory of the case?

MR. ZIZZAMIA: That there's an issue as to whether the accident happened in the manner alleged.

THE COURT: Correct. I thought that's what I said.

MR. ZIZZAMIA: Yeah, well, or that it didn't happen at all, but it's the second one, not the first one, right, but that doesn't mean that the door's thereby opened, right? It's still a question of accident treatment. The gap, the timing, the process of how he got from A to B isn't part of the case. I don't plan on asking any questions to him or anybody else about that.

THE COURT: Okay.

MR. VARGAS: And his part is -- the person, the statements we're talking about, they're not a party to this. Just because they perceive it as it will be inferred onto their client, I don't believe that. He can point out that that's not my client who did that, that's fine.

THE COURT: I don't understand.

MR. VARGAS: Well, he's saying, just because his employer, who's not a party to the case and not testifying, they have no connection to the Defendant, right? He can say that's not my client, my client didn't do that, so don't hold it against my client of what his employer did.

THE COURT: Well, let us say this, I'm gonna preclude you from saying anything in opening statements. I'm gonna take a look at your case law and we'll -- I'll reserve decision on that, okay?

So, may we begin?

MR. VARGAS: Yes.

THE COURT: You're not gonna mention it, he's not gonna mention it.

MR. ZIZZAMIA: Yep, understood. And the other motions we'll address after opening?

THE COURT: Absolutely. We have a jury that's waiting and I don't like to keep them waiting.

MR. VARGAS: I'm just going to get my client.

THE COURT: Yeah, for him to just be sitting here?

MR. VARGAS: Yes.

(Whereupon, a short recess was taken)

(Whereupon, the jury entered the courtroom)

COURT OFFICER: All rise. Jury entering.

Please remain standing in front of your seat. The honorable Alison Y. Tuitt presiding. Come to order.

THE COURT: Thank you, Madame Officer. Please be seated. Good morning, members of the jury. Good morning, members of the jury. Okay. Thank you so much.

My name is Alison Tuitt, as the Court Officer has stated, and I will be the justice that will be presiding over matter this morning and for about a week or two. We try, or I try, my best to alert the jury of any shortcomings, any extended delays that we're gonna have, whether we're gonna be late, what time we're gonna start, what's gonna happen the next day, and I'm going to ask you

to give the same courtesies to me. If you are running late, please call the Court and let us know that you're running late and let us know if you have anything that is coming up. Please just let us know. Call the clerk and he will inform me.

Also, I understand that some people are having difficulties with their employers for coming to jury duty. That is illegal for them to say that you're not gonna get paid. You are going to get paid. You may not be able to keep both paychecks, you may just have to settle for one of them, but you are going to get paid and it is against the law to harass or in any way deter someone from serving jury duty. So, if have you that issue or problem, we do have a note that we can send for you to give to your employer.

At this point, we're now going to start the trial, about which you have heard some details during the jury selection process. Before the trial begins, however, there are certain instructions you should have in order to understand what you will hear and see and how you should conduct yourselves during the trial.

Do you need water, the person who is coughing? Would you like water?

JUROR: No.

THE COURT: Okay.

The party who brings a lawsuit is called the

Plaintiff.

Does anybody have the marked pleadings? Thank you so much.

COURT OFFICER: You're welcome.

THE COURT: Again, let me begin. The parties who brings a lawsuit is called the Plaintiff. In this action, the Plaintiff is Inocencio Martinez.

Is that the correct pronunciation?

MR. VARGAS: I think it's Inocencio, Inocencio Martinez.

THE COURT: Inocencio Martinez, and he is represented by Chris Vargas.

MR. VARGAS: Hi, everyone. Good afternoon. Good morning.

THE COURT: And your name, sir, again?

MR. ZIZZAMIA: Zizzamia, Matt Zizzamia, yeah.

THE COURT: Okay. I'm gonna let you do it, okay?

The party against whom the suit is brought is called the Defendant. In this action, the Defendant is Yeshiva Yakov, Inc., Yeshiva Headstart and NY Dimension Builders, and they are being represented by --

MR. ZIZZAMIA: Good morning. Matt Zizzamia. Just let's forget the Zizzamia, I'm Matt. Nice to see you again.

THE COURT: Thank you so much. I didn't want to butcher his name so early in the trial.

When I have completed these opening instructions to you, the attorneys will make opening statements to you, in which each will outline for you what he expects to prove. The purpose of such opening statements is to tell you about each parties claims, so that you will have a better understanding of the evidence as it is introduced. What is said in such opening statements is not evidence.

The evidence upon which you will base your decision will come from the testimony of witnesses here in court, on examinations before trial or in the forms of photographs, documents or other exhibits introduced into evidence.

Plaintiff makes an opening statement first and is followed by the Defendants. After the opening statements, Plaintiff will introduce evidence in support of his claim. Normally, a Plaintiff must produce all of his witnesses and complete his entire case before the Defendant introduces any evidence, although exceptions are sometimes made to that rule in order to accommodate a witness.

After Plaintiff has completed the introduction of his evidence, Defendant may present witnesses and exhibits. If he does so, Plaintiff may be permitted to offer additional evidence for the purpose of rebutting Defendant's evidence. Each witness is first examined by the party who calls that witness to testify and then the opposing party is permitted to question the witness.

During the trial, you may hear the lawyers for the Plaintiff and Defendants read a portion of a document referred to as an Examination Before Trial of the Plaintiff, Defendant or of a witness. You may hear the lawyers refer to this document as an EBT or a deposition.

At some point before this trial began, the Plaintiff, Defendant or witness, under oath, answered certain questions put to them by the lawyers for the Plaintiff and the Defendant. A stenographer recorded the questions and answers and transcribed them into a document, which the Plaintiff, Defendant or the witness later reviewed and then signed before a notary public.

The portions of the transcript of the Examination Before Trial that you will hear are to be considered as if the Plaintiff, Defendant or that witness were testifying from the witness stand.

At times during the trial, an attorney may object to a question or to the introduction of an exhibit or make motions concerning legal questions that apply to this case. Arguments in connection with such objections or motions are sometimes made out of the presence of the jury. Any ruling upon such objections or motions will be based solely upon the law and, therefore, you must not consider or you must not conclude from any such ruling or from anything I say during the course of the trial that I favor either party to

this lawsuit.

After such a ruling, you may hear one of the attorneys take what we call an exception to it. Exceptions have nothing to do with you or your role in this case and I mentioned the procedure to you so that you will not be confused if you hear the word during the trial.

Upon the completion of the introduction of the evidence, the attorneys will again speak to you in a closing statement or a summation. In summing up, the lawyers will point out what they believe the evidence has shown, what inferences or conclusions they believe you should draw from the evidence and what conclusions they believe you should reach as your verdict.

What is said in their opening statements or in the making of objections or motions during the trial is not evidence. Summations are intended to present the arguments of the parties based on the evidence. Under our system, the Defendants sum up first, followed by the Plaintiff.

After the summations, I will instruct you on the rules of law applicable to this case and you will then retire for your deliberations. Your function as jurors is to decide what has or has not been proved and apply the rules of law that I give you to the facts as you find them to be. The decision you reach will be your verdict. Your decision will be based on the testimony that you will hear

and the exhibits that will be received in evidence during the trial.

You are the sole and exclusive judges of the facts and nothing I say or do should be considered by you as any indication of my opinion as to the facts. As to the facts, neither I nor anyone else may invade your province. I will preside impartially and not express any opinion concerning the facts. Any opinions of mine on the facts would, in any event, be totally irrelevant, because the facts are for you to decide.

On the other hand, and with equal importance, I instruct you that you, in accordance with the oath you took as jurors, you're required to accept the rules of law that I give you, whether you agree with them or not.

As the sole judges of the facts, you must decide which of the witnesses you believe, what portion of the testimony you will accept and what weight you will give it.

At times during the trial, I may sustain objections to questions and you may hear no answer or, where an answer has been given, I may instruct that it be stricken or removed from the record and that you should disregard it. You may not draw any inference or conclusion from an unanswered question, nor may you consider testimony which has been stricken or removed from the record in reaching your decision. The law requires that your decision be made

solely on the evidence before you and the evidence I exclude from your consideration will be excluded because they are not legally admissible.

A lawsuit is a civilized method of determining disputes. It is basic to the administration of any system of justice that the decisions on both the law and the facts be made fairly and honestly. You, as the jurors, and I, as the Court, have a heavy responsibility to act impartially and ensure a just result is reached in deciding the dispute between the Plaintiff and the Defendants in this case. The purpose of the rules of law I have outlined for you is to make sure that a just result is reached when you decide the case.

For the same purpose, you should keep in mind several rules governing your own conduct during any recess.

Before I explain to you the conduct that you should conduct yourselves with, let me read one particular law that I think I omitted, one instruction I believe I omitted, and it is very vital to this case. Okay, let me read this.

The question of liability already has been decided. Thus, in this part of the case, you will decide only the nature and extent of Plaintiff's injuries and what amount of money will fairly and justly compensate Plaintiff for all resulting loss.

Should there be any mention of how the incident

happened, you will consider that reference only in deciding the amount of money, if any, that will fairly and justly compensate Plaintiff.

Now, I wanted you to have that before I went into your own conduct.

Well, this is probably not applicable, but if it, is let me read it.

Since this case involves something that happened at a particular location, you may be tempted to visit the location yourself. Please do not do so. Even if you happen to live near the location, please avoid going to it or past it until the case is over.

In addition, please do not attempt to view the scene by using computer programs such as Google Earth. Viewing the scene either in person or through a computer program would be unfair to the parties, since the location as it looked at the time of the incident and as it looks now may be very different.

This case involves a location as it existed at the time of the incident, not as it exists today. Thus, you should rely on the evidence that is presented here in court to determine the circumstances and conditions under which the incident occurred.

Also, in making a visit without the benefit of explanation, you might get a mistaken impression on matters

not properly before you, leading to unfairness to the parties who need you to decide this case based solely upon the evidence that is relevant to this matter.

In fairness to the parties to this lawsuit, it is very important that you keep an open mind during the trial. Then, after you have heard both sides fully, you will reach your verdict only on the evidence as it is presented to you in this courtroom and only in this courtroom and then, only after you have heard the summations of each of the attorneys and my instructions to you on the law, you will then have an opportunity to exchange views with each member of the jury during your deliberations to reach a verdict.

Please, and I'm saying please, do not discuss this case either amongst yourselves or with anyone else during the course of this trial. Do not do an independent research on any topic you may hear about in the testimony or see in the exhibits, whether by consulting others, reading books or magazines or conducting an internet search of any kind.

All electronic devices, including any cellphones, Blackberries, iPhones, laptops or any other personal electronic devices must be turned off while are you in the courtroom and while you are deliberating after I have given you the law applicable to this case. It is important to remember that you may not use any internet services, such as Google, Facebook, I guess it's X now, or any other

individually or collectively researched topics concerning the trial, which includes the law, information about any of the issues in contention, the parties, the attorneys or the Court.

After you have rendered your verdict and have been discharged, you will be free to do any research you choose or to share your experiences, either directly or through your favorite electronic means. For now, be careful to remember these rules whenever you use a computer or other personal electronic devices during the time you are serving as a juror but you are not in the courtroom.

While this instruction may seem unduly restrictive, it is vital that you carefully follow these instructions. The reason is simple. The law requires that you consider only the testimony and evidence that you hear and see in this courtroom and only in this courtroom. Not only does our law mandate it, but the parties depend on you to fairly and impartially consider only the admitted evidence. To do otherwise, by allowing outside information to effect your judgment, is unfair and prejudicial to the parties and could lead to having this case being retried. Accordingly, I expect that you will seriously and faithfully abide by this instruction.

Please do not permit any person who is not a juror to discuss this case in your presence and, if anyone does

so, despite you're telling that person not to, report that to me as soon as you are able. You should not, however, discuss with your fellow jurors either that fact or any other fact you feel necessary to bring to my attention.

Although it is a normal human tendency to talk to people whom one comes in contact with, please, and I'm asking you please again, do not, during the time you serve on this jury, talk, whether in or out of the courtroom, with any of the parties or any witness or their attorneys. By this I mean not only do not talk to them about the case, but do not talk to them at all, even to pass the time of day. In no other way can all parties be assured of the absolute impartiality they are entitled to expect from you as jurors.

So, now, if you come from the courtroom and you see the attorneys running away from you or not speaking to you at all, they're not being rude, they're following my instructions to you, okay?

Under the law, only six jurors will deliberate on this case when it is submitted for your consideration. We have selected additional or alternate jurors. The fact that there are additional jurors does not mean that anyone who is chosen as a regular juror is free to excuse himself or herself from the case. As a duly chosen juror, it is your obligation to be available throughout the trial.

The description of the trial procedure, the rules

governing your conduct and the legal principals I have discussed with you, I believe, make it easier for you to understand the trial as it goes on and to reach a just result at its conclusion.

At this point, Mr. Vargas, do you need a moment or are you ready?

MR. VARGAS: Ready, Your Honor.

THE COURT: Okay. We will have the opening statements by Plaintiff's Counsel.

MR. VARGAS: Thank you, Your Honor.

Ladies and gentlemen of the jury, welcome back. So, I want to first start by thanking everyone for being back here on time to get started. If anyone is missing, of course, we can't get started and we have to wait.

As I mentioned during jury selection, and as the Court mentioned as well, liability has been decided. We're talking about what are the damages or the injuries suffered by my client from the accident and, at the end of the trial, I will be asking for past pain and suffering, future pain and suffering and future medical expenses and, in order to give you a fair and accurate idea of what that entails, you know, you're gonna be hearing from some of the doctors who gave him treatment over the years.

As, I also mentioned during jury selection, the accident occurred in 2016. We're going on year nine since

the accident and, as you'll hear from the Plaintiff, you'll hear from the doctors, over the years, some of the injuries, they evolve, some of them get better, some get worse. There's surgeries, some of the surgeries help, some had to be re-done. It's a complicated matter, because the human body doesn't always just heal like that and sometimes you need more treatment and sometimes you're gonna need treatment in the future and, as you'll hear, we'll be arguing that some of these injuries in the future, he will need monitoring, he may need even revisions on what treatment he's received, and that will be based on what the doctors say and what they testify, which you'll hear.

I had mentioned some of the doctors. A lot of them, not every doctor that's treated him, will come in and testify, because, as you'll come to realize, he's treated with a lot of doctors and a lot of facilities over the years. So, we're getting the doctors who actually did surgeries on him and the doctors who've seen him most recently.

Now, talking about the past, Mr. Martinez, who's sitting in front, all the way to the left, blue shirt, he also goes by Jose. Because of his name, Inocencio, Inocencio, I mispronounced it even, he will usually, at work, tell people his name is Jose, because it's easier for them to say that and it's easier as far as, like, getting

along with people, and he came to the -- he was born and raised in Mexico. He's forty-four-years-old, he's married to his wife, who's sitting next to him, and they have three children, two daughters, Leslie and Jennifer, and a son, Diego.

He came to the country in 2001 and when he first got here, he was living with his aunt and he got a job working in a supermarket, which he did for several years, and then eventually, to get more money, he started working in demolition. So, he worked for a couple construction companies doing demolition and then, in 2011, he got a job at a company called A-1 Spray Foam and they go to different residential business and they spray insulation on the walls and ceilings and a lot of times it involves using scaffolding.

So, they have a big, three hundred foot hose they bring in and they spray it down. You have to wear a full body suit and usually it involves one guy spraying, a helper, who's at the bottom helping get debris out of the way of the scaffold or helping with the hose, and a supervisor, a gentlemen named Osvaldo, and the owner of the company was a gentlemen named Leo.

Mr. Martinez enjoyed that job and he worked there for five years, until the day of the accident, September 6, 2016, when he's at the Defendant's premises and he's been

there for three days spraying the insulation and on day three, all of a sudden, the platform he's standing on, fifteen feet up, one side of it collapses. He falls down to the ground, landing on his back and, as he's falling, that platform completely disengages and falls on top of him once he lands and the last thing he remembers is putting his right arm up as the platform is hitting. He briefly loses consciousness. The only reason he knows he lost consciousness is because the helper he was working with came over and said he was talking to him and his eyes were open, but he wasn't responding.

When he comes to, his hand is excruciatingly killing him and you'll see pictures of what his hand looked like right after the accident. He decides he needs to get some medical care. His back and his leg are hurting him, but at that moment, the arm is the most concerning thing for him.

He's also worried about getting to the hospital and then getting home from the hospital. Now, he lives right by North Central Bronx Hospital, which is two blocks away from his house. So, he got on the train and he went up to the Bronx and, on the way, because he had broken his phone during the fall, he borrowed a good samaritan's phone and phoned his wife and she sent the oldest daughter, Jennifer, who's sitting there all the way to the right, and asked

Jennifer to meet him at the hospital to help get him home and help with whatever he needs at the hospital. She was younger at that time, early teens, and she wasn't exactly fluent in Spanish and she was receiving, you know, his complaints, how the accident occurred, and translating as best she could to the people at North Central Bronx. The main concern at that time, of course, was the hand.

Later, at that point, there wasn't a definitive diagnosis of what the injury was. It would actually take several years of treatment before a Dr. Lorenzo, who will testify, will testify that there was a tear of the -- let me make sure I get this name right. There was a tear of the triangular fibrocartilage complex, which is a mouthful, but you'll hear a lot of the doctors refer to it as the TFCC. It's located between your wrist and your hand. There is a little triangle you'll see it when they finally put films up showing the wrist. There was a tear in there and that tear can effect the strength and your grip of your hand. It can also cause nerve -- it feels like a nerve injury, numbness, tingling, burning.

So, at that moment they took x-rays. That kind of injury doesn't show up on an x-ray. You need an MRI to show soft tissue injuries. So, they took the x-rays, they didn't see anything, he seemed okay at the time, so the hospital discharged him and told him to followup at a hand clinic at

Jacobi Hospital.

So, he went home, the leg was still bothering him, but he thought, you know, wait out the pain, it would probably get better. The hand, though, was definitely hurting him a lot at that time. So, the following week he went to Jacobi. He was out of work that whole time for Jacobi. He goes to the hand clinic and they looked again and did some x-rays, they did some CAT scans, which is pretty much an x-ray, but more in depth x-ray. Still no definitive diagnosis and they discharge him and just told him to follow up with whoever his family doctor was and he tried then to go back to work.

He went back to A-1, he tried to work for a couple days. They give him some light duty, because he couldn't climb the scaffold and spray anymore, but, he couldn't do the work and, after a couple days, they let him go, because he couldn't do the work and that is what precipitated him to ultimately bring in the lawsuit, because he had nothing at that moment, right? He couldn't work anymore, he was injured and he had no one to pay for his medical bills. So, he then started a lawsuit.

He also started treating at a facility called City Medical in the Bronx on Gunhill Road, I believe. He went there, there was several doctors that he saw there, they start out with prescribing physical therapy, MRI's, x-rays,

they even did acupuncture, and no definitive diagnosis, other than a herniation, at that point, of the lower back.

Now, this is where the spine comes in. When we talk about the spine, usually you'll hear, you know, C-1 through C-7, L-1 through S-1, and what we're taking about is the cervical spine, of course your neck, the middle of the your back, down to the lumbar spine, which is the thoracic spine, and then you have the lumbar vertebrae, and when we're talking about herniations and bulges, we're talking about the disc between your vertebrae, the bones, either coming out or, like a jelly donut, sometimes it's described as squirting out, or sometimes you can have bulging and sometimes you can have a combination of the two, or you can have it where it's, at some level, it's pinching the nerve, right? You have that disc and then you have nerves that come out of the sides of those discs and they run down your arms and they run down your legs. If you have an injury to your neck, for example, a lot of times it will cause numbness down your arms, and when you have an injury to your lower back, it causes numbness or shooting pain down your legs.

Mr. Martinez, throughout all of this, has been having shooting pain down his left leg. Now, what will come out later, when he's treating, down the road, is that there was actually a torn meniscus in his knee, his left knee,

which is the padding in between your knee joint. But, if you have shooting pain down your leg, it can mask that pain and make it more difficult for the doctors to diagnose.

So, he continues treating at City Medical for two years, conservative treatment, and, most doctors, that's what they'll first recommend is conservative treatment, before you even think about doing surgeries, and, after two years at City Medical, they weren't any closer to having answers as to how to stop the pain or how to help him.

They had referred him to a Dr. Ratliff, a hand surgeon, and Dr. Ratliff looked at that wrist, didn't come to a diagnosis of the tear of the TFCC, saw him a few times and told him to keep doing physical therapy. He also was referred to a spine surgeon, a Dr. Grossman, from City Medical. Again, he saw him, told him to continue doing conservative treatment and, you know, after two years he was frustrated with those doctors.

He then tried going to a New York Ortho Sports Medicine and Trauma, which is a sports facility or a sports medicine facility owned by a Dr. Jeffrey Kaplan, who will testify and you'll hear from him, and when he went there, Dr. Kaplan's specialty is elbow joints, knee joints. He's not a specialist in hand and wrist surgery and he then sent him out for more MRIs and this is August of 2018 by now.

When he gets the MRI's, he diagnoses the torn

meniscus in the left knee and eventually recommends a surgery in February of 2019 where he goes in and, because the meniscus is torn, he goes in and he takes out the torn piece in hopes of reducing the pain and giving him more mobility in the knee. That surgery was unsuccessful and, ultimately, down the road in 2022, he had to do another surgery on that same knee, because there was still pain in that knee.

But, while he's with Dr. Kaplan, Dr. Kaplan then refers him to a pain management doctor, a Dr. Grimm, Matthew Grimm, who you'll hear from later on today, this afternoon. Dr. Grimm's job, as a pain management doctor, is to try to make the patient feel as comfortable as they can with the pain they have. He doesn't do surgery, per se. He does do what's called epidural injections, which is where they take a long needle and stick it into your spine, he usually deals with pain of the spine, and they shoot steroids in there to reduce the pain, but it usually doesn't cure it.

So, he sees Dr. Grimm and he receives several series of epidurals and what are called trigger point shots, which is a smaller version of an epidural. It's more focussed on smaller parts of the body that are hurting. And he prescribed medication for the pain and antiinflammatories for the joints and that ultimately doesn't help with the pain and he's then referred by Dr. Grimm to a Dr. Joseph

Weinstein.

Dr. Joseph Weinstein is a spine surgeon and, if everything goes as expected, we will hear from him on Wednesday morning, next week, and Dr. Weinstein sees him in December of 2018 and he looks at him and sends him out for x-rays, MRIs, there's a million films that you'll see, but all these diagnostic tools are used by all these doctors and they try to use it in conjunction with examining the patient, hearing how the accident occurred and then they come to a diagnosis.

Dr. Weinstein ended up saying to continue with the physical therapy and he kept running tests on him and eventually he came to a diagnosis that one of the nerves between L-5 and S-1 was being pinched from this accident. He then, after two years, recommended surgery and did it in 2020, September of 2020, and what he did was a spinal fusion.

So, I'm not a doctor, of course, but he'll come in and describe it in better detail. He goes in and takes out the injured disc between L-5 and S-1, right at the bottom of your back. He then puts in a filler so that the spine stays the same spaced way at that level and then he puts screws in and fuses it together. He does the surgery and it -- those kind of surgeries, they take a while, like, we're talking at least a year, before you can start to see the benefits and,

ultimately, that surgery did help. It didn't make him a hundred percent, but it did help, and Mr. Martinez will tell you when he takes the stand how much each one of these surgeries helped or how little they did.

During around that same time, in March of 2020, Dr Lorenzo, the hand surgeon, now finally sees him. He has another MRI, diagnoses the tear of the TFCC and then he performs a surgery in March of 2020 and, again, it didn't make his wrist a hundred percent, but it did help.

After each one of these surgeries, he does more physical therapy. He did physical therapy at several facilities. Hew went to City Medical. There's another physical therapy place called Tender Love & Care, and I believe it's in the Bronx, and then at the end he did physical therapy at Dr. Weinstein's office.

That leads us to, around that time is the pandemic, which everyone loved, I'm sure, and at that time his wife, who was working in the laundromat, lost her job and she started selling jewelry on the street around the corner from their apartment and this brings up what the Defendants were mentioning during jury selection. They were taking videos of him, because he's been helping her with her jewelry stand.

Now, what entails in working this jewelry stand is that he helps her set it up. It's moving, like, a ten or

fifteen pound table, setting it up, it involves carting down the jewelry or plastic boxes that weigh about ten or fifteen pounds and putting up an umbrella. You'll see this video. They took hours and hours of it.

I argue that it's not that big of a deal. It's not doing construction, it's not lifting fifteen hundred pound pieces of material like he was doing at his job and it's consistent with what his doctors said he could do. They said find a light duty job, keep the lifting to fifteen to twenty pounds. If you can do that, go ahead and do it.

He tried to get other jobs. He tried to go back to doing -- working at super markets. They wanted him to stock shelves again. Crouching, lifting things that are more heavy than ten to twenty pounds and repetitively for forty hours, his body just can't do that anymore. So, he's tried to work. He tried to go back to work and really, now, what you're gonna see in the video is a man just trying to make sure they're putting food on their kid's plate and trying to pay the bills as best they can.

But, it's not -- he's been cured and these videos, they're taken in 2023, so we had already had seven years of treatment and injuries. These videos don't show that the nerve was injured. They don't show what he feels like at the end of the day. The videos, they just show what he -- what he has to do.

Now, at the end, towards the end of the people I'm gonna call to the stand, is a Dr. Fred Goldman and he's gonna talk about the cost of medical care. This is not gonna shock anyone, but medical care is expensive and it gets more expense every year. He's gonna talk about the growth rates of medical expenses and, based on what his doctors that have treated Mr. Martinez, what they expect he needs in the future, because he's forty-four and, as you'll hear from the Court, he has a life expectancy of twenty something years, at least, if not thirty years.

Over those thirty years, you can expect, of course, and you don't have to be a doctor, that if you've been injured, those injuries, even if they've healed, you'll feel arthritis, you'll feel worse as you get older and, so, based on what the doctors are diagnosing, Dr. Goldman, an economist, will tell you what that will cost going over those thirty years and, after you hear all that, I expect that you will agree with me that Mr. Martinez deserves compensation for his injuries that he suffered at no fault of his own and I look forward to talking to you at the end of the trial.

Thank you.

THE COURT: Thank you so much, Counsel.

Okay. Jurors, you all right? Okay.

THE COURT: Counsel?

MR. ZIZZAMIA: Thank you, Judge.

All right. Good morning, everybody. Great to see everybody again. I know over the last couple days I've been kind of going on about what a bummer it is that you guys have to be on jury duty and everyone seems so enthusiastic that I feel like saying congrats to most of you. You made it, you're on jury duty. I feel like your coach at the Garden trying to pump up the crowd. Good for you guys.

So, you just heard a lot of information that was very articulately presented describing what the Plaintiff intends to prove and what the -- how the Plaintiff wants you to interpret the evidence that you're going to hear and see at the trial.

Okay, I'm now going to present my own version and I think one thing we'll definitely agree on is that there is more than enough evidence in total in the case to allow for a pretty wide range of interpretations, okay? The Plaintiff is on one side, the Defendant is on the other side. It's not a big surprise, right? That's trials. That's the nature of these cases, okay?

So, I'm not going to talk to you at length about what all this evidence is or what it's gonna show or what conclusion I think you should draw from it. I'll say it a little bit, right, but I wouldn't go into, like, grandular detail about it. For the most part, I want this evidence to

speak for itself, okay?

So, I just want to touch briefly on what the different kinds of evidence are and why we selected you in particular as the jurors best placed and best fit to sort of look at it and give it all the necessary context and come to, you know, a smart, rational, reasonable decision, okay?

So, the main kind of evidence that we're gonna have is testimony, right? We all know what that means. It's gonna be a whole bunch of witnesses that will get on the stand, they're gonna be asked a lot of questions and they're gonna give answers, okay? That's testimony.

Now, we've got two different kinds of witnesses that can testify at a trial, all right? We've got what we call uninterested witnesses, right? That's, you know, someone who just is testifying, you know, incidentally, with no other relation to the case.

So, for example, if one of you fell on the sidewalk, you know, and somebody came over and said, oh, my God, are you okay and helped you to your feet and borrowed your phone, took a couple pictures, called 911 and stayed with you until the ambulance came and then she came in and testified at trial, she's an uninterested witness. She doesn't have a stake in the outcome. She doesn't have any skin in the game, right?

I submit that the evidence is gonna show that

you're not gonna hear from any witnesses like that in this case, none that are gonna be called by the Plaintiff and, frankly, none that will be called by me either. All of the witnesses that are gonna testify in this case are the opposite of uninterested witnesses, which are interested witnesses, right?

All of the witnesses that are gonna testify in this case have an interest in the outcome of the case, which means they have an incentive to testify in a certain way and, to be clear, I'm talking about my witnesses that I'm going to call as well. I'm not casting aspersions on one side or the other, that's across the board. That's the only testimony that you're gonna hear in this case, which is why the other kinds of evidence are gonna be of such importance, right, which I'll get into momentarily.

These witnesses that are going to be called, right, the main one is obviously who? Mr. Martinez. There's no secret why he has an interest in the outcome of the case. It's his case, right? He has a financial incentive to make sure the case goes this way, that's why he filed the lawsuit in the first place. He's not suing for an apology, right? He's not suing for, you know, some sort of charitable foundation to be established. He's suing for money in his pocket, right? That's what he's gonna be asking you for at the end of the case. It's up to you decide whether he

really deserves it or not. Maybe you'll decide that he does, maybe you'll decide that he doesn't. That will depend on your interpretation of the evidence that you hear and see in this case.

The other witnesses, right, are all, quote, unquote, experts of some kind that we, both sides, will be calling to testify, right? Plaintiff's calling six, I'm calling three. Frankly, all of them are getting paid to be here, all right? And that's no secret, but that's understandable, right? They all have other things to do, right? Most of them are doctors. Some of them are operating surgeons. They're busy, okay? So, they're all getting paid to be here, right? So, that's one.

Second, none of them, and this is -- again, everything I'm saying is for both sides. None of them -- the evidence is gonna show here that none of them will be testifying for the law firm that calls them for the first time, not even close, and probably not the last time either, all right? The evidence is gonna show that these doctors involving themselves in the treatment or examination of clients of the Plaintiff or Plaintiffs in cases that my law firm represents that is a continuing source of work for them, right? Which means that they have an interest, right? Even doctors want to get paid, right? They have an interest in making sure that the case goes the way of the party that

hired them and we're going to ask questions, I will ask questions, to the Plaintiff's doctors about that and, as a quick housekeeping note, you'll note that there is a pleasant gentlemen sitting next to me at my table. He's a colleague of mine. His name is Kenneth Danielsen. He was not present for jury selection, but he will be participating in the questioning of some of the Plaintiff's doctors, he'll be doing some today and tomorrow. What happens going forward is a little bit in flux. We're still trying to figure out what doctors are coming in and who's testifying when and where, but please be as patient with me as you've been so far, okay?

Okay, so, that's the reason why what you're hearing is interested or even biassed testimony all provided by witnesses who have a financial incentive in making sure the case goes the way of the people that hired them, okay? Him and me, same thing, which is the reason why it is of such importance in this case to be able to take what those witnesses say and consider it in the context of the other evidence that you get to see in this case, right?

There are two types, right? There are records or documents in different forms, right, and there is video. It's pretty safe to say that Mr. Vargas and I are gonna have different opinions about what the video shows and what conclusion you should draw from it. That's fine. That's

our job, okay? I'm not gonna say a lot about it, I'll leave that to you, but I just want to say that, remember that the Plaintiff in this case is going to be attempting to prove the two parts of his case, which is that he has injuries that were caused by the accident, and you guys all remember us talking about that over the last couple days, right, so, caused and injuries, right?

Now, the way I say it is a little bit backwards, right, because the caused part is what happened back then when it all happened, right, and the injuries part is what's happened ever since, even including up until today, right? So, the first part of the documentary evidence is the cause part, that is the records, right? There's gonna be a lot of records that are offered into evidence and that are gonna be shown to witnesses who will be having questions asked of them to compare what they're saying to what these records show, right?

Why is that important? I will submit and I will say only this about the records, right, is that these documents will show that there are clear inconsistencies between what was said about the accident when it happened and what has been testified to by the Plaintiff about what happened since then and what he's gonna testify to on the stand, right? Inconsistencies that will not be explained away by the fact that the description of the accident was

provided through a loved one in the emergency room at North Central Bronx where everybody speaks Spanish anyway and everybody knows it, it's a city hospital in the Bronx, okay?

I'll submit that these records are gonna show that early on in the case, right, when Mr. Martinez was describing what happened to him, he did so loudly and often and repeatedly many different times to many different people in a way that is completely inconsistent from the version of events that he's testified to at his deposition.

The judge talked a little bit about that in the instructions. We asked him questions under oath at a deposition a few years ago, we'll be using that testimony at the trial, and the testimony that he's gonna give you at the trial, you know, in the coming days, right? Inconsistencies that cannot be reconciled and inconsistencies that lead you to ask, what do I believe? What he's telling me now, when he's motivated by profit, or what he said that day when his motivation was medical attention? Which do I consider to be the more credible?

Why did we select you to make that decision? Other than the fact that you all seem extremely enthusiastic about sitting on jury duty for some reason or that you had the time to do it to the point where somebody was willing to move a vacation, for goodness sakes? Yeah. So, you guys weren't the only ones who said you could do it. You weren't

the only ones who said you were interested in doing it, right, but at least, for my part, I chose you because each of you described something that speaks to a skill set or some experience or even expertise in being able differentiate between when somebody is giving it to you straight and when somebody's not, right?

That's something that we deal with all the time because, the reality is, people get on the stand and they don't tell the truth. Shouldn't be the way it is, but it's 2025, it's really the least of our concerns at this point, right? But, all of you bring something special to the table that allow you to do more than just listen to the testimony and go, uh-huh, okay, mm-hmm, okay, checks out, makes sense, video says what, so what? Each of you are smarter than that, right, and it doesn't matter whether it's a personal experience with your own lawsuit where the video made the difference, right, or it's somebody who maybe is being straight with you or maybe is not and at a city jail, at a city shelter, at a city emergency room, I guess at a multinational media conglomerate, somebody might say, I didn't click that link in the junk e-mail. Yeah, you did, right? Or it's someone who may legitimately be in crisis and needs assistance, or maybe is just trying to get from you for personal gain, for personal profit, for personal profit at the expense of others, right?

That's why you're here. That's why you're in the best place to be able to hear the testimony, the interested testimony of each of these witnesses and compare it with what is being said in the records, what the source of the information was for what's in those records and draw the right conclusions about what actually happened, what injuries were actually caused by the accident and which injuries were either not caused by the accident or just didn't happen at all, right, because any combination thereof is a possibility, right?

Which gets us to the video. I don't want to oversell the video, right? People can lie, pictures can't. Unless they're on the internet, then pictures lie all the time, but these are not that, right? There's no filter, right? This is actual video of Mr. Martinez and we all discussed it. I was very up front about the circumstances under which it was and was not taken, okay? So, we all know what we're getting into and what we're going to be looking at, okay?

I will say only this about the video and I'll leave it to your expertise to be the judge. Okay, she's the judge, but you're the decider of fact. I'll leave it to the jury, right? I submit that there's enough in the records for you to conclude, when you have heard and seen everything, that Mr. Martinez was involved in an accident of

some kind, but it did not involve a fall from a height and it did not involve an injury to his wrist, to his knee, to his head, to his back. Did he injure any of those things at some time, somewhere in some way? I don't know. Did he need medical treatment that he got for it in the past to any degree? I don't think the evidence overall will support that, but, I will submit that the evidence will show that, categorically, he did not injure those parts of the body on the date of this accident when it happened, okay?

That's the back then. The video is the what about now, right? Video was taken in 2023, video was taken in 2024. Some of it was taken up until recently, okay? That's last year or two years ago. It's 2025, okay, right? Again, I'll let you be the judge. Pictures speak a thousand words.

I promise I'm gonna have a thousand words or more to say about it when we do the closing arguments when it's done, but for now I will say only that I will submit that this video will show this man is not injured today and not as injured as he was, or he got somewhat better, but he still can't do this. I'll submit that the evidence is gonna show and, again, you be the ultimate judge of this, that he is not injured, he is not in any pain, there is nothing he used to be able to do that he can't do now. He does not need any medical treatment and, when all of that is said and done and we come back to it, I expect to submit to you that,

because the evidence has shown all these things, but, even more importantly, because Mr. Martinez has not and is not being truthful about that with you, the jury, who have come in here to hear and decide his case, that he therefore is not entitled to compensation.

Now, we've got a road ahead of us, all right? I, for my part, am going to ensure that all of us are gonna try to get this to the finish line as quick as we can. We have a number of witnesses to get to. Some of them will take some time, right? I'll try to blow through it, but, again, for some of them, there's a lot there and, in order to for you to hear what you need to hear, it will take a while. Be as patient as you can and for me to speak with you again to review what the evidence shows and what we should do going forward.

Thanks very much.

THE COURT: Thank you so much, Counsel.

Can counsel approach, please?

(Whereupon, a discussion is held at the bench)

THE COURT: Members of the jury, that's gonna conclude our morning session this morning. So, I'm going to allow you to go to lunch at this time. Please get something healthy and light so you can stay up this afternoon. We do have a doctor that's going to testify. Please remember my admonitions about speaking among yourselves or others about

the case. Have a great lunch. We'll see you back here 2:15. 2:15. So, maybe you'll come back around two, so that you can go through the mags, because we do have a doctor and we're gonna need all the testimony this afternoon. So, if you come back around two, I'll appreciate it. Have a great lunch. Thank you.

COURT OFFICER: All rise. Jury exiting.

(Whereupon, the jury exits the courtroom)

MR. VARGAS: Your Honor, I just want to put something on the record real quick. It's about what you're considering on that motion we discussed that counsel is attacking the version of the accident on the day of the accident that Plaintiff gave and that's after he was told to lie by his boss.

So, I would add that to why he should be allowed to testify about that conversation when he does testify.

THE COURT: Did you say that, Counsel, that his boss told him to lie?

MR. ZIZZAMIA: No, I --

MR. VARGAS: You testified to that, yeah, when you were talking about your motion, that he was told to lie about the accident, that it didn't happen where it did.

THE COURT: Are you speaking about his opening statements or are you speaking about your argument in general?

MR. VARGAS: His opening statement. He said the version he gave on the day of the accident and the subsequent versions do not match up and then he alludes that he's lying, but on the day of the accident he was told to lie by his boss. So, I thinks it's very pertinent to the state of mind as to how he describes the accident when he goes to the hospital.

THE COURT: Okay.

MR. ZIZZAMIA: Judge?

THE COURT: Yes?

MR. ZIZZAMIA: What the Plaintiff testified that the employer told him was just -- just went to the location of the accident, not how it happened. He said he was -- he went into the hospital and he said he was at work and he was hit by a piece of scaffolding. So, obviously, he didn't listen to the employer, so there's no reason for that statement to come in.

MR. VARGAS: We're gonna be debating -- he's gonna be debating all the different versions. I think it's imperative that he be allowed to testify about that conversation. It's not his client, it's a non-party.

THE COURT: Okay. Thank you so much for the additional argument. I'm gonna take a quick break for the reporter. We'll come back in about fifteen minutes so that we can allocute, hopefully we'll have an interpreter, and do

whatever is --

MR. VARGAS: And the other motion.

THE COURT: The other motion that we need to do. We'll have a fifteen minute break.

MR. ZIZZAMIA: Thank you.

MR. VARGAS: Okay.

(Whereupon, a short recess was taken)

COURT OFFICER: Come to order.

THE COURT: Come on up.

COURT OFFICER: Please remain standing. Raise your right hand. Do you swear or affirm that the testimony you're about to give today is the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

I N O C E N C I O M A R T I N E Z G O N Z A L E Z, called as a witness by and on behalf of the Plaintiff, after having been first duly sworn, was examined and testified as follows:

COURT OFFICER: Please be seated, sir. Please state your name for the record.

THE WITNESS: Inocencio Martinez Gonzalez.

THE COURT: Thank you.

Madame Interpreter, if you could, state your name for the record, please.

THE INTERPRETER: Vanessa Curry, C-U-R-R-Y.

THE COURT: Mr. Vargas?

MR. VARGAS: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. VARGAS:

Q Mr. Martinez, we brought you up to the stand to ask you a few questions about the settlement offer offered to you and, to start out with, have you taken any prescription or non-prescription medications that may inhibit your ability to make decisions about settlement today?

A No.

Q And do you understand that an offer of two million dollars has been offered to you to settle this case? You understand that?

THE INTERPRETER: Interpreter will verify.

MR. ZIZZAMIA: I know what he means.

A So, I just want to make sure that the two million is clean. By clean, I'm saying, all for me? I'm getting the two million?

Q Right, and that's not the case. At the moment, if you settled it for two million, you would have to pay back any moneys you owe and any liens. You understand that, correct? You understand that?

A I do understand, but I think I want more money. I think justice should be done, should be served.

Q Okay. And you are turning down the offer of two million dollars, correct?

A Yes. I'm very sad. I'm not gonna be the same person that I was before.

Q And no one, either from my office or anyone else, has forced you not to take this money, correct?

A No.

Q And you do this under your own freewill?

A No.

Q So, who is -- if you're not doing it under your own will, who's telling you not to settle?

A I just want justice to be served here in the Supreme Court.

Q I understand that, but we're just trying to address that you don't want the settlement and that you are deciding that. I'm not deciding it for you, no one is else is deciding it for you, correct? You are turning down the offer and that is your choice. I'm not trying to talk you into it, I'm just asking, that's your decision, correct?

A Yes.

Q All right.

MR. VARGAS: That's all I have, Your Honor.

MR. ZIZZAMIA: Judge, if I may?

MR. VARGAS: I would object to him asking him any questions.

MR. ZIZZAMIA: I'm not going to ask him any questions. I would just like to raise an issue with the

Court. If you want us to approach to do so, we can do that.

THE COURT: Perhaps we should do that.

MR. VARGAS: Are we done with him before we do that?

MR. ZIZZAMIA: Not quite yet.

THE COURT: Not quite yet.

Why don't have you a seat, sir?

(Whereupon, the witness steps down from the stand)

(Whereupon, a discussion was held at the bench)

THE COURT: Okay, Mr. Martinez, you can step back up, please.

(Whereupon, the witness takes the stand)

THE COURT: Please be seated.

THE PLAINTIFF: Thank you.

THE COURT: Let me just remind you that you are still under oath.

THE WITNESS: Yes.

DIRECT EXAMINATION

BY MR. VARGAS:

Q So, Mr. Martinez, the Court would like a few questions still answered. We just want to make it clear, you deciding not to settle for the two million dollars offered, that is your decision, correct? No one is putting you under duress or making you make that decision, is that correct or incorrect?

A Okay, I apologize. When I'm in pain, I do not

understand some of the things that you're saying. Could you repeat the question?

Q We're trying to make clear that the decision that you're making not to settle to two million dollars is your decision alone. Is anyone making you make that decision or is it yours alone?

A What about what you said before that?

Q So, the question is, is someone making you make this decision, or is this your decision? We just want a clear answer, because you're the only one that can decide. So, we want to make sure you're deciding and that someone is not deciding for you.

A It's my decision only.

Q Okay. And no one threatened you, no one put you under duress to make that decision, you made it on your own?

A Yes.

Q And you understand that if we go through this trial, it is possible that you could end up with nothing or you could end up with more than two million, correct?

THE COURT: Or less.

Q Or less? Like I said, something between zero or two million, something more than two million. Who knows? You never know what a jury is gonna do. You understand that, correct?

THE INTERPRETER: Interpreter will verify.

A So, I will accept the two million dollars.

Q I don't understand. Do you want to settle for two million dollars? Do you understand the question? So, the question --

A No.

Q -- I'm asking is, is do you understand that you if you don't settle for this two million today, that if we go through with this trial and the jury decides it, you could end up with nothing, something between zero and two million or you could even end up with more than two million? It could be any of those. You understand that, correct?

A So, I'll settle for two million.

Q That's not the question.

MR. DANIELSEN: Your Honor, that is his response.

MR. VARGAS: He's not settling for the two million. He doesn't want it.

THE COURT: Counsel?

MR. ZIZZAMIA: He just said he does.

MR. VARGAS: He says he wants two million clean. That's not what we're asking.

THE COURT: Excuse me, Mr. Martinez has something to say.

You have to talk to the interpreter, not me. I don't understand you.

THE WITNESS: So, I have a very strong headache and I'm in pain. Could my wife answer for me or translate for

me?

MR. VARGAS: Unfortunately, no. I guess we'll have to do this at a later date then, unless Your Honor has a better solution.

THE COURT: We can do this this afternoon.

MR. VARGAS: Is his headache gonna be better by this afternoon?

THE WITNESS: Yes.

MR. VARGAS: Okay.

THE COURT: Well, let him come back right after lunch.

And you understand that the issue, sir, is that we want to make clear that it's your decision whether or not you're going to take the two million dollars to resolve this case. Do you understand, sir?

THE WITNESS: Yes, I do, and I want to settle.

THE COURT: Okay. Is this your own decision?

THE WITNESS: Yes.

MR. VARGAS: I have to speak to him, Your Honor.

THE COURT: Okay.

And let me make clear, sir, any settlement or any verdict, you will always have to pay your expenses, your attorney's fees. It's gonna come out no matter what.

MR. VARGAS: And that's what I want to discuss with him.

THE COURT: Whether you settle for this amount, whether you go to trial or whether you get nothing, they wouldn't get anything then, but, you know, you always have the pay the expenses.

I don't even expect an answer, but, also, at this point, if we go start this trial, then the two million dollars is off the table, am I correct, Counsel?

MR. ZIZZAMIA: That's my understanding, Judge, yes.

MR. DANIELSEN: Yes, Your Honor.

THE COURT: Okay. I want to make sure that he understands that.

I'm going to allow you to speak with your attorney. So, we're gonna take a break and then we'll come back after lunch.

THE WITNESS: Okay. I'll go to lunch, take a pill and talk to my wife.

MR. ZIZZAMIA: Can I just clarify what medication he'll take during lunch?

MR. VARGAS: Yeah, if you take medication --

MR. ZIZZAMIA: Well, if it's ibuprofen, that's one thing. If it's percocet, that's something else.

THE COURT: You have to stand, Counsel.

MR. ZIZZAMIA: I apologize.

THE COURT: What medication are you taking?

THE WITNESS: Gabapentin.

THE COURT: Gabapentin?

THE WITNESS: Mm-hmm.

MR. VARGAS: Will that effect your ability to make decisions?

THE WITNESS: Okay, so, then I'll tell my wife to buy Tylenol.

MR. VARGAS: Okay. Whatever works for you. It's just that we need you clearheaded when you answer these questions on the record. That's why we're worried about what you take. Otherwise, you can take whatever your medication is.

THE WITNESS: Okay.

THE COURT: Okay. Thank you so much and feel better.

(Whereupon, the witness steps down from the stand)

THE COURT: Can Counsel step up, please?

(Whereupon, a discussion was held at the bench)

(Whereupon, a lunch recess was taken)

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

(Whereupon, the document was marked as Plaintiff's Exhibit One in evidence by the Reporter)

COURT OFFICER: Come to order. Jury entering.

(Whereupon, the jury entered the courtroom)

THE COURT: Please be seated. Okay, members of the jury, thank you for your time and attention. We're going to

continue or start with Plaintiff's case at this time.

Mr. Vargas, you have someone you'd like to call?

MR. VARGAS: Yes. I'm calling Dr. Matthew Grimm to the stand.

THE COURT: Doctor?

MR. VARGAS: And, Your Honor, out of your presence, we consented to marking this chart as Plaintiff's One.

THE COURT: Thank you. Great. And that's for identification purposes?

MR. VARGAS: Into evidence.

THE COURT: Into evidence, okay.

COURT OFFICER: Please remain standing, raise your right hand. Do you swear or affirm that the testimony you're about to give today is the truth, the whole truth and nothing but the truth?

THE WITNESS: Yes.

M A T T H E W G R I M M, called as a witness by and on behalf of the Plaintiff, after having been first duly sworn, was examined and testified as follows:

COURT OFFICER: State your name and profession for the record, please.

THE WITNESS: Matthew Grimm. I'm a physician at New York Ortho, Sports Medicine & Trauma.

COURT OFFICER: Please be seated, sir.

THE COURT: Okay. Good afternoon, Dr. Grimm. I'm

going to stop you right now, because I just heard you say that and that was very quick. You see this young lady here? You know she's trying to get everything that you say. Can you please just slow down a little bit and use the microphone when you're speaking?

THE WITNESS: Yep. No problem.

THE COURT: Okay. Mr. Vargas, you may inquire.

MR. VARGAS: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. VARGAS:

Q Good afternoon, Dr. Grimm. Could you start off by telling the jury your educational background?

A I went to college at Penn State University, graduating in electrical engineering. I then went to med school at Jefferson Medical College and then did my residency, initially starting with my internship at Graduate Hospital in Philadelphia, and then I specialized in physical medicine and rehabilitation at the University of California Irvine, in the William Beaumont Medical Center in Michigan. I then did a fellowship at nonsurgical orthopedics in interventional pain management in Marietta, Georgia and finally graduating. After that, I started my work at New York Ortho, Sports Medicine & Trauma and have worked there ever since.

Q And what is -- your specialty is pain management. What is that?

A So, I describe it sort of as treatment of a patient's, a lot of times, orthopedic conditions, often times the neck and back, in a nonsurgical manner, utilizing multidisciplinary approaches; medications, physical therapy, injections. So, minimally invasive things, but no real incisions or anything like that. Sort of the before they need surgery.

Q And are you board certified?

A Yes, I'm board certified in physical medicine and rehabilitation.

Q What does board certification mean?

A Board certification is a series of tests that they give to doctors once they graduate residency to make sure that those doctors are competent in their fields. Mine was both written and oral testing. There was a few days of written tests. If you pass that, then you go on to the oral tests where they give you various scenarios and patients and you test through that and then you're deemed competent. If they deem you as board certified, you must maintain that on a regular basis. Every year I take tests, every quarter, online to make sure I maintain my eligibility.

Q And are you licensed to practice in New York?

A Yes.

Q And, Dr. Grimm, did there come a time when you treated a Mr. Martinez, Inocencio Martinez?

A Yes.

Q Do you know the first time you treated him?
A I don't -- I don't have my chart.
THE COURT: Do you want to mark it Plaintiff's One in evidence?
MR. VARGAS: It's already marked, Your Honor.
Q And, so, looking at your charts, can you tell us the first time you treated Mr. Martinez?
A Yes. So, my first visit was on September 12, 2018.
Q And when you first see a patient for the very first time, is there some kind of procedure you follow?
A I'll take a history from the patient, then I'll examine or take a history, past medical history, past surgical history, find out if they're allergic to anything, on any medications, then I'll do a physical examination, evaluate the patient and then we'll come up with an assessment plan.
Q And what was the history you received on that date, September 12, 2018?
A He reported being injured while at work on September 6, 2018, working construction, standing on a scaffolding. A piece of construction debris struck him, causing him to fall back on the scaffolding, the scaffolding to collapse, with resulting injury to his back, right hand and left knee.
Q And that date you have, September 6, 2018, is that a typo? His accident was alleged to have occurred in 2016.
A That must be a typo.

Q And once you took the history, did you do an exam?
A Yes.
Q And what was your -- what were the findings of the exam?
A On examination, when he entered the room, he was walking with antalgic gate, meaning sort of a painful, uneven walking pattern, and then I tested his range of motion of his lower back. He had a marked decreased ranging. He had pain with extension at five degrees, bending backwards. Pain with flexion at thirty degrees, which is bending forwards. Pain with left and right lateral flexion. Left lateral flexion at ten degrees, right at fifteen degrees. And then normal extension is usually twenty-five. For flexion, people can usually get to eighty-five to ninety degrees pain free and left and right lateral flexion, the normal is about twenty-five degrees. He had intact reflexes. He was displaying some decreased sensation involving his left lower extremity to his post-lateral calf, thigh and foot. He had a positive straight leg raise to the left. Straight leg raise is a provocative test that we do. It will test to see if there's any issues in the back that may be causing some nerve impingement when you're stretching the sciatic nerve. When it's irritated, you can irritate it with something in the back and it can irritate it further, if you get past thirty degrees, generally, and the patient will describe a radiating pain into the leg. So, he did describe some pain

radiating to his leg upon testing, just with his left lower extremity, not his right. And then muscle strength testing, he was describing some left sided weakness involving his ankle dorsiflexion, so, lifting his ankle up. Ankle plantar flexion, so, pushing his ankle down. EHL extension, which is the muscle bringing his big toe up, and then he also was displaying some muscular spasms when I was palpating his musculature in his lower back.

Q And have you ever heard of the terms objective and subjective findings during an exam?

A Yes.

Q And what's the difference for the jury?

A So, a subjective finding is something where we are relying on the patient's response. So, with the straight leg raise, it does have a subjective component, meaning I'm relying on him describing what he's feeling with the testing. Also, pain would be considered a subjective complaint, primarily because we're relying on the patient telling us what they're feeling. Objective would be something more like the muscular spasm. You can feel the taught bands in the back. It's something to be palpated and felt. So, not necessarily relying on the patient's response, you're actively seeing it or feeling it.

Q And when you have injuries to the back, what's the cause of a spasm?

A Spasms can be caused by direct trauma. At times it can cause it to tense up. It can be caused by stress, it can by caused by pain, it can be caused by overuse or, sometime, if patients are walking with antalgic gate, they can be using muscles that they normally aren't and they can be overused and increase the spasm. So, it's often caused by a multitude of things.

Q Okay. And, in your practice, do you practice with any other doctors?

A I practice with doctor Jeffrey Kaplan. He's my boss.

Q And, as far as the treatment you give patients, compared to Dr. Kaplan, do you focus more on something, one particular body part, or is it that you -- do you treat the same body parts or something else?

A I focus primarily on the neck and back. That's what I've sort of specialized in. Now, if a patient has pain in other areas and they're seeing me, I can give them medication for pain and give them a quick shot for an area, but, generally, diagnosis and treatment of the joints, the knees and the shoulders, I leave to Dr. Kaplan. That is his specialty and he's in my office.

Q And, prior to him seeing you on September 12, 2018, had he seen Dr. Kaplan?

A Yes. He had seen Dr. Kaplan and Dr. Kaplan then did refer him to me for pain management evaluation.

Q Do you know how far or when Dr. Kaplan had seen him before you?

A I have his notes, I believe, somewhere here. I believe his first visit was on August 16, 2018.

Q And do you know if Dr. Kaplan gave him any treatment or recommendations at that time?

A At that time he had given him recommendation for physical therapy for his knee and back and he also referred him for MRI's and he also stated he will have him see pain management.

Q Okay and. Back, to your visit, sorry to jump around, I know you have a lot of paper there. On September 12, 2018, did you have recommendations after taking the history and doing the exam?

A Yes. At that point his MRI had shown pathology at L-4/5 and L-5/1 and I was recommending epidural steroid injections to the left side at L-5/S-1, as well as recommending an EMG nerve conduction study to his lower extremities, recommended the continued physical therapy.

Q And the next time you saw Mr. Martinez?

A The next time in the office? I saw him on December 18, 2018.

Q I saw an EM G report.

A Oh, so, he did get the test done, the EMG, which was done on September 19, 2018.

Q And what is an EMG?

A So EMG is a test that is done to evaluate -- the reason why I generally do them is to test the nerves and muscles of the body to make sure, one, that the nerves are conducting properly and, two, if the nerves are not conducting properly, it can start to cause some muscular damage. The way I describe it to patients is a water hose with a kink. If the water's not getting to where it's supposed to, not getting downstream, everything will start to die. Same thing with the nerves. If the nerves inflame, as I described it will get that little kink, and the signal downstream may start to become damaged and then this nerve test can pick up on it. We put a needle into the muscle and it will gives us the electrical signals as it starts to become damaged in different muscles, which then corresponds to different nerves in the back.

Q And you did this test yourself?

A Yes.

Q And what were the results of that test?

A The results of that was showing evidence of a bilateral L-5/S-1 radiculopathy.

Q What does that mean?

A So, L-5/S-1 radiculopathy, at the L-5 and S-1 nerves, the muscles generally corresponds to the muscles that are down in the more distal part of your leg that usually involve lifting your foot up, lifting your big toe up and pushing down like

pushing a gas pedal.

Q And when you say bilateral radiculopathy, what does that mean?

A It was showing evidence of it on both sides.

Q And when you have that kind of result, what does that tell you?

A It just tells you that there is -- again, the nerves are kinked, so you are starting to see some damage. It doesn't necessarily mean that -- this picks up on it a lot sooner than, say, weakness or whatnot, but, if you're having pain, it does tell you that it's for of a moderate to marked issue, whereas as mild to moderate radiculopathy often times won't show up on an EMG.

Q And I saw another procedure involving you on December 6, 2018?

A That, I believe, was the -- that day I did the epidural injection.

Q And can you describe to the jury what an epidural is?

A Yes. On that date I did what's called a transforaminal epidural.

MR. VARGAS: And, Your Honor, with your permission, can we have the model marked?

THE COURT: Yes, let's have it deemed marked as Plaintiff's number --

MR. VARGAS: Two, as ID.

THE COURT: Are we up to Two?

MR. VARGAS: Well, Plaintiff's One was the chart.

THE COURT: Okay, are we up to Two?

MR. VARGAS: As far as I know, we're up to Two.

THE COURT: Okay, we'll deem it marked as Plaintiff's Two for ID.

(Whereupon, the model was marked as Plaintiff's Exhibit Two for identification by the Reporter)

Q And, Dr. Grimm, can you tell the jury what they're looking at?

A So, this is just a generic model of the spine. It's smaller than a normal spine. I just like to use it to give a basic idea. So, this is the front, this is the back, these are the vertebral bodies, so the bones, and in between the bodies are these discs. The discs is what gives space between the bones and give you range of motion, kind of like a shock absorber. A normal disc has sort of a rubbery outside that will contain a gelatinous inside. That's what gives it the sponginess. If there's some trauma to the spine, that gelatinous inside can push out and it can cause something called a bulge or herniation. The bulge or herniation in itself doesn't cause pain. If it comes into contact with nerves as they're coming out of the spine, that's when you can start to become irritated. I describe those as kind of like a radial tire. If it's getting ready to blow out, the fibers that are

containing the jelly on the inside will start to become weaker and if the trauma hits it, it can protrude out. Or if you think of, like, a hamburger coming out from a hamburger bun, whereas the burger would just come all the way up, all the way around as it's being compressed down, and either of those can cause some narrowing where the nerves are coming out and then as you walk or do something it can squish it and go in and out, depending on your activity or what you're doing. So, the epidural, if something caused a bulge or herniation to irritate the nerve, the nerve will become inflamed and irritated and swollen. The initial treatment would be with antiinflammatory medications that you take by mouth and with some physical therapy. If patients have continued pain, despite the conservative efforts, often times the next step would be something called an epidural injection. In his case I did what's called a transforaminal approach where I go in from the side here using an x-ray machine, or we take live pictures in multiple plains to guide the needle down to the nerve and we then inject a dye into the area and we want to view the flow of the medication along the nerve root. Once we see that, I'll inject a cocktail of a steroid and saline, generally, and the steroid is to take the inflammation down to sort of reopen that kink on the nerve and then it takes anywhere between a day to a week or two for it to take effect and the patient comes back. It also helps us diagnose the issue as well. If a patient's received a positive

response to the injection, it's generally considered a positive diagnostic factor to help determine that that is the issue that is causing the pain. If the patient reports they're not receiving any relief, then it's -- you're not a hundred percent sure if that's the issue or if that's the problem, it could be some other problem going on.

Q What's your usual expectation for how long an epidural injection would last?

A It's patient dependent. I mean, I have some patients that have gotten the epidurals, followed it with physical therapy and medication and they're able to treat the issue in a nonsurgical manner. I have some patients where the epidurals last mere weeks. We do a series of one two or three, depending on how well it worked or how aggressive the patient wants to be and if the pain returns and it's severe, then they, at times, will go forward with something more invasive like surgery.

Q And this procedure, the epidural, is it done at a facility, in your office or somewhere else?

A Generally it's done at a surgical center. Patients can get sedated there, the x-ray machine is there and nursing staff and whatnot.

Q And after he got administered the epidural, when is the next time you saw Mr. Martinez?

A I believe that was the next office visit. I saved it. That was the December 18th visit.

Q And at that time did you find out the effectiveness of the epidural?

A Yes. He reported that, returns following epidural injection. He noted this injection helped more than his prior injections. I believe there's two approaches to the epidurals. One is interlaminar approach, which is coming in from the back, sort of the center, and the other is the approach that I did, coming from the sides. I believe the one he previously had with another physician was the interlaminar approach. Often times that works more so if a patient is complaining of more back pain with leg pain, but since that didn't give him significant relief, I elected to go with the transforaminal approach, which, again, because he was complaining of significant leg pain, it appeared to work a little better for him.

Q And once he reports that it helped, does that change how you -- your recommendations for future care?

A Well, like I said, it sort of helped diagnostically, in that it tells us that the issue with the nerve is causing a significant portion of his pain now. Also, it's likely multifactorial. He likely has muscular issues as well, because, with pain, the muscles tense up. So, it's all connected, but if he showed relief with the radiating pain to the leg, that tells me it positive diagnostic.

Q And what were your recommendations for him at 12/18/2018?

A On that date I had referred him to -- for a surgical evaluation with Dr. Weinstein. I recommended continued physical therapy and I also put him on medication, both for inflammatory pain and neuropathic pain.

Q And the names of those medications?

A I put him on nabumetone, which is a nonsteroidal antiinflammatory medication, which is a like a stronger Advil, and gabapentin, which is -- that's for nerve pain. It's a medication that was initially used for seizures, but they found it has a side effect of it that helps with patients that had nerve pain, be it from diabetic neuropathies or, in his case, radiculopathy.

Q And I'm not going to go through every visit, but I'll just mention, you did see him on February 4, 2019, correct?

A Yes.

Q And then you next saw him on April 1, 2019?

A Yes.

Q And at that time you did an exam, correct?

A Yes.

Q And what were your findings at that time?

(Whereupon, the following was recorded and transcribed by Official Court Reporter Michelle Cox)

(Continued on next page)

* * * * *

A He was having, again, significant decrease ranges of motion like before. Still had the decreased sensation. Still had the weakness in comparison to the left, to the right. He wasn't having any classic weakness. He couldn't move his leg. But just on testing, tested the left and the right. I did notice a little difference, and he still had muscle spam.

Q And did he see Dr. Weinstein as you had recommended?

A He had gone to see Dr. Weinstein. Dr. Weinstein had recommended something called a discogram.

Q And could you tell the jury what a discogram is?

A Yes.

So like I said earlier, it's not the disc that causes the pain, it's the nerve that can cause the pain.

So he had two levels in his spine, L4-5 and L5-1 that had issues. But just looking at the MRI itself, Dr. Weinstein couldn't tell exactly which one it was that he felt was causing pain.

The MRI is just one picture taken statically at one point in time. So he just wasn't confident which of the disc it was causing the pain. So he doesn't want to do surgery on both of them if he doesn't need it, or if they are not causing significant pain anymore, he didn't want to do surgery on it.

So the discogram you take a needle, and using the x-ray machine, pat it down, stick it into to disc and into that jelly part. And I do one level which is a control level. So

put it in one disc, which is fine, and then put in the two discs which have the issues. And then I injected that to try and temporarily blow the disc up to try and reproduce the pain to see if that's the disc that's causing the problem.

The control level was done so we can sort of weed out and know what procedural pain is versus the disc pain. Usually, the patients would just feel some pressure at the control level. So when it's done blindly, we don't tell the patient which discs we're doing, and we do it in a different order, so it's not just one after the other.

And when I do it with him, he did not elicit his radicular symptoms with the L3-4 or the L4-5. He did describe radiating pain at the L5-1. So this test is done with him alert during the testing portions of that so he can tell us what he's feeling.

But, again, he's blind. So we do it. See what he's feeling. See if he's feeling pain. That's to sort of keep him in the dark so we can obviously sort of know which disc is being tested just being your normal self.

Q And after doing the discogram or before that, did you provide any treatment for him that day?

A That date, I did give him something called lumbar muscular trigger point injections to his lower back.

Q And what's a trigger point injection?

A So, again, with pain, your muscle can form something

called a trigger point, which is a very tough pain, muscle spam. It's very painful. Painful to touch. And trigger point is just you inject a needle into it, help release it and relieve the issue temporarily. But it's the needling of it that gives the relief, and then a little bit of Lidocaine is injected as well for comfort. I have patients that come in weekly to get these. I give them to my wife on a regular basis.

Q And what's your expectation for an ultimate trigger point plain?

A As long as you have an underlying condition, these muscular trigger points will often continue to come back.

So, again, it's dependent on the patient. Some of them they often last weeks to months or even longer. I have a patient who is a regular. Gets a trigger point in his neck. I did it. It lasted a year, and he came back a year later and he did it again. I also have another patient who is an elderly lady, comes in on a weekly basis.

Maybe she just likes me. I don't know.

Q And after seeing him on April 1, 2019, you saw him next on May 15, 2019?

A I then saw him, yes, May 15th.

Q And then I saw a procedure after that visit on June 17, 2019.

I can show you what I have.

A I'm sorry, I'm just trying to find it. Here we go.

Let me see. Procedures, June 17th?

Q Yes.

A Yes.

That was the one I performed, the discogram we discussed earlier.

Q But I thought you also did one April 1, 2019. Oh, no. I'm sorry. I'm mixed up. Sorry about that.

And then you next saw him on -- after the discogram, July 3, 2019?

A Yes.

Q And at that time did you get any information as to how effective the trigger point was?

A I don't -- July 3rd?

Q Yes, July 3rd.

A I don't see that I put anything in the note regarding trigger point, unless I'm missing it.

Q Okay. I was just asking.

A Oh, okay.

Q And you next saw him on August 21, 2019?

A I then saw him August 21st.

Q And at that exam, did you make any recommendations at that time?

A At that time I just had noted, again, everything, I guess, chronic pain area, and nothing was much changing. And he had reported that Dr. Weinstein had recommended and requested

surgery. That also changed his meds a little bit, starting him on a different anti-inflammatory, ketorolac, which is just another common Ibuprofen. We issued gabapentin, increasing his dose a bit.

And at that point he did report that the trigger point injections had helped; didn't need them on that date. And I just recommended repeat as necessary.

Q And as far as Dr. Weinstein recommending surgery, is this the normal procedure if you're treating a patient, you don't make that decision for the surgery, correct?

A No. I would defer to Dr. Weinstein.

Q And that also goes for any other surgeries to any of the joints, that you defer to Dr. Kaplan, for example?

A Yes, I would tell them to request to do them.

Q And you next saw him on October 9, 2019.

A October 9th, yes.

Q And at that time you did an exam as well?

A Yes.

Q And what were your findings?

A Again, he was wearing a lumbar orthosis, a back brace that day that was removed. He did have moderately decrease in reaching in his back as before; decrease sensation on positive straight leg raise. He has weaknesses and spam trigger point formation was noted in his bone graft slides.

Q And next you saw him December 3, 2019, and then after

that January 16, 2020?

A Okay.

Q And on January 16, 2020, was there any treatment you provided to him?

A On that day I did give him additional muscular trigger point injections.

Q Then May 20, 2020, is the next time you saw him?

A Yes.

Q And at this point, we're in the pandemic.

Your office was closed; is that correct?

A Yes. Our office is closed. Approximately two months we did telemedicine.

Q So you couldn't examine him, all you could do is talk to him and give him recommendations?

A Yes. There was a translator in our own offices. And so with translators in the room with me, and we spoke over the phone.

Q And then the next visit June 15, 2020?

A Okay.

Q At that time did you take a history?

A Yes.

Q And what did he tell you?

A Continued to await authorization for the surgery. He reported his wife was assisting him with dressing, was helping with shoes, socks and pants, with home care. And he reported

that he was having, again, muscular trigger point pain. He reported to me the last set of injections provided roughly two months of relief of his trigger point issue. And he requested we repeat trigger point injections. He also reported he had them interval, during surgery, and he had surgery with Dr. Lenzo the prior year.

Q So the hand?

A Yes.

Q And at that time, did you give him any treatment?

A Yes. He was given muscular trigger point injections on that date. I also gave him a shot of Toradol for just acute inflammatory pain. And Toradol is a stronger anti-inflammatory given to a lot of football players to get them back in playing or in the emergency room. He was in the emergency room. He came in with increased pain, I gave him a shot of Toradol.

Q And then you next saw him on July 27, 2020.

And at that time, what treatment did you give him, if any?

A He was given muscular trigger point injections on that date. And he also was complaining of some pain in his thumb on the right, it was tendonitis.

So your tendons often get irritated right there more. Your thumb goes like this. You can get some treatment for some conditions in the office. So they don't have to wait, before they see the orthopedist. I do inject the medicine prior for

acute relief.

Q And this was right after his surgery, correct, three months after his surgery?

A Surgery was in 2019, right?

Q 2020, I think.

MR. DANIELSEN: Objection, Your Honor.

THE COURT: Yes, you have to stand up.

MR. DANIELSEN: Objection.

THE COURT: What's your objection?

MR. DANIELSEN: Leading, Your Honor.

THE COURT: Yes, you are leading, Counsel.

Objection sustained.

Q Doctor, next you saw -- did you see -- when's the next time you saw Mr. Martinez?

A I then saw him on 12/17/2020. I spoke with him over the phone.

Q And the next time you saw him?

A I then saw him in the office on March 1, 2021.

Q At that time, what treatment, if any, did you provide?

A So had reported surgery with Dr. Weinstein September 8, 2020. He was complaining of severe right-sided pain and electrical feeling down his leg.

And on that date, he was also complaining of pain in his lower back and around his side joints. Oftentimes, after a fusion surgery -- so the spine, any forces that are elicited in

the spine are generally distributed. The way the body is made, it will distribute the force amongst all the joints.

If you disrupt the body's natural physics, those forces especially, at the lowest level, L5-S1, you can increase forces above the joints above the surgery, as well as the sacroiliac joint, which is the joint between your coccyx and your pelvis, which is because of your screws are directly screwed into the coccyx at the lowest level, the S1.

So many patients develop sacroiliiitis, which is pain in the sacroiliac joint. It gets worse with transition movements and sitting. And so I gave him injections to that area on that date.

Q And then next I saw a procedure, March 18, 2021?

A March 18th.

Yes. Due to his complaints of the severe post-surgical radicular symptoms, I did give him an epidural at the level above his fusion level on that date.

Q And it was all the same procedure as you described before, correct, as far as administrative epidural?

A At this time I did do the posterior approach, interlaminar approach because the lateral areas had been surgically opened up.

So at this point it was just post-surgical radiculitis causing the pain.

I found that the posterior approach, which is short of

a shotgun approach, the medicine in the back, it spreads everywhere, works quite well after -- for post-surgical radiculitis. So it's -- again, the epidural is just a little bit different approach.

Q And next you saw him April 8, 2021?

A Yes.

Q And at that time, did you have treatment that you provided?

A So he came in post-epidural. He reported that it helped a great deal with that issue. He reported he was calmer. He was sleeping better, and he was able to walk better without the radicular symptoms flaring up.

On that date he was just prescribed some supports for plantar fascitis. He was getting some anti-spasm medication and was given some TENS unit pads.

Q And I also see you report -- you had put percentage of disability for him at that time?

A He was not working post-surgical soon after the procedure at 100 percent disability.

Q Now, when you give that label of "disabled," what does that apply to exactly?

A It's a temporary issue. So it applies to -- generally applies to his prior occupation. And I want him to come and discuss something with me before starting something even less than a sedentary life.

Q And next you saw him on May 26, 2021 and July 21, 2021?

A Okay.

Q On July 21, 2021, can you tell me what treatment, if any, you provided to him?

A Yes.

So he reported his plantar fascitis had shown improvement following the prescription for foot orthosis. He had discussed returning to a sedentary position. We discussed specific job restrictions, and recommending lifting roughly 10 pounds, just being able to take breaks and stretch every -- approximately 30 minutes if he was in a sedentary position.

He was also prescribed anti-inflammatory medications, and topical anti-inflammatory gel, anti-spasm medication. TENS unit electrodes. And then he was given muscular trigger points on that date.

Q And what is a TENS unit?

A TENS unit is an electrical stimulation device. You put it on your muscles and stimulate your muscles. It's sort of hard to explain. It's sort of a wait period. It just sort of releases some of the body's natural endorphins. It can help temporarily with pain, especially for musculoskeletal issues. Most of the people who use it, many use it behind their back, knees, anywhere where there would be sort of a musculoskeletal problem.

I prescribe it to patients regularly, and then they oftentimes use it on a daily basis.

Q And next you saw him November 22, 2021 and then January 19, 2022.

A Okay.

Q And on January 19, 2022, did you take a history?

A Yes.

Q And what did Mr. Martinez report, if anything different from the other visit?

A He stated that his -- the radiating symptoms had returned. He reported that it was at a level where he cannot do a simple act as putting on his shoes and tying them. The pain was worse into his right leg.

He reported then going to physical therapy, but he was still having continued pain. And I made -- I recommended an additional injection.

Q And then you next saw him May 19, 2022?

A May 18th.

Q Yes, I'm sorry. I don't know what I said.

May 18, 2020.

A Yes.

Q At that time you took a history?

A Yes.

Q And what was the history, if anything different from the other visit?

A So, yes, we had discussed -- I discussed the radiating pain that we discussed last time. He stated that it had calmed following conservative management. So we did not need to proceed with the injection. I prescribed him some anti-inflammatory medication.

Q And did you make any recommendations for treatment that day or provided treatment?

A On that date, he was given additional muscular trigger point injections that day.

Q And you next saw him June 16, 2022?

A Yes.

Q And you took a history at that time?

A Yes.

Q And had he stated anything different from the other visits at that point?

A Again, on that date he -- again, he states the pain waxes and wanes. Good days, bad days. He said recently he had difficulty sleeping due to the pain and wakes him up. He reported to me sometimes he has nightmares as if someone is stabbing him in the back. Pain radiating down his leg.

Q And did you have any recommendations at that time?

A So we had discussed again an epidural. Also prescribed him a new TENS unit device and new topical electrodes. He was given medication specifically for nerve pain, amitriptyline. And a topical Lidoderm patch. And he was given muscular trigger

point injections.

Q And then you next saw him August 22, 2022, and then October 6, 2022 and November 16, 2022?

A Okay.

Q And I want to draw your attention -- sorry. Skip that.

February 15, 2021.

A Okay.

Q And at that visit, did you provide any treatment to Mr. Martinez?

A That visit, as we talked earlier, he was complaining more of the left-sided pain at his sacroiliac joint, just the left and not the right one. He had previously been given bilateral SI joint injections the prior visit. This date, we just did it on the left side.

Q And then you next saw him June 21, 2023.

And at that time, what treatment, if any, did you provide?

A In June 21st, I gave him trigger point injections. And he had had an increase in radiating pain. And I was making a recommendation for an additional post-surgical epidural.

Q At that time, had you put a numeric value on his disability?

A Again, I just had it at 100 percent from his prior occupation.

Q And next you saw him August 19, 2023; am I correct?
A Let me check. We did an epidural.
Q I'm sorry, July 25, 2023.
MR. DANIELSEN: Objection, Your Honor.
THE COURT: Sustained.
Q And on July 25, 2023, what kind of procedure was it?
A I did anther post-surgical epidural as he had an increase in his post-surgical radiating pain.
Q And then you next saw him August 9, 2023?
MR. DANIELSEN: Objection, Your Honor.
THE COURT: Yes, Counsel, what is it?
MR. DANIELSEN: Leading. I'm trying to let some of it go, Your Honor, but it's a lot.
THE COURT: It is leading.
I understand that we're trying to get through.
Sustained.
Q When is the next time you saw Mr. Martinez?
A I saw him on August 9, 2023.
Q And at that time, did you have any recommendations for treatment?
A He reported improvement following the epidural. His pain was tolerable at the time, following the injection. And I had, again, given him some of the sacroiliac injections. He was complaining of bilateral SI pain on that date. And he was given those injections in the office.

Q And then the next time you saw Mr. Martinez?

A I saw him on September 20, 2020.

Q And at that time, were there any medications you were recommending?

A I was recommending prescribing him gabapentin, again, which the nerve medication. I was giving me Celebrex, which is another non-steroidal antiinflammatory medicine. It's a little easier on the stomach. So if you are on chronic non-steroidal antiinflammatories, oftentimes I just move to that one just because it's -- I worry about long-term effects on the stomach. And I prescribed him a muscle relaxer cyclobenzaprine to take at night. And overnight patients' spasms increase and oftentimes making it difficult to sleep. Cyclobenzaprine helps with spasms. And it's also sedating.

Q And I also saw Voltaren listed?

A It's a topical.

Q Okay. And what does that do?

A Topical antiinflammatory. It's a topical NSAID. It doesn't go in your blood stream as much. So it's safer for stomach. But it also helps if you're having any sort of neuropathic or muscular pain in the muscles, more surface.

Some people often use it on to knees, lower back, shoulders, joints.

Q And what did Mr. Martinez report in his history, if anything?

A He had stated that after the epidural, his pain, his radicular symptoms were tolerable. His SI injection that he had previously helped, but his symptoms had returned. Lateral pain had gotten worse with sitting. TENS unit has helped with his pain. Then we discussed returning to a sedentary position. He stated that there had been no positions available to meet his restrictions and skill set.

Q So he's looking for work but couldn't find it?

A According to my note, yes.

MR. DANIELSEN: Objection, Your Honor.

THE COURT: What's your objection?

MR. DANIELSEN: Leading.

THE COURT: Sustained.

Q Next did you see Mr. Martinez after that?

A I saw him on January 22, 2024.

Q And at that time what treatment, if any, did you recommend?

A That date I recommended medication, the Voltaren gel, the gabapentin, cyclobenzaprine, Celebrex, and just to monitor his post-surgical radicular symptoms. Monitor is the sacroiliac pain. And, again, monitor the muscular trigger points on that date. He didn't need any injections, just medications.

Q And, Doctor, do you have an opinion with a reasonable degree of medical certainty as to whether the accident of September 6, 2016, immediately to his lumbar spine was causally

connected to that accident?

A Yes. It's my opinion that to a reasonable degree of medical certainty, the accident -- his back pain and radicular muscle symptoms are related to the accident.

Q And do you have an opinion to a reasonable degree of medical certainty as to a future prognosis for Mr. Martinez?

A Generally, issues in the spine is a progressive condition, especially at the fused levels. So I think has it progresses, his condition will become poorer.

Q And do you have to a reasonable degree of medical certainty as to future treatment plan for Mr. Martinez?

A Yes, I was asked to opine, come up with a future treatment plan.

Q And can you tell us, what is a future treatment plan?

A Just treatment that he may need or may likely need in the future as a result of his back condition.

Q And when you come to this plain, do you consult any other doctors, or is this all your opinion?

A Well, with regards to the neck and the back, certain of my recommendations are of my sole opinion or opinion with my expertise, my history of treating patients like this, my research in the areas. Others, I would discuss with surgeons in that field. Dr. Kaplan did the knee surgery. So I would discuss some future treatment with regards to the knee. As well as, Dr. Weinstein did his lumbar surgery, so I would ask his opinions

about whether any future treatment would be needed for the adjacent level of his back.

Q So can you tell the jury what your future treatment is?

A Yes.

The medications he's currently taking, he may need in the future, including TEN unit supplies, Celebrex, cyclobenzaprine, gabapentin, amitriptyline, Lidoderm patches.

If he were to take brand name, those cost or quite excess, up to $1,215 a month. There are some generics available for some of them. Sometimes they don't work quite as well. But sometimes we have to use them.

So I'd say that the range could be from a few hundred dollars up to 1,215, given, for the best.

For pain management office visits, he's on these medications so I generally recommend to monitor it with pain management visits three to four times a year at a cost of $250 per visit for a lifetime duration.

Orthopedic surgeon office visits. He has his knee issue. He's had to have two arthroscopic surgeries. He's also received what are known as Euflexxa injections, which is injections to monitor his heart. He had some heart issue. So that the fluid on the knee sort of lubricate it some. It can help with pain. And he's been seeing Dr. Kaplan on a regular basis. We put orthopedic surgeon visits at a cost of $300 a

visit three times a year. Orthopedic spinal surgeon visits at a cost of $500 a visit once a year for monitoring as long as he's complaining of pain. Orthopedic hand surgeon visits at approximately $500 a visit once a year.

Again, he has had a few times where he's needed the lumbar epidural steroid injections. Those, as I say, as he progresses, he may need them more often. Right now he needs 0 to one a year. He can get up to three every two years at a cost of $1,200 per injection, plus a $2,000 facility cost for the fluoroscopic guidance and the anesthesia needed for that.

The muscular trigger point injections, we're at a cost of approximately $300 per set of injections approximately every three months as needed. And then the Euflexxa injections that Dr. Kaplan has done, which he has recommended on a few occasions at a cost of $3,830, a series of ultrasound guided injections in the left knee were found to be effective if done every six months. So likely every six months.

Then the sacroiliac joint injection as we discussed, the cost at $1,000 per injection set, up to six injections. Right now he's not needing that many. So as issues progress, he may need more.

But after six per year for a lifetime, we generally recommend patients have benefited from physical therapy once or twice a month, just to instruct on the home program and to monitor and make sure they're doing things safely. If it's

available to them, it comes at a cost of 100 to $150 per visit.

I did discuss with Dr. Kaplan. He's had two arthroscopies of the knee. It subsequently gets worse, a need for additional arthroscopy; often gets more so as more surgeries are done.

So he told me in all likelihood he would have to have an arthroscopy for a total knee replacement in the future. Here arthroscopy comes to a cost of $26,307. And I don't have cost recommendations for any other arthroscopies on here.

Q And that's including the facility?

A Yes. It includes the facility fee and equipment.

I did discuss with Dr. Weinstein how many patients need, so when you get the fusion, like I was discussing earlier, when he puts more pressure on the adjacent levels, so you often have breakdown or disc issues at an adjacent level.

He said approximately 20 to 30 percent of patients will develop this in their lifetime after a fusion surgery. They may or may not need that, but note it's a possible future care cost.

So if he needs a revision or extension of the fusion surgery, that comes at a cost of roughly $100,000, including the facility, anesthesia, equipment. So that's another reason why he would need to be monitored over his life.

And, again, if he's having pain, which he still was at his last visit, I would generally recommend an MRI every five

years of the lumbar spine at a cost of $1,300. Same thing with monitoring the knee. Monitor the breakdown. Obviously, if something is getting worse, he's complaining of pain in that area, $1300 every five years.

Again, the right hand, if he's complaining of any pain, just continue to monitor it, at $1,300 every five years. But, again, these are estimates. Could be needing sooner or later. It all depends on if he's complaining of increased pain. I wouldn't do it if he comes in and says oh, I'm feeling good, then I want to send him for an MRI.

Same thing with x-rays. He's been getting regular x-rays. We want to see it to evaluate his hardware. The reason we check the x-rays is to make sure that the hardware is conclusive and to make sure you see some blurriness. His hardware is still intact based on his most recent x-rays.

Then, again, the knee every six months at a cost of $400, just to monitor it, to see if there's any further breakdown in the joint space. Same thing with the hand, every six months, $400.

EMG studies, which again includes the monitoring. And he can tell us if there's any sort of acute issue that could be happening as a result of the adjacent levels, the level above. So if he's complaining of increased pain that is persisting, then I recommend an EMG test to see if there's any acute findings; meaning, very high sharp waves on testing it, rather

than chronic ones, very small ones.

So that would be approximately a cost of $2,000 every five years roughly. Again, it could be more or less depending on his symptoms.

MR. VARGAS: Thank you, Doctor, I have no further questions.

THE COURT: Thank you so much.

Counsel, step up, please.

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

THE COURT: Doctor, you can step down, please.

Okay. Members of the jury, that's going to conclude our testimony for today. I'm going to release you for this afternoon. Please remember m admonitions about speaking among yourself or with others. Please don't talk to any of the parties, witnesses or attorneys. And, lastly, since you are going home, please do not past the scene of the incident.

Have a great safe home, and I'll see you tomorrow, 9:30.

THE COURT OFFICER: All rise. Jury exiting.

(Whereupon, the jury exists the courtroom.)

$

$1,000 (1)
93:19
$1,200 (1)
93:9
$1,215 (1)
92:10
$1,300 (2)
95:1,6
$100,000 (1)
94:21
$1300 (1)
95:4
$150 (1)
94:1
$2,000 (2)
93:9;96:2
$250 (1)
92:17
$26,307 (1)
94:8
$3,830 (1)
93:15
$300 (2)
92:25;93:12
$400 (2)
95:17,19
$500 (2)
93:2,4

A

A-1 (2)
26:12;29:13
abide (1)
22:22
ability (2)
51:7;58:3
able (9)
13:9;23:2;41:18;
44:4;45:2;46:23;
71:11;83:11;84:11
above (4)
82:5,5,17;95:22
absolute (1)
23:12
Absolutely (2)
5:1;12:6
absorber (1)
69:17
accept (3)
18:13,17;54:25
accident (36)
6:20;9:9;10:10,13,
14,19,20,25;11:5;
24:18,25;25:1;26:24;
27:14;28:5;33:9,14;
42:5,21,25;45:7,8,25;
46:9;48:12,13,22;
49:2,4,6,13;62:24;
90:24;91:1,3,4
accommodate (1)
15:18
accordance (1)
18:12
According (1)
90:9
Accordingly (1)
22:21
accurate (1)
24:21
across (1)
39:12
act (2)
19:8;85:12
action (2)
14:6,19
actively (1)
64:22
activity (1)
70:8
actual (1)
45:15
actually (5)
25:17;28:9;30:25;
45:6,7
acupuncture (1)
30:1
acute (4)
80:11;81:1;95:21,
24
AD2d (1)
9:4
add (1)
48:15
addition (1)
20:13
additional (11)
3:15;4:6;15:22;
23:20,21;49:23;79:5;
85:16;86:8;87:21;
94:4
address (2)
12:5;52:12
addressed (1)
3:23
adduced (1)
8:7
adjacent (4)
92:2;94:14,15;
95:22
administered (1)
71:22
administration (1)
19:5
administrative (1)
82:19
admissible (1)
19:3
admitted (1)
22:18
admonitions (2)
47:25;96:14
adversary (1)
9:17
Advil (1)
73:7
affirm (2)
50:11;59:13
afternoon (11)
3:3;4:15;14:13;
32:11;47:23;48:4;
56:5,7;59:25;60:11;
96:14
again (41)
9:13;14:5,15,23;
17:8;23:7;29:7;31:15;
34:8;35:13;37:3;
40:14;46:13,21;
47:10,13;68:7;72:13;
74:1;75:16,25;76:12,
16;77:23;78:20;80:1;
83:3;86:16,16,22;
87:24;88:23;89:5;
90:21;93:5;94:24;
95:5,7,16,20;96:3
against (3)
11:20;13:11;14:18
aggressive (1)
71:14
ago (2)
43:12;46:13
agree (3)
18:14;36:18;37:15
agreement (1)
3:14
ahead (2)
35:10;47:6
alert (2)
12:22;75:13
Alison (3)
2:1;12:15,19
alleged (2)
10:25;62:24
allergic (1)
62:13
allocute (3)
2:8;4:22;49:25
allow (4)
37:16;44:12;47:22;
57:12
allowed (2)
48:15;49:20
allowing (1)
22:19
alludes (1)
49:3
alone (2)
54:5,6
along (2)
26:1;70:19
alternate (1)
23:20
although (2)
15:17;23:5
always (3)
25:6;56:22;57:3
ambulance (3)
10:7,8;38:21
amitriptyline (2)
86:24;92:8
among (2)
47:25;96:15
amongst (2)
21:14;82:2
amount (3)
19:22;20:2;57:1
anesthesia (2)
93:10;94:22
ankle (4)
64:3,4,4,5
answered (2)
16:7;53:21
antalgic (2)
63:6;65:4
anther (1)
88:7
Anthony (1)
8:3
antiinflammatories (2)
32:23;89:9
antiinflammatory (4)
70:11;73:7;89:7,18
anti-inflammatory (5)
78:2;80:12;84:13,
14;86:4
anti-spasm (2)
83:14;84:14
anxiety (1)
8:14
anymore (4)
29:15,19;35:15;
74:22
apartment (1)
34:20
apologize (2)
53:25;57:23
apology (1)
39:21
Appeals (2)
8:2,16
appeared (1)
72:14
appearing (1)
7:3
appellants (1)
9:5
applicable (3)
17:20;20:6;21:23
applies (2)
83:22,23
apply (3)
16:19;17:22;83:21
appreciate (1)
48:5
approach (12)
47:18;53:1;70:16;
72:6,7,9,12;82:20,21,
25;83:1,4
approached (1)
8:25
approaches (2)
61:4;72:5
Approximately (7)
79:11;84:12;93:4,
12,12;94:16;96:2
April (4)
73:16;76:19;77:6;
83:5
area (5)
65:18;70:19;77:24;
82:12;95:4
areas (3)
65:17;82:21;91:22
argue (2)
7:12;35:5
arguing (1)
25:9
argument (3)
6:12;48:24;49:23
Arguments (3)
16:20;17:16;46:16
arm (2)
27:7,16
arms (2)
30:17,19
around (8)
34:5,16,19;48:2,5;
66:11;70:4;81:24
arrived (1)
10:15
arthritis (1)
36:14
arthroscopic (1)
92:20
arthroscopies (2)
94:3,9
arthroscopy (3)
94:4,7,8
articulately (1)
37:10
aspersions (1)
39:11
assault (1)
8:24
asserted (1)
7:4
assessment (1)
62:15
assistance (1)
44:23
assisting (1)
79:24
assured (1)
23:12
attacking (1)
48:12
attempt (1)
20:13
attempted (1)
8:24
attempting (1)
42:3

attention (4)
23:4;43:18;58:25;
87:5
attorney (2)
16:17;57:12
attorneys (8)
15:2;17:3,8;21:9;
22:3;23:9,15;96:16
attorney's (1)
56:23
August (8)
31:24;66:4;77:19,
20;87:2;88:1,9,18
aunt (1)
26:7
authorization (1)
79:23
automobile (1)
9:8
availability (1)
2:25
available (4)
23:24;90:6;92:10;
94:1
avoid (1)
20:11
await (1)
79:23
away (4)
8:22;23:15;27:20;
42:25

B

back (56)
24:11,13;27:4,15;
29:12,13;30:2,7,20;
33:21;35:11,16;42:9;
46:3,10,25;48:1,2,5;
49:24;51:19;53:10;
56:10;57:13;61:3;
62:20,22;63:8,20,23;
64:8,20,24;65:15;
66:8,11;67:15;69:13;
70:24;72:6,10;75:23;
76:11,15;78:20,22;
80:13;81:24;83:1;
84:23;86:20;89:22;
91:3,16,19;92:2
background (1)
60:12
backwards (2)
42:8;63:9
bad (1)
86:17
bands (1)
64:20
base (1)
15:8
based (8)
16:22;17:17,25;
21:2;25:11;36:6,14;
95:15
basic (2)
19:5;69:13
basically (1)
3:2
basis (6)
8:14;61:18;76:7,17;
85:2;92:25
Beaumont (1)
60:19
become (7)
8:8;67:11,14;69:24;
70:1,10;91:9
began (1)
16:6
begin (3)
2:4;11:25;14:5
begins (1)
13:17
behalf (2)
50:16;59:18
behind (1)
84:23
bench (3)
47:19;53:9;58:17
bending (2)
63:9,10
benefit (1)
20:24
benefited (1)
93:23
benefits (1)
33:25
best (7)
12:22;28:6;35:19;
38:4,4;45:2;92:14
better (11)
15:5;25:3;29:4;
33:19;46:19;56:4,6;
58:14;72:14;83:11,11
biassed (1)
41:14
big (6)
7:14;26:16;35:5;
37:19;64:6;67:25
bilateral (4)
67:19;68:2;87:14;
88:24
bills (2)
29:20;35:19
bit (9)
37:24;41:9;42:8;
43:10;60:4;76:5;78:1,
4;83:4
Blackberries (1)
21:20
blind (1)
75:16
blindly (1)
75:8
blocks (1)
27:20
blood (1)
89:19
blow (3)
47:10;69:25;75:3
blue (1)
25:21
blurriness (1)
95:14
board (6)
39:12;61:7,8,10,11,
17
bodies (2)
69:14,14
body (9)
25:6;26:18;32:22;
35:15;46:8;65:13,14;
67:4;82:1
body's (2)
82:3;84:21
bone (1)
78:24
bones (3)
30:10;69:14,16
books (1)
21:17
born (1)
26:1
borrowed (2)
27:23;38:19
boss (4)
48:14,18;49:5;
65:10
both (10)
3:17;13:10;19:6;
21:6;40:6,15;61:13;
68:4;73:3;74:20
bothering (1)
29:2
bottom (2)
26:19;33:20
boxes (1)
35:2
brace (1)
78:20
brand (1)
92:9
break (3)
49:23;50:4;57:13
breakdown (3)
94:15;95:2,18
breaks (1)
84:11
briefly (2)
27:7;38:2
bring (4)
23:4;26:17;29:18;
44:11
bringing (1)
64:6
brings (3)
13:25;14:6;34:20
broken (1)
27:22
Bronx (7)
27:20,22;28:6;
29:23;34:14;43:2,3
brought (3)
7:23;14:18;51:4
Brunson (2)
8:23;9:1
Brunson's (1)
8:21
Builders (1)
14:21
bulge (3)
69:21,21;70:9
bulges (1)
30:9
bulging (1)
30:12
bummer (1)
37:4
bun (1)
70:3
bunch (1)
38:9
burger (1)
70:4
burn (1)
8:8
burning (1)
28:20
business (1)
26:13
busy (2)
6:24;40:12
butcher (1)
14:25
buy (1)
58:6
bystander (1)
8:25

C

C-1 (1)
30:4
C-7 (1)
30:5
calf (1)
63:17
California (1)
60:18
call (9)
2:13;10:8;13:2,4;
17:3;36:2;38:14;
39:11;59:2
called (21)
13:25;14:6,19;
26:12;29:22;32:15,
20;34:13;38:20;39:2,
3,16;50:15;59:17;
68:19;69:20;70:14,
15;74:9;75:22;76:1
calling (4)
40:7,7,8;59:3
calls (2)
15:24;40:17
calmed (1)
86:2
calmer (1)
83:10
came (11)
3:13;26:1,6;27:9;
33:13;38:18,21,21;
76:15;80:14;83:9
can (82)
3:7;4:10,12,16;5:2,
13;6:11,12,17;7:7;
11:13,18;13:14;
23:12;28:18,18;
30:12,13,13;31:2;
32:13;33:25;35:10,
19;36:11;38:13;
45:12;47:8,13,18,23;
48:3;49:25;53:1,10;
54:10;56:5;57:17;
58:10,16;60:3;62:6;
63:13,22,23;64:20;
65:1,1,2,2,3,4,5,17;
67:5,12;68:18,22;
69:9,20,20,23;70:2,5,
7;71:19;74:13;75:5,
14,18,25;76:24;
80:23;82:4;84:4,21;
91:14;92:3,23;93:8;
95:21;96:11
cancer (2)
8:6,12
cancerous (1)
8:8
car (1)
9:9
care (7)
27:15;34:13;36:3,4;
72:16;79:25;94:19
careful (1)
22:8
carefully (1)
22:13
carting (1)
35:1
case (56)
7:3,15;8:9,16;9:3;
10:16,23;11:7,17,23;
15:16;16:19;17:4,20;
19:10,13,19,21;20:8,
12,19;21:2,14,23;
22:21,25;23:10,19,23;
37:16;38:16;39:2,4,8,
8,13,18,19,20,25;
40:4,25;41:16,18,20;
42:3,4;43:5;47:4;
48:1;51:11,18;56:15;
59:1;70:15;73:11
cases (3)
7:23;37:20;40:21
casting (1)
39:11
CAT (1)
29:8

categorically (1)
46:8
causally (1)
90:25
cause (11)
7:6;28:19;30:18;
42:12;64:25;65:2;
67:6;69:20,22;70:5;
74:13
caused (11)
42:5,7,9;45:7,8;
65:1,2,3,3,6;70:9
causes (2)
30:20;74:12
causing (9)
62:20;63:21;71:3;
72:18;74:16,20,21;
75:4;82:24
ceilings (1)
26:14
Celebrex (3)
89:6;90:19;92:7
cellphones (1)
21:19
Center (3)
60:19;71:19;72:7
Central (3)
27:20;28:6;43:2
certain (5)
9:5;13:18;16:8;
39:9;91:19
certainly (1)
10:21
certainty (4)
90:24;91:3,6,11
certification (2)
61:10,11
certified (3)
61:7,8,18
cervical (1)
30:6
change (1)
72:15
changed (1)
78:1
changing (1)
77:24
charitable (1)
39:22
chart (3)
59:7;62:2;69:2
charts (1)
62:6
check (2)
88:2;95:13
checked (1)
8:5
checks (1)
44:13
children (1)
26:4
choice (1)
52:16
choose (1)
22:6
chose (1)
44:2
chosen (2)
23:22,23
Chris (1)
14:12
chronic (3)
77:24;89:8;96:1
circumstances (2)
20:22;45:16
City (9)
29:22;31:4,8,14;
34:12;43:3;44:18,19,
19
civilized (1)
19:4
claim (1)
15:14
claims (1)
15:5
clarify (1)
57:17
classic (1)
74:4
clean (3)
51:16,16;55:18
clear (8)
5:5;39:10;42:20;
53:21;54:3,9;56:13,
21
clearheaded (1)
58:8
clearly (1)
8:20
CLERK (2)
2:13;13:4
click (1)
44:21
client (10)
4:25;7:9;11:13,14,
19,19,20;12:8;24:18;
49:21
clients (1)
40:21
climb (1)
29:15
clinic (2)
28:25;29:7
close (1)
40:18
closed (2)
79:10,11
closer (1)
31:8
closing (2)
17:8;46:16
coach (1)
37:7
coccyx (2)
82:6,8
cocktail (1)
70:20
collapse (1)
62:21
collapses (1)
27:3
colleague (1)
41:5
collectively (1)
22:1
college (2)
60:13,15
combination (2)
30:13;45:9
comfort (1)
76:6
comfortable (1)
32:13
coming (10)
13:3,7;30:11;41:10;
43:14;69:23;70:3,6;
72:6,8
common (1)
78:3
companies (1)
26:11
company (2)
26:12,22
compare (2)
42:16;45:3
compared (1)
65:12
comparison (1)
74:3
compensate (2)
19:23;20:3
compensation (2)
36:19;47:5
competent (2)
61:13,17
complaining (12)
72:10,13;80:20;
81:21,23;87:11;
88:24;93:3;95:3,5,8,
23
complaint (1)
64:17
complaints (2)
28:5;82:15
complete (1)
15:16
completed (2)
15:1,19
completely (2)
27:5;43:8
completion (1)
17:7
complex (1)
28:13
complicated (1)
25:5
component (1)
64:15
compressed (1)
70:5
computer (3)
20:14,15;22:9
concern (1)
28:7
concerning (4)
16:19;18:7;22:1;
27:16
concerns (1)
44:10
conclude (4)
16:24;45:24;47:21;
96:13
conclusion (4)
18:22;24:4;37:23;
41:25
conclusions (3)
17:11,12;45:6
conclusive (1)
95:14
condition (4)
76:10;91:8,9,16
conditions (3)
20:22;61:2;80:24
conduct (7)
8:22;13:20;19:15,
16,17;20:5;24:1
conducting (3)
21:18;67:4,5
conduction (1)
66:18
conference (1)
3:4
confident (1)
74:19
confused (1)
17:6
conglomerate (1)
44:20
congrats (1)
37:6
conjunction (1)
33:8
connected (2)
72:21;91:1
connection (2)
11:18;16:20
consciousness (2)
27:8,9
consented (1)
59:7
conservative (5)
31:5,6,16;70:13;
86:3
consider (7)
16:23;18:23;20:1;
22:14,18;41:19;43:18
consideration (2)
19:2;23:19
considered (4)
16:14;18:4;64:17;
71:1
considering (1)
48:11
consistent (1)
35:8
constituted (1)
9:7
construction (4)
26:10;35:6;62:19,
20
consult (1)
91:17
consulting (1)
21:17
contact (2)
23:6;69:22
contain (1)
69:18
containing (1)
70:1
contention (1)
22:3
context (2)
38:5;41:19
contingent (1)
2:23
continue (5)
31:15;33:11;59:1;
76:11;95:6
continued (6)
66:19;70:13;73:2,
23;79:23;85:15
continues (1)
31:4
continuing (1)
40:22
control (3)
74:25;75:5,7
conversation (4)
6:19,21;48:16;
49:21
copies (4)
4:3;8:1;9:15,16
corner (1)
34:19
corresponds (2)
67:14,23
cost (19)
36:3,16;92:9,17,25;
93:2,8,9,11,15,19;
94:1,8,8,19,21;95:1,
16;96:2
coughing (1)
13:21
Counsel (16)
2:4;7:11;24:9;
36:23,25;47:17,18;
48:11,17;55:16;57:7,
22;58:16;81:11;
88:11;96:8
country (1)
26:6
couple (6)
26:10;29:13,16;
37:3;38:20;42:6

course (7)
16:25;21:15;24:14;
28:7;30:6;33:18;
36:11
COURT (137)
2:1,3,9,12,19;3:1,6,
11,15,18,21,24;4:5,9,
13,16,20,24;5:1,8,10,
12,14,15,16,19,21,23,
25;6:2,4,6,8,11,15;
7:2,11;8:1,2,16;9:4,
16,19;10:2,18,23;
11:1,9,15,21;12:2,6,9,
13,16,19;13:2,24;
14:4,5,11,15,17,24;
15:9;19:8;20:21;22:4;
24:8,16;36:9,23,25;
47:17,20;48:7,17,23;
49:8,10,22;50:3,8,9,
10,18,21,25;52:11;
53:1,2,6,10,13,15,20;
54:20;55:16,20;56:5,
10,17,20;57:1,10,22,
24;58:1,13,16,22,24;
59:5,8,11,12,20,24,
25;60:7;62:3;68:23;
69:1,3,5;73:22;81:7,9,
11;88:5,11,14;90:11,
13;96:7,11,21
courtesies (1)
13:1
courtesy (1)
4:3
courtroom (12)
12:12;21:8,8,22;
22:11,16,16;23:8,14;
48:8;58:23;96:22
Court's (2)
5:16,20
Cox (1)
73:22
credible (1)
43:19
crisis (1)
44:22
cross (2)
4:14;9:22
Crouching (1)
35:13
crowd (1)
37:8
cure (1)
32:18
cured (1)
35:20
currently (1)
92:6
Curry (1)
50:24
C-U-R-R-Y (1)
50:24
cyclobenzaprine (4)
89:11,13;90:19;
92:8

D

daily (1)
85:2
damage (2)
67:6;68:8
damaged (2)
67:11,14
damages (2)
10:12;24:17
DANIELSEN (13)
4:3;5:12;41:5;
55:13;57:9;81:6,8,10;
88:4,10,12;90:10,12
dark (1)
75:18
date (21)
46:9;56:3;62:16,23;
68:19;73:1;75:22;
78:6;80:11,20;81:23;
82:12,17;83:13;
84:16;86:8,16;87:14;
88:24;90:18,22
daughter (1)
27:24
daughters (1)
26:4
day (18)
3:4;6:20;12:25;
23:11;26:24;27:1;
35:24;43:17;48:12;
49:2,4;68:16;70:23;
75:21;78:21;79:5;
86:7,9
days (9)
27:1;29:14,16;37:3;
42:6;43:14;61:14;
86:17,17
deal (5)
4:10;7:14;35:5;
44:7;83:10
deals (2)
4:14;32:16
dealt (1)
3:13
debating (2)
49:18,19
debris (2)
26:19;62:20
December (5)
33:5;66:21;68:14;
71:25;78:25
decide (11)
17:22;18:10,15;
19:12,21;21:2;39:25;
40:1,2;47:4;54:10
decided (2)
19:20;24:16
decider (1)
45:22
decides (2)
27:14;55:7
deciding (8)
19:9;20:1;52:13,14,
14;53:21;54:11,12
decision (21)
11:24;15:8;17:24,
25;18:25,25;38:6;
43:20;52:17;53:23,
24;54:3,5,5,9,9,13,15;
56:13,17;78:10
decisions (3)
19:6;51:8;58:4
decrease (3)
74:1;78:21,22
decreased (3)
63:8,16;74:2
deem (2)
61:17;69:5
deemed (2)
61:17;68:23
Defendant (12)
8:25;11:18;14:19,
19;15:16,20;16:4,7,9,
11,15;37:18
Defendants (7)
2:7;7:14;15:13;
16:2;17:18;19:10;
34:20
Defendant's (2)
15:22;26:25
defer (2)
78:11,13
definitely (2)
29:4;37:15
definitive (3)
28:8;29:10;30:1
degree (5)
46:6;90:24;91:2,5,
10
degrees (7)
63:9,10,12,12,14,
15,24
delay (1)
10:5
delays (1)
12:23
deliberate (1)
23:18
deliberating (1)
21:22
deliberations (2)
17:21;21:12
demolition (2)
26:10,11
Department (1)
9:3
depend (2)
22:17;40:2
dependent (2)
71:9;76:12
depending (3)
70:7;71:13;96:3
depends (1)
95:8
deposition (3)
16:5;43:9,12
depth (1)
29:9
dermatologist (2)
8:5,11
describe (8)
33:19;61:1;63:24,
25;67:6;68:18;69:24;
75:12
described (4)
30:11;44:3;67:10;
82:18
describes (1)
49:6
describing (4)
37:10;43:6;64:3,16
description (2)
23:25;42:25
deserves (2)
36:18;40:1
despite (2)
23:1;70:13
detail (2)
33:19;37:25
details (1)
13:16
deter (1)
13:12
determine (2)
20:22;71:2
determining (1)
19:4
develop (4)
8:7,12;82:9;94:17
device (2)
84:18;86:23
devices (3)
21:19,21;22:10
diabetic (1)
73:11
diagnose (2)
31:3;70:25
diagnoses (2)
31:25;34:7
diagnosing (1)
36:15
diagnosis (7)
28:9;29:10;30:1;
31:12;33:10,13;65:19
diagnostic (3)
33:7;71:2;72:23
diagnostically (1)
72:17
die (1)
67:9
Diego (1)
26:5
difference (3)
44:17;64:12;74:6
different (17)
20:18;26:12;38:3,
12;41:22,24;43:7,7;
49:19;67:14,15;75:9;
78:2;83:4;85:9,24;
86:14
differentiate (1)
44:5
difficult (2)
31:3;89:13
difficulties (1)
13:7
difficulty (1)
86:18
Dimension (1)
14:20
DIRECT (4)
51:2;53:18;60:9;
65:1
directly (3)
10:6;22:7;82:7
disability (3)
83:17,19;87:23
disabled (1)
83:20
disc (13)
30:10,15;33:20;
69:17;74:12,19,24;
75:1,3,4,6,18;94:15
discharge (1)
29:10
discharged (2)
22:6;28:25
discogram (6)
74:9,10,23;75:20;
77:4,8
discouraged (1)
10:7
discs (5)
30:16;69:15,15;
75:1,8
discuss (10)
5:4;21:13;22:25;
23:3;56:24;83:24;
91:22,23;94:2,12
discussed (12)
24:2;45:16;48:11;
77:5;84:9,9;86:1,1,2,
22;90:5;93:18
discussing (1)
94:13
discussion (5)
6:10;47:19;53:9;
58:17;96:9
disengages (1)
27:5
displaying (2)
63:16;64:6
dispute (1)
19:9
disputes (1)
19:5
disregard (1)
18:21
disrupt (1)

82:3
distal (1)
67:24
distribute (1)
82:2
distributed (1)
82:1
doctor (14)
25:14;29:11;32:10, 12;33:18;36:12; 47:24;48:3;59:5; 65:10;81:13;90:23; 96:5,11
doctors (27)
2:22;24:22;25:2,12, 13,16,17,18;28:14; 29:24;31:3,5,17;33:7; 35:8;36:7,15;40:11, 19,24;41:2,7,10; 61:12,13;65:9;91:18
document (10)
5:23,25;6:2,4,6,8; 16:2,5,10;58:20
documentary (1)
42:12
documents (3)
15:11;41:22;42:20
dollars (9)
51:11,25;53:22; 54:4,25;55:2;56:14; 57:7;92:14
done (16)
3:5;46:17,25;51:23; 53:3;66:24,25;67:2; 71:17,19;75:5,8,13; 93:14,16;94:5
donut (1)
30:11
door (1)
10:2
door's (1)
11:4
dorsiflexion (1)
64:4
dose (1)
78:4
down (27)
26:17;27:3;30:7,16, 17,19,20,23,24;31:2; 32:6;35:1;51:24; 52:15;53:8;58:15; 60:4;64:5;67:23,25; 70:5,18,22;74:24; 81:22;86:20;96:11
downstream (2)
67:8,11
Dr (49)
28:10;31:10,11,14, 20,22;32:9,9,10,12, 19,25,25;33:2,4,11; 34:5,15;36:2,15;59:3, 25;60:11;61:23; 65:12,20,23,24,24; 66:1,5;69:9;73:2; 74:7,8,8,15;77:25; 78:8,11,13;80:5; 81:20;91:23,25; 92:24;93:14;94:2,12
draw (6)
17:11;18:22;37:23; 41:25;45:5;87:5
dressing (1)
79:24
driving (1)
9:9
Due (2)
82:15;86:18
duly (3)
23:23;50:17;59:19
duration (1)
92:18
duress (2)
53:23;54:15
during (25)
5:4;13:16,20;16:1, 17,25;17:6,15;18:1, 18;19:15;21:5,12,14; 22:10;23:7;24:15,24; 27:23;34:5,21;57:18; 64:10;75:14;80:5
duty (7)
13:7,13;29:14;35:9; 37:5,7;43:22
dye (1)
70:18

E

earlier (4)
74:12;77:5;87:11; 94:13
early (3)
14:25;28:3;43:5
Earth (1)
20:14
easier (4)
24:2;25:24,25;89:8
EBT (1)
16:5
economist (1)
36:16
educational (1)
60:12
effect (7)
5:7;8:24;22:19; 28:18;58:3;70:24; 73:10
effective (2)
77:12;93:16
effectiveness (1)
72:1
effects (1)
89:10
efforts (1)
70:13
e-filed (1)
4:1
EHL (1)
64:5
eighty-five (1)
63:14
either (13)
5:3;9:23;16:25; 20:15;21:14;22:7; 23:3;30:10;39:3; 40:18;45:8;52:3;70:5
elbow (1)
31:22
elderly (1)
76:16
Eleanor (1)
8:2
elected (1)
72:12
electrical (4)
60:14;67:13;81:22; 84:18
electrodes (2)
84:15;86:23
electronic (4)
21:19,21;22:8,10
elicit (1)
75:11
elicited (1)
81:25
eliciting (1)
9:5
eligibility (1)
61:20
else (8)
11:8;18:6;21:14; 52:3,14;57:21;65:14; 71:18
EM (1)
66:23
e-mail (1)
44:21
emergency (7)
6:21;10:15,16;43:1; 44:19;80:14,14
EMG (7)
66:18,24;67:1,2; 68:13;95:20,24
employer (10)
6:20,22,24;7:8,9; 11:17,20;13:14; 49:12,16
employers (1)
13:7
end (11)
24:18;34:14;35:24; 36:1,1,20;39:25; 54:18,18;55:7,9
ended (1)
33:11
endorphins (1)
84:21
engineering (1)
60:14
enjoyed (1)
26:23
enough (2)
37:16;45:23
ensure (2)
19:9;47:7
entails (2)
24:21;34:24
entered (3)
12:12;58:23;63:5
entering (2)
12:13;58:22
enthusiastic (2)
37:5;43:21
entire (1)
15:16
entitled (2)
23:13;47:5
epidural (23)
32:15,21;66:16; 68:16,18,20;70:8,14; 71:7,17,22;72:2,3; 82:16,19;83:3;86:22; 87:21;88:2,7,21;90:1; 93:6
epidurals (4)
32:20;71:10,12; 72:5
equal (1)
18:11
equipment (2)
94:11,22
erred (1)
9:4
especially (3)
82:4;84:22;91:8
essentially (1)
2:25
establish (3)
8:7,18;9:14
established (1)
39:23
establishes (2)
10:4,6
establishing (1)
8:13
estimates (1)
95:7
Euflexxa (2)
92:21;93:13
evaluate (3)
62:14;67:2;95:12
evaluation (2)
65:25;73:2
Even (17)
20:10;23:11;25:10, 23;30:1;31:7;36:13; 40:18,24;41:14; 42:11;44:4;47:1;55:9; 57:5;76:13;83:24
event (1)
18:9
events (1)
43:9
eventually (3)
26:9;32:1;33:13
everybody (4)
37:2,3;43:2,3
everyone (4)
14:13;24:12;34:17; 37:5
everywhere (1)
83:2
evidence (48)
10:14;15:6,7,8,11, 14,17,20,22,23;17:8, 10,12,16,17;18:1; 19:1,1;20:21;21:3,7; 22:15,18;37:12,16,22, 25;38:3,7,25;39:14; 40:3,16,19;41:20; 42:12,14;46:6,7,20; 47:1,14;58:21;59:10, 11;62:4;67:19;68:4
evolve (1)
25:3
exactly (3)
28:3;74:16;83:21
exam (7)
63:1,4;64:10;66:14; 73:18;77:21;78:17
Examination (8)
16:3,13;40:20;51:2; 53:18;60:9;62:14; 63:5
examinations (1)
15:10
examine (3)
9:22;62:11;79:13
examined (3)
15:23;50:17;59:19
examining (2)
4:14;33:8
example (3)
30:18;38:17;78:13
exception (1)
17:3
exceptions (3)
7:13;15:17;17:3
excess (1)
92:10
exchange (1)
21:11
exclude (1)
19:1
excluded (1)
19:2
exclusive (1)
18:3
excruciatingly (1)
27:12
excuse (2)
23:22;55:20
Exhibit (9)
5:24;6:1,3,5,7,9; 16:18;58:21;69:8

exhibits (4)
15:11,20;18:1;
21:17
existed (1)
20:19
exists (2)
20:20;96:22
exiting (2)
48:7;96:21
exits (1)
48:8
expect (8)
7:16;22:22;23:13;
36:7,11,17;46:25;
57:5
expectancy (1)
36:9
expectation (2)
71:7;76:8
expected (1)
33:3
expects (1)
15:3
expense (2)
36:5;44:25
expenses (4)
24:20;36:6;56:22;
57:4
expensive (1)
36:4
experience (2)
44:4,16
experiences (1)
22:7
expert (2)
2:24;4:15
expertise (3)
44:4;45:21;91:21
experts (2)
2:15;40:6
explain (4)
8:21;9:7;19:16;
84:20
explained (1)
42:24
explanation (1)
20:25
express (1)
18:7
extended (1)
12:23
extension (4)
63:9,12;64:5;94:20
extent (1)
19:22
extremely (1)
43:21
extremities (1)
66:18
extremity (2)
63:17;64:2
eyes (1)
27:10

F

Facebook (1)
21:25
facilities (2)
25:16;34:12
facility (8)
29:22;31:19,20;
71:18;93:9;94:10,11,
22
fact (8)
8:7;10:3;23:3,4,20;
42:25;43:21;45:22
factor (1)
71:2
facts (9)
17:23;18:3,5,5,8,8,
9,15;19:6
fair (1)
24:21
fairly (4)
19:7,23;20:2;22:17
fairness (1)
21:4
faithfully (1)
22:22
fall (3)
27:23;46:1;62:20
falling (1)
27:4
falls (2)
27:3,5
falsity (1)
8:19
family (1)
29:11
far (9)
2:15;10:15;25:25;
41:12;65:11;66:1;
69:4;78:8;82:19
fascitis (2)
83:14;84:7
fault (2)
3:12;36:19
favor (1)
16:25
favorite (1)
22:8
February (3)
32:2;73:14;87:7
fee (1)
94:11
feel (9)
23:4;32:13;36:13,
14;37:6,7;58:13;
64:20;75:7
feeling (8)
64:16,19,22;75:15,
17,17;81:22;95:9
feels (2)
28:19;35:23
fees (1)
56:23
feet (2)
27:3;38:19
Felder (1)
8:17
fell (1)
38:17
fellow (1)
23:3
fellowship (1)
60:20
felt (2)
64:21;74:16
Fererra (1)
8:2
few (8)
31:12;43:12;51:5;
53:20;61:14;92:13;
93:5,14
fibers (1)
69:25
fibrocartilage (1)
28:13
field (1)
91:23
fields (1)
61:13
fifteen (8)
27:3;35:1,2,6,9;
49:24;50:4;63:12
figure (1)
41:10
filed (1)
39:20
filled (1)
9:8
filler (1)
33:21
films (2)
28:16;33:6
filter (1)
45:14
finally (3)
28:16;34:6;60:21
financial (2)
39:19;41:15
find (6)
17:23;35:9;62:13;
72:1;76:25;90:8
finding (1)
64:13
findings (5)
63:3;64:10;73:20;
78:19;95:25
fine (3)
11:14;41:25;75:1
finish (2)
4:17;47:8
finished (1)
3:21
firm (2)
40:17,22
first (20)
3:10;7:13;11:3;
15:12,23;17:18;
24:12;26:6;31:6;
39:21;40:17;42:12;
50:17;59:19;62:1,7,8,
9,9;66:4
fit (2)
3:7;38:4
five (6)
26:24;63:9;94:25;
95:4,6;96:3
flaring (1)
83:12
flexion (6)
63:10,11,11,13,15;
64:4
flow (1)
70:19
fluent (1)
28:4
fluid (1)
92:23
fluoroscopic (1)
93:10
flux (2)
2:23;41:9
Foam (1)
26:12
focus (2)
65:12,15
focussed (1)
32:22
follow (3)
22:13;29:11;62:10
followed (3)
15:13;17:18;71:10
following (8)
23:16;29:5;72:3;
73:21;84:8;86:3;
88:21,22
follows (2)
50:17;59:19
followup (1)
28:25
food (1)
35:18
foot (4)
26:16;63:18;67:25;
84:8
football (1)
80:13
force (1)
82:2
forced (1)
52:4
forces (3)
81:25;82:4,5
forget (1)
14:23
form (2)
9:8;75:25
formation (1)
78:24
forms (2)
15:10;41:22
forty (1)
35:14
forty-four (1)
36:8
forty-four-years-old (1)
26:2
forward (4)
36:20;41:9;47:15;
71:16
forwards (1)
63:10
found (3)
73:9;82:25;93:16
foundation (1)
39:23
four (4)
7:15,19,21;92:17
frankly (2)
39:3;40:8
Fred (1)
36:2
free (3)
22:6;23:22;63:14
freewill (1)
52:6
front (5)
7:16;12:14;25:21;
45:16;69:13
frustrated (1)
31:17
full (1)
26:17
fully (1)
21:6
function (1)
17:21
further (3)
63:23;95:17;96:5
fused (1)
91:8
fuses (1)
33:23
fusion (6)
33:17;81:25;82:17;
94:13,17,20
future (17)
24:19,20;25:8,9;
36:8;72:16;91:6,11,
12,14,16,24;92:1,3,7;
94:7,18

G

Gabapentin (7)
57:25;58:1;73:8;
78:3;89:5;90:19;92:8
gain (1)
44:24
Galluchio (1)
8:3
game (1)

38:24
gap (2)
10:14;11:5
Garden (1)
37:8
Garsten (3)
9:3,6,7
gas (1)
68:1
gate (2)
63:6;65:4
gave (8)
24:23;48:13;49:2;
66:5;80:11,15;82:11;
87:19
gel (2)
84:14;90:18
gelatinous (2)
69:18,20
general (1)
48:25
generally (13)
63:24;65:18;67:3,
23;70:21;71:1,19;
82:1;83:22;91:7;
92:16;93:22;94:25
generic (1)
69:11
generics (1)
92:10
gentlemen (4)
24:11;26:21,22;
41:4
Georgia (1)
60:21
gets (7)
31:25;36:5;45:11;
76:14;82:10;94:3,4
gist (1)
6:21
given (16)
3:25;18:20;21:22;
66:7;80:10,13,19;
83:15;84:15;86:8,24,
25;87:13;88:23,24;
92:14
gives (4)
67:13;69:15,18;
76:4
giving (3)
32:4;44:5;89:6
God (1)
38:19
goes (13)
24:3;25:22;29:7;
32:2,3;33:3,19;39:20;
40:25;41:16;49:7;
78:12;80:23
Goldman (2)
36:2,15
gonna (58)
2:8;7:20;9:20;10:9,
12,13;11:21,23;12:2,
3,23,24,24,25;13:8;
14:17;24:22;25:7;
35:17;36:2,3,4,5;
37:22;38:7,9,10,11,
25;39:1,2,4,7,13,14,
24;40:16,19;41:23;
42:1,13,14,23;43:4,
13;46:15,20;47:7,20;
48:4;49:18,18,23;
52:1;54:23;56:6,23;
57:13
Gonzalez (1)
50:20
good (14)
2:3;8:3;12:17,17;
14:13,13,22;27:23;
37:2,8;59:25;60:11;
86:17;95:9
goodness (1)
43:24
Google (2)
20:14;21:25
governing (2)
19:15;24:1
Graduate (2)
60:16;61:12
graduating (2)
60:13,21
graft (1)
78:24
grandular (1)
37:24
Great (6)
37:2;48:1,5;59:8;
83:10;96:19
Grimm (10)
32:10,11,19,25;
59:3,22,25;60:11;
61:23;69:9
Grimm's (1)
32:12
grip (1)
28:18
Grossman (1)
31:14
ground (1)
27:4
grounds (2)
7:1;9:6
growth (1)
36:6
guess (4)
21:25;44:19;56:2;
77:24
guidance (1)
93:10
guide (1)
70:17
guided (1)
93:15
Gunhill (1)
29:23
guy (1)
26:18
guys (4)
37:4,8;42:5;43:24

H

hamburger (2)
70:3,3
hand (20)
5:13;18:11;27:12,
13;28:7,15,18,25;
29:4,7;31:10,23;34:6;
50:11;59:13;62:22;
80:7;93:3;95:5,18
happen (7)
10:19,21;11:2;
12:25;20:10;45:9;
48:22
happened (15)
10:13,15,20,25;
20:1,8;42:9,10,11,21,
23;43:6;45:6;46:9;
49:13
happening (1)
95:22
happens (1)
41:8
happily (1)
9:23
harass (1)
13:12
hard (2)
8:1;84:19
hardware (3)
95:12,13,15
head (1)
46:3
headache (2)
55:24;56:6
Headstart (1)
14:20
heal (1)
25:6
healed (1)
36:13
healthy (1)
47:23
hear (29)
13:19;16:1,4,14;
17:2,6,25;18:19;
21:16;22:15;25:1,2,8,
12;28:14;30:4;31:21;
32:11;33:3;36:9,17;
37:12;39:1,13;40:3;
45:2;47:4,12,12
heard (8)
9:10;13:16;21:6,9;
37:9;45:24;60:1;64:9
hearing (3)
24:22;33:9;41:13
hearsay (3)
8:15;9:2,7
heart (2)
92:22,22
heavy (2)
19:8;35:14
height (1)
46:1
held (5)
6:10;47:19;53:9;
58:17;96:10
help (12)
25:4;28:1,2;31:9;
32:24;34:1,2,9;71:2;
76:3;84:21;92:24
helped (9)
34:4;38:19;72:4,15,
17;78:6;83:10;90:3,4
helper (2)
26:19;27:9
helping (4)
26:19,20;34:22;
79:24
helps (5)
34:25;70:24;73:10;
89:13,20
herniation (4)
30:2;69:21,21;70:9
herniations (1)
30:9
herself (1)
23:23
Hew (1)
34:12
Hi (1)
14:13
high (1)
95:25
himself (2)
6:24;23:22
hired (2)
41:1,16
history (14)
62:11,12,12,12,16;
63:1;66:13;79:20;
85:6,22,24;86:12;
89:24;91:21
hit (1)
49:15
hits (1)
70:2
hitting (1)
27:7
hold (1)
11:20
home (7)
27:19;28:1;29:2;
79:25;93:24;96:17,19
honestly (1)
19:7
Honor (24)
4:4;5:6,12;7:12;
9:15;24:7,10;48:9;
51:1;52:20;55:13;
56:3,19;57:9;59:6;
60:8;62:5;68:21;81:6,
10;88:4,10,13;90:10
Honorable (2)
2:1;12:15
Hopefully (2)
6:15;49:25
hopes (1)
32:4
hose (3)
26:16,20;67:7
hospital (19)
6:22,25;7:15;9:24;
10:5,6,7,10;27:18,19,
20;28:1,2,24;29:1;
43:3;49:7,14;60:16
hours (6)
7:15,20,22;35:4,4,
15
house (1)
27:21
housekeeping (1)
41:3
human (2)
23:5;25:5
hundred (6)
26:16;34:2,9;35:6;
71:4;92:13
hurt (3)
6:23;7:17,21
hurting (3)
27:15;29:5;32:22

I

I-A (2)
5:21;6:1
ibuprofen (2)
57:20;78:3
ID (2)
68:25;69:6
idea (2)
24:21;69:13
identification (2)
59:9;69:8
II (2)
5:20;6:3
II-B (1)
6:5
III (1)
6:7
illegal (1)
13:8
immediately (1)
90:25
impartiality (1)
23:13
impartially (3)
18:7;19:8;22:18
imperative (1)
49:20
impingement (1)
63:21
importance (3)
18:11;39:14;41:18

important (3)
21:5,23;42:18
importantly (1)
47:2
impression (2)
7:13;20:25
improvement (2)
84:8;88:21
imputed (1)
7:8
imputes (1)
7:7
Inc (1)
14:20
incentive (3)
39:9,19;41:15
incident (5)
19:25;20:17,20,23;
96:18
incidentally (1)
38:15
incisions (1)
61:5
includes (3)
22:2;94:11;95:20
including (5)
21:19;42:11;92:7;
94:10,21
inconsistencies (4)
42:20,24;43:14,15
inconsistent (1)
43:8
incorrect (1)
53:24
increase (5)
65:6;82:4;87:20;
88:8;89:12
increased (3)
80:15;95:8,23
increasing (1)
78:3
independent (1)
21:15
indication (1)
18:5
individually (1)
22:1
inference (2)
10:18;18:22
inferences (1)
17:11
inferred (1)
11:12
inflame (1)
67:10
inflamed (1)
70:10
inflammation (1)
70:22
inflammatory (2)
73:3;80:12
inform (1)
13:4
information (5)
22:2,19;37:9;45:5;
77:11
inhibit (1)
51:7
initial (1)
70:11
initially (2)
60:15;73:9
inject (4)
70:18,20;76:3;
80:25
injected (2)
75:2;76:5
injection (14)
68:17;70:15;71:1,8;
72:4,4;75:24;85:16;
86:4;88:22;90:2;93:9,
18,19
injections (27)
32:15;61:4;66:17;
72:5;75:23;78:6;79:6;
80:2,4,10,19;82:11;
86:9;87:1,14,19;
88:23,25;90:22;
92:21,22;93:6,11,12,
13,15,19
injure (2)
46:3,8
injured (8)
29:20;33:20;35:23;
36:13;46:18,19,22;
62:18
injuries (14)
19:22;24:17;25:2,9;
28:23;35:22;36:13,
19;42:4,7,10;45:7,8;
64:24
injury (7)
28:9,19,22;30:17,
19;46:2;62:22
Inocencio (8)
14:7,9,9,11;25:22,
23;50:20;61:24
inquire (1)
60:7
inside (3)
69:18,20;70:1
instead (1)
2:17
instruct (4)
17:19;18:12,20;
93:24
instruction (3)
19:18;22:12,23
instructions (6)
13:18;15:1;21:10;
22:13;23:17;43:11
insulation (2)
26:13;27:1
intact (2)
63:16;95:15
intend (1)
5:4
intended (1)
17:16
intends (1)
37:11
intention (1)
9:24
interest (4)
39:8,18;40:23,24
interested (4)
39:5;41:14;44:1;
45:2
interlaminar (3)
72:6,9;82:21
internet (3)
21:18,24;45:13
internship (1)
60:16
interpret (1)
37:12
interpretation (1)
40:3
interpretations (1)
37:17
interpreter (11)
2:10,12;4:24;49:25;
50:22,24;51:13,13;
54:24,24;55:22
interval (1)
80:5
interventional (1)
60:20
into (21)
15:11;16:10;20:4;
32:16;37:24;39:15;
42:14;45:18;49:14;
52:16;59:10,11;
63:25;67:12;69:22;
70:18;74:24,24;76:3;
82:8;85:13
introduce (1)
15:14
introduced (3)
8:11;15:6,11
introduces (1)
15:16
introduction (3)
15:19;16:18;17:7
invade (1)
18:6
invasive (2)
61:5;71:16
involve (3)
46:1,2;67:24
involved (2)
9:11;45:25
involves (5)
20:8,19;26:14,18;
35:1
involving (4)
40:20;63:17;64:3;
68:14
iPhones (1)
21:20
irrational (1)
8:22
irrelevant (1)
18:9
irritate (3)
63:22,23;70:9
irritated (4)
63:22;69:24;70:10;
80:22
Irvine (1)
60:18
issue (17)
10:24;13:13;52:25;
56:12;68:11;70:25;
71:2,5,11;72:18;76:4;
80:3;83:10,22;92:20,
22;95:21
issued (1)
78:3
issues (9)
22:3;63:20;72:20;
74:15;75:2;84:22;
91:7;93:20;94:15
IV (1)
6:9

J

Jacobi (3)
29:1,6,7
jail (1)
44:18
January (5)
79:1,3;85:4,6;90:15
Jefferson (1)
60:15
Jeffrey (2)
31:20;65:10
jelly (3)
30:11;70:1;74:25
Jennifer (3)
26:4;27:24;28:1
jewelry (4)
34:19,22,24;35:2
job (12)
6:23,24;7:21;26:7,
11,23;32:12;34:18;
35:7,9;42:1;84:10
jobs (1)
35:11
Joe (1)
9:1
joint (8)
31:1;82:6,6,10;
87:12,14;93:18;95:18
joints (9)
31:22,22;32:24;
65:19;78:13;81:24;
82:2,5;89:23
Jordan (1)
5:11
Jose (2)
25:22,24
Joseph (2)
32:25;33:2
Judge (11)
6:17;10:11;37:1;
43:10;45:21,22;
46:14,21;49:9;52:21;
57:8
judges (2)
18:3,15
judgment (1)
22:20
July (8)
77:9,13,14;80:16;
84:1,4;88:3,6
jump (1)
66:11
jumping (1)
8:22
June (6)
76:23;77:1;79:18;
86:10;87:16,19
junk (1)
44:21
JUROR (5)
13:23;22:11,24;
23:22,23
jurors (11)
4:18;17:21;18:13;
19:7;23:3,13,18,20,
21;36:24;38:4
jury (44)
3:8;7:8,16,18;10:9;
12:6,12,13,17,18,22;
13:7,12,16;16:21;
21:11;23:8;24:11,15,
24;34:21;37:5,7;41:6;
43:22;45:23;47:3,20;
48:7,8;54:23;55:7;
58:22,23,25;60:12;
64:12;68:18;69:9;
74:10;92:3;96:12,21,
22
justice (4)
12:20;19:6;51:23;
52:10
justly (2)
19:23;20:2

K

Kaplan (16)
31:20;32:9,9;65:10,
12,20,23,24,24;66:1,
5;78:13;91:23;92:24;
93:14;94:2
Kaplan's (1)
31:22
keep (8)
4:18;12:7;13:10;
19:14;21:5;31:13;
35:9;75:17
Kenneth (1)

41:5
kept (1)
33:12
ketorolac (1)
78:2
kid's (1)
35:18
killing (1)
27:13
kind (13)
2:22;21:18;28:21;
33:24;37:4;38:7;40:6;
46:1;62:10;68:5;
69:16,24;88:6
kinds (3)
38:3,12;39:14
kink (3)
67:7,10;70:22
kinked (1)
68:8
knee (20)
30:25,25;31:1,22;
32:1,5,7,8;46:2;
62:22;66:8;91:23,24;
92:19,23;93:16;94:3,
7;95:2,16
knees (3)
65:19;84:24;89:22
known (1)
92:21
knows (3)
27:8;43:3;54:22

L

L-1 (1)
30:5
L3-4 (1)
75:12
L-4/5 (1)
66:16
L4-5 (2)
74:14;75:12
L-5 (3)
33:14,20;67:22
L-5/1 (1)
66:16
L-5/S-1 (3)
66:17;67:20,22
L5-1 (2)
74:14;75:13
L5-S1 (1)
82:4
label (1)
83:20
Ladies (1)
24:11
lady (2)
60:2;76:17
landing (1)
27:4
lands (1)
27:6
laptops (1)
21:20
last (12)
4:2;27:6;37:3;
40:18;42:6;46:13;
71:8,13;76:13;80:2;
86:2;94:25
lasted (1)
76:15
lastly (1)
96:17
late (3)
12:24;13:1,3
later (8)
4:16;16:11;28:8;
30:24;32:11;56:3;
76:15;95:8
lateral (5)
63:11,11,15;82:21;
90:3
laundromat (1)
34:18
law (19)
8:3;11:23;13:12;
16:23;17:20,23;
18:13,25;19:6,11,17;
21:10,23;22:2,14,17;
23:18;40:17,21
lawsuit (9)
13:25;14:6;17:1;
19:4;21:4;29:18,21;
39:20;44:16
lawyers (4)
16:1,4,8;17:9
lead (2)
22:21;43:15
leading (6)
21:1;81:10,11;
88:12,14;90:12
leads (1)
34:16
least (4)
33:25;36:10;44:2,
10
leave (4)
42:1;45:20,22;
65:20
left (19)
7:18;25:21;30:23,
25;32:1;62:22;63:11,
11,14,17,19;64:1,3;
66:17;74:3,5;87:13,
15;93:16
left-sided (1)
87:12
leg (18)
27:15;29:2;30:23;
31:2;63:18,19,25;
64:1,14;67:24;72:11,
13,22;74:4;78:23;
81:22;85:13;86:20
legal (2)
16:19;24:1
legally (1)
19:3
legitimately (1)
44:22
legs (2)
30:17,21
length (1)
37:21
Lenzo (1)
80:5
Leo (1)
26:22
Leonard (1)
8:17
Leslie (1)
26:4
less (4)
54:20,21;83:24;
96:3
level (14)
30:14;33:22;74:25,
25;75:5,7;82:4,8,17,
17;85:11;92:2;94:15;
95:22
levels (4)
74:14;91:8;94:14;
95:22
liability (2)
19:20;24:16
licensed (1)
61:21
Lidocaine (1)
76:5
Lidoderm (2)
86:25;92:8
lie (6)
45:12,13;48:14,18,
21;49:5
liens (1)
51:20
life (3)
36:9;83:25;94:23
lifetime (3)
92:18;93:22;94:17
lifting (7)
35:6,9,13;64:4;
67:24,25;84:10
light (3)
29:14;35:9;47:23
likelihood (1)
94:6
likely (4)
72:19,20;91:15;
93:17
likes (1)
76:18
limited (2)
2:25;3:2
line (2)
4:8;47:8
lining (1)
2:22
link (1)
44:21
listed (1)
89:15
listen (2)
44:12;49:16
little (14)
28:16;34:4;37:24;
41:9;42:8;43:10;60:4;
67:10;72:14;74:6;
76:5;78:1;83:3;89:7
live (2)
20:11;70:17
lives (1)
27:19
living (1)
26:7
located (1)
28:15
location (6)
20:9,10,11,16,19;
49:12
long (4)
32:16;71:7;76:10;
93:2
longer (1)
76:13
long-term (1)
89:10
look (4)
2:19;11:23;36:20;
38:5
looked (4)
20:17;27:13;29:7;
31:11
looking (5)
45:18;62:6;69:10;
74:15;90:8
looks (3)
2:15;20:17;33:5
Lorenzo (2)
28:10;34:6
loses (1)
27:7
loss (1)
19:24
lost (2)
27:8;34:18
lot (17)
25:13,16,16;26:14;
28:14;29:5;30:18;
37:9;38:10;42:1,13;
47:11;61:2;66:12;
68:9;80:13;88:13
loudly (1)
43:6
Love (1)
34:13
loved (2)
34:17;43:1
lower (10)
30:2,20;63:8,17;
64:1,8;66:18;75:23;
81:24;89:22
lowest (2)
82:4,8
lubricate (1)
92:23
lumbar (8)
30:7,8;75:22;78:20;
90:25;91:25;93:6;
95:1
lunch (8)
47:22;48:1,6;56:11;
57:14,15,18;58:18
lying (1)
49:4

M

machine (3)
70:17;71:20;74:24
MacMurray (1)
9:4
Madame (3)
2:3;12:16;50:22
magazines (1)
21:18
mags (1)
48:3
main (3)
28:7;38:7;39:17
maintain (2)
61:18,19
makes (2)
15:12;44:13
making (11)
7:22;17:15;20:24;
40:25;41:15;53:23;
54:4,5,8;87:20;89:13
man (2)
35:17;46:18
management (9)
32:10,12;60:21,24;
65:25;66:10;86:3;
92:15,17
mandate (1)
22:17
manner (3)
10:25;61:3;71:12
many (6)
43:7,7;82:9;84:23;
93:20;94:12
March (5)
34:5,8;81:18;82:13,
14
Marietta (1)
60:21
mark (3)
4:5;5:16;62:3
marked (18)
5:10,11,15,23,25;
6:2,4,6,8;14:2;58:20;
62:5;63:8;68:11,22,
23;69:5,7
markets (1)
35:12

marking (1)
59:7
married (1)
26:2
Martinez (33)
14:7,10,11;25:20;
26:23;30:22;34:2;
36:7,18;39:17;43:5;
45:15,25;47:2;50:20;
51:4;53:10,20;55:20;
61:24,24;62:7;66:20;
71:23;81:14;85:8;
87:10;88:17;89:1,24;
90:14;91:6,11
mask (1)
31:2
match (1)
49:3
material (1)
35:7
Matt (3)
14:16,22,23
matter (7)
7:4,25;12:21;21:3;
25:5;44:15;56:23
matters (1)
20:25
Matthew (3)
32:10;59:3,22
may (42)
10:11;11:25;13:9,
10;15:20,21;16:1,4,
17;17:2;18:6,18,19,
20,22,23;20:9,18;
21:16,24;22:12;
25:10;44:22;51:7;
52:21;60:7;63:20;
67:11;76:20,21;79:7;
84:1;85:17,18,20;
91:15,15;92:6;93:7,
21;94:18,18
Maybe (7)
40:1,2;44:17,18,23;
48:2;76:18
mean (8)
11:4;23:10,21;
61:10;67:21;68:3,9;
71:9
meaning (3)
63:6;64:15;95:25
means (5)
22:8;38:8;39:9;
40:23;51:14
med (1)
60:14
media (1)
44:20
medical (21)
24:20;27:15;29:20,
23;31:4,8,15;34:12;
36:3,4,6;43:18;46:5,
24;60:15,19;62:12;
90:24;91:3,6,10
medication (17)
32:23;57:17,19,24;
58:11;65:17;70:19;
71:11;73:3,7,9;83:14;
84:14;86:5,24;89:6;
90:18
medications (10)
51:7;61:4;62:13;
70:11;73:5;84:13;
89:3;90:22;92:6,16
Medicine (9)
31:19,20;59:23;
60:17,22;61:8;80:25;
83:1;89:7
med-mal (1)
8:8
meds (1)
78:1
meet (3)
7:13;28:1;90:6
member (1)
21:11
members (5)
12:17,18;47:20;
58:24;96:12
meniscus (3)
30:25;32:1,3
mental (1)
8:14
mention (4)
12:2,3;19:25;73:14
mentioned (5)
17:5;24:15,16,24;
25:13
mentioning (1)
34:21
mere (1)
71:13
merely (1)
8:13
method (1)
19:4
Mexico (1)
26:2
mic (1)
6:11
Michelle (1)
73:22
Michigan (1)
60:19
microphone (1)
60:5
middle (1)
30:6
might (4)
8:7,8;20:25;44:20
mild (1)
68:12
million (21)
33:6;51:10,15,17,
19,25;53:22;54:4,19,
22,22,25;55:2,6,8,9,
11,14,18;56:14;57:6
mind (5)
7:24;9:14;19:14;
21:5;49:6
Mine (5)
4:12,14;18:8;41:5;
61:13
minimally (1)
61:5
minute (1)
50:4
minutes (3)
4:21;49:24;84:12
mispronounced (1)
25:23
missing (2)
24:13;77:16
mistaken (1)
20:25
mixed (1)
77:7
mm-hmm (2)
44:13;58:2
mobility (1)
32:5
model (3)
68:22;69:7,11
moderate (2)
68:11,12
moderately (1)
78:21
moment (5)
24:5;27:16;28:21;
29:19;51:18
momentarily (1)
39:15
Monday (1)
3:3
money (7)
9:1;19:23;20:2;
26:9;39:23;51:22;
52:4
moneys (1)
51:20
monitor (9)
90:19,20,21;92:16,
22;93:25;95:2,6,17
monitored (1)
94:23
monitoring (4)
25:10;93:2;95:2,20
month (2)
92:10;93:24
months (10)
8:6;76:13;79:11;
80:3;81:3;93:13,17,
17;95:16,19
more (37)
3:19,19;25:7;26:9;
29:9;31:3,24;32:4,21;
34:10;35:13;36:5;
37:16;43:19;44:12;
46:15;47:2;51:22;
54:19,22;55:9;64:19;
65:12;67:24;71:16;
72:4,10,10;80:22;
87:12;89:21;93:7,21;
94:4,4,14;96:3
morning (11)
2:3,18;12:17,17,21;
14:14,22;33:4;37:2;
47:21,21
most (8)
25:18;27:16;31:5;
37:6,25;40:11;84:23;
95:15
motion (19)
2:7,8;3:8,9,9,12,16;
4:7;5:7,8,17;6:18;
48:11,21;50:2,3;63:7;
69:16;74:2
motions (10)
4:6,9;5:4,10,18;
12:5;16:19,20,22;
17:15
motivated (1)
43:17
motivation (1)
43:18
mouth (1)
70:12
mouthful (1)
28:13
move (3)
43:24;74:4;89:9
movements (1)
82:11
moving (1)
34:25
MRI (7)
28:22;34:7;66:15;
74:15,18;94:25;95:10
MRIs (2)
31:24;33:6
MRI's (3)
29:25;31:25;66:9
much (13)
12:18;14:3,24;29:9;
34:3;36:23;47:16,17;
49:22;58:13;77:24;
89:19;96:7
multidisciplinary (1)
61:3
multifactorial (1)
72:20
multinational (1)
44:20
multiple (1)
70:17
multitude (1)
65:6
muscle (8)
64:2,5;67:13;74:6;
75:25;76:1;89:11;
91:4
muscles (9)
65:5;67:3,14,23,23;
72:21;84:19,19;89:21
muscular (16)
64:7,19;67:6;72:20;
75:23;76:11;79:5;
80:1,10,19;84:15;
86:8,25;89:21;90:21;
93:11
musculature (1)
64:7
musculoskeletal (2)
84:22,24
must (7)
15:15;16:23,23;
18:15;21:21;61:18;
62:25

N

nabumetone (1)
73:6
name (11)
12:19;14:15,25;
25:22,24;28:12;41:5;
50:19,22;59:20;92:9
named (2)
26:21,22
names (1)
73:5
narrowing (1)
70:6
natural (2)
82:3;84:21
nature (2)
19:22;37:20
near (1)
20:11
necessarily (2)
64:21;68:9
necessary (3)
23:4;38:5;78:7
neck (6)
30:6,18;61:2;65:15;
76:14;91:19
need (28)
13:21;21:2;24:5;
25:7,7,10,10;28:22;
46:5,24;47:12;48:4;
50:3;58:8;61:6;74:21;
78:6;86:3;90:22;
91:15,15;92:6;93:7,
21;94:3,13,18,23
needed (5)
2:10;92:1;93:5,10,
13
needing (2)
93:20;95:7
needle (5)
32:16;67:12;70:18;
74:23;76:3
needling (1)
76:4
needs (6)
27:14;28:2;36:8;

44:23;93:7;94:20
negative (1)
7:7
neither (1)
18:6
nerve (19)
28:19,19;30:14;
35:23;63:21,22;
66:18;67:12;70:9,10,
18,20,22;72:18;73:8,
11;74:13;86:24;89:6
nerves (12)
30:15;33:13;67:3,4,
5,9,10,15,22;68:7;
69:22;70:6
neuropathic (2)
73:4;89:21
neuropathies (1)
73:11
New (7)
8:17;31:18;59:23;
60:22;61:21;86:23,23
next (36)
8:16;12:25;26:3;
33:4;41:4;66:20,21;
70:14;71:23,24;
73:16,23;76:20;77:8,
19;78:15,25;79:7,18;
80:16;81:13,13,17;
82:13;83:5;84:1;85:3,
17;86:10;87:2,16;
88:1,9,17;89:1;90:14
Nice (1)
14:23
night (2)
4:2;89:12
nightmares (1)
86:19
nine (1)
24:25
ninety (1)
63:14
none (5)
39:2,3;40:14,15,16
non-party (1)
49:21
non-prescription (1)
51:7
nonsteroidal (1)
73:6
non-steroidal (2)
89:7,8
nonsurgical (3)
60:20;61:3;71:12
Nope (1)
9:22
nor (2)
18:6,23
normal (7)
23:5;63:12,15;
69:12,17;75:19;78:9
Normally (2)
15:15;65:5
North (3)
27:20;28:6;43:1
notary (1)
16:12
note (6)
13:14;41:3,3;77:15;
90:9;94:18
noted (3)
72:4;77:23;78:24
notes (1)
66:3
notice (1)
74:5
November (2)
85:3;87:3
NSAID (1)
89:18
number (2)
47:9;68:24
numbness (3)
28:19;30:19,20
numeric (1)
87:22
nursing (1)
71:20
NY (1)
14:20
NY2d (2)
8:2,18

O

oath (4)
16:7;18:12;43:11;
53:16
object (2)
16:17;52:22
Objection (8)
81:6,8,9,12;88:4,
10;90:10,11
objectionable (1)
8:15
objections (4)
16:20,22;17:15;
18:18
objective (2)
64:9,19
obligation (1)
23:24
obviously (4)
39:17;49:15;75:18;
95:2
occasions (1)
93:14
occupation (2)
83:23;87:25
occurred (5)
20:23;24:25;28:5;
33:9;62:24
October (3)
78:15,16;87:3
off (3)
21:21;57:7;60:11
offer (5)
15:21;51:5,10,24;
52:15
offered (7)
7:2;8:18;9:13;
42:14;51:5,11;53:22
offering (1)
7:24
office (13)
34:15;52:3;65:21;
66:21;71:18,24;
79:10,11;80:24;
81:18;88:25;92:15,19
OFFICER (16)
2:1;5:14,15;12:13,
16,19;14:4;48:7;50:8,
10,18;58:22;59:12,20,
24;96:21
offices (1)
79:15
Official (1)
73:22
off-the-record (2)
6:10;96:9
often (13)
43:6;61:2;65:6;
68:12;70:14;72:9;
76:11,13;80:22;
89:22;93:7;94:4,14
Oftentimes (4)
81:24;85:2;89:9,12
oil (2)
9:9,11
older (1)
36:14
oldest (1)
27:24
omission (1)
7:1
omitted (2)
19:18,18
once (8)
27:5;61:12;63:1;
70:20;72:15;93:2,4,
23
one (52)
2:21,24;3:11,19;
7:13;11:3,3;13:10;
17:2;19:17,18;23:6;
26:18;27:3;29:20;
33:13;34:3,10;37:15,
18;38:17;39:11,17;
40:13;43:1;52:3,14;
53:23;54:10,14,14;
57:20;58:21;59:7;
62:3;65:12;67:4;69:2;
71:13;72:6,8;74:16,
18,18,25;75:1,10;
77:4,6;87:13;89:9;
93:8
ones (4)
43:25;44:1;96:1,1
online (1)
61:19
only (22)
9:13;10:12;19:21;
20:1;21:7,8,8;22:15,
16,16,18;23:10,18;
27:8;39:12;42:19;
43:25;44:1;45:20;
46:17;54:10,13
onto (1)
11:12
open (5)
2:18;4:23;10:2;
21:5;27:10
opened (2)
11:4;82:22
opening (14)
5:7;9:21;11:22;
12:5;15:1,2,4,7,12,13;
17:14;24:8;48:23;
49:1
openings (3)
4:10,17;5:4
operating (1)
40:12
opine (1)
91:12
opinion (8)
18:5,7;90:23;91:2,
5,18,20,20
opinions (3)
18:8;41:24;91:25
opportunity (1)
21:11
opposing (1)
15:24
opposite (1)
39:5
opposition (2)
4:2;5:21
oral (2)
61:14,15
order (9)
2:2;12:15;13:18;
15:18;24:20;47:11;
50:8;58:22;75:9
Ortho (3)
31:18;59:23;60:22
orthopedic (5)
61:2;92:19,25;93:1,
3
orthopedics (1)
60:20
orthopedist (1)
80:25
orthosis (2)
78:20;84:8
Osvaldo (1)
26:21
others (5)
21:17;44:25;47:25;
91:22;96:15
otherwise (3)
8:21;22:19;58:10
out (34)
7:2,14;9:8;11:13;
16:21;17:10;23:8;
26:19;29:3,6,25;
30:11,12,16,24;31:24;
32:3;33:5,19;41:10;
44:13;51:6;56:23;
59:6;62:13;69:20,23,
25;70:2,3,6,7;72:1;
75:5
outcome (3)
38:23;39:8,18
outline (1)
15:3
outlined (1)
19:11
outside (2)
22:19;69:17
outweighed (1)
7:6
over (14)
12:21;20:12;24:23;
25:2,16;27:10;36:11,
16;37:3;38:18;42:6;
79:16;81:15;94:23
overall (1)
46:6
overnight (1)
89:12
oversell (1)
45:12
overuse (1)
65:3
overused (1)
65:5
owe (1)
51:20
own (10)
19:15;20:5;36:20;
37:14;44:16;52:6,8;
54:15;56:17;79:15
owned (1)
31:20
owner (1)
26:21

P

padding (1)
31:1
pads (1)
83:15
page (2)
8:4;73:23
paid (6)
13:9,9,11;40:8,13,
24
pain (98)
24:19,19;29:3;
30:20,23;31:2,2,9;
32:4,7,10,12,14,17,18,
23,25;46:22;53:25;
55:25;60:20,24;63:8,

9,10,14,25,25;64:17;
65:3,16,18,25;66:9;
68:10;69:22;70:13;
71:3,15;72:10,11,13,
19,21,22;73:4,4,8,11;
74:13,13,17,20,22;
75:3,6,6,13,17,25;
76:1;77:24;80:1,12,
15,20;81:21,23;82:9,
24;84:22;85:12,15;
86:2,16,18,20,24;
87:12,20;88:8,22,24;
89:21;90:1,3,5,21;
91:3;92:15,16,24;
93:3;94:24;95:3,6,8,
23
painful (3)
63:6;76:2,2
palpated (1)
64:21
palpating (1)
64:7
pandemic (2)
34:16;79:9
pants (1)
79:25
paper (1)
66:12
papers (4)
3:18,20,24,25
part (13)
11:6,10;19:21;
37:25;42:9,10,12,13;
44:2;47:7;65:13;
67:24;74:25
participating (1)
41:6
particular (6)
4:8;10:3;19:17;
20:9;38:4;65:13
parties (12)
14:5;15:5;17:17;
20:16;21:2,4;22:3,17,
20;23:9,12;96:16
parts (4)
32:22;42:4;46:8;
65:14
party (10)
7:2,3;11:11,17;
13:25;14:18;15:23,
24;16:25;40:25
pass (2)
23:11;61:15
past (8)
20:11;24:19;25:20;
46:5;62:12,12;63:24;
96:17
pat (1)
74:24
patch (1)
86:25
patches (1)
92:8
pathology (1)
66:15
patient (20)
32:13;33:9;41:11;
47:13;62:9,11,14;
63:24;64:18;65:16;
70:24;71:3,9,14;
72:10;75:8;76:12,14,
16;78:9
patients (17)
61:16;65:4,11;67:7;
70:13;71:9,12,19;
73:10;75:7;76:6;82:9;
85:1;91:21;93:23;
94:12,16
patients' (1)
89:12
patient's (4)
61:1;64:14,22;
70:25
pattern (1)
63:7
pay (5)
29:20;35:19;51:19;
56:22;57:4
paychecks (1)
13:10
pedal (1)
68:1
pelvis (1)
82:7
Penn (1)
60:13
People (14)
8:17;13:6;23:6;
25:24;26:1;28:6;36:1;
41:16;43:7;44:8;
45:12;63:13;84:23;
89:22
per (7)
32:14;92:18;93:9,
12,19,22;94:1
perceive (1)
11:12
percent (6)
34:2,9;71:4;83:19;
87:24;94:16
percentage (1)
83:16
percocet (1)
57:21
performed (1)
77:4
performs (1)
34:8
Perhaps (1)
53:2
period (1)
84:20
permission (1)
68:21
permit (1)
22:24
permitted (2)
15:21,25
persisting (1)
95:23
person (7)
7:24;11:10;13:21;
20:15;22:24;23:1;
52:1
personal (6)
21:20;22:10;44:15,
24,24,24
pertinent (1)
49:5
Philadelphia (1)
60:17
phone (5)
27:22,23;38:20;
79:17;81:16
phoned (1)
27:24
photographs (1)
15:10
physical (18)
29:25;31:13;33:12;
34:11,11,13,15;60:17;
61:4,8;62:14;66:8,19;
70:12;71:10;73:2;
85:14;93:23
physician (2)
59:22;72:9
physics (1)
82:3
pick (1)
67:12
picks (1)
68:9
picture (1)
74:18
pictures (6)
27:13;38:20;45:12,
13;46:14;70:17
piece (3)
32:4;49:15;62:19
pieces (1)
35:7
pill (1)
57:15
pinched (1)
33:14
pinching (1)
30:14
place (3)
34:13;39:21;45:2
placed (1)
38:4
plain (2)
76:9;91:17
plains (1)
70:17
Plaintiff (36)
2:8;4:22;6:19;8:12;
10:21;14:1,6,7;15:12,
14,15,19,21;16:2,3,7,
9,11,15;17:18;19:10,
23;20:3;25:1;37:10,
11,17;39:2;40:21;
42:3,22;48:13;49:11;
50:16;53:14;59:18
Plaintiffs (2)
5:3;40:21
Plaintiff's (17)
2:24;5:16,18;8:4;
19:22;24:9;40:7;41:2,
7;58:20;59:1,7;62:3;
68:24;69:2,6,7
plan (5)
11:7;62:15;91:11,
13,14
plantar (3)
64:4;83:14;84:7
plastic (1)
35:2
plate (1)
35:18
platform (3)
27:2,5,7
players (1)
80:13
playing (1)
80:13
pleadings (1)
14:2
pleasant (1)
41:4
please (34)
2:4;12:14,16;13:2,
4;20:10,11,13;21:13,
13;22:24;23:6,7;
41:11;47:18,22,24;
50:10,18,18,23;53:11,
13;58:16,24;59:12,21,
24;60:4;96:8,11,14,
15,17
plus (1)
93:9
pocket (1)
39:24
point (37)
11:13;13:15;16:6;
17:10;24:5;28:8;30:2;
32:20;43:23;44:10;
57:6;66:15;74:19;
75:23,24;76:1,2,9,14;
77:12,16;78:5,5,23;
79:6,9;80:1,3,4,10,19;
82:23;86:9,15;87:1,
19;93:11
points (3)
76:11;84:15;90:21
poorer (1)
91:9
portion (3)
16:2;18:16;72:19
portions (2)
16:13;75:14
position (3)
84:9,12;90:5
positions (1)
90:6
positive (5)
63:18;70:25;71:1;
72:23;78:22
possibility (2)
8:6;45:10
possible (3)
3:5;54:18;94:18
post-accident (1)
6:19
post-epidural (1)
83:9
posterior (2)
82:20,25
post-lateral (1)
63:17
post-surgical (8)
82:16,23;83:2,18;
87:21;88:7,8;90:20
pound (2)
35:1,6
pounds (4)
35:3,10,14;84:11
practice (4)
61:21;65:8,8,10
precipitated (1)
29:17
preclude (3)
4:7;6:18;11:22
precluded (1)
7:10
precluding (1)
9:5
prejudice (1)
7:6
prejudicial (1)
22:20
premises (2)
8:23;26:25
prescribe (1)
85:1
prescribed (6)
32:23;83:13;84:13;
86:4,22;89:11
prescribing (2)
29:25;89:5
prescription (2)
51:6;84:8
presence (3)
16:21;22:25;59:6
present (5)
7:13;15:20;17:16;
37:14;41:6
presented (3)
20:21;21:7;37:10
preside (1)
18:7
presiding (3)
2:2;12:15,20
pressure (2)
75:7;94:14

pretty (3)
29:9;37:17;41:23
previously (3)
72:8;87:13;90:3
primarily (2)
64:17;65:15
principals (1)
24:1
prior (7)
65:22;72:4;80:6,25;
83:23;87:14,24
probably (3)
20:6;29:4;40:18
probative (2)
7:5,5
problem (6)
13:13;60:6;71:5,6;
75:4;84:25
procedural (1)
75:6
procedure (11)
17:5;23:25;62:10;
68:14;71:17;76:22;
78:9;82:13,18;83:19;
88:6
Procedures (1)
77:1
proceed (1)
86:3
process (2)
11:6;13:17
produce (1)
15:15
profession (1)
59:20
profit (3)
43:17;44:24,25
prognosis (1)
91:6
program (2)
20:16;93:24
programs (1)
20:14
progress (1)
93:20
progresses (2)
91:9;93:7
progressive (1)
91:7
promise (1)
46:15
pronunciation (1)
14:8
properly (3)
21:1;67:4,5
protrude (1)
70:2
prove (4)
9:13;15:3;37:11;
42:3
proved (1)
17:22
provide (4)
75:21;81:19;87:9,
18
provided (7)
41:14;43:1;79:4;
80:2;83:8;84:5;86:7
province (1)
18:6
proving (1)
8:12
provocative (1)
63:19
public (1)
16:12
pump (1)
37:8
purpose (7)
8:12,13,20;15:4,22;
19:11,14
purposes (1)
59:9
push (1)
69:20
pushing (3)
64:5;67:25;68:1
put (17)
2:5;3:24;6:11;16:8;
28:16;48:9;54:14;
67:12;73:3,6;75:1,1;
77:15;83:16;84:18;
87:22;92:25
puts (3)
33:21,22;94:14
putting (5)
27:6;35:3,18;53:23;
85:12

Q

quarter (1)
61:19
quick (6)
41:3;47:8;48:10;
49:23;60:2;65:18
quite (5)
53:5,6;83:2;92:9,11
quote (2)
9:1;40:5

R

radial (1)
69:24
radiating (9)
63:25;64:1;72:22;
75:13;85:10;86:1,20;
87:20;88:8
radicular (6)
75:12;82:16;83:12;
90:2,20;91:3
radiculitis (2)
82:23;83:3
radiculopathy (5)
67:20,22;68:2,12;
73:12
radio (1)
9:11
Raise (7)
50:10;52:25;59:12;
63:18,19;64:15;78:23
raised (1)
26:2
range (4)
37:17;63:7;69:16;
92:13
ranges (1)
74:1
ranging (1)
63:8
rates (1)
36:6
rather (1)
95:25
rational (1)
38:6
Ratliff (2)
31:10,11
reach (5)
17:13,24;21:6,12;
24:3
reached (2)
19:9,12
reaching (2)
18:24;78:22
read (4)
16:2;19:17,19;20:7
reading (1)
21:17
ready (3)
24:6,7;69:25
real (2)
48:10;61:5
reality (1)
44:8
realize (1)
25:15
really (5)
4:20,21;35:16;40:1;
44:10
reason (10)
7:21;22:14;27:8;
41:13,17;43:22;
49:16;67:2;94:22;
95:12
reasonable (5)
38:6;90:23;91:2,5,
10
reasonably (1)
7:8
rebutting (1)
15:22
received (5)
18:1;25:11;62:16;
70:25;92:21
receives (1)
32:19
receiving (2)
28:4;71:4
recent (1)
95:15
recently (3)
25:19;46:12;86:17
recess (4)
12:11;19:15;50:7;
58:18
recommend (6)
31:6;90:17;92:16;
93:23;94:25;95:24
recommendation (2)
66:7;87:21
recommendations (11)
66:6,13;72:16,24;
77:21;79:14;86:6,21;
88:19;91:20;94:9
recommended (10)
33:15;66:19;73:2;
74:7,9;77:25;78:7;
85:15;90:18;93:14
recommending (6)
66:16,17;78:8;
84:10;89:4,5
recommends (1)
32:1
reconciled (1)
43:15
record (9)
2:5;8:1;18:21,24;
48:10;50:19,23;58:9;
59:21
recorded (2)
16:9;73:21
records (9)
41:21;42:13,14,16,
19;43:4;45:4,5,23
re-done (1)
25:5
reduce (1)
32:18
reducing (1)
32:4
refer (3)
16:4;28:14;65:25
reference (1)
20:1
referred (6)
16:3;31:10,14;
32:25;66:8;73:1
refers (1)
32:10
reflexes (1)
63:16
regarding (3)
2:21;6:19;77:15
regards (2)
91:19,24
regular (6)
23:22;61:18;76:7,
14;92:24;95:11
regularly (1)
85:1
rehabilitation (2)
60:18;61:9
related (1)
91:4
relation (1)
38:16
relaxer (1)
89:11
release (2)
76:3;96:13
releases (1)
84:21
relevance (1)
10:3
relevant (3)
8:21;10:1;21:3
relief (6)
71:4;72:12,22;76:5;
80:3;81:1
relieve (1)
76:3
rely (1)
20:21
relying (4)
64:14,15,18,21
remain (3)
12:14;50:10;59:12
remember (6)
21:24;22:9;42:2,5;
47:24;96:14
remembers (1)
27:6
remind (1)
53:15
removed (3)
18:21,24;78:21
rendered (1)
22:5
reopen (1)
70:22
repeat (4)
6:13;54:2;78:7;
80:4
repeatedly (1)
43:7
repetitively (1)
35:14
replacement (1)
94:7
report (7)
9:10;23:1;66:23;
78:5;83:16;85:8;
89:24
reported (15)
62:18;72:3;77:25;
79:24,25;80:2,4;
81:20;83:9,10;84:7;
85:11,14;86:19;88:21
Reporter (11)
2:3;5:24;6:1,3,5,7,
9;49:24;58:21;69:8;
73:22
reports (2)

71:3;72:15
represent (1)
5:3
represented (2)
14:12,21
represents (1)
40:22
reproduce (1)
75:3
request (2)
7:10;78:14
requested (2)
77:25;80:3
required (1)
18:13
requires (2)
18:25;22:14
research (3)
21:15;22:6;91:21
researched (1)
22:1
reserve (1)
11:24
residency (2)
60:15;61:12
residential (1)
26:13
resolve (1)
56:14
respondent (1)
9:6
responding (1)
27:11
response (4)
55:13;64:14,22;
71:1
responsibility (1)
19:8
restrictions (2)
84:10;90:7
restrictive (1)
22:12
result (6)
19:9,12;24:4;68:5;
91:16;95:22
resulting (2)
19:24;62:21
results (2)
67:18,19
retire (1)
17:21
retried (1)
22:21
returned (2)
85:11;90:3
returning (2)
84:9;90:5
returns (2)
71:15;72:3
review (1)
47:14
reviewed (1)
16:11
revision (1)
94:20
revisions (1)
25:10
right (97)
2:18;3:24;4:17;7:6,
7,18,22;10:10;11:3,4,
18;27:7,14,19,25;
28:12;29:19;30:15;
33:20;36:24;37:2,19,
24;38:8,13,14,24;
39:6,15,16,19,21,24;
40:5,7,9,10,11,13,19,
23,23,24;41:20,21,22;
42:6,7,9,10,11,13,17,
19,24;43:5,14;44:2,6,
11,15,17,22,25;45:6,
9,10,12,14,15,23;
46:11,13;47:6,10;
50:11;51:18;52:19;
56:10;59:13;60:1;
62:22;63:11,12,14;
64:2;74:3,5;80:21,22;
81:2,4;85:13;87:13;
93:7,20;95:5
right-sided (1)
81:21
rise (4)
2:1;12:13;48:7;
96:21
Road (4)
29:23;30:24;32:6;
47:6
robbery (1)
8:24
role (1)
17:4
room (9)
6:21;10:15,17;43:1;
44:19;63:5;79:16;
80:14,14
root (1)
70:20
roughly (4)
80:2;84:10;94:21;
96:3
rubbery (1)
69:17
rude (1)
23:16
rule (1)
15:18
rules (7)
17:20,23;18:13;
19:11,15;22:9;23:25
ruling (3)
16:21,24;17:2
run (2)
30:16,17
running (5)
8:22;13:1,2;23:15;
33:12

S

S1 (1)
82:8
S-1 (4)
30:5;33:14,20;
67:22
sacroiliac (6)
82:6,10;87:12;
88:23;90:20;93:18
sacroiliitis (1)
82:9
sad (1)
52:1
safe (2)
41:23;96:19
safely (1)
93:25
safer (1)
89:19
sakes (1)
43:24
saline (1)
70:21
samaritan's (1)
27:23
same (15)
3:12;7:16;13:1;
19:14;32:7;33:22;
34:5;41:17;52:1;
65:13;67:9;82:18;
95:1,11,18
saved (1)
71:24
saw (40)
29:24;31:12,15;
66:20,21,23;68:14;
71:23;73:16;76:19,
21,22;77:8,19,20;
78:15,25;79:7;80:16;
81:13,14,15,17,18;
82:13;83:5;84:1;85:3,
17;86:10;87:2,16;
88:1,9,17,18;89:1,2,
15;90:15
saying (11)
2:24;10:20;11:16,
22;21:13;33:11;37:6;
40:15;42:16;51:16;
54:1
scaffold (2)
26:20;29:15
scaffolding (5)
26:15;49:15;62:19,
21,21
scans (1)
29:8
scenarios (1)
61:16
scene (3)
20:14,15;96:18
schedule (1)
2:20
scheduling (1)
2:22
school (1)
60:14
sciatic (1)
63:22
screwed (1)
82:8
screws (2)
33:22;82:7
se (1)
32:14
search (1)
21:18
seat (2)
12:14;53:7
seated (6)
2:4;12:17;50:18;
53:13;58:24;59:24
second (2)
11:3;40:14
secret (2)
39:18;40:9
sedated (1)
71:20
sedating (1)
89:14
sedentary (4)
83:25;84:9,12;90:5
seeing (5)
64:22;65:17,22;
76:19;92:24
seem (2)
22:12;43:21
seemed (1)
28:24
seems (1)
37:5
sees (3)
32:19;33:4;34:6
seizures (1)
73:9
select (1)
43:20
selected (2)
23:20;38:3
selection (5)
13:17;24:15,24;
34:21;41:6
self (1)
75:19
selling (1)
34:19
send (2)
13:14;95:10
sends (1)
33:5
sensation (3)
63:16;74:2;78:22
sense (2)
7:13;44:13
sent (2)
27:24;31:23
September (12)
26:24;33:16;62:8,
17,18,23;65:22;66:12,
25;81:21;89:2;90:25
series (4)
32:20;61:11;71:13;
93:15
seriously (1)
22:22
serve (1)
23:7
served (3)
8:21;51:23;52:10
services (1)
21:24
serving (2)
13:12;22:10
session (1)
47:21
set (7)
3:14;34:25;44:3;
80:2;90:7;93:12,19
setting (1)
35:1
settle (10)
13:10;51:11;52:9;
53:22;54:4;55:1,6,11;
56:16;57:1
settled (1)
51:19
settlement (4)
51:5,8;52:13;56:21
settling (1)
55:14
seven (1)
35:21
several (6)
19:15;26:8;28:10;
29:24;32:19;34:11
severe (3)
71:15;81:21;82:15
share (1)
22:7
sharp (1)
95:25
shelter (1)
44:19
shelves (1)
35:13
shirt (1)
25:21
shock (2)
36:4;69:16
shoes (2)
79:25;85:12
shoot (1)
32:17
shooting (3)
30:20,23;31:2
short (3)
12:11;50:7;82:25
shortcomings (1)

12:23
shot (3)
65:18;80:11,15
shotgun (1)
83:1
shots (1)
32:20
shoulder (1)
8:5
shoulders (2)
65:20;89:23
show (17)
28:22,22;35:22,23,24;37:22;38:25;40:16,19;42:17,20;43:4;46:7,18,21;68:12;76:24
showed (1)
72:22
showing (4)
8:20;28:17;67:19;68:4
shown (5)
17:10;42:15;47:1;66:15;84:7
shows (2)
41:24;47:14
SI (3)
87:14;88:24;90:2
side (9)
27:3;37:18,18;39:12;66:17;70:16;73:10;81:24;87:15
sided (1)
64:3
sides (6)
21:6;30:16;40:6,15;68:4;72:8
sidewalk (1)
38:18
signal (1)
67:11
signals (1)
67:13
signed (1)
16:12
significant (5)
72:11,13,19;74:1,22
simple (2)
22:14;85:12
simply (1)
8:19
site (1)
8:8
sitting (8)
12:9;25:21;26:3;27:25;41:4;43:22;82:11;90:4
six (9)
8:6;23:18;40:7;93:16,17,19,22;95:16,19
skidded (1)
9:9
skill (2)
44:3;90:7
skin (1)
38:24
Skip (1)
87:5
sleep (1)
89:13
sleeping (2)
83:11;86:18
slick (2)
9:10,11
slides (1)
78:24
slow (1)
60:4
small (1)
96:1
smaller (3)
32:21,22;69:12
smart (1)
38:6
smarter (1)
44:14
socks (1)
79:25
soft (1)
28:23
sole (3)
18:3,15;91:20
solely (3)
16:22;19:1;21:2
solution (1)
56:4
somebody (5)
38:18;43:23;44:5,17,20
somebody's (1)
44:6
someone (7)
13:12;38:15;44:22;54:8,11;59:2;86:19
sometime (1)
65:3
sometimes (10)
15:17;16:21;25:6,7;30:11,12,13;86:19;92:11,12
somewhat (1)
46:19
somewhere (3)
46:4;66:3;71:18
son (1)
26:4
soon (3)
9:8;23:2;83:18
sooner (2)
68:9;95:7
sorry (8)
5:6;66:11;76:25;77:7,7;85:19;87:5;88:3
sort (20)
38:4;39:22;61:1,6;63:6;65:16;69:17;70:22;72:7,17;75:5,17,18;84:19,20,20,24;89:20;92:23;95:21
sought (1)
9:7
source (2)
40:22;45:4
space (2)
69:15;95:18
spaced (1)
33:22
spam (3)
74:6;76:1;78:23
Spanish (2)
28:4;43:2
spasm (3)
64:20,25;65:6
spasms (4)
64:7;65:1;89:12,13
speak (6)
17:8;38:1;46:14;47:13;56:19;57:12
speaking (6)
23:15;47:25;48:23,24;60:5;96:15
speaks (2)
43:2;44:3
special (1)
44:11
specialist (1)
31:23
specialized (2)
60:17;65:16
specialty (3)
31:22;60:24;65:20
specific (1)
84:10
specifically (1)
86:24
speculating (1)
7:18
spinal (3)
2:16;33:16;93:1
spine (20)
30:3,4,6,7,8;31:14;32:16,17;33:2,21;69:11,12,19,23;74:14;81:25;82:1;90:25;91:7;95:1
spoke (2)
79:16;81:15
sponginess (1)
69:19
Sports (5)
31:18,19,19;59:23;60:22
Spray (4)
26:12,13,17;29:15
spraying (2)
26:18;27:1
spreads (1)
83:1
squirting (1)
30:12
squish (1)
70:7
stabbing (1)
86:20
staff (1)
71:20
stake (1)
38:23
stand (16)
6:11;16:16;34:3,23,24;36:2;38:10;42:24;44:8;51:4;53:8,12;57:22;58:15;59:4;81:7
standing (5)
12:14;27:2;50:10;59:12;62:19
start (16)
3:5;4:21;12:24;13:15;24:12;29:25;33:25;51:6;57:6;59:1;60:11;67:6,9,11;69:23;70:1
started (7)
24:13,14;26:9;29:21,22;34:19;60:22
starting (4)
60:16;68:8;78:1;83:24
starts (2)
10:16;67:13
state (8)
7:24;8:17;9:14;49:6;50:19,22;59:20;60:13
stated (9)
8:25;9:8;12:20;66:9;85:10;86:2,14;90:1,6
statement (12)
7:1,7,10;8:4,11,19,20;9:21;15:12;17:9;49:1,17
statements (10)
7:25;11:11,22;15:2,4,7,13;17:14;24:9;48:24
states (1)
86:16
statically (1)
74:18
stay (1)
47:23
stayed (1)
38:20
stays (1)
33:21
stenographer (1)
16:9
step (5)
53:10;58:16;70:14;96:8,11
steps (2)
53:8;58:15
steroid (4)
66:16;70:21,21;93:6
steroids (1)
32:17
stick (2)
32:16;74:24
still (17)
2:12;8:3;10:1;11:5;29:2,9;32:7;41:9;46:20;53:16,21;74:2,2,6;85:15;94:24;95:15
stimulate (1)
84:19
stimulation (1)
84:18
stipulate (1)
9:23
stock (1)
35:12
stomach (3)
89:8,10,20
stop (2)
31:9;60:1
straight (6)
44:6,18;63:18,19;64:14;78:23
stream (1)
89:19
street (1)
34:19
strength (2)
28:18;64:2
stress (1)
65:2
stretch (1)
84:11
stretching (1)
63:21
stricken (2)
18:20,24
strong (1)
55:24
stronger (2)
73:7;80:12
struck (1)
62:20
studies (1)
95:20
study (1)
66:18
subjective (4)
64:10,13,15,17
submit (8)
38:25;42:18;43:4;45:23;46:7,17,20,25

submitted (2)
3:20;23:19
subsequent (1)
49:3
subsequently (1)
94:3
substantially (1)
7:5
succinctly (1)
6:17
sudden (1)
27:2
suffered (2)
24:17;36:19
suffering (2)
24:19,20
suing (3)
39:21,22,23
suit (2)
14:18;26:18
sum (1)
17:18
summation (1)
17:9
Summations (3)
17:16,19;21:9
summing (1)
17:9
super (1)
35:12
supermarket (1)
26:8
supervisor (1)
26:21
supplies (1)
92:7
support (2)
15:14;46:6
supports (1)
83:13
supposed (2)
2:13;67:8
Supreme (1)
52:10
sure (18)
4:24;19:12;28:12;
34:17;35:18;39:20;
40:25;41:15;51:15;
54:11;57:10;61:12,
19;67:4;71:5;93:25;
95:13,14
surface (1)
89:21
surgeon (9)
2:16;31:11,14;33:2;
34:6;92:19,25;93:1,3
surgeons (2)
40:12;91:22
surgeries (10)
25:4,4,18;31:7;
33:24;34:4,10;78:12;
92:20;94:4
surgery (29)
31:23;32:2,5,7,14;
33:15,23;34:1,8;61:6;
71:16;74:20,22;78:1,
8,10;79:23;80:5,5;
81:2,3,4,20,25;82:5;
91:23,25;94:17,21
surgical (3)
62:12;71:19;73:1
surgically (1)
82:22
surprise (1)
37:19
sustain (1)
18:18
sustained (4)
81:12;88:5,16;
90:13
swear (2)
50:11;59:13
swollen (1)
70:10
sworn (2)
50:17;59:19
symptoms (9)
75:12;82:16;83:12;
85:10;90:2,3,20;91:4;
96:4
system (2)
17:17;19:5

T

table (5)
8:22;35:1;41:4;
44:11;57:7
talk (14)
4:1;23:5,8,10,11;
30:4;36:3,5;37:21;
52:16;55:22;57:16;
79:13;96:15
talked (2)
43:10;87:11
talking (12)
3:11;11:11;24:17;
25:20;27:10;30:9,9;
33:24;36:20;39:10;
42:6;48:21
talks (1)
7:23
taught (1)
64:20
tear (6)
28:11,12,17,17;
31:12;34:7
teens (1)
28:3
telemedicine (1)
79:12
telling (5)
23:1;43:16;52:9;
60:12;64:18
tells (3)
68:7;72:18,22
temporarily (3)
75:3;76:4;84:22
temporary (1)
83:22
tempted (1)
20:9
ten (5)
34:25;35:2,14;
63:11;92:7
tendency (1)
23:5
Tender (1)
34:13
tendonitis (1)
80:21
tendons (1)
80:22
TENS (6)
83:15;84:14,17,18;
86:23;90:4
tense (2)
65:2;72:21
terms (1)
64:9
test (11)
61:16;63:19,20;
66:24;67:2,3,12,16,
18;75:13;95:24
tested (3)
63:7;74:5;75:19
testified (8)
9:10;38:22;42:22;
43:9;48:20;49:11;
50:17;59:19
testify (17)
7:3;15:24;25:12,15;
28:11,11;31:21;
38:13;39:4,7,9;40:7;
42:23;47:24;48:16,
16;49:20
testifying (5)
11:17;16:15;38:15;
40:17;41:10
testimony (28)
4:8;6:18;8:14,18,
23;9:5,6;10:12,13;
15:9;17:25;18:17,23;
21:16;22:15;38:8,11;
39:13;41:14;43:12,
13;44:12;45:2,3;48:4;
50:11;59:13;96:13
testing (7)
61:14;64:1,2,16;
74:5;75:14;95:25
tests (5)
33:12;61:11,14,15,
19
TFCC (3)
28:14;31:12;34:7
thanking (1)
24:12
Thanks (1)
47:16
theory (1)
10:23
therapy (15)
29:25;31:13;33:12;
34:11,11,13,15;61:4;
66:8,19;70:12;71:11;
73:3;85:14;93:23
thereby (1)
11:4
Therefore (3)
7:10;16:23;47:4
thereof (1)
45:9
thigh (1)
63:18
thirty (5)
36:10,11,17;63:10,
24
thoracic (1)
30:7
though (1)
29:4
thought (4)
3:21;11:1;29:3;
77:6
thousand (2)
46:14,15
threatened (1)
54:14
three (12)
8:4;26:3,16;27:1,2;
40:8;71:13;81:2;
92:17;93:1,8,13
throughout (2)
23:24;30:22
thumb (2)
80:20,23
Thus (2)
19:21;20:20
timeframe (2)
9:21,25
times (16)
16:17;18:18;26:14;
30:18;31:12;43:7;
61:2,2;65:1;68:12;
70:14;71:15;72:9;
92:17;93:1,5
timing (1)
11:6
tingling (1)
28:20
tire (1)
69:25
tissue (1)
28:23
today (10)
20:20;32:11;41:8;
42:11;46:18;50:12;
51:8;55:6;59:14;
96:13
toe (2)
64:6;67:25
together (1)
33:23
told (13)
6:22;8:5;9:11;
28:25;29:10;31:13,
15;48:13,18,21;49:4,
12;94:6
tolerable (2)
88:22;90:2
tomorrow (2)
41:8;96:20
took (11)
7:14,21;9:25;18:12;
28:21,23;35:4;38:20;
63:1;85:22;86:12
tools (1)
33:7
top (1)
27:5
topic (1)
21:16
topical (6)
84:14;86:23,25;
89:16,18,18
topics (1)
22:1
Toradol (3)
80:11,12,15
torn (4)
30:25;31:25;32:3,3
total (2)
37:16;94:7
totally (1)
18:9
touch (2)
38:2;76:2
tough (1)
76:1
towards (1)
36:1
train (1)
27:21
transcribed (2)
16:10;73:22
transcript (1)
16:13
transforaminal (3)
68:19;70:15;72:12
transition (1)
82:10
translate (1)
55:25
translating (1)
28:5
translator (1)
79:15
translators (1)
79:16
Trauma (6)
31:19;59:23;60:23;
65:1;69:19;70:2
treat (2)
65:13;71:11
treated (6)

25:14,15;36:7;
61:23;62:1,7
treating (5)
29:22;30:24;31:4;
78:9;91:21
treatment (39)
11:5;24:23;25:7,8,
11;28:10;31:5,6,16;
35:22;40:20;46:5,24;
61:1;65:11,19;66:5;
70:11;75:21;79:3;
80:9,17,23;81:19;
83:7;84:4;86:6,7;
87:9,17;88:20;90:16;
91:11,13,14,15,24;
92:1,3
trial (34)
7:4;9:4;13:15,17,
20;14:25;15:10;16:1,
3,6,14,17,25;17:6,15;
18:2,18;21:5,15;22:2;
23:24,25;24:3,18;
36:21;37:13;38:13,
22;43:13,14;54:17;
55:7;57:2,6
trials (1)
37:19
triangle (1)
28:16
triangular (1)
28:13
tried (7)
29:12,13;31:18;
35:11,11,15,16
trigger (24)
32:20;75:23,24;
76:1,2,8,11,14;77:12,
16;78:5,23;79:5;80:1,
3,4,10,19;84:15;86:8,
25;87:19;90:21;93:11
truth (11)
7:4,25;8:19;9:13;
44:9;50:12,12,13;
59:14,14,15
truthful (1)
47:3
try (11)
3:5;6:16;7:20;
12:22,22;32:12;33:8;
47:7,10;75:2,3
trying (12)
35:17,18;37:8;41:9;
44:23;52:12,16;54:3;
60:3;76:25;88:12,15
Tuitt (3)
2:2;12:15,19
turned (1)
21:21
turning (2)
51:24;52:15
twenty (4)
4:21;35:10,14;36:9
twenty-five (2)
63:13,15
twice (1)
93:24
two (53)
3:19;5:18;12:21;
26:4;27:20;30:13;
31:4,7,16;33:15;
38:12;41:21;42:4;
46:13;48:2,5;51:10,
15,16,19,24;53:22;
54:4,19,21,22,25;
55:1,6,8,9,11,14,18;
56:14;57:6;67:5;
68:25;69:1,3,4,6,8;
70:23;71:13;72:5;
74:14;75:1;79:11;
80:2;92:20;93:8;94:2
tying (1)
85:12
Tylenol (1)
58:6
types (1)
41:21
typo (2)
62:24,25

U

ultimate (2)
46:21;76:8
ultimately (4)
29:18;32:6,24;34:1
ultrasound (1)
93:15
umbrella (1)
35:3
unanswered (1)
18:23
under (11)
16:7;17:17;20:22;
23:18;43:11;45:17;
52:6,8;53:16,23;
54:14
underlying (1)
76:10
understandable (1)
40:10
understands (1)
57:11
understood (1)
12:4
unduly (1)
22:12
uneven (1)
63:6
unfair (2)
20:16;22:20
unfairness (1)
21:1
Unfortunately (1)
56:2
uninterested (3)
38:14,22;39:5
unit (7)
83:15;84:15,17,18;
86:23;90:4;92:7
University (2)
60:13,18
Unless (3)
45:13;56:3;77:16
unquote (1)
40:6
unsuccessful (1)
32:5
up (59)
2:22;5:13;7:20,22;
13:3;17:9,18;27:3,7,
21;28:16,22;29:11;
33:11;34:20,25;35:1,
3;37:8;39:25;42:11;
45:16;46:12;47:23;
49:3;50:9;51:4;53:11;
54:18,19;55:7,9;
58:16;62:15;64:4,6;
65:2;67:12,25,25;
68:9,12;69:1,3,4;
70:4;72:21;75:3;77:7;
81:7;82:22;83:12;
86:18;91:12;92:10,
14;93:8,19;96:8
upon (6)
15:8;16:22,22;17:7;
21:2;64:1
use (10)
21:24;22:9;33:8;
60:4;69:12;84:23,23;
85:2;89:22;92:12
used (3)
33:7;46:23;73:9
using (6)
20:14;26:14;43:12;
65:4;70:16;74:23
usual (1)
71:7
usually (9)
25:23;26:18;30:4;
32:16,18;63:13,13;
67:24;75:6
utilizing (1)
61:3

V

vacation (1)
43:24
value (2)
7:5;87:22
Vanessa (1)
50:24
VARGAS (66)
2:7,10,15;3:9,23,
25;4:14,19,22,25;5:6,
18,20,22;7:12;9:18;
10:1,4;11:10,16;12:1,
8,10;14:9,12,13;24:5,
7,10;41:23;48:9,20;
49:1,18;50:2,6,25;
51:1,3;52:20,22;53:3,
19;55:14,18;56:2,6,9,
19,24;57:19;58:3,7;
59:2,3,6,10;60:7,8,10;
62:5;68:21,25;69:2,4;
96:5
various (1)
61:16
verdict (6)
17:13,24;21:7,12;
22:5;56:22
verify (2)
51:13;54:24
version (5)
32:21;37:14;43:8;
48:12;49:2
versions (2)
49:3,19
versus (4)
8:3,17;9:3;75:6
vertebrae (2)
30:8,10
vertebral (1)
69:14
victim (1)
8:24
video (14)
35:3,17;41:22,24;
44:14,16;45:11,12,15,
20;46:10,11,11,18
videos (4)
34:21;35:20,22,24
view (2)
20:13;70:19
Viewing (1)
20:15
views (1)
21:11
visit (21)
20:9,24;62:8;66:4,
11;71:24,25;73:13;
76:22;79:18;85:9,25;
87:9,11,14;92:18;
93:1,2,4;94:1,25
visits (7)
86:15;92:15,17,19,
25;93:1,3
vital (2)
19:19;22:13
Voltaren (2)
89:15;90:18

W

wait (5)
4:12;24:14;29:3;
80:24;84:20
waiting (3)
4:18;12:7,7
wakes (1)
86:18
walk (2)
70:6;83:11
walking (3)
63:6,7;65:4
walls (1)
26:13
wanes (1)
86:17
wants (3)
37:11;55:18;71:14
water (3)
13:21,22;67:7
water's (1)
67:7
waves (1)
95:25
waxes (1)
86:17
way (20)
10:21;13:12;23:12;
25:21;26:20;27:22,
25;33:22;39:9,20;
40:25;41:16;42:8;
43:8;44:9;46:4;67:6;
70:4,4;82:1
weaker (1)
70:1
weakness (4)
64:3;68:10;74:3,4
weaknesses (1)
78:23
wear (1)
26:17
wearing (1)
78:20
Wednesday (3)
2:16,18;33:4
weed (1)
75:5
week (4)
12:21;29:5;33:4;
70:23
weekly (2)
76:6,17
weeks (2)
71:13;76:13
weigh (1)
35:2
weight (1)
18:17
Weinstein (15)
33:1,2,4,11;73:2;
74:7,8,8,15;77:25;
78:8,11;81:20;91:25;
94:12
Weinstein's (1)
34:15
welcome (2)
14:4;24:11
weren't (3)
31:8;43:25,25
whatnot (2)
68:10;71:21
What's (15)

3:8;10:3;12:25;
32:15;42:10;45:5;
64:12,24;68:19;
70:15;71:7;75:24;
76:8;81:9;90:11
whenever (1)
22:9
when's (1)
81:13
whereas (2)
68:11;70:3
Whereupon (24)
5:23,25;6:2,4,6,8,
10;12:11,12;47:19;
48:8;50:7;53:8,9,12;
58:15,17,18,20,23;
69:7;73:21;96:9,22
whole (5)
7:22;29:6;38:9;
50:12;59:14
who's (8)
7:3;11:17;25:20;
26:3,19;27:25;41:10;
52:9
who've (1)
25:18
wide (1)
37:17
wife (9)
9:10;26:3;27:24;
34:17;55:25;57:16;
58:5;76:7;79:24
William (1)
60:19
willing (1)
43:23
without (2)
20:24;83:11
witness (31)
15:18,23,24,25;
16:4,7,11,15,16;23:9;
38:22;50:14,16,20;
53:8,12,17;55:24;
56:8,16,18;57:15,25;
58:2,5,12,15;59:16,
18,22;60:6
witnesses (22)
2:24;15:9,15,20;
18:16;38:9,12,14;
39:1,4,5,6,7,10,16;
40:5;41:15,19;42:15;
45:3;47:9;96:16
wondering (1)
3:4
Woodhall (2)
7:18,19
word (1)
17:6
words (2)
46:14,15
work (16)
25:24;29:6,12,13,
16,17,19;35:16,16;
40:22;49:14;60:22;
62:18;72:14;90:8;
92:11
worked (4)
26:10,23;60:23;
71:14
working (8)
26:8,9;27:9;34:18,
24;35:12;62:19;83:18
works (3)
58:7;72:10;83:2
worried (2)
27:18;58:9
worry (1)
89:10
worse (7)
25:3;36:14;82:10;
85:13;90:4;94:3;95:3
worth (1)
5:2
wrist (6)
28:15,17;31:11,23;
34:9;46:2
written (2)
61:13,14

X

x-ray (6)
28:22;29:9,9;70:16;
71:20;74:24
x-rays (9)
28:21,23;29:8,25;
33:6;95:11,12,13,15

Y

Yakov (1)
14:20
year (14)
24:25;33:25;36:5;
46:13;61:19;76:15,
15;80:6;92:17;93:1,2,
4,8,22
years (22)
24:23;25:2,17;26:8,
24;28:10;31:5,8,16;
33:15;35:21;36:10,
10,11,17;43:12;
46:13;93:8;95:1,4,6;
96:3
Yep (2)
12:4;60:6
Yeshiva (2)
14:20,20
York (5)
8:17;31:18;59:23;
60:22;61:21
young (1)
60:2
younger (1)
28:3

Z

zero (2)
54:21;55:8
ZIZZAMIA (38)
2:21;3:2,10,13,17,
19;4:7,12;5:2,9;6:13,
16;9:22;10:11,22,24;
11:2;12:4;14:16,16,
16,22,22,23;37:1;
48:19;49:9,11;50:5;
51:14;52:21,24;53:5;
55:17;57:8,17,20,23

0

0 (1)
93:7

1

1 (4)
73:16;76:19;77:6;
81:18
1,215 (1)
92:14
10 (1)
84:11
100 (3)
83:19;87:24;94:1
12 (4)
62:8,17;65:22;
66:12
12/17/2020 (1)
81:15
12/18/2018 (1)
72:25
133 (1)
9:4
15 (3)
76:20;79:18;87:7
15th (1)
76:21
16 (6)
8:2;66:4;79:1,3;
86:10;87:3
17 (1)
76:23
17th (1)
77:1
18 (3)
66:21;82:13;85:20
18th (3)
71:25;82:14;85:18
19 (5)
66:25;85:4,6,17;
88:1
1958 (1)
8:3
1975 (1)
8:16
1987 (1)
9:4

2

2:15 (3)
3:5;48:2,2
20 (3)
79:7;89:2;94:16
2001 (1)
26:6
2011 (1)
26:11
2016 (4)
24:25;26:25;62:24;
90:25
2018 (12)
31:24;33:5;62:8,17,
19,23;65:22;66:4,12,
22,25;68:15
2019 (12)
32:2;73:14,16;
76:19,20,23;77:6,9,
19;78:15,25;81:4
2020 (13)
33:16,16;34:5,8;
79:1,3,7,18;80:16;
81:5,21;85:20;89:2
2021 (8)
81:18;82:13;83:5;
84:1,2,4;85:3;87:7
2022 (8)
32:6;85:4,6,17;
86:10;87:2,3,3
2023 (8)
35:21;46:11;87:16;
88:1,3,6,9,18
2024 (2)
46:12;90:15
2025 (2)
44:10;46:13
21 (4)
77:19;84:1,4;87:16
21st (2)
77:20;87:19
22 (3)
85:3;87:2;90:15
22nd (1)
2:16
24th (1)
2:17
25 (2)
88:3,6
26 (1)
84:1
27 (1)
80:16
27th (1)
3:3
2nd (1)
9:3

3

3 (2)
77:9;78:25
30 (2)
84:12;94:16
37 (1)
8:18
3rd (2)
77:13,14

4

4 (1)
73:14
442 (1)
9:4

5

5 (1)
8:2

6

6 (6)
26:24;62:18,23;
68:15;87:3;90:25

7

779 (1)
8:18

8

8 (2)
81:21;83:5

9

9 (3)
78:15;88:9,18
9:30 (1)
96:20
911 (1)
38:20
9th (1)
78:16