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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND - CIVIL TERM - PART 17

----------x

Teresa Kosiarek,

Plaintiff,

-against-

Pasquale Campanelli,

Defendant.

----------x

Index # 100238/10 October 17, 2011
Trial 18 Richmond Terrace
Staten Island, New York

WITNESSES:Dr. Merola
Dr. Kaisman

B E F O R E:

HONORABLE ALAN C. MARIN, Justice and The Jury.

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

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FRANCES ROSE ROYCE SENIOR COURT REPORTER
FRANCESCA BUSH SENIOR COURT REPORTER

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COURT CLERK: All jurors present. All parties present. Counsel waive the reading of the roll.

Case on trial continued.

THE COURT: Mr. Platta, call your witness.

MR. PLATTA: I would like to call Dr. Andrew Merola as my first witness.

A N D R E W M E R O L A,

called on behalf of the Plaintiff, having been first duly sworn/affirmed, is examined and testified as follows:

COURT CLERK: You may be seated. In a loud, clear voice, please state your name.
THE WITNESS: Andrew Merola.
COURT CLERK: Please spell your last name.
THE WITNESS: M-E-R-O-L-A.
COURT CLERK: Occupation?
THE WITNESS: Orthopedic spine surgeon.
COURT CLERK: Business address?
THE WITNESS: 142 Prospect Park West, Brooklyn, New York.
COURT CLERK: Thank you.

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DIRECT EXAMINATION
BY MR. PLATTA:
Q Good morning, Dr. Merola.
A Good morning.
Q Dr. Merola, can you tell me when did you finish medical school.
A I graduated medical school in 1990.
Q What school did you go to?
A Howard University College of Medicine in Washington DC.
Q When did you become a doctor?
A When I graduated.
Q Do you specialize in any particular area?
A Yes. Orthopedic surgery.
Q How long had you been a specialist?
A I graduated my orthopedic training in 1995 and I did a fellowship in spinal surgery for the '95/'96 year. So I have been in private practice since 1996.
Q Are you board certified?
A Yes.
Q Can you explain to the jury what being board certified means?
A Board certification is a process whereby you take an exam after you finish training. It's a two-part exam. Part one comes after you finish your residency and then a

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second part, which is an oral exam, after you have been in practice for several years.
After you pass both parts of the examination you are what is called board certified and every ten years thereafter we are required to recertify, another reexamination process every ten years. I initially became recertified in 1998 and recently recertified in 2008.
Q What is your board certification in?
A Orthopedic surgery.
Q Do you perform fusion surgeries?
A Yes, I do.
Q How many of them did you perform so far?
A I've been in practice for fifteen years. So I do somewhere in the neighborhood of 275 to 300 some odd

surgeries a year. So three times fifteen, probably over 3,000 surgeries.
Q Doctor, what is the usual way patients get to your office?
A Patients come into my office by referral, that is someone sends them into my office for surgical consultation.
Q Who can they be?
A Any number of people, word of mouth of other patients that I've taken care of in the past or other physicians.
Q In this case did you treat Ms. Kosiarek?

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A Yes.
Q Who referred her to you?
A A pain management physician by the name of Dr. Arden Kaisman.
MR. PLATTA: Your Honor, I would like to qualify Dr. Merola as an expert in the field of orthopedic surgery and orthopedic physician.
MR. SCAHILL: The procedure for qualifying an expert has not occurred in New York for years. I ask counsel not to do that because it's improper.
THE COURT: I don't want to get into sort of the subtleties of the law here. Why don't you just move on. If there is an objection, I'll deal with it.
MR. PLATTA: Thank you, your Honor.
THE COURT: Okay.
Q Dr. Merola, what is the reasoning, if you can tell us, that Ms. Kosiarek came to your office?
A She presented to the office -- she came in to the office with having had treatment through pain management, having persistent neck pain with radiating pain into her arms and hands and low back pain with radiating pain into her legs and feet.
Q And when was the first time that she came to your office for your treatment?
A I first saw Ms. Kosiarek in July of 2009.

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Q And can you tell me did you review any records during her treatment?
A Yes.
Q Did you review any MRI films?
A Yes.
Q Did you review this MRI film from Omega Diagnostic, that is the MRI of the lumbosacral spine?
A Yes.
Q Doctor, can you please come to the board just to tell us what were your findings upon your review of her MRIs?
THE COURT: Doctor, you can step down if you want.
THE WITNESS: Thank you.
COURT CLERK: Which exhibit is displayed?
MR. PLATTA: Plaintiff's Exhibit 16.
(Doctor approached projection screen.)

THE WITNESS: This is a projection of an MRI film of Ms. Kosiarek from 19 -- 2008, December 12 of 2008.

An MRI is a test that looks at the anatomy of a person in this particular case. It's their lower back and it looks at the portions of their lower back and there is basically three parts to your lower back, there are the bones of your lower back those are known as the vertebrae.

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Q Doctor, can I interrupt you, would you mind using any models to explain to the jury?

A This is probably the easiest model to look at. This plastic model represents the spine of an adult lower back and it's basically made up of three basic parts. Those parts are the vertebral bodies or the bones of your lower back. They appear as white pieces of plastic here.

In between the bones are objects known as the discs and they are located in between each respective bone of your lower back and in an area of your lower back called the spinal canal represented here by this yellow tubular structure with these yellow what appears to be wires coming off of it.

These are the nerves of your lower back. These three basic parts make up the anatomy of your lower back and each bone in your lower back is named by number according to where it lies. There are basically five bones numbered one through five. One sacral bone. The sacral bone is this lower bone here that almost appears triangular. That is the bone that attaches your lower back to your pelvis for your legs.

Each one of the nerves that comes out of your lower back also has a name and those names are the numbers corresponding to the bone behind which they exit the spine and each one of those is also numbered one through five and

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the sacrum or that part of your lower back that attaches to the pelvis because it begins with an "S" and is different than the lumbar bones. That first nerve that comes out of your sacrum is known as sacrum one or the first nerve root out of your sacrum.

Five nerves out of the lumbar spine, one major nerve coming out of the sacrum. These nerves travel down into your legs.

This side-view of this model corresponds to the side-view of the MRI that we're looking at in the lower left-hand corner of this screen. And you can see here that it looks very much like the plastic model.

THE COURT: Hold on a second. Can all jurors it see it?

Move to the left closer to the screen, Doctor, please.

THE WITNESS: If we look at the projection of the MRI, each projection is like a specific slice through

the lower back and multiple slices are taken so you can reconstruct the three dimensional nature of the lower back anatomy and it is one particular slice through the lower back.

The bottom of it represents that triangular area we call the sacrum. The squares are the bones and in between the bones are the discs and behind the bones

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and the discs, or to the right of this projection, is the spinal canal that contains the nerves that travel down into the legs.

So when we're looking at this particular projection of the lower back on this particular slice of the lower back we can count the sacrum and the bones and we look to see whether or not any of these bones are fractured or misshapen and they're not and then we look in between the bones and we look at the discs and we take a look to see whether or not there is any disc beyond what we call the confines of the vertebral bodies.

So if you drew a straight line you can see this is a very good example of two bones with a disc in between them, straight line connecting the back side of the bones. We look to see if there is any disc material beyond that straight line and in between these two bones there is no disc material beyond the bones and we get to this bone.

This is the fourth bone and the fifth bone. We look at the disc and we see that beyond the straight line of the vertebral bodies there is some dark substance in the area of the spinal canal and that dark substance represents what we would otherwise call a herniation of disc material.

In between the fifth and the first sacral

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element we also draw the line behind both bones and we look to see if there is any disc material beyond that area and we can see that there is some disc material inside the spinal canal area here as well.

So between the fourth bone and the fifth bone we can see some anatomical evidence of disc material in the spinal canal. In between the fifth bone and the first sacral bone we can also see some evidence of disc material in the spinal canal area. That is the area where the nerves are that go into your legs.

Q Doctor, was there any significance of your findings?

A Well, these images or these pictures of the lower back anatomy are a part of a doctor or a surgeon or a clinician coming up with a diagnosis for what a patient is suffering from, that is when they come in and they make a complaint they say my back hurts and my legs hurt. It's my job to try to figure out what is causing that complaint and to do a physical exam and then to correlate that physical exam, that is to take my physical findings and my having

spoken to the patient and then correlate it with their anatomy.

So the pictures give us an anatomical basis for complaints and symptoms upon which to compare physical findings.

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Q Doctor, what were your findings on this MRI?

A This MRI has, as we see, shows disc material in the spinal canal between L4 and L5. That is protrusion of the material or herniation of the material into the spinal canal and, likewise, L5/S1 protrusion of material or herniation of material in the spinal canal area between L5 and S1.

Q What does it mean there is protrusion or there is a herniation?

A That means that there is material belonging to the disc that is in an anatomical location that it really doesn't belong there or it shouldn't be there.

Q I'll ask you to look at what was marked as Plaintiff's Exhibit 21B and could you please using this diagram explain more thoroughly what a herniation causes to the body?

A This is a diagram that combines a drawing with MRI findings in order to highlight the MRI the anatomy of the MRI. Once again, in the upper left-hand side of the slide what we're looking at is the MRI projection of the lower back and to the right of that is the diagramatic representation of what that MRI projection means.

So, if we look between the fourth and the fifth bones, that is the fourth bone and the fifth bone, and we look between the fifth bone and the first sacral bone, specifically at the disc material in between them, we see on

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the MRI that there is disc material extending beyond the borders of the vertebral bodies into the spinal canal and that's represented here on the diagram where these two red arrows are shown.

Red arrows are pointing exactly to the material itself inside the spinal canal area beyond the borders of the vertebral bodies into the area where these yellow tubes or cables are. Those are the nerves that then descend into the legs and because those nerves are behind the fourth and fifth vertebral body and behind the fifth and first sacral body, those are the nerves that we would otherwise number L4/5 and 1.

Q Doctor, using the diagram on the left bottom portion of this page and also using the model, can you please explain the difference between regular, normal and herniated disc?

A This is a little different projection. We need to look at the model in a little different way. Instead of looking at the model in the direct side-view what we do is look at the model from the top down. And we see that when you look at the model from the top down, the vertebral body appears circular and that is generally at the top of your

diagram, that circular area.
The disc -- because the disc is in between the bones of the vertebral bodies also appears to be in a
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circular area in between the bones.
On the bottom side of this diagram you see what looks like a "Y" with some ears on it. The "Y" with the ears is what we call a spinous process, a lamina and a facet joint. Those are the confines of the spinal canal. When you are looking at this projection it's everything in the base of the "Y" are the nerves.
So on the top of the "Y" is disc. In the base of the "Y" are the nerves. And the "Y" itself makes up the bottom portion or the back portion of the spinal canal. So when you are looking at a herniation it's important to understand that a herniation is an asymmetrical protrusion of disc material.
Q What does that mean?
A If you picture a symmetrical area it would be a smooth, continuous line all the way around the disc.
Q Is this like the one in the left bottom portion of the screen?
A Yes. This is a normal or anatomically symmetric disc. You see a smooth, circular or ovoid outline to the disc in the lower left-hand portion of this diagram.
In the upper right-hand portion of the lower portion of the diagram you see an eccentric protrusion of disc material noted by the red arrow. That is an asymmetrical protrusion of the disc material or break in the
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smooth line of the disc. That asymmetry whereby material is protruding, that is what is known as a herniation.
Q Doctor, what is the big deal about herniation?
A Well, this material -- discs are interesting things because they're made up of two separate parts and they can be very much thought of as a jelly donut. A jelly donut has a pastry outside and jelly on the inside.
The disc has an external layer that is tougher and more resilient than it's soft internal jelly-like layer.
A herniation can very much be thought up as the jelly leaking out of the donut. That jelly contains within it certain inflammatory chemicals that belong inside the pastry crust of the disc. When those inflammatory chemicals are exposed to the covering of the nerve or nerve, those chemicals produce an inflammatory reaction on the nerves and that inflammatory reaction causes a neurological -- that is a nerve response.
It initially starts out as pain and it can progress to things like numbness and the actual compressive force of that jelly-like material can cause, in addition to pain and numbness, can cause a loss of reflexes and/or weakness in the nerves that the muscles are supplied by those particular disc areas.
Q Doctor, once you have herniation -- actually how

many herniations were there? Two in the lower back?
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A In the lower back we're looking at the L4/L5, which represents one disc and L5/S1, which represents a second disc. Two areas whereby the disc material has herniated.
Q Doctor, when you saw Ms. Kosiarek did you ask her about any history of treatment of surgeries or anything at all?
A Yes.
Q What did you find out from her?
A That she had been referred, as I had indicated, by a pain management physician, that is a doctor who treats pain in a non open form. In other words, as a surgeon I treat pain in an open way, surgically, by opening the skin and treating what's below it on an anatomical basis.
The pain management physician treats pain from a pain generator, such as a disc herniation by medications and/or the injection of medicines or medications into the area where the disc is or sometimes by removing portions of that disc through minimally invasive or small procedures.
So she had seen a pain management physician and was ultimately referred to me for what is known as a surgical consultation to see whether or not open surgery would be something that she might benefit from.
Q Doctor, are you aware that she actually received steroid injections, two steroid injections as a result of this treatment?
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A Yes.
Q With Dr. Kaisman?
A Yes.
Q Are you also aware she wasn't able to receive the third one due to the high blood pressure?
A Correct, yes.
Q Can you explain to the jury the significance when you receive two out of three steroid injections?
A Lumbar steroid injection is injection of medication into the area where this herniated material is in an effort to block that chemical inflammatory response. A steroid is a very potent anti-inflammatory medication.
So the steroid blocks the effects or the chemical effects of this herniated nucleus material and the epidurals are generally given in a series of three at separate time points in order to give that steroid medication an opportunity to decrease the inflammatory response that the disc is creating on the nerves.
Q Doctor, are you also aware she underwent decompressive surgery?
A Yes.
Q Can you explain to the jury what is the significance of that?
A Now, a decompression in the manner that a pain management physician would do it or discectomy, the way it's
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performed is called percutaneous procedure. So they would pass a cannular, which basically means a big straw, across the tissues of the lower back into the jelly-like center of the disc and that cannular or that big straw has on its tip it has a little device that cuts and sucks up this jelly material.

And it's known as a decompression because in removing this jelly-like material is decompressing or taking the pressure off of this herniated area in order to try to relieve the effects that that disc herniation is producing on the nerve roots.

Q Are you aware of the fact, Doctor, that the disc height between L5/S1 and L4/L5 diminished to less fifty percent after the procedure?

A Yes.

Q What is the significance of that?

A The discs do several things. The discs lie in between the bones and in a very general sense can be thought of as shock absorbers between the bones. They keep the bones separated.

They maintain height between the bones. That height provides for the normal exit of the nerve roots.

The disc also controls the way the bones themselves move on each other when your body moves.

So they absorb shock, they maintain height in

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between the bones, they maintain a normal exit area for the nerve roots.

When you see the height between the vertebral bodies begin to diminish it means the discs are no longer performing those tasks appropriately and that is a harbinger of an anatomical process whereby as the bones get closer together the exit area for the nerve gets more pressure on it and the bones no longer move normally upon each other. And so that's an anatomical picture of a problem with the way your bones are actually behaving are, if you will, in your lower back.

Q Doctor, let me ask you this. If she had the surgery and this disc material that was extending was removed, why there is a problem?

A Well, a couple of things. The disc itself is made up of -- the disc is made of collagen just the way much of the other collagen in our body is, collagen of your skin and tendons and joints. So this collagen has a blood supply and that blood supply brings in nourishment that keeps the disc alive and keeps the disc working.

The hope is in doing procedures like medical treatment, epidural steroid injections and percutaneous disectomies, the hope is by treating the anatomical problem gives your body a chance to heal that area and decrease pain and improve function.

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Much of that depends upon the overall blood supply to that disc and the nature of that disc to be able to heal

that injury and those are things that only time will tell.
So when we render a treatment, depending upon the severity of the problem, any number of things may happen. Those treatments may improve function and make patients feel better. Or they may not work exactly the way we wanted them to and you can have a progressive process over time. So that loss of disc space height tells us that there is a progressive disc process happening over time.
Q And, Doctor, I just want you to assume Ms. Kosiarek had an accident on November 11, 2008.
When was the first time you saw her?
A July 6 of 2009.
Q So that is roughly nine months later. Can you tell me at that time did you take a history from her?
A Yes.
Q What was it that she told you about her history?
A She had been brought in by her family members and had come in as a referral for evaluation for injuries to her neck and back secondary to a traumatic accident, that is a motor vehicular accident.
Q Do you treat, for example, shoulder and knees for operating on shoulders and knees?
A I no longer do surgeries for shoulder and knees.

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Q She specifically saw you for spine only?
A Yes, correct.
Q Did she mention anything about any prior injuries, accidents, anything at all?
A No history of any prior injuries or illnesses to the neck and back at all.
Q Except for the one on November 11 of 2008?
A Correct.
Q Doctor, what is the significance of this?
A The significance of that is that when taking a history it helps us to differentiate the process, the timing of the process, and what we call basically the etiology of what's happening or the cause of what's happening and you can have disc problems for a variety of reasons.
Just like anything else in medicine, you can be born with a disc problem, you can have an infection that causes a disc problem, you can have just the normal wear and tear over time that causes a disc problem or you can have a trauma that causes a disc problem.
So that history as to when did it happen and what happened thereafter gives us some idea of what we call etiology or cause for the problem.
Q Doctor, I want to you assume that Ms. Kosiarek was 54 at the time of the accident. She is 57 right now.
What about the aging process, what role does it

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play in your assumptions or in your diagnosis?
A You know, the aging process is something that all of us are subject to and, once again, I think the best analogy is collagen. Because with the disc we're looking at

collagen.
So, as I said, we all have certain wrinkles that appear on our skin. As time goes on and as we get older those wrinkles increase. Same is true for discs.
Discs being made up of collagen will show what we call the natural degenerative process as time goes on. That natural degenerative process nine times out of ten is asymptomatic or can sometimes cause problems but it has a different clinical presentation than an acute deterioration.
So the aging process exists in us all. The degenerative process is part of the normal aging process of all human beings and it makes up the constitution of that patient. In other words, each patient is who they are based on their height, their weight, their age, factors like that.
Q Doctor, I want you also to look at this model and tell me, this is pretty much how the degenerative disc would look like, the one on the bottom?
A Yes.
Q Why is that?
A So these -- the collagen fibers, the disc itself just like your skin, holds water and as the aging process

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happens the water content of the collagen of the disc diminishes over time. So there is an effect or a drying up process of discs as time goes on. When you look at a degenerative disc, the degenerative disc is not as fluffy or as spongy or as wet as a young, healthy, non degenerative disc.
Q And, Doctor, what is the significance of degenerative disc versus any nerve damage?
A Degenerative discs in that process of degeneration happens very, very slowly over time and that slow day-by-day incremental process allows your body an opportunity to accommodate to the degenerative process itself.
So your body is very good at coming up with ways around the degenerative process. Likewise, your nerves and your bones of your lower back can accommodate those incremental degenerative changes over time so that you can, in essence, live with them. That is something that differentiates a degenerating disc or an asymptomatic disc from an otherwise symptomatic disc.
(Whereupon, Senior Court Reporter Frances Royce was relieved by Senior Court Reporter Francesca Bush.)
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CONTINUED DIRECT EXAMINATION
BY MR. PLATTA:
Q. AND, DOCTOR, DID YOU FIND ANY DEGENERATION IN MRS. KOSIAREK'S SPINE IN HER LOWER BACK?
A. IN -- IN HER LOWER BACK THERE WERE NO REAL SIGNIFICANT -- WHAT WE WOULD CALL -- DEGENERATIVE CHANGES.

PRETTY MUCH 2008 MRI SHOWED WELL-PRESERVED DISC SPACE HEIGHTS AND NO EVIDENCE OF ANY SIGNIFICANT FACET JOINT DISEASE. THAT IS THE JOINTS OF YOUR LOWER BACK WITH -- WITH DEGENERATIVE PROCESSES WILL ACQUIRE BONE SPURS AND A LOSS OF CARTILAGE.

THERE WERE NO SIGNIFICANT DEGENERATIVE PROCESSES GOING ON ON THAT 2008 MRI.

Q. AND, DOCTOR, IN YOUR PRACTICE, WHEN YOU OPERATE ON PATIENTS, WHEN YOU OPEN THEM UP AND YOU SEE THEIR SPINES, THE SPINAL COLUMN, AND YOU CAN COMPARE THE VISUAL OF WHAT YOU ACTUALLY SEE IN THE BODY TO THE MRIS, DO YOU ALWAYS CORRELATE -- DO YOU ALWAYS READ THE MRIS YOURSELF OR YOU DEPEND ON RADIOLOGISTS? HOW DO YOU DO THAT?

A. I ALWAYS -- I LOOK AT THE MRI FILMS MYSELF BECAUSE I HAVE -- I'M TRAINED TO READ MRIS. I'M TRAINED TO READ MRIS AS AN ORTHOPEDIC SURGEON, SPECIFICALLY AS A SPINE SURGEON, BECAUSE I HAVE THE OPPORTUNITY TO ACTUALLY LOOK AT THE ANATOMY AS IT EXISTS AND THE MRI FILM ITSELF.

SO I HAVE ONE-TO-ONE CORRELATION BETWEEN THE FILM AND THE ANATOMY AND WHAT I EXPECT TO SEE FROM A SURGICAL POINT OF

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VIEW.

SO I WILL ALWAYS LOOK AT THE FILMS AND READ THOSE FILMS MYSELF. THAT'S A PREREQUISITE OF MY SEEING THE PATIENT IS LOOKING AT THE FILMS.

Q. AND SO, DOCTOR, SO WHAT WAS YOUR FINAL DIAGNOSIS OF MRS. KOSIAREK'S CONDITION TO HER LOWER BACK?

A. THIS -- THE DIAGNOSIS IS A LUMBOSACRAL RADICULOPATHY. WHAT THAT MEANS IS -- LUMBOSACRAL MEANS THE NERVES INVOLVED, LUMBAR AND SACRAL, AND RADICULOPATHY MEANS PROBLEM WITH THE NERVES.

Q. AND, DOCTOR, ARE YOU ALSO AWARE THAT MRS. KOSIAREK ALSO HAD AN EMG DONE BY DR. KRISHNA ON TWO OCCASIONS?

A. YES.

Q. AND ARE YOU AWARE THAT EMG SHOWED DAMAGE TO THE LUMBOSACRAL AS WELL AT L5-S1?

A. CORRECT. IT SHOWED AN L5-S1 RADICULOPATHY.

Q. AND WOULD THIS CAUSE PAIN?

A. YES.

Q. WHAT WOULD BE HER LIMITATIONS OF DAILY LIVING WHEN SHE HAS THIS KIND OF SYMPTOMS -- THIS KIND OF INJURY?

A. YEAH, ANOTHER WAY -- ALSO ANOTHER WAY TO SAY RADICULOPATHY IS SCIATICA, AND THIS IS -- IT'S TWO SEPARATE THINGS.

IT'S LOW BACK PAIN, SO THAT'S PAIN IN THE LOWER BACK, WHICH IS AGGRAVATED BY ACTIVITIES, REPETITIVE MOTION, BENDING,

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LIFTING, TWISTING, THOSE TYPES OF ACTIVITIES, STANDING FOR A LONG PERIOD OF TIME, PUTTING A LOT OF PRESSURE ON YOUR LOWER BACK, EVEN SITTING FOR A LONG PERIOD OF TIME. THOSE CAN AGGRAVATE WHAT WE CALL THE MECHANICAL AXIAL LOW BACK PAIN. THAT'S PAIN TO THE LOW BACK AREA.

THE SECOND PROBLEM IS THE NERVE PAIN. THAT IS PAIN OF THE NERVES THEMSELVES AS THEY GO DOWN INTO YOUR LEGS OR THE ACTUAL SCIATIC COMPONENT OF THAT PAIN, AND ALL OF THOSE THINGS

CAN ALSO AGGRAVATE THAT BY IRRITATING THE NERVES THAT ARE GOING DOWN INTO YOUR LEGS.

AND THOSE ARE SYMPTOMS THAT, FOR EXAMPLE, MAY BE DIFFICULT TO WALK FOR A LONG PERIOD OF TIME. WHEN YOU'RE SITTING, YOU'RE SITTING ON THOSE NERVES. THE NERVES ARE IRRITATED.

AND YOU SIT FOR 20 MINUTES OR 25 MINUTES, SITTING ON THOSE NERVES CAN ALSO PRODUCE IRRITATION BECAUSE IT'S A SECONDARY SOURCE OF PRESSURE.

SO ALL THOSE THINGS THAT CAN IRRITATE THE NERVES WILL ALSO BE PRODUCTIVE OF PAIN.

Q. AND, DOCTOR, WHAT IS THE PROGNOSIS FOR MISS KOSIAREK? WHAT IS YOUR RECOMMENDATION FOR HER IN REGARDS TO HER LOWER BACK?

A. FOR THE LOWER BACK, SHE'S HAD WHAT WE CALL A CLINICALLY -- CLINICALLY SYMPTOMATIC COURSE, WHICH MEANS SHE'S HAD SYMPTOMS SINCE NOVEMBER OF '08.

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SHE HASN'T GOTTEN BETTER WITH NONSURGICAL TREATMENT, INCLUDING A PERCUTANEOUS DISCECTOMY, WITH SIGNS AND SYMPTOMS OF SCIATICA THAT ARE PERSISTENT FOR GREATER THAN A YEAR.

THE PROGNOSIS FOR THAT IS WHAT WE CALL GUARDED. IN OTHER WORDS, THAT'S SOMETHING THAT HAS TO BE MONITORED VERY CLOSELY BECAUSE IT IS -- IT IS ESSENTIALLY PERMANENT AND HAS A VERY GOOD CHANCE OF GETTING WORSE.

Q. AND IS THERE ANY CURE FOR MISS KOSIAREK?

A. CURE? CURE IS AN INTERESTING TERM BECAUSE -- PARTICULARLY IN SPINE SURGERY WE DON'T TALK ABOUT CURING A PROBLEM, BUT WE TALK ABOUT TREATING A PROBLEM.

AND THE SURGERY FOR THIS IS TREATMENT DESIGNED TO DO TWO THINGS: NUMBER ONE, TAKE THE PRESSURE OFF THE NERVES AND GIVE THE NERVES AS MUCH ROOM AS POSSIBLE SO THAT THE IRRITATION AROUND THEM IS DIMINISHED AS MUCH AS POSSIBLE TO PREVENT THE NERVES FROM GETTING WORSE.

SO WE'RE LOOKING AT PREVENTING THE NERVES FROM GETTING WORSE THAN THEY ARE NOW, AND THEN THE OTHER THING WE'RE LOOKING AT DOING IS PREVENTING THE 4-5 AND 5-1 DISC SPACES FROM COLLAPSING ANY FURTHER SO THAT THE BONES THEMSELVES DON'T CONTINUE TO CAUSE ANY MORE NERVE INJURY OR NERVE DAMAGE.

SO THAT'S A TREATMENT, BUT IT'S NOT A CURE BECAUSE THE SURGICAL TREATMENT OF THAT PROBLEM INVOLVES ALL THREE OF THE ANATOMY OF THE LOWER BACK, CHANGING IT IN A VERY SPECIFIC WAY SO THAT IT'S NOT THE SAME AS IT EVER WAS BEFORE.

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Q. SO, DOCTOR, IN OTHER WORDS -- LET ME USE THIS MODEL. IF YOU HAVE A PATIENT WHO ALREADY GOT INJECTIONS TO THE SPINE, TO THE DISC, THEY COULDN'T WORK BECAUSE OF HER REACTION TO THAT.

THEN SHE HAD THE PERCUTANEOUS DISCECTOMY, WHICH SUCKED UP PORTION OF THE DISC -- ACTUALLY TWO DISCS, L4-5, L5-S1. NOW DISC SPACE IS VERY LIMITED.

WHAT IS THE OUTCOME OF THAT IF SHE DOESN'T GET THE SURGERY? WHAT HAPPENS NEXT?

MR. SCAHILL: OBJECTION, YOUR HONOR.

THE COURT: I'LL ALLOW IT. GO AHEAD.

A. SO WHAT'S THE NEXT SEQUENCE OF EVENTS IN THE EVENTS THAT WE'RE SEEING HAPPEN RIGHT NOW? WHAT'S THE -- THE ANTICIPATED NEXT COURSE OF EVENT HERE?

PROGRESSIVE DISC SPACE COLLAPSE WITH PROGRESSIVE NERVE ROOT IMPINGEMENT BETWEEN L4-L5 AND L5-S1, WITH PROGRESSIVE NERVE ROOT IRRITATION, INCLUDING PROGRESSIVE PAIN AND NEUROLOGICAL LOSS TO THE LEGS.

Q. CAN SHE BECOME PARALYZED?

MR. SCAHILL: OBJECTION, YOUR HONOR.

THE COURT: WASN'T RAISED BY THE WITNESS. LET'S MOVE ON. OBJECTION SUSTAINED.

Q. DOCTOR, DO YOU HAVE AN OPINION, WITH A REASONABLE DEGREE OF MEDICAL CERTAINTY, ABOUT THE NEED FOR ANY FUTURE SURGERY FOR MISS KOSIAREK'S LOWER BACK?

MR. SCAHILL: I'M GOING TO OBJECT TO THIS, YOUR

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HONOR.

THE COURT: I'LL ALLOW IT. GO AHEAD.

THE WITNESS: YES.

Q. WHAT IS YOUR OPINION?

A. MY OPINION IS THAT SHE WILL REQUIRE A LUMBAR LAMINECTOMY AND A SPINAL FUSION.

Q. WHAT IS LAMINECTOMY?

A. LAMINECTOMY IS TAKING BONE AWAY OR LAMINA AWAY IN ORDER TO MAKE MORE ROOM FOR THE NERVES THAT ARE IN THE SPINAL CANAL.

Q. AND WHAT IS THE PROCEDURE ABOUT ALTOGETHER? HOW DOES IT LOOK LIKE? WHAT DO YOU DO WITH THE SPINE? YOU CAN PLEASE FEEL FREE IF YOU WANT TO USE ANY OF THE MODELS.

(HANDING TO THE WITNESS.)

A. SO WHAT YOU DO IS SEE -- THE LAMINA IS THIS -- THIS PORTION OF THE "Y" HERE ON THE BACKSIDE OF THIS AREA, THE CANAL WHERE THE NERVES ARE.

AND WHAT YOU DO IS YOU -- ESSENTIALLY REMOVE THAT "Y". YOU TAKE IT OFF. SO YOU MAKE SOME VERY SPECIFIC BONE CUTS IN THE LAMINA WITH SOME SPECIAL INSTRUMENTS THAT ARE DESIGNED TO REMOVE THE LAMINA.

SO THAT YOU EXPOSE THE SPINAL CANAL. YOU OPEN UP THIS SPINAL CANAL AREA SO THAT THE NERVES NOW HAVE MORE ROOM TO BREATHE, AND, IN ADDITION TO THAT, YOU ALSO OPEN UP THIS AREA HERE (INDICATING).

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IT LOOKS A LITTLE BIT LIKE A CIRCLE OR A HOLE, WHICH IS ACTUALLY WHERE THE NERVE ITSELF IS, AND THAT'S CALLED THE NEUROFORAMEN OR THE NERVE HOLE.

AND IN THE SAME WAY YOU CUT BONE OUT OF THAT HOLE TO MAKE THAT HOLE LARGER SO THAT THE NERVE THAT EXITS THAT HOLE NOW HAS MORE ROOM TO BREATHE AND SO THAT THERE'S NOTHING AROUND THAT NERVE TO IRRITATE IT ANY LONGER.

Q. WOULD YOU ACTUALLY GO INTO EXPLAINING IF THERE IS ANY REMOVAL OF THE DISC NECESSARY IN THIS PROCEDURE?

A. DISC REMOVAL COMES IN WITH THE FUSION PROCESS. SO THE LAMINECTOMY PROCESS IS A REMOVAL OF THOSE STRUCTURES TO GIVE MORE ROOM TO THE NERVES, AND THEN IN ORDER TO GET THESE BONES --

A FUSION MEANS TO WELD.
IF YOU CAN THINK OF IT AS WELDING THE BONES TOGETHER SO THEY NO LONGER MOVE AROUND ANYMORE, BUT YOU WANT TO WELD THEM TOGETHER IN A BETTER POSITION THAN THE ONE THAT THEY'RE IN NOW.
SO TO DO THAT, YOU PHYSICALLY REMOVE THE DISC, AND AFTER YOU'VE REMOVED THE DISC, YOU INSERT A DEVICE CALLED -- WHICH WE CALL A CAGE. IT'S LIKE A SHIM. IT'S LIKE -- IT'S MADE OUT OF SOMETIMES CARBON FIBER, SOMETIMES TITANIUM.
IT'S A BOX, AND IN THAT BOX YOU PUT WHAT'S CALLED BONE GRAFT OR BONE GLUE SO THAT THE BONES CAN GROW TOGETHER, AND YOU INSERT IT IN BETWEEN THE BONES SO THAT YOU CAN SHIM THE BONES UP, REESTABLISH BONE HEIGHT, REESTABLISH THE OPENING FOR THE NERVES, AND THEN GLUE THE BONES TOGETHER AGAIN SO THAT THEY

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DON'T CONTINUE TO COLLAPSE OR MOVE.
SO YOU REMOVE THE DISC, INSERT A SHIM IN BETWEEN THE BONES, AND THEN HOLD THE ENTIRE THING TOGETHER WITH SOME SCREWS IN THE BONES THAT ARE ANCHORS FOR A COUPLE OF RODS THAT THEN HOLD EVERYTHING STABLE SO THAT THE HEALING PROCESS CAN ENSUE FROM THEREIN AND THEN HEAL THAT LOWER PART OF THE BACK THAT YOU'VE QUOTE, UNQUOTE, RECONSTRUCTED.
Q. AND, DOCTOR, HOW MANY DISCS DO YOU NEED TO REMOVE OR WOULD YOU RECOMMEND REMOVING?
A. SO IN THIS CASE YOU WOULD REMOVE THE DISC BETWEEN L4-L5, ONE DISC, AND YOU WOULD REMOVE THE DISC BETWEEN L5 AND S1, THE SECOND DISC. SO TWO DISCS.
Q. AND, DOCTOR, DID YOU EXPLAIN TO MISS KOSIAREK THE DETAILS OF THIS PROCEDURE?
A. YES.
Q. WAS SHE HAPPY TO UNDERGO IT RIGHT AWAY?
A. NO.
MR. SCAHILL: OBJECTION.
THE COURT: LET'S WAIT -- LET'S WAIT FOR THE PLAINTIFF. GO AHEAD. LET'S MOVE ON.
MR. PLATTA: THANK YOU.
Q. DOCTOR, CAN YOU TELL ME WHAT IS THE COST OF SUCH SURGERY?
MR. SCAHILL: OBJECTION.
THE COURT: I'LL ALLOW IT. GO AHEAD.

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A. SO THIS IS -- THIS PARTICULAR TYPE OF SURGERY IS WHAT'S CALLED AN INPATIENT PROCEDURE BECAUSE YOU NEED TO HAVE A HOSPITAL IN ORDER TO DO THIS PARTICULAR KIND OF AN OPERATION.
AND THEN THERE ARE MULTIPLE TEAMS OF PROFESSIONALS THAT ARE REQUIRED TO BRING THIS KIND OF AN OPERATION TOGETHER.
SO YOU HAVE TO ADMIT THE PATIENT TO THE HOSPITAL, AND THEY ARE GENERALLY IN THE HOSPITAL FOR SOMEWHERE IN THE NEIGHBORHOOD OF ABOUT THREE-TO-FOUR DAYS. SO THERE'S A HOSPITAL COST.
IT'S DONE IN AN OPERATING ROOM, SO THERE'S AN OPERATING ROOM COST, WHICH INCLUDES THE MEDICAL PERSONNEL IN THE OPERATING ROOM: SCRUB NURSE, CIRCULATING NURSE, EQUIPMENT AND SUPPLIES IN THE OPERATING ROOM; THE COST OF THE SHIM AND THE SCREWS AND THE RODS, WHAT ARE KNOWN AS IMPLANTS; AN

ANESTHESIOLOGIST THAT TAKES CARE OF THE PATIENT INTRAOPERATIVELY; A PRIMARY SURGEON THAT'S ACTUALLY DOING THE PROCEDURE; AND AN ASSISTANT SURGEON THAT'S HELPING WITH THE PROCEDURE; AND THEN A RECOVERY ROOM STAY; A FLOOR STAY FOR THREE-TO-FOUR DAYS; AND A REHABILITATION PERIOD INSIDE THE HOSPITAL ITSELF WITH REHAB DOCTORS AND PHYSICAL THERAPISTS.

SO THAT -- THAT COST FOR A -- WHAT WE WOULD CALL A TWO-LEVEL LUMBAR SPINAL FUSION IS ABOUT $125,000.

Q. AND, DOCTOR, IS THERE ANY NEED FOR ANY FUTURE SURGERIES FOLLOWING OR SHE GOING TO BE BASICALLY FINE AFTER THE SURGERY?

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MR. SCAHILL: I'M GOING TO OBJECT TO THAT, YOUR HONOR.

THE COURT: I THINK -- WELL --

MR. PLATTA: I'M ASKING --

THE COURT: I JUST THINK -- I MEAN IT'S A CLOSE CALL, BUT I THINK IT'S A LITTLE TOO SPECULATIVE. THE OBJECTION IS SUSTAINED. LET'S MOVE ON.

Q. DOCTOR, IN YOUR PRACTICE WHEN YOU OPERATE ON SOMEONE, WHEN DO YOU A FUSION WITH -- LAMINECTOMY WITH FUSION, DO YOU EVER HAVE TO REVISIT PATIENTS?

MR. SCAHILL: SAME OBJECTION.

Q. AFTER THOSE --

MR. PLATTA: I'M ASKING GENERALLY HIS PRACTICE, YOUR HONOR.

THE COURT: YES, BUT SAME RESULTS FOR THE SAME REASON. OBJECTION SUSTAINED.

Q. DOCTOR, WHAT IS THE COURSE OF FUTURE TREATMENT POST SURGERY, POSTLAMINECTOMY WITH FUSION?

A. SO AFTER THE PROCEDURE IS DONE AND THE PATIENT HAS RECOVERED IN THE HOSPITAL AND THEY'RE DISCHARGED TO HOME, WE START THEM ON A POST-OP REHAB PROCESS, AND THE SHORT TERM REHAB PROCESS CAN LAST ANYWHERE BETWEEN FOUR-TO-SIX MONTHS, AND THEN THERE IS A LONG-TERM REHAB PROCESS FOR WHAT WE CALL MAINTENANCE PHYSICAL THERAPY, AND THAT'S GENERALLY SOMETHING THAT WE LIKE TO CONTINUE FOR BASICALLY A LIFETIME TO MAINTAIN THE MUSCLES AND

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THEIR CORE STRENGTH AS TIME GOES ON.

SO THAT'S FROM THE PHYSICAL POINT OF VIEW AFTER A FUSION, A LUMBAR SPINAL FUSION.

THE SURGICAL FOLLOW-UP FOR THAT IS PATIENTS COME IN TO SEE ME A WEEK AFTER SURGERY FOR THE ACUTE HEALING PROCESS, WHICH IS THE FIRST SIX MONTHS. I SEE THEM IN THE NEIGHBORHOOD OF ABOUT EVERY FOUR-TO-SIX WEEKS.

AFTER SIX MONTHS I SEE THOSE PATIENTS EVERY THREE-TO-FOUR MONTHS.

THE COURT: THREE-TO-FOUR WEEKS?

THE WITNESS: THREE-TO-FOUR MONTHS.

THE COURT: I'M SORRY.

A. SO EVERY FOUR-TO-SIX WEEKS FOR THE ACUTE HEALING PROCESS, AND THEN AFTER ABOUT THREE-TO-FOUR MONTHS OF HEALING, I WILL SEE THOSE PATIENTS GENERALLY ON A QUARTER BASIS.

AT THE END OF A YEAR POST SURGERY I SEE THEM GENERALLY

EITHER ANNUALLY OR BIANNUALLY, DEPENDING UPON HOW THEY'RE FEELING.

AND THEN THOSE ANNUAL-TO-BIANNUAL VISITS, WE DO X-RAYS AND MRIS AND THEN ANY OTHER TESTING THAT THEY MAY NEED, AND THAT'S CARRIED OUT FOR A LIFETIME.

Q. IS THERE ANYTHING ELSE THAT YOU DO FOR YOUR PATIENTS FOLLOWING SUCH SURGERY?

A. MANY OF THESE PATIENTS WILL ALSO REQUIRE -- FROM THE PHYSICAL POINT OF VIEW, THEY WILL REQUIRE CERTAIN THINGS SUCH AS

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HOME HEALTH ASSISTANCE OR HOME HEALTH AIDS OR MODIFICATIONS IN THEIR HOMES TO ACCOMMODATE THEIR -- THEIR LIVING CONDITIONS BASED ON WHAT WE'VE DONE THE FUSION FOR IN THE FIRST PLACE, WHICH IS THEIR LUMBOSACRAL RADICULOPATHY.

MR. SCAHILL: JUDGE, I'M GOING TO OBJECT TO THIS. THIS IS ALL DISCUSSING AN OPERATION THAT NEVER HAPPENED AND THE SEQUELAE FROM THAT.

THE COURT: LET'S MOVE ON.

MR. PLATTA: THANK YOU.

THE COURT: SUBJECT TO CONNECTION, SOME OF THE STUFF WAS BLOCKED. GO AHEAD.

Q. DOCTOR, WHEN YOU SCREW THE SPINE ON TWO LEVELS, WHICH IS BASICALLY MEANING THAT SHE CANNOT MOVE THIS PORTION OF THE SPINE, (INDICATING), WHAT HAPPENS -- WHAT'S HAPPENING WITH THE REST OF THE SPINE; ESPECIALLY THE LEVELS ABOVE THE FUSION, ABOVE THE PLACE WHERE YOU HAVE THE METAL SCREWS PUT IN PLACE TO HOLD THIS PORTION OF THE SPINE TOGETHER?

A. SO WHEN -- WHEN YOU'VE HAD A RECONSTRUCTION OF THE SPINE WHEREBY WE INSERT THESE IMPLANTS OR THESE DEVICES INTO THE SPINE, WE CHANGE WHAT ARE CALLED THE BIOMECHANICS OF THE WAY THE SPINE BEHAVES, AND IN A LOT OF WAYS YOU CAN LOOK AT THAT AS THOUGH YOU WERE GRABBING A GARDEN HOSE.

SO A GARDEN HOSE IS PRETTY FLOPPY AND SUPPLE UNLESS YOU GRAB THE HOSE, AND THEN WHERE YOU GRAB THE HOSE YOU CREATE A VERY STIFF AREA.

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AND THE AREA ABOVE WHERE YOU GRAB IT BECOMES THE SUPPLE OR FLOPPY PART, AND THERE'S A JUNCTION THAT HAPPENS WHERE THAT STIFFNESS TRANSITIONS TO FLOPPY.

AND IF YOU TAKE THAT GARDEN HOSE AND YOU BEND IT A LOT, AND FLOP IT AROUND WHILE YOU'RE GRABBING IT REALLY HARD, YOU'LL START TO DEVELOP A KINK THERE, AND SOMETIMES YOU CAN ACTUALLY START TO DEVELOP A TEAR IN THE AREA WHERE THE GARDEN HOSE MEETS YOUR RIGID HAND.

IT'S VERY SIMILAR IN THE SPINE. BECAUSE YOU'RE TAKING BASICALLY BONE AND DISC AND FLESH AND BLOOD -- WHICH HAS GOT A CERTAIN AMOUNT OF ELASTICITY TO IT -- AND THEN YOU'RE ADDING TITANIUM IMPLANTS THAT ARE VERY STIFF. SO THIS CREATES WHAT WE CALL AN ADJACENT SEGMENT.

THE REASON, AS A SPINE SURGEON, WE CONTINUE TO FOLLOW YOU FOR AS LONG AS WE'RE POSSIBLY -- WE CAN POSSIBLY FOLLOW YOU IS WE'RE LOOKING AT THOSE ADJACENT SEGMENTS. WE'RE LOOKING AT THE REST OF THE SPINE AND WHAT HAPPENS TO THE REST OF THE SPINE AS TIME GOES ON.

Q. AND IN YOUR PRACTICE, WHAT USUALLY HAPPENS?
MR. SCAHILL: OBJECTION.
THE COURT: SUSTAINED. LET'S MOVE ON.
MR. PLATTA: OKAY.
Q. DOCTOR, WHEN YOU SAW MISS KOSIAREK, NOT ONLY EXAMINED HER, NOT ONLY ASKED HER FOR THE HISTORY, BUT YOU ALSO ASKED HER FOR ANOTHER MRI. WHY DID YOU ASK HER FOR ANOTHER MRI?

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A. WELL, WHEN -- WHEN WE'RE TRYING -- WHEN WE'VE HAD AN OPPORTUNITY TO LOOK AT A PATIENT, GET THEIR COMPLAINTS AND SYMPTOMS -- PARTICULARLY IF THOSE COMPLAINTS AND SYMPTOMS ARE PROGRESSIVE OVER TIME -- AND WE'RE CONTEMPLATING DOING A SURGICAL RECONSTRUCTION, WE WANT TO GET ANOTHER MRI TO SEE IF THE SITUATION ITSELF HAS CHANGED IN SOME WAY THAT I WOULD THEN NEED TO ADDRESS FROM A SURGICAL POINT OF VIEW.
Q. AND, DOCTOR, DID YOU, IN FACT, RECEIVE THE MRI?
A. YES.
Q. COULD YOU ACTUALLY SHOW US THE FINDINGS ON THE SECOND MRI? YOU CAN FEEL FREE TO USE ANY OF THE FILMS THAT ARE IN EVIDENCE RIGHT NOW.
A. SURE.
Q. THE SHADOW BOX IS ALSO FOR YOU TO USE.
THE COURT: IF YOU CAN MOVE BACK HERE SO EVERYBODY CAN SEE IT.
MR. PLATTA: SURE. SURE.
THE COURT: MR. COOPER AND MISS ADAMS.
Q. DOCTOR, BEFORE WE CONTINUE WITH THE MRI, I JUST WANT TO ASK YOU A QUICK QUESTION. DID YOU HAVE TO -- DID YOU -- WHAT WERE YOU GOING TO DO NORMALLY TODAY BUT FOR YOUR TESTIFYING HERE?
MR. SCAHILL: I'M SORRY?
Q. WHAT WERE YOU GOING TO DO NORMALLY TODAY BUT FOR COMING TO THE COURT?

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A. WELL, A COUPLE OF THINGS. NUMBER ONE, I -- I MADE ROUNDS IN THE HOSPITAL IN THE MORNING. THEN I HAVE OFFICE HOURS.
AND THEN THIS AFTERNOON I'LL GO BACK TO THE HOSPITAL, AND THEN THE REST OF THE WEEK I'LL PRETTY MUCH BE IN THE OR.
Q. AND DID YOU GET COMPENSATED FOR COMING TO COURT TODAY?
A. YES.
Q. HOW MUCH WERE YOU COMPENSATED TODAY?
A. COMPENSATION IS $650 PER HOUR.
Q. OKAY. THANK YOU. LET'S GO TO THE MRI, AND CAN YOU TELL US WHAT WERE YOUR FINDINGS OF THE MRI AND ALSO WHEN WAS IT DONE?
A. THIS MRI WAS DONE ON SEPTEMBER 9TH OF 2010.
Q. WHICH IS PRETTY MUCH TWO YEARS AFTER -- ALMOST TWO YEARS AFTER THE ACCIDENT, CORRECT?
A. CORRECT. YES.
Q. AND THIS MRI IS --
A. WE'RE LOOKING AT THE SIDE VIEWS, THE SIDE-VIEW FILMS OF THE MRI OF MISS KOSIAREK. AND SO, ONCE AGAIN, WE'RE GOING TO LOOK AT THE SAME THINGS WE LOOKED AT BEFORE.

WE'RE GOING TO LOOK AT THE BONES OR THE SQUARES, AND THEN IN BETWEEN THE BONES, ONCE AGAIN WE'RE LOOKING AT THE DISCS.

WE DON'T SEE ANY -- WE DON'T SEE ANY NEW HERNIATIONS AT ANY OF THE OTHER LEVELS. WE LOOK AT L4-L5. WE SEE THAT

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THERE IS SOME DISC STICKING OUT BEYOND THE 4-5 REGION, AND WE ALSO NOTICE THAT AT -- AT L4-5 SEGMENT THERE IS -- THERE'S A LITTLE BIT OF WHAT'S KNOWN AS A LISTHESIS OR A SLIPPAGE.

THAT IS TO SAY THAT THE EDGES OF THE BACK SIDES OF THE VERTEBRAL BODIES DON'T PRECISELY LINE UP ON EACH OTHER, SO THERE'S A SLIPPAGE THERE, AND THAT -- THERE'S A FANCY TERM FOR THAT WHICH MEANS -- LISTHESIS -- OR A SLIPPAGE OF THE VERTEBRAL BODIES. SO WE SEE THAT THERE'S A LITTLE BIT OF THAT HAPPENING BETWEEN L4 AND L5 AND AT L5 AND S1.

WHAT WE SEE IS WITH -- WE SEE THAT THE SPACE IN BETWEEN THESE BONES IS DECREASED, AND WHEN WE LOOK AT THE AREA WHERE THE -- THE NERVE HOLES ARE, OR THE EXITING NEUROFORAMEN, WE CAN SEE THAT THE NERVES ARE BECOMING A LITTLE BIT SQUEEZED IN THAT L5-S1 NEUROFORAMEN OR NERVE HOLE AREA BETWEEN FIVE AND ONE.

Q. AND, DOCTOR, WHAT IS THE SIGNIFICANCE WHEN YOU COMPARE THOSE TWO MRIS? WHAT IS THE DIFFERENCE OR SIMILARITIES?

A. SO THE -- THE MAJOR DIFFERENCE HERE BETWEEN THESE TWO MRIS IS THAT -- IS THAT FAILURE OF THAT L4 AND L5 BONE TO COMPLETELY AND ENTIRELY LINE UP ON EACH OTHER, THAT LISTHESIS OR THAT SLIPPAGE, AND THAT'S A SIGN THAT THAT DISC BETWEEN L4 AND L5 IS -- IS MALFUNCTIONING. IT'S MALFUNCTIONING TO THE POINT WHERE THE BONES THEMSELVES ARE NOT IN THEIR PROPER ALIGNMENT ANYMORE. SO THAT'S ONE MAJOR DIFFERENCE.

THE OTHER ONE IS THAT IN ADDITION TO THAT, AT THAT 5-1 SECTION, WE'RE SEEING AN INCREASE IN THE PRESSURE THAT'S

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HAPPENING ON THOSE NERVES BETWEEN THAT L5-S1 SEGMENT.

Q. AND, DOCTOR, WHEN MISS KOSIAREK HAD AN ACCIDENT, WHEN SHE FELL TO THE GROUND SHE HIT HER SPINE IN THE -- IN SUCH A WAY THAT SHE FELL TO THE GROUND ON HER BACK AND THEN FELL TO THE GROUND COMPLETELY.

CAN YOU TELL ME IF THIS IS CONSISTENT WITH THE FINDINGS OF THE MRIS THAT YOU SEE?

MR. SCAHILL: OBJECTION, YOUR HONOR.

THE COURT: WELL, ASSUME -- ASSUME THAT'S THE CASE SUBJECT TO THE -- TO THE -- WHAT WE HEAR IN THE TESTIMONY AND WHAT THE JURY BELIEVES. GO AHEAD.

A. SO WHEN YOU LOOK AT THAT TYPE OF TRAUMA TO THE LOWER BACK, THE BONES OF YOUR LOWER BACK ARE NOT -- THEY DON'T MOVE IN ANY ONE PURE FORM OR ANY ONE PURE DIRECTION.

WHAT YOU HAVE IS -- YOU HAVE WHAT'S CALLED COUPLED MOTION IN A TRAUMA WHEREBY YOU HAVE A FALL, PARTICULARLY A FALL WHEREBY THE LOWER BACK AND THE PELVIS HIT THE GROUND, AND THEN YOU HAVE ENERGY OR YOU HAVE THE FORCE OF THAT FALL TRANSMITTED TO THE SPINE. YOU HAVE WHAT ARE KNOWN AS SHEER FORCES.

SHEER FORCES ARE THE SAME TYPE OF FORCES THAT ARE INVOLVED WHEN YOU TEAR A PIECE OF PAPER. THEY'RE FORCES THAT HAPPEN PARALLEL TO THE TISSUES INVOLVED. AND THOSE SHEER

FORCES, WITH WHAT WE CALL COMPLEX MOTION OF THE BONES, IS CONSISTENT WITH DISC INJURY.

Q. AND, DOCTOR, I ALSO WANT YOU TO ASSUME THAT NOT ONLY

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SHE FELL TO HER BACK OR THE SPINE, BUT THE FIRST INITIAL IMPACT WAS TO THE FRONT.

SO SHE BASICALLY MOVED FORWARD LIKE THIS (INDICATING), AND THEN SHE FELL BACKWARDS. WHAT WOULD BE SIGNIFICANCE OF THAT IN REGARDS TO HER MRI FINDINGS?

A. THAT -- THOSE -- THOSE TYPES OF MOTION INCREASE THOSE TORSIONAL OR THE SHEER FORCES THAT HAPPEN TO THE DISCS. THAT'S AN INCREASE IN TORSIONAL FORCE OR SHEER FORCE ACROSS THE DISCS.

Q. DOCTOR, DO YOU HAVE AN OPINION, WITH A REASONABLE DEGREE OF MEDICAL CERTAINTY, AS TO THE PERMANENCY OF THIS INJURY?

A. YES.

Q. WHAT IS YOUR OPINION?

A. THESE ARE -- THESE ARE PERMANENT DISC INJURIES.

Q. AND, DOCTOR, DO YOU HAVE AN OPINION, WITH REASONABLE DEGREE OF MEDICAL CERTAINTY, AS TO CAUSALITY OF THIS INJURY?

MR. SCAHILL: OBJECTION, YOUR HONOR.

THE COURT: I'LL SUSTAIN IT. LET'S -- I'LL ALLOW IT. GO AHEAD. GO AHEAD. YOU CAN ANSWER.

A. YES.

Q. WHAT IS YOUR OPINION?

A. THAT THESE INJURIES ARE CAUSALLY RELATED TO THE NOVEMBER 11, '08 INCIDENT.

Q. WHY DO YOU THINK SO?

MR. SCAHILL: OBJECTION, YOUR HONOR.

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THE COURT: NO, LET'S MOVE ON.

MR. PLATTA: OKAY. NO PROBLEM.

Q. DOCTOR, DID YOU ALSO EXAMINE MISS KOSIAREK DURING YOUR -- DURING HER VISITS AT YOUR OFFICE?

A. YES.

Q. WHAT WERE YOUR FINDINGS DURING THE PHYSICAL EXAMINATIONS AND DID THEY CORRELATE WITH THE MRI FINDINGS?

A. SURE. YES. THE PHYSICAL FINDINGS, PARTICULARLY WITH RESPECT TO THE LOWER BACK, SHOWED AN ANATOMICAL PROBLEM WITH MOTION IN THE LOWER BACK.

FOR EXAMPLE, SHE HAD WHAT'S KNOWN AS A REVERSAL OF LUMBAR LORDOSIS UPON ASCENT, WHICH MEANS WHEN YOU PUT YOUR HAND ON SOMEONE'S BACK AND THEY ARE ARISING FROM A SEATED POSITION, YOUR LOWER SPINE AND PELVIS SHOULD FORM A NORMAL CURVE TO HELP YOU GET YOU OUT OF THE CHAIR SO THAT YOU CAN REDISTRIBUTE WEIGHT THROUGH YOUR LUMBAR SPINE AND PELVIS.

WHEN THAT DOESN'T HAPPEN, IT'S KNOWN AS A REVERSAL OF LUMBAR LORDOSIS ON ASCENT, BUT -- WHICH SHE DID DEMONSTRATE.

THERE'S A PROCEDURE WHEREBY WE TRY TO REPRODUCE PAIN IN THE OFFICE BY INCREASING PRESSURE ON THE NERVES. IT'S SOMETHING KNOWN AS A SPINAL PHALEN'S MANEUVER, AND THAT IS BENDING THE LOWER BACK OR EXTENDING IT AS MUCH AS YOU CAN TO TRY TO CLOSE DOWN THESE NERVE HOLES, REPRODUCING PALPABLE SPASM IN YOUR LOWER BACK AND RADIATING PAIN INTO THE LEGS.

SO SHE HAD A POSITIVE SPINAL PHALEN'S MANEUVER. SHE
0095
ALSO HAD SOMETHING KNOWN AS A STRAIGHT LEG RAISE. BECAUSE THE -- BECAUSE THESE NERVES TRAVEL DOWN YOUR LEG, THE SCIATIC NERVE IS A BIG NERVE CABLE THAT COMES ALL THE WAY DOWN YOUR LEG. THEY ORIGINATE IN YOUR LOWER BACK.

A STRAIGHT LEG RAISE IS A TEST WHEREBY YOU EXTEND THE KNEE, YOU EXTEND THE ANKLE, AND THEN YOU RAISE THE LEG TO TENSION THAT NERVE.

IF THE NERVE IS SWOLLEN AND IRRITATED, THE PATIENT WILL EXHIBIT A PAINFUL RESPONSE; THAT IS, A WITHDRAWAL RESPONSE WITH PALPABLE SPASM. SHE HAD A POSITIVE STRAIGHT LEG RAISE WHICH WAS MEASURED AT -- ON THE RIGHT SIDE AT 50 DEGREES AND ON THE LEFT SIDE AT 40 DEGREES.

THE TENDON REFLEXES IN THE QUAD AND ACHILLES TENDONS, WHICH ARE THE L4-L5 AND S1 REFLEXES, WERE ABSENT. THAT IS THE REFLEXES COMING FROM THOSE NERVES.

Q. WHAT IS THE RESULT OF THAT?

A. A REFLEX ARC IS AN -- IT'S AN AUTOMATIC RESPONSE THAT YOUR NERVE DOES WITHOUT YOU THINKING ABOUT IT WHEN -- IN RESPONSE TO A TENDON BEING STRETCHED.

SO YOU'VE ALL SEEN DOCTORS TAKE A REFLEX HAMMER OR THEIR HANDS AND TAP A TENDON. WHEN YOU TAP THE TENDON, YOU STRETCH IT. THAT RESPONSE GOES BACK INTO YOUR SPINE, AND YOUR AUTOMATIC RESPONSE FROM YOUR BODY IS TO EXTEND YOUR MUSCLE.

SO REFLEXES WERE ABSENT. SO THAT AUTOMATIC RESPONSE ARC WAS NOT WORKING.
0096

AND SHE ALSO HAD WHAT WE CALL -- DIFFICULTY WITH HEEL-TOE STANDING. THAT IS AN INABILITY TO EITHER TOE STAND OR HEEL STAND. BECAUSE THOSE MUSCLES THAT CONTROL YOUR HEEL AND TOE STANDING ARE ALSO THOSE MUSCLES IN THAT L4 THROUGH S1 AREA.

Q. AND, DOCTOR, WE'VE REVIEWED THE MRIS THAT SHE'S HAD. NOW, I WANT YOU TO ASSUME THAT IN THE EMERGENCY ROOM NO ONE TOLD HER TO HAVE THE MRI. SHE HAD X-RAYS. SHE HAD CAT SCANS, CAT SCANS OF SPECIFIC PARTS OF HER BODY. X-RAYS ALSO OF HER SPINE.

WOULD YOU BE ABLE TO TELL WHAT YOU TOLD US TODAY BY LOOKING AT AN X-RAY?

MR. SCAHILL: OBJECTION TO THAT QUESTION, YOUR HONOR.

THE COURT: WELL, I'LL ALLOW IT. GO AHEAD.

A. SO X-RAYS AND CAT SCANS ARE VERY GOOD TESTS TO LOOK FOR FRACTURES OR DISPLACEMENTS OF BONES. AND SO WHEN YOU COME TO AN EMERGENCY ROOM, ONE OF THE THINGS THAT THEY WANT TO MAKE SURE OF IS THAT YOU DON'T HAVE A -- AN EMERGENT LIFE OR LIMB THREATENING PROBLEM, AND THEY OFTENTIMES WILL DO X-RAYS AND CAT SCANS IN ORDER TO MAKE SURE YOU DON'T HAVE A FRACTURE OR A DISLOCATION OR A PROBLEM SUCH AS THAT.

AND THEY'RE -- THEY'RE GOOD TESTS BECAUSE THEY RULE THOSE PROBLEMS OUT, SO THEY'RE HELPFUL IN THAT SENSE. THEY'RE PART OF THE WHOLE PICTURE AND OFTENTIMES NEED TO BE COMBINED WITH AN MRI WHEN YOU HAVE OTHER SYMPTOMS AND PHYSICAL FINDINGS AS TIME GOES ON.
0097

BUT THEY ARE HELPFUL AND THEY HELP TO ELUCIDATE THE -- THE PARTICULAR PROBLEM THAT THAT PATIENT HAS.

Q. WOULD YOU OPERATE ON SOMEONE WHICH IS BASED ON THE X-RAY?

A. NO, YOU WOULD NEVER OPERATE BASED ONLY ON AN X-RAY UNLESS WE KNOW, YOU KNOW, YOU WERE SOMEWHERE WHERE YOU DIDN'T HAVE MRI OR CAT SCAN AVAILABLE AND ALL YOU HAD AVAILABLE WAS AN X-RAY.

AND I HAVE BEEN IN THOSE SITUATIONS, BUT YOU TRY TO AVOID DOING THAT. YOU WANT TO GET AS MUCH INFORMATION AS YOU CAN BEFORE DOING A SURGICAL RECONSTRUCTION.

Q. AND, DOCTOR, I WILL ALSO ASK YOU TO LOOK AT WHAT WAS MARKED AS PLAINTIFF'S EXHIBIT 21-A, WHICH IS BASICALLY THE MRI DONE ON THE -- DECEMBER 12, 2008, A FEW DAYS AFTER -- ACTUALLY A MONTH AFTER HER ACCIDENT. AND IT IS AN MRI OF HER CERVICAL SPINE.

CAN YOU TELL US WHAT, IF ANYTHING, DID YOU -- DO YOU FIND THERE?

A. SO THE MRI OF THE CERVICAL SPINE IS VERY SIMILAR TO THE MRI OF THE LOWER SPINE ONLY THE BONES ARE -- THEY'RE NOT AS LARGE AS THEY WERE IN THE LOWER BACK.

BUT, ONCE AGAIN, WE'RE LOOKING AT SQUARES, WHICH ARE THE BONES, AND THEN IN BETWEEN THESE SQUARES, ONCE AGAIN WE'RE LOOKING AT THE DISCS BEHIND THE BONES.

AND THE DISCS ARE -- RUN (INDICATING). AGAIN, THIS IS

0098

THE SPINAL CANAL, AND WE'RE LOOKING FOR THE SAME THING. WE'RE LOOKING TO SEE WHETHER THERE IS DISC MATERIAL BEYOND THE CONFINES OF A VERTEBRAL BODY.

AND IN COUNTING THE BONES OF THE CERVICAL SPINE, TWO, THREE, FOUR, FIVE, SIX, WHAT WE SEE IS BETWEEN C5 AND C6 THERE IS DISC MATERIAL IN THE AREA OF THE SPINAL CANAL, AND THAT'S ILLUSTRATING TO THE RIGHT OF THE MRI PROJECTION, ALONG THE MRI PROJECTION, SO THAT YOU CAN SEE WHAT THAT LOOKS LIKE GOING IN THE CANAL AREA WHERE THE NERVES ARE.

Q. AND, DOCTOR, WOULD YOU MIND SHOWING THIS -- US THE SAME FINDINGS ON THE ACTUAL -- ON THE ACTUAL FILM OF THE MRI OF THE LUMBAR -- I'M SORRY -- CERVICAL SPINE?

YOU CAN ACTUALLY USE IT WITH TAKING THE MOUSE AND --

A. I SEE WHAT YOU'RE SAYING. FIND -- WE HAVE TO FIND OUR CERVICAL. THIS IS ALL LUMBAR. AND IS CERVICAL ON THE SAME DISK OR DIFFERENT DISK?

Q. SHOULD BE ON THE SAME DISK.

A. ALL RIGHT.

Q. YEAH, SHOULD BE ON THE SAME DISK. IF YOU WANT, YOU CAN JUST START THE CD HERE --

A. YOU WANT TO RESTART IT -- YOU -- YEAH. YOU KNOW WHY, BECAUSE WHEN YOU RESTART IT, THE MENU WILL COME UP.

Q. (ATTORNEY COMPLIED.)

A. OKAY.

Q. IS THIS BETTER?

0099

A. THAT'S GOOD. SO HERE'S "C". FINE. WE ARE IN THE L-SPINE. NOW WE'LL GO TO THE C-SPINE MENU. THIS IS THE

CERVICAL SPINE 2008.
SO EACH CLICK -- EACH CLICK OF THE MOUSE SHOWS US A DIFFERENT PROJECTION OR A DIFFERENT SLICE. SO WE'RE SLICING THROUGH THE CERVICAL SPINE.
AND HERE, AGAIN, WHERE WE PUT THE ARROW, WE'LL LOOK AT THIS -- WE'LL COUNT TWO, THREE, FOUR, FIVE, SIX. LOOKING BETWEEN C5 AND C6, AND WE LOOK TO SEE DISC MATERIAL BEYOND THE CONFINES OF THE VERTEBRAL BODY.
THESE ARE TWO SEPARATE PROJECTIONS. MRIS LOOK AT THINGS IN DIFFERENT WAYS TO LOOK AT DIFFERENT SOFT TISSUES.
HERE YOU'LL SEE A BIG BRIGHT LINE NEXT TO A GRAY LINE. THAT BRIGHT LINE NEXT TO THE GRAY LINE IS CSF OR CEREBRAL SPINAL FLUID, AND YOU CAN SEE THAT THERE'S AN AREA WHERE THE CEREBRAL SPINAL FLUID IS INDENTED BETWEEN C5 AND C6.
Q. DOCTOR, DO YOU MIND MOVING OVER BECAUSE I BELIEVE THE JURORS BEHIND YOU MIGHT NOT BE ABLE TO SEE.
A. SURE. SO WE'RE LOOKING AT INDENTATION TWO, THREE, FOUR, FIVE, SIX. INDENTATION IN THE AREA OF C5-C6 WHERE THE CEREBRAL SPINAL FLUID IS AROUND THE SPINAL CORD.
Q. AND WHAT IS THE SIGNIFICANCE OF THAT?
A. THAT INDENTATION TELLS YOU THAT THERE'S SOMETHING IN THERE INDENTING IT, AND MATERIAL THAT'S IN THERE THAT'S INDENTING IT IS COMING FROM THE DISC. SO THAT THAT IS A DISC

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HERNIATION.
Q. IS IT THE SAME SITUATION AS IN HER LOWER BACK?
A. YES.
Q. AND, DOCTOR, I WANT YOU TO ASSUME THAT MISS KOSIAREK DIDN'T COMPLAIN RIGHT AWAY IN THE EMERGENCY ROOM ABOUT HER CERVICAL SPINE. WOULD THAT BE SURPRISING TO YOU?
A. NO.
Q. WHY NOT?
A. COMPLAINTS AND SYMPTOMS OFTENTIMES DEPEND ON, YOU KNOW, HOW -- HOW PAINFUL SOMETHING IS. AND EMERGENCY ROOM SITUATIONS, WHAT'S DONE IS WHAT'S CALLED A PRIMARY SURVEY. SO YOUR PRIMARY LOOK IS AT -- FOR VERY PAINFUL CONDITIONS, LIFE AND LIMB THREATENING CONDITIONS.
WITH DISC INJURIES, DEPENDING UPON THE SEVERITY OF THE INJURY, THE PAIN AND THE SYMPTOMS CAN HAPPEN AS TIME GOES ON DEPENDING UPON WHETHER OR NOT THAT DISC HAS A LARGE TEAR IN IT OR A SMALL TEAR IN IT OR A -- A BIG PIECE OF HERNIATED MATERIAL STICKING OUT ON THE CORD OR NERVES, OR A SMALLER PIECE OF HERNIATED MATERIAL STICKING OUT ON THE CORD OR NERVES, OR IF IT'S COMING OUT SLOWLY OR IF IT'S COMING OUT MORE RAPIDLY.
SO THAT'S -- THAT'S WHAT WE CALL A CLINICAL COURSE OR CLINICAL SYMPTOMS, AND THAT'S SOMETHING THAT YOU ONLY SEE OVER TIME.
Q. AND, DOCTOR, WHAT IS THE SIGNIFICANCE FOR HER THAT SHE HAS HERNIATION IN HER CERVICAL SPINE? WHAT KIND OF TREATMENT

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WILL SHE REQUIRE?
A. THE CERVICAL SPINE ISSUE IS -- IT'S VERY SIMILAR TO THE LUMBAR SPINE ISSUE, AND DISC PROBLEMS IN GENERAL FOLLOW BASICALLY THE SAME KIND OF A CLINICAL SCENARIO, WHICH IS

CONSERVATIVE OR NONOPERATIVE TREATMENT FIRST, REST, ACTIVITY MODIFICATIONS AND RESTRICTIONS, NON-STEROIDAL ANTIINFLAMMATORIES, PAIN MEDICATIONS, PERHAPS EPIDURAL STEROID INJECTIONS, THOSE TYPES OF THINGS.

Q. DOCTOR, I WANT YOU TO ASSUME THAT SHE CANNOT HAVE ANY EPIDURAL IN THE FUTURE BECAUSE OF HER BLOOD PRESSURE.

A. RIGHT. BARRING A FAILURE OF CONSERVATIVE MEANS, THEN ULTIMATELY, AS TIME GOES ON, IF IT REMAINS SYMPTOMATIC AND IT CONTINUES TO CAUSE A PROBLEM, YOU CONSIDER AN OPERATION.

Q. AND WHAT KIND OF OPERATION WOULD BE ABLE TO STOP THIS PROCESS?

MR. SCAHILL: JUDGE, I'M GOING TO OBJECT TO --

THE COURT: THIS ONE IS TOO SPECULATIVE. OBJECTION SUSTAINED.

MR. SCAHILL: JUDGE, CAN WE APPROACH FOR A SECOND?

THE COURT: MAYBE IT'S ON THE SCHEDULE. JURORS, JUST HANG ON. LET THE TWO LAWYERS APPROACH.

(WHEREUPON, A SIDE-BAR DISCUSSION WAS HELD.)

Q. DOCTOR, DO YOU HAVE, WITH A REASONABLE DEGREE OF MEDICAL CERTAINTY, ANY RECOMMENDATIONS FOR FUTURE TREATMENT OF

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MISS KOSIAREK'S SURGICAL SPINE?

MR. SCAHILL: OBJECTION, YOUR HONOR.

THE COURT: LET'S SEE WHERE IT GOES. HE TALKED A LITTLE BIT ABOUT DIFFERENT THINGS PRESURGERY. I TOOK THE SURGERY. I DON'T KNOW WHETHER THIS WOULD BE REPETITIVE. IS THIS SOMETHING WE HAVEN'T HEARD YET? LET ME HEAR A LITTLE. I MAY STRIKE IT OR I MAY HEAR IT BEFORE IT GETS OUT TO THERE.

A. SO WITH RESPECT TO FUTURE CARE OF THE CERVICAL SPINE --

Q. YES.

A. -- WE WOULD BE TALKING ABOUT SURGERY.

MR. SCAHILL: SAME OBJECTION, YOUR HONOR.

THE COURT: I'LL SUSTAIN. I DON'T WANT TO GO THERE GIVEN WHAT WE'VE HEARD.

Q. DOCTOR, DO YOU BELIEVE THAT THERE IS ANY SURGERY REQUIRED RIGHT NOW FOR MISS KOSIAREK'S CERVICAL CONDITION?

MR. SCAHILL: SAME OBJECTION, YOUR HONOR.

MR. PLATTA: WHY THERE IS AN OBJECTION, YOUR HONOR?

THE COURT: LET'S TRY IT RIGHT NOW. GO AHEAD.

A. YES.

Q. WHAT KIND OF PROCEDURE IS -- DOES SHE REQUIRE?

A. SHE WOULD REQUIRE WHAT'S KNOWN AS A CERVICAL DISCECTOMY AND FUSION.

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Q. IS THIS THE SAME THING THAT YOU DESCRIBED FOR HER LOWER BACK?

A. IT'S A VERY SIMILAR PROCEDURE WHEREBY THE DISC IS REMOVED. A SHIM IS INSERTED IN BETWEEN THE BONES, AND THEN THE BONES ARE LOCKED TOGETHER SO THAT THEY DON'T MOVE.

THE COURT: LET'S NOT -- LET'S STRIKE IT. THE

WITNESS SAID WE'RE GOING TO START WITH CONSERVATIVE TREATMENT. IGNORE THE TESTIMONY AS MUCH AS POSSIBLE. IT'S TOO SPECULATIVE. I UNDERSTAND THE QUESTION.

MR. PLATTA: MY QUESTION WAS ABOUT --

THE COURT: I UNDERSTAND THE WORDS ARE A LITTLE DIFFERENT.

MR. PLATTA: I'LL REPHRASE IT, YOUR HONOR.

THE COURT: NO, NO, LET'S MOVE ON. I DON'T WANT TO HEAR ABOUT THIS.

Q. DOCTOR, DO YOU KNOW IF MISS KOSIAREK ALREADY HAD CONSERVATIVE TREATMENT FOR HER CERVICAL SPINAL?

A. YES.

Q. AND DO YOU KNOW THAT SHE HAD ALREADY TREATMENT WITH CHIROPRACTIC OR PHYSICAL THERAPY FOR OVER A PERIOD OF TIME RIGHT NOW SINCE THE TIME OF THE ACCIDENT?

A. YES.

Q. AND WOULD YOU THINK THAT SHE REQUIRES MORE PHYSICAL THERAPY TO HER CERVICAL SPINE AS A RESULT OF THIS ACCIDENT OR NOT?

0104

A. NOT AT THIS TIME.

Q. WHY NOT?

A. WELL, SHE HASN'T ACTUALLY RESPONDED TO THE PHYSICAL THERAPY UP TO THIS POINT.

Q. SO WHAT'S THE NEXT STEP? WHAT DO YOU WANT TO DO FOR HER?

THE COURT: I DON'T WANT TO GO THERE. YOU HAD AN OPPORTUNITY THROUGH THIS WITNESS. WE MAY HEAR THROUGH OTHER WITNESSES.

MR. PLATTA: YOUR HONOR, HE IS THE ONLY DOCTOR WHO CAN OPERATE ON HER RIGHT NOW. IF I --

MR. SCAHILL: OBJECTION, YOUR HONOR.

THE COURT: DON'T TESTIFY. THOSE ARE MY RULINGS. I DO THE BEST I CAN WITH WHAT I HEAR. I TRY AND KEEP -- THERE'S A LOT OF INFORMATION FLOWING OUT HERE.

MR. PLATTA: THANK YOU, YOUR HONOR.

THE COURT: BUT WE CAN'T PREDICT THE FUTURE. IF WE COULD, WE'D GET INTO ANOTHER LINE OF WORK AND MAKE MUCH, MUCH MORE MONEY, RIGHT?

MR. PLATTA: YOUR HONOR, THANK YOU.

Q. DR. MEROLA, SO WHICH SURGERY DOES SHE NEED FIRST, LUMBOSACRAL OR CERVICAL?

MR. SCAHILL: OBJECTION.

THE COURT: DON'T -- STOP. YOU KNOW, SUSTAINED.

Q. DOCTOR, WITH A REASONABLE DEGREE OF MEDICAL CERTAINTY,

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IS THERE ANYTHING ELSE THAT CAN BE DONE FOR HER CERVICAL CONDITION?

MR. SCAHILL: SAME -- SAME QUESTION, JUDGE. SAME OBJECTION.

Q. ANYTHING ELSE --

MR. PLATTA: IT'S FAIRLY BROAD, YOUR HONOR.

THE COURT: IS THIS YOUR LAST QUESTION?

MR. PLATTA: IN REGARDS TO THIS LINE, YES.

THE COURT: NO, THIS IS YOUR LAST ONE. WE JUST HAD A CONFERENCE ABOUT THE TIME.
MR. PLATTA: I'M FINISHING, YOUR HONOR. I AM DEFINITELY FINISHING. IT'S NOT MY LAST QUESTION BUT --
THE COURT: WE HEARD THIS ANYWAY. OBJECTION SUSTAINED. MOVE ON. ALL RIGHT. YOU DIDN'T USE UP YOUR LAST QUESTION, SO GO ON.
MR. PLATTA: PLEASE NOTE MY EXCEPTION, YOUR HONOR.
THE COURT: YOU HAVE AN EXCEPTION.
Q. DOCTOR, DID YOU SEE HER IN 2010?
A. YES.
Q. AND WHEN WAS IT?
A. OCTOBER 11TH OF 2010.
Q. I WANT YOU TO ASSUME THAT ELEVEN OR TWELVE DAYS BEFORE SHE SAW ANOTHER DOCTOR WHO HOPEFULLY WILL TESTIFY HERE IN -- DURING THIS TRIAL, AND THAT HE DIAGNOSED HER BASED ON HIS

0106

PHYSICAL EXAMINATION WITH NO LIMITATIONS WHATSOEVER, NO LIMITATIONS TO HER LUMBAR SPINE, NO LIMITATIONS TO HER CERVICAL SPINE.
HE PRETTY MUCH CLEARED HER UP FOR GOING BACK TO NORMAL WORK, NORMAL LIFE. WOULD YOU AGREE WITH HIS FINDINGS?
MR. SCAHILL: OBJECTION, YOUR HONOR.
THE COURT: I'LL ALLOW IT.
A. NO.
Q. WHY NOT?
A. BASED ON HER HISTORY, HER PHYSICAL FINDINGS AND HER CLINICAL COURSE OVER TIME, WITH A FAILURE OF CONSERVATIVE CARE AND MANAGEMENT, WITH DIAGNOSTIC IMAGES THAT DEMONSTRATE HERNIATIONS AND PHYSICAL FINDINGS THAT DEMONSTRATE NERVE ROOT PROBLEMS, I WOULD RESPECTFULLY DISAGREE WITH THAT.
Q. AND, DOCTOR, ALSO, IF THIS DOCTOR WERE TO PERFORM TESTS LIKE STRAIGHT LEG RAISING THAT WOULD BECOME NEGATIVE (SIC), WOULD YOU AGREE WITH THAT --
MR. SCAHILL: OBJECTION, YOUR HONOR.
Q. -- TWO WEEKS BEFORE YOUR EXAMINATION?
MR. SCAHILL: HE'S ASKING HIM TO COMMENT ON THE IME FINDINGS.
MR. PLATTA: THAT'S CORRECT.
THE COURT: WELL, WE HAD A LITTLE OF THIS. WE ALSO HAD A MENTION OF STRAIGHT LEG RAISING BEFORE BY THIS WITNESS. MOVE ON. IS THERE ANYTHING ELSE?

0107

Q. WOULD YOU AGREE?
THE COURT: NO. NO. DON'T ANSWER. OBJECTION SUSTAINED.
MR. PLATTA: OH, IT'S SUSTAINED. OKAY.
THE CLERK: DOES HE NEED TO BE IN FRONT OF THIS ANYMORE OR CAN HE HAVE A SEAT?
THE COURT: DOCTOR, YOU CAN SIT DOWN AGAIN.
MR. PLATTA: YES, THAT'S FINE.
Q. DOCTOR, VERY LAST QUESTION. I WANT YOU TO ASSUME THAT MRS, KOSIAREK, AT THE TIME OF THE ACCIDENT, WAS WORKING IN A

WATCH FACTORY WHERE SHE WAS REPLACING BATTERIES, PUTTING BRACELETS, DOING MANUAL WORK, GETTING PACKAGES FROM THE STORAGE, BRINGING THEM OVER TO HER DESK AND DOING SOME MANUAL WORK.
CAN SHE PERFORM THIS WORK RIGHT NOW IN YOUR OPINION?
A. NO.
Q. WHY NOT?
A. THOSE ARE THE TYPES OF ACTIVITIES THAT REQUIRE REPETITIVE MOTION TO THE NECK AND BACK, AND THEY ALSO REQUIRE BENDING, LIFTING, AND TWISTING. THOSE VERY THINGS THAT WE SPOKE ABOUT ARE RESTRICTED WITH THIS PARTICULAR KIND OF A PROBLEM.
Q. AND, DOCTOR, WHAT ARE THE OTHER RESTRICTIONS IN HER LIFE? WHAT'S SHE, IN YOUR OPINION, NOT BE ABLE TO DO?
A. WELL, IN GENERAL THOSE -- THOSE TYPES OF ACTIVITIES THAT RE -- REQUIRE THAT TYPE OF EFFORT ON HER PART. AND THAT INCLUDES THINGS LIKE SHOPPING, ACTIVITIES OF DAILY LIVING AT

0108

HOME SUCH AS MAINTAINING A HOUSEHOLD, DOING HOUSEHOLD CHORES AND DUTIES, TAKING OUT THE TRASH, THOSE TYPES OF THINGS.
Q. OKAY. CAN SHE SIT FOR A LONG TIME?
A. SITTING FOR THIS PARTICULAR KIND OF PROBLEM, BECAUSE OF THE PRESSURE ON THE SCIATIC NERVE --
(HANDING TO THE WITNESS.)
THE WITNESS: THANK YOU VERY MUCH.
A. -- IS SOMETHING THAT WOULD BE LIMITED TO APPROXIMATELY 20 TO 25 MINUTES PER TIME, AND THEN YOU'D HAVE TO GET UP AND GET PRESSURE OFF THAT NERVE AND WALK AROUND FOR A BIT.
Q. AND WHAT HAPPENS WHEN YOU SIT OVER THAT TIME?
A. YOU PRODUCE PRESSURE ON THAT NERVE, WHICH CAUSES IRRITATION TO THE NERVE, WHICH CAUSES SWELLING TO THE NERVE, WHICH CAUSES PAIN.
Q. AND, DOCTOR, MY VERY LAST QUESTION. DO YOU HAVE AN OPINION, WITH A REASONABLE DEGREE OF MEDICAL CERTAINTY, AS TO PERMANENCY OF MISS KOSIAREK'S CERVICAL SPINE INJURY?
A. YES.
Q. WHAT IS YOUR OPINION?
A. IT IS A -- IT'S A PERMANENT CERVICAL INJURY.
Q. DO YOU ALSO HAVE AN OPINION AS TO CAUSAL RELATIONSHIP OF THIS INJURY TO THE ACCIDENT?
MR. SCAHILL: OBJECTION.
THE COURT: SUSTAINED.
MR. PLATTA: THANK YOU, YOUR HONOR.

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THE COURT: ALL RIGHT. DOCTOR, YOU CAN STEP DOWN. WE'RE GOING TO TAKE A ONE-HOUR BREAK. I'D LIKE TO GO TO 2:15, BUT I WANT TO MAKE SURE WE HAVE ENOUGH TIME. LET'S TRY TO COME BACK -- IT'S WEIRD TO SAY LET'S DO AN HOUR. LET'S TRY TO COME BACK AT 2:10, GET GOING, AND PICK UP WITH THE CROSS-EXAMINATION OF DR. MEROLA.
I WANT TO KEEP THE JURY -- I DON'T KNOW THE WHOLE SCHEDULE YET MYSELF. I WANT TO KEEP YOU APPRISED OF THE SCHEDULE SO YOU CAN MAKE PLANS IF YOU HAVE AN APPOINTMENT.
I KNOW WE'RE NOT WORKING WEDNESDAY MORNING, SO I'M GOING TO GO VISIT MY DENTIST. WE'RE OFF WEDNESDAY, AS WE AGREED, SO WE PROBABLY WON'T START WEDNESDAY UNTIL 2:00.

I DON'T THINK WE CAN START ANY EARLIER.
LET'S ASSUME WE MIGHT BE ABLE TO START AT 1:30, BUT YOUR MORNING IS FREE THAT DAY, AND WHEN I FIND OUT MORE ABOUT THE SCHEDULE, I'LL LET YOU KNOW. ALL RIGHT?
THANK YOU. PLEASE DON'T DISCUSS THE CASE AMONG YOURSELVES OR WITH ANYONE. DON'T DO ANY RESEARCH.
(JURY EXITED.)
THE COURT: WE PROBABLY NEED AN HOUR. ARE YOU GUYS READY TO TALK ABOUT THE SCHEDULE? PERHAPS WHEN YOU COME BACK YOU'LL HAVE A LITTLE BETTER SENSE OF IT.
I WANT TO TELL THE JURY WHEN YOU HAVE A BETTER SENSE OF IT. I THINK THEY'RE ENTITLED TO KNOW.
MR. PLATTA: SURE.

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THE COURT: THANK YOU.
(WHEREUPON, A LUNCHEON RECESS WAS TAKEN.)
(FOLLOWING THE LUNCHEON RECESS, FRANCESCA BUSH WAS REPLACED BY FRANCES ROYCE AS THE OFFICIAL COURT REPORTER.)

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THE COURT: Mr. Platta has a question.
COURT CLERK: All parties present. Case on trial continues.
THE COURT: There is application to prevent Mr. Scahill from asking about the relationship of the witness either professional, personal or both.
MR. PLATTA: Personal.
THE COURT: Meaning what?
MR. PLATTA: Anything personal between me and the witnesses that are testifying. I would like to avoid this kind of question and I'm sure Mr. Scahill is going to ask them.
THE COURT: We have questions where a doctor was in a conference with someone. Why shouldn't we let

that come out? We always ask how much are you going to be paid, what is your mix of plaintiff's cases and defense cases.

Are you going to be asking --

MR. SCAHILL: All subject to collateral attack if he is personal friends with the plaintiff's counsel. It's fair game.

THE COURT: I think its permissible.

MR. PLATTA: Your Honor, I have one more motion to preclude any testimony of Dr. Kaisman relating to any of his lawsuits that he was involved in that are not a

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part of this case in regard to any of his personal lawsuits that were either taken against him or on his behalf.

THE COURT: We don't normally do haven't you been a subject of a lot of lawsuits. What often happens is either lawyer will dig in someone else's testimony didn't you testify in a particular case ideally opposite what you are testifying about today.

MR. SCAHILL: If the Court is acceptable to finishing with Dr. Merola and then move on to --

MR. PLATTA: He will move on to Dr. Kaisman with regard to the personal lawsuits not related to personal injury cases.

THE COURT: We don't have him on the case.

MR. PLATTA: Knowing what Mr. Scahill is going to bring up, I want to make a motion in limine to preclude any testimony regarding private lawsuits.

THE COURT: I'll hear Mr. Scahill a little bit on it. I promised the jury 2:10. I'm not inclined to say were you sued on this one or that one. I will listen to somebody say didn't you testify this way in a particular case where you were the expert or the treating physician which you think comes up to show the person is taking the opposite position. I don't think we allow haven't you been sued a lot.

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MR. PLATTA: That is what I'm afraid --

THE COURT: I'll give Mr. Scahill a chance and I'll think about it. Then we have to go into did you win or lose it and Appellate Division did this. I think it's too prejudicial. I could be wrong. Let's get the jury in.

MR. PLATTA: Also I believe Mr. Scahill wants to use some of the blow ups that are not marked and I have not had a chance to see them.

THE COURT: Let me check one more thing.

COURT CLERK: Jury entering. All jurors present. All parties present. Counsel waives the reading of the roll.

Case on trial continued. You may be seated. Come to order.

Doctor, at this time you are still reminded you

are still under oath.
THE COURT: Good afternoon, everybody. This is cross examination of Dr. Merola by Counsel Scahill.
Go ahead, sir.
MR. SCAHILL: Thank you, your Honor.

CROSS EXAMINATION

BY MR. SCAHILL:

Q Good afternoon, Doctor.

A Good afternoon.

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Q Doctor, are you involved in personal injury cases besides this case?

MR. PLATTA: Objection, your Honor.

THE COURT: I'll allow it.

THE WITNESS: Yes.

Q Do you frequently testify in court on personal injury cases?

A I testify in court if a patient that I am treating asks me to come to court.

Q In this particular case you have a personal relationship with plaintiff's counsel; is that correct?

MR. PLATTA: Objection, your Honor.

THE COURT: I'll allow it.

THE WITNESS: I do not, no.

Q How often are you asked to come to court to testify in personal injury cases?

A I would anticipate that I'm asked somewhere in the neighborhood of three to four times per year.

Q In this particular case it's your professional opinion that the plaintiff in this action, Teresa Kosiarek, suffered injuries to her neck and her back as a result of this accident that required surgical intervention; is that correct?

A Yes.

Q Now, you first saw this plaintiff, Teresa Kosiarek,

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in July of 2009, approximately nine months after the accident happened; is that correct?

A Yes.

Q And when you saw her for the first time were you aware that she had a lawsuit pending?

A No.

Q Was that ever communicated to you during the course of your treatment of this plaintiff?

A Was the fact that she had a lawsuit pending communicated to me at some point in time?

Q Yes?

A Yes. I'm sure it was.

Q In fact, you wrote a narrative report to Mr. Platta outlining your findings and recommendations in connection with that lawsuit; is that correct?

A Yes.

Q Is that unusual for a spinal surgeon to get involved in lawsuits to the extent of writing narrative

reports for the plaintiff's attorney in the case outlining what you think happened and what she needs in the future?
A No, that is not unusual.
Q Spinal surgeons do that on a regular basis?
A When asked by their patients if you are treating them and a request is made for a summary or a narrative of their treatment, that is part of what we do for our patients.

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Q How much did you charge for that narrative report?
A I do not recall.
Q Is it the same $650 an hour that you're charging for your testimony here?
A Yes. In general, those services are in the neighborhood of about $650 per hour, yes.
Q Totally for all of the time that you spent on this personal injury case what are you charging the plaintiff for your time?
MR. PLATTA: Objection, your Honor, to the form of the question. What does counsel mean by spending time on personal injury --
THE COURT: The question is now what he is charging now in this case. You want to refine it including treatment or beyond treatment.
MR. PLATTA: For medical services, I assume.
MR. SCAHILL: I'll withdraw the question for a moment.
Q Doctor, in terms of your contact with this patient, you saw her once on July 6, 2009, correct?
A Yes.
Q You saw her again in October of 2009; is that correct?
A October 11, 2010.
Q I'm sorry, so you saw her once in July of 2009 and

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once in October of 2010. That's the extent of your contact with this patient; is that correct?
A No. October 11. So July 6, 2009, first visit. October 11, 2010, next visit. Subsequent to that there was November 8, 2010 and then actually just saw her last Friday.
Q The visit last Friday, that was because this case is coming for trial?
MR. PLATTA: Objection.
Q Is that correct?
THE COURT: I'll allow the question.
THE WITNESS: Last Friday she came in to discuss surgery.
Q When you say came into discuss surgery, had you already communicated with Mr. Platta that you would be testifying and he asked you to see the plaintiff in the case prior to you testifying?
MR. PLATTA: Objection.
THE COURT: I'll allow it.
THE WITNESS: No. Mr. Platta did not ask me to see the plaintiff.

Q Did anyone in his office contact you to set up the appointment?
A To set up appointment for the visit? I think the patient called up the office to set up the appointment.
Q Did she advise you that the case would be coming up
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for trial and she would be calling you as a witness on her behalf?
A She told me she was having significant pain in the neck and back.
Q I'm only talking about the trial.
A She did not discuss the trial with me, no.
Q It was a coincidence you saw her last week and her case is coming up for trial this week in Supreme Court in Richmond County? It was just a coincidence?
A It was a scheduled office visit.
Q So in terms of your contact with her, you saw her in July of '09, October of 2010, November 2010 and then you saw her again in October of 2011; is that correct?
A Yes.
Q So, the first visit I'd ask you to talk about that first visit when you saw her and I'm going to ask you some questions about your findings and what her complaints are.
That first visit, did she come in with her son?
A She actually came in with some of her family members.
Q Did they act as interpreters for you?
A Yes.
Q That first visit, did you take a history from her?
A Yes.
Q When you say take a history, you asked her what
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happened; is that correct?
A I asked her what her complaints and symptoms were and what happened, yes.
Q Is that an important part of your diagnosis asking what the history of the injury is?
A The history is part of how you formulate a diagnosis, yes.
Q Now, specifically with respect to the complaints regarding her neck, what history did you take from her regarding her complaints with respect to her neck?
A She indicated that she had an increasing neck pain since the time of her accident.
Q Now, in addition to the neck pain, she also complained about other things with respect to her neck; is that correct?
A She said neck pain and bilateral upper extremity, pins and needles, numbness and pain.
Q That is a significant neurological finding?
A That is actually not a finding. It's a complaint.
Q Would you say it's significant she was complaining about pins and needles in her upper extremities?
A Yes. That is why it's part of the history section.

Q Did you suspect --
THE COURT: Let the witness finish, counsel.
Did you finish your answer, Doctor?

THE WITNESS: Yes, I have.
Q Did you suspect at that time that had something to do with a problem in her neck?
A Yes. That could manifest itself as a problem from the neck, yes.
Q Did she tell you that she injured her neck in this automobile accident?
A She did indicate she was having progressive neck pain and symptoms since the time of the accident, yes.
Q You at some point had an opportunity to examine her hospital records; is that correct?
A Yes.
Q And part of the hospital record also includes the emergency medical service ambulance call report; is that correct?
A Yes.
Q I'd ask you to review that with us now and also review it with the jury.
MR. SCAHILL: And if I can, your Honor, I'd like to give the hospital records, which have been admitted into evidence as Plaintiff's Exhibit 9 for the jury -- to the witness.
THE COURT: Go ahead.
Q Doctor, can you find the EMS record from the date of the accident, that's November 11, 2008. Do you have that, Doctor?
A Yes, I believe I do.
MR. SCAHILL: Judge, I ask the blow up of it be marked as defendant's exhibit so I can show it to the jury.
THE COURT: Do you want to make this 9A or give it a number -- do you want to make it Defendant's A?
COURT CLERK: Yes.
THE COURT: Defendant's A is a blow up. It's a page from Exhibit 9.
Any objection to that?
MR. PLATTA: No, your Honor.
COURT CLERK: Deemed marked at this time.
THE COURT: We didn't put the label on it.
COURT CLERK: In evidence or ID?
THE COURT: In evidence.
Q Before we discuss the EMS report, you said when you saw her for the first time that she complained of symptoms involving increased neck pain, numbness and tingling in the upper extremities and on your physical evaluation you found the absence of normal reflexes for the neck and upper extremities; is that correct?
A Yes.
Q Now, the EMS report on the date of the accident --

can you read this, Doctor?

A I can certainly read parts of it, yes.
Q And does it say specifically references to neck pain, is there any references regarding neck pain?
It's actually on the eighth line there is a notation that says PT. Does that stand for patient?
A It looks likes PT period.
Q Denies neck; is that correct?
A It says denies neck.
Q Back, minimal pain lower back. Do you see that notation?
A Arrow down back, yes.
Q Am I correct in saying that at the scene of the accident Ms. Kosiarek denied neck pain as recorded by the emergency medical service; is that correct?
A Yes. That's what's recorded by EMS at the scene.
Q You also said you had an opportunity to examine her hospital record; is that correct?
A Yes.
Q And in the hospital there was an evaluation of this plaintiff.
By the way, as far as the EMS report, you do understand that it indicates pedestrian being struck by slow moving vehicle?
MR. PLATTA: Objection, your Honor.
Q Do you see that, Doctor?

A Yes. It says that in the report.
Q Now, in the hospital record was there an evaluation of her neck?
THE COURT: You know what, let me do this, this is subject to connection. I don't know who the source for slow moving is. My inclination is to strike the slow moving. I don't know where it comes from. I may hear from both parties.
MR. SCAHILL: I believe both the plaintiff and defendant will testify to that.
THE COURT: Subject to connection. If we don't hear any connection it will be struck at the appropriate time.
Q I ask you to look at the first page of the hospital record where it says emergency physician record --
MR. PLATTA: I object. I have not had a chance to look at the exhibits counsel is putting before the jury, which is not marked. It's improper.
THE COURT: Is this Defendant's A still or on the next page?
MR. SCAHILL: The next page. This is the hospital record in evidence.
THE COURT: I understand but it's a page. Show it to Mr. Platta. This is a blow up from Plaintiff's Exhibit 9 as well.

MR. SCAHILL: Correct. Blow up of the hospital record.
THE COURT: Let him see what it is.
MR. PLATTA: Thank you, your Honor.
THE COURT: Any objection to coming in as evidence?
MR. PLATTA: No.
THE COURT: "B" will be deemed in evidence.
Q This is the emergency room physician who examined the plaintiff on the date of the accident. Is that a fair statement?
A The chart I have in front of me has multiple Staten Island University visits on it.
Q We're talking about the day of the accident, 11/11/08?
A I'm seeing if I can find that in this particular chart. 11/11/08, yep, I have it. It's in the back of the chart.
Q Do you see the emergency physician record on the date of the accident?
A Yes.
Q Do you see the complaint of the plaintiff where it indicates was struck by car, fell on to right hip, complaint of pain?
A Chief complaint, pedestrian struck, complains of

0125

right hip pain and low back.
Q "Ped", that's pedestrian, correct?
A Yes.
Q You see the notation where it says context, was struck by car, fell on to right hip, complaint of pain?
A Where is that, I'm sorry? The part you were just talking about, I'm sorry.
Q Right here it says struck by car, fell on to right hip, complaint of pain.
A I don't see where it says complaint struck. I have pedestrian struck, low speed.
Q Try the next page.
A Next page is medications. Okay, there is another 11/11/08 sheet. There is the 7:15. This is 10:00 a.m.
Q So 10:00 a.m., correct?
A This is the 10:00 a.m. evaluation.
Q Do you see what I'm referring to where it says was struck by car, fell on to right hip, complaint of pain?
A Yes, I see that.
Q There is a box for the location of the pain where the physician circles what the plaintiff is complaining about. Do you see that location?
A Yes.
Q Do you see the location where there is a circle around back upper and lower and there's a circle around

0126

abdomen? Do you see that?
A Yes.

Q And do you see where it says severity? That means the severity of the pain?
A Yes.
Q That circle -- the circle is moderate; is that correct?
A Yes.
Q Also, as far as the extremities, there's a circle around right hip and also around right thigh; is that correct?
A Yes.
Q Is there any notation there with respect to the neck, complaining of no pain?
A No. Neck is not circled.
Q Although neck is not listed it's not circled which is indicative of you as a physician --
MR. PLATTA: Objection.
THE COURT: I'll allow it.
Q The physician who made the record noting the hospital record did not record any complaint of pain to the neck. Is that fair to say?
A Yes.
Q Is it also fair to say both at the scene of the accident based on the emergency medical service report and

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also at the hospital the plaintiff made no complaints with respect to her neck. Is that fair to say?
A Based on those -- those pieces of documentation it's fair to say they did not record any complaints of neck problems, correct.
Q Is it fair to say there was a physical evaluation with respect to the neck; is that correct?
A Yes.
Q And the physical evaluation is seen in the right side of this document, the hospital record from the date of the accident, and there is three check offs with respect to the neck; is that correct?
A Yes.
Q And the first is non-tender?
A Yes.
Q Do you see that, Doctor?
A Yes.
Q Is it fair to say that on the date of the accident when she got to the emergency room she had no tenderness in her neck?
A That's correct, yes.
Q Was there also an evaluation with respect to her range of motion, R-O-M; is that correct?
A Yes.
Q Range of motion means whether a person can turn

0128

their head from side to side and up and back and the physician would ask the patient to do that to find out if the patient had any pain, turning their neck from side to side and their head from up to down; is that correct?

A Yes.
Q Is there a notation with respect to how this plaintiff was on the date of the accident with respect to her neck?
A It said painless range of motion.
Q Midline trachea is an anatomical observation made by the physician in the emergency room; is that correct?
A Yes.
Q That was normal?
A It says trachea midline, correct.
Q In terms of diagnosis with respect to her neck at the hospital, would it be fair to say that the history on the date of the accident showed no neck pain whatsoever? Would that be a fair statement? That is a yes or no, Doctor.
A The neck was non-tender, painless range of motion and midline trachea, yes.
Q Do you see anywhere in the hospital record from the date of the accident that there were any complaints with respect to her neck?
A No.
Q I'd also ask you to look at the next page.

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THE COURT: Is this another sheet? We haven't seen this sheet?
MR. SCAHILL: Yes.
THE COURT: Show it to Mr. Platta, Mr. Scahill.
MR. PLATTA: I have no objection, your Honor.
THE COURT: "C" will be deemed in evidence. A blow up from Plaintiff's Exhibit 9.

Q The next page concerns orders; is that right?
A This is a continued physical exam and it goes into procedures and --
Q When I say orders meaning what was asked by the emergency room physician based on what his or her assessment was at the time; is that correct?
A Yes.
Q X-rays and CT scans; is that correct?
A Yes.
Q With respect to the complaints, the areas where the plaintiff was complaining of, there is a diagram where the plaintiff is complaining of, diagram of the human body, correct?
A Yes.
Q Ms. Kosiarek was complaining of tenderness to the abdomen and there was a "T" with a line pointing to where she was tender; is that correct?
A Yes.

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Q There is also tenderness to the right hip and there is a "T" with a line where she was complaining of tenderness; is that correct?
A Yes.
Q And there is also complaint of pain to the mid and upper back meaning the thoracic spine and there is a "T" with

a line where she was complaining of; is that correct?
A Yes.
Q Does that correspond either to the neck or to the lower back the areas that you were discussing earlier this morning, that line in the "T"?
A Well, the line in the "T" and it does say thoracic and lumbar corresponds to the lower back.
Q There is no complaint with respect to the neck shown on the diagram, correct?
A Correct. Not on this diagram.
Q What about the orders, what the doctor ordered in terms of diagnostic tests, what tests did the doctor order on the date of the accident?
A Let's see, looks like CT scan chest, abdomen pelvis, right hip x-ray, right femur, CT scan of the chest, lumbosacral spine, thoracic spine, CT scan abdomen and pelvis.
Q Now, is there any diagnostic test ordered for the neck?

0131

A No.
Q Anywhere on that chart?
A No.
Q Would you agree that if a person sustained a serious injury to their neck in a motor vehicle accident that the emergency room physician would have at least ordered an x-ray of the neck?
MR. PLATTA: Objection. That is speculative.
THE COURT: I'll allow it. It's cross.
THE WITNESS: If there was suspicion of a cervical spine fracture or impending neurological damage.
Q There were diagnostic images ordered for the check abdomen, pelvis, the lumbar spine, the thoracic spine and a CT scan ordered.
You find it remarkable that the patient that you claim now needs radical neck surgery because of the accident didn't even have as much as an x-ray ordered on the day of the accident. Do you find that to be remarkable?
A No. I don't.
Q I'd ask you to also discuss the diagnosis that was made on the day of the accident.
THE COURT: Any objection?
MR. PLATTA: No, your Honor.
THE COURT: This will be deemed in evidence, blow up from Plaintiff's Exhibit 9.

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Q Ms. Kosiarek was not admitted to the hospital on the day of the accident. She was examined and then she was discharged; is that correct?
A Yes.
Q The discharge diagnosis is the physician's assessment as to what happened to this plaintiff and what he or she saw in the emergency room after they examined the plaintiff and after she went through all of the diagnostic

tests that were done in the hospital; is that correct?
A Yes.
Q And the diagnosis and the impression of this plaintiff's injuries on the date of the accident they're listed in the hospital record from November 11, 2008; is that correct?
A Yes.
Q Could you go through with the jury what the diagnosis was?
A Sure. I'm trying to find it in this chart. It might be easier if I could read it off there for you.
THE COURT: Do you want the witness to step down and look at the exhibit?
MR. SCAHILL: I can bring it over to the witness.
COURT CLERK: "D"?
THE COURT: "D" deemed in evidence.

0133

November 11, 2008.
Q What is the first line of the impression, diagnosis?
A Diagnosis impression it's actually blank. It goes down to discharge instructions and then patient instructions.
Q I'm referring to the notation where it says "bruise". Do you see that notation?
A Correct. That is under discharge instructions, though, not discharge diagnosis.
Q Do you see the three items listed here: Bruise, muscle strain and myalgia?
What is myalgia, Doctor? Can you explain that to the jury?
A It's pain in your muscles.
Q On the date of the accident when Ms. Kosiarek left the hospital the discharge instruction was bruise, contusion, hematoma, muscle strain, and pain in the muscle. That's what was included in the chart from the date of the accident?
A Yes.
Q You would agree with me that there is no references to the neck pain anywhere in the hospital chart or in the ambulance call report?
A Correct.
Q Now, when you saw the plaintiff in July of 2009 you looked at her MRI films from Omega Diagnostic Imaging; is

0134

that correct?
A Yes.
Q Do you have that report?
A I don't think I have the Omega report on me.
Q You have the chart on this?
A Yes, and I have my reading of the films, correct.
Q Do you have a chart on this patient?
A It's right here.
Q Can I see your chart?
A Sure.

Q This is the extent of your chart?
A It's an electronic medical record so the notes are dictated and then my impressions and office visits are dictated, put into the EMR and if we need to print it out we print it out as a hard copy.
Q Did she bring the films with her from Omega Diagnostic?
A Yes.
Q Did you look at the report as well as the films?
A I read the films myself and then gave my interpretation of those films.
Q Did you look at the report from the radiologist?
A I don't recall.
Q Would you normally look at the report from the radiologist?

0135

MR. PLATTA: Objection, your Honor.
THE COURT: Let's see where it goes. I'll allow it so far.
THE WITNESS: No. If the report is available, yes. But I read my own films and I prefer my own readings to a radiologist's reading.
Q Do you defer to a radiologist in any circumstance?
A No, I do not.
Q By the way, do you -- can explain to the jury what is the field of radiology and when I talk about defer to a radiologist what does that mean?
A Sure. A radiologist is a physician who specializes in reading x-ray film or MRI film.
Q As opposed to you who specializes in orthopedic surgery to the spine?
A As opposed to myself who specializes in actually treating patients and being able to correlate my own film reading with patient care and treatment.
Q The Omega films you saw for the cervical spine, you indicated you came to your own conclusion as to what the Omega films showed; is that correct?
A Yes.
Q And you don't recall if you looked at the actual report that was generated by the radiologist who read those films when they were taken?

0136

A Correct. Because I dictated my MRI findings on my chart.
Q Now, in your reading of those films did you find multi level disc narrowing, multi level disc space narrowing?
A I can read you my --
Q I'm asking you did you find multi level disc space narrowing --
MR. PLATTA: Can the doctor respond?
THE COURT: You have some written notes, Doctor?
THE WITNESS: Yes, I do.
THE COURT: See if you can answer the question.

If you can't, you are entitled to look down to refresh your recollection. See if you can answer from memory. If you need to look down, you can.

THE WITNESS: Sure. Based on my readings of the films there was central herniation of C5/C6.

Q I'm talking about multi level disc space narrowing.

MR. PLATTA: Objection.

THE COURT: I'll allow it.

THE WITNESS: No.

Q You did not find it?

A No.

Q Did you also find disc desiccation at multiple levels?

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A No, I did not.

Q I'd ask you to take a look at the report from the actual MRI taken in December 12 of 2008.

MR. SCAHILL: And I'd ask that this be marked for identification, your Honor.

THE COURT: Didn't we mark these? What is the date? December --

MR. SCAHILL: 12th of 2008.

THE COURT: It's marked 16A. It's not coming into evidence because we don't have the doctor here who did it.

MR. SCAHILL: I'm going to ask the witness here to review it.

MR. PLATTA: Objection. It's not in evidence and he knows that he has to --

THE COURT: Let's keep it out. He said he didn't rely on it. He did it independently.

Q Would you disagree --

THE COURT: This is 16A not 17A, right?

MR. SCAHILL: MRI of the cervical spine, 12/12/08.

THE COURT: Do not show it to the witness.

Objection sustained.

Q Would you disagree with the findings?

MR. PLATTA: Objection.

0138

THE COURT: The witness testified he didn't recall. He testified that he came to his conclusion independently. This item is not in evidence. Under the rules of evidence it's not coming in because we don't have the radiologist here to testify.

Go ahead.

Q Would you disagree the MRI taken in December of 2008 showed multiple desiccation --

THE COURT: I don't want to go in the back door or the side door and I don't want to go in the front door here. Don't answer that.

Please strike it from your memory.

Go ahead.

Q Doctor, I ask you about the MRI findings. Do you

feel that the MRI findings were causally related to the accident?
A My interpretation of what I saw on the MRI?
Q Correct.
A Yes.
Q Is it also true that those same MRI findings are found in a large majority of people over fifty years of age with and without an accident or trauma; is that also true?
A And we're talking about central disc herniations at C5/6.
Q What about disc herniations of the cervical spine,

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is that found in a large percentage of population over the age of fifty with or without an accident?
A Are you asking in general or are you asking for this specific patient?
Q In general.
A In general, disc herniations can be found in, depending upon the age of the population looked at, there is a percentage of herniations.
Q I'm talking about over fifty. People over fifty years of age.
A People over the age of fifty you can have the finding of herniations on MRIs, yes.
Q Specifically, there have been studies to that effect. They looked at people over --
THE COURT: Don't testify, counsel. Ask him if he knows any statistic.
Q Are you familiar with any studies?
A I'm familiar with studies looking at MRI films in particular age groups.
Q One of the age groups were people over the age of forty?
A Yes.
Q People over the age of fifty?
A Yes.
Q Those people had similar MRI findings as the

0140

plaintiff in this case with or without a trauma; is that fair to say?
A It is unfair to relate those studies to what happened in this specific case.
Q I'm just asking you do those studies show MRI findings and MRI pathology of the neck with or without trauma for people over the age of fifty?
MR. PLATTA: Objection, your Honor.
THE COURT: I'll allow it.
THE WITNESS: Those are MRI studies that look at film findings in a distribution of patients at various ages.
Q Is that a yes?
A At various ages that's what those studies are.
Q I'm talking about clinical studies that were done on people over the age of fifty that were asymptomatic,

meaning they had no symptoms, and they had disc pathology in their neck; is that fair to say?
A That's -- I agree with you. Those studies exist and there are studies that show that patients of various ages, particularly over the age of forty and fifty, can have disc herniations on MRI findings.
Q Both of the neck and of the lower back?
A Correct with respect to the neck and the lower back.

0141

Q Without any symptoms whatsoever?
A Yes. Considered asymptomatic disc herniations.
Q So an individual can have the exact same findings as Ms. Kosiarek with or without a trauma; is that correct?
A When you say the exact same findings --
Q Meaning disc herniation of the cervical spine at the C5/C6 segment that you described in the report in the film that you looked at that was taken on December 12, 2008?
MR. PLATTA: Objection.
THE COURT: We're not referring to the report. The report is not in evidence. This witness testified he doesn't remember it. He -- again, he did his own independent evaluation.
MR. SCAHILL: I'm talking about his evaluation.
THE COURT: His evaluation?
MR. SCAHILL: Yes.
THE WITNESS: Based on the MRI alone you can have findings of a herniation as are seen on Ms. Kosiarek in a symptomatic population.
Q You can have the exact same finding as Ms. Kosiarek with or without an accident. Is that also fair to say?
A In an asymptomatic population, yes.
Q People over the age of fifty with or without the accident can have the exact same MRI findings that Ms. Kosiarek did?

0142

A In essence, yes. Anyone can have any scope of findings on an MRI.
Q You're basing your conclusion that she suffered a traumatic disc herniation based on what she told you happened at the time of the accident. Is that fair to say?
A No, not solely and entirely on what she told me.
Q Was her history the reason that you believed that this happened in the accident?
A Her history was part of the reason that we believe that --
Q Did she --
THE COURT: Let the doctor finish. Repeat the answer.
THE WITNESS: Her history was a part of that conclusion regarding causation.
Q You were referred this patient by Dr. Kaisman, correct?
A Yes.

Q You are referred many patients by Dr. Kaisman?
A Dr. Kaisman does refer me patients, yes.
Q And did you have the opportunity to look at the Dr. Kaisman's records?
A Yes.
Q I'd ask you to review with the jury Dr. Kaisman's impression of this plaintiff when he saw her on November 13,

0143

two days after the accident.
THE COURT: You have three more blow ups?
MR. SCAHILL: Dr. Kaisman's report of November 13, 2008.
THE COURT: This is Plaintiff's 12? Is that what the larger exhibit is?
MR. SCAHILL: It is Plaintiff's 12.
THE COURT: If it's okay with counsel, let's put all three in at once and it's presumably a page or pages blown up of Plaintiff's 12.
MR. PLATTA: Thank you, your Honor.
THE COURT: Any problems, Mr. Platta?
MR. PLATTA: No.
THE COURT: Let's put them in as "E", "F" and "G".
MR. PLATTA: No problem.
THE COURT: Without objection, Defendant's E, F and G.
Q Dr. Kaisman's blow up of the date of the first visit two days after the accident.
This is the doctor who sent you Ms. Kosiarek, correct? Dr. Kaisman?
A Yes.
Q You see the history that he indicates that the plaintiff in this case is a female struck by an automobile on

0144

November 11 sustaining injuries to her lumbar spine and right hip. Do you see that?
A Yes.
Q Do you also see the complaints that she made when she came to the office, right-sided low back pain, right hip pain radiating to her right knee?
A Yes.
Q You see that.
Did you also take a look at Dr. Kaisman's assessment two days after the accident? Do you see his assessment?
A Yes.
Q And does the assessment indicate that the plaintiff, Ms. Kosiarek, suffered pain to her low back, her right hip and her right elbow?
A Yes.
Q Do you understand that Dr. Kaisman was seeing Ms. Kosiarek for months before you saw her?
A Yes.
Q Do you understand that Ms. Kosiarek made no

complaints to Dr. Kaisman when he saw her two days after the accident of any pain to her neck?
A Correct.
Q But yet you feel that the accident was the competent producing cause of the problem to her neck?

0145

A There are records after these records, including records from Dr. Krishna, with the MRI on cervical spine and EMG indicating cervical radiculopathy bearing out Ms. Kosiarek's progressive pains after the accident.
Q So you are disregarding this?
A No, absolutely not.
Q Is it important that she never complained about her neck two days after the accident? Is that --
MR. PLATTA: Objection. Asked and answered.
THE COURT: I'll allow it.
THE WITNESS: I think it's important that her low back is much more severe than the neck, particularly in terms of what we would operate on first.
Q What about the fact she never mentioned her neck, is that important?
A There comes a point in time when she mentions her neck. Otherwise, she wouldn't have an MRI of the cervical spine that I didn't order.
Q A month later --
MR. SCAHILL: I ask that this be marked also, Dr. Kaisman's report of December 18.
THE COURT: "H".
COURT CLERK: We haven't officially marked them in order. It can actually be "G" and the next one is "H".

0146

THE COURT: We took "E", "F" and "G". Let's make this "H". "E, "F" and "G" come from November 13, 2008. Does this also come from the same exhibit because it's Kaisman's records?
MR. SCAHILL: Yes.
THE COURT: But a later date? Sorry, Ms. Connair.
COURT CLERK: Sorry.
Q This is six weeks after the accident when she went back to Dr. Kaisman. You see her complaints here, low back pain, hip pain, right elbow pain.
Do you see any references to problems with her neck?
A No.
Q Do you see Dr. Kaisman's assessment six weeks after the accident low back pain, right hip pain, right elbow pain? Do you see any mention of complaint regarding her neck?
A No.
Q Would you believe that Dr. Kaisman, who is a pain management doctor, would do an assessment and evaluation of her neck if she traumatically injured her neck in a motor vehicle accident to the extent when you saw her eleven months

later, ten months later that she would need radical surgery?
A It's not radical surgery. It is a standard operation. She didn't need radical surgery ten months later.

0147

Dr. Kaisman notes here does not demonstrate a neck problem.
Q The neck problem somehow developed between her seeing Dr. Kaisman two days after the accident, six weeks after the accident, to the time that she saw you in July of 2009?
MR. PLATTA: Objection, your Honor. This is just statement. It is against the evidence and there is records showing the neck complaints in between.
THE COURT: I'll allow it. I will give the witness an opportunity to answer.
THE WITNESS: Her neck problem did develop over time.
Q You still associate it with the accident?
A We have no prior or subsequent injury or illness to the neck and there are medical records that do point out her neck problem including the MRI ordered by the neurologist and EMG and nerve conduction study clearly indicate a cervical radiculopathy.
Q Doctor, you already told me -- let's try to play the role of the clinician.
A Yes.
Q That's one of your roles as an expert orthopedic surgeon, you act as a clinician being an investigator to find out how this happened, right?
A No. A clinical orthopedic surgeon needs to know

0148

what the problem is and what I can do to fix it. You are asking me under these circumstances about how the problem happened and I'm happy to help you determine that.
Q You testified this morning that this all happened because of the motor vehicle accident. This afternoon you told us that asymptomatic people have the same disc abnormalities that Ms. Kosiarek has in her neck and her back and you also confirm that she made no complaints of pain to the neck at the scene, no complaints of pain to the neck in the hospital and for the first six weeks when she went to see Dr. Kaisman she didn't mention her neck at all. But, yet, you are saying to this jury --
MR. PLATTA: Objection. Is this a question or a statement?
THE COURT: If there is a question mark at the end of it it will be a question.
Go ahead. I'll allow it.
Q You are saying to this jury that her neck problem occurred as a result of the accident; is that correct?
A I'm telling the jury that her cervical radiculopathy is causally related to the accident, yes.
Q With respect to the lumbar spine, when Ms. Kosiarek went to see you in July of '09 she brought an MRI of the lumbar spine; is that correct?

A Yes.
0149
Q And you reviewed that MRI yourself and you said that it had evidence of a disc herniation at L4 on L5 as well as a herniation at L5/S1?
A Yes.
Q Were you aware of any preexisting conditions which could contribute to that condition?
A Any preexisting conditions that Ms. Kosiarek had with respect to her lower back?
Q Are you aware of any preexisting conditions that would contribute to that finding?
A She didn't have any significant past medical or surgical history or injury history with respect to her lower back, no.
Q Did you take her prior medical history when she came in?
A Yes.
Q Were you aware that she suffered from hypo thyroidism?
A Yes.
Q Are you also aware that that gives a person an injury --
MR. PLATTA: That is not even related to this accident, objection, nor any part of the body that is involved in this accident. We're going to have medical history of --
0150
THE COURT: It's cross.
You can ask the question about hypo thyroidism.
Q Is it a fact that somebody who has hypo thyroidism have increased risk of osteoporosis?
A Hypo thyroidism can cause a problem with osteoporosis.
Q Are you also aware Ms. Kosiarek specifically had an x-ray of her lumbar spine that showed her bones were osteopenic?
MR. PLATTA: Objection.
THE COURT: I'll allow it.
THE WITNESS: Osteopenia and osteoporosis is two different things.
Q We'll we get to that in a --
A Osteopenia and osteoporosis has nothing to do with disc herniation.
Q I'm asking are you aware the x-rays taken on the day of the accident showed the thoracic spine showed evidence of osteopenia?
A When you look at the films you can see osteopenia as a description, yes.
Q Osteopenia can be a --
A No. Osteopenia is radiographic description of what bones look like on a x-ray film, not diagnosis. Osteopenia merely means it's a subjective term that means the bones
0151

appear to look less dense than quote/unquote normal bones. It's a descriptive term not a diagnosis.

Osteoporosis is a diagnosis. Osteoporosis refers to lack of mineralization in the bones. That is a pathological diagnosis. It can only be made when you take a piece of bone and look at it under the microscope. Confusing the terms osteopenia and osteoporosis would be a huge malalignment in medicine. One is a descriptive term. One is diagnosis.

Q The descriptive term was found in the hospital record on the date of the accident with respect to her thoracic spine; is that correct?

A Adjective describing the x-ray finding.

Q That means the radiologist who looked at the x-ray felt that the bone was not as strong as a normal bone; is that correct?

A Strength is something that you can only test on a machine to test the strength biomechanically. What he is saying is and this is the definition of the term osteopenia means the bone does not appear to be as dense as you would otherwise see a bone to look on an x-ray. It has to do with x-ray appearance with respect to density not a diagnosis.

Q Is it an abnormal finding?

A Absolutely not. In fact, osteopenia with age can be a normal finding. As we said, depending upon the age

0152

group that you look at many things can show up on either x-rays or CT scans or MRIs.

Osteopenia, that is why it's not a diagnosis. It's not necessarily an abnormality. It's not necessarily a pathological process or pathological problem. It's more of an adjective describing the way the x-ray looks.

Q Were you aware the plaintiff in this case had a preexisting problem known as retrolisthesis?

A Retrolisthesis is a malalignment of one bone on the other.

Q That is not as a result of the accident. That is a congenital or a condition she had before she walked into the emergency room before this accident happened; is that correct?

A Well, unless we have something to compare it to and we truly have a pathological specimen we can't tell you the etiology of the retrolisthesis. There are many different ways you can acquire retrolisthesis.

You are right, it can be something you are born with, congenital, traumatic, trauma in disease, it can be secondary to tumor or secondary to infection. It's a descriptive term.

Q Let's talk about descriptive terms. I'd like you to assume for a moment you had a patient that had a history of hypo thyroidism, you had a patient with an x-ray finding

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of osteopenia, you had a patient that had an x-ray finding of retrolisthesis and you had the same patient that had an MRI

finding of disc herniation of the lower back L4/L5, L5/S1.
Is it fair to say that that individual can have all of those findings with or without a traumatic event? And that's a yes or no answer.
A Yes.
Q Thank you.
Now, with respect to your treatment of this plaintiff, you spoke to her, you told her that you think she is a candidate for both cervical and lumbar discectomy and fusion, correct?
A Yes.
Q And you told her that in July of 2009?
A Yes.
Q And when did she come back to you after that?
A So July of '09 and October and November of 2010.
Q About thirteen months after she first saw you she came back to you; is that correct?
A Yes.
Q Do you know who referred her back to you?
A She came back. First of all, I always tell patients to come back, depending upon their clinical situation, usually somewhere in the neighborhood of about six weeks or on either a quarterly or bimanual basis. I would

0154

assume she made a follow-up visit with the office based on the fact that she was continuing to treat.
Q And you saw her again in October and November of 2008. When did she come back to you after that?
A So October '10, November 2010 and then, like I said, most recently October of this year, 11th.
Q Another year?
A Correct, just about a year.
Q That would be typical for your patients that you're following, come back on a yearly basis?
A Bimanual to annual if they haven't had a surgery, depending upon their treatment.
Q It's been over two years since you first saw Ms. Kosiarek and she didn't have the surgery, correct?
A Correct.
Q Now, she did have what you described earlier as a percutaneous discectomy done by a pain management physician, correct?
A Yes.
Q As a spinal surgeon do you have any opinion as to whether or not a pain management physician can do a percutaneous discectomy on a spine?
A Yes.
Q You feel that is acceptable?
A Yes.

0155

Q Even though there may be a risk of the surgery if the dura is punctured cerebral spinal fluid can be leaking and that pain management physician is not qualified to perform surgery? Do you think that is an acceptable risk of

that procedure?
A It is low risk because the approach they take is not near the spinal canal. Like, for example --
Q It is a small puncture hole in the back about the size of a dime; is that correct?
A Goes through the paraspinal muscle and around the spinal canal nowhere near in the canal area.
Q It's actually a puncture --
THE COURT: I don't know if I want to go with this. Wait for Dr. Kaisman on this one.
Q Day out procedure?
A Same day surgery, correct.
Q You go in the morning, they prep you, you have the surgery, you are not under anesthesia for the surgery, it's just local; is that correct?
A No. They do intravenous sedation.
Q Do you know what Ms. Kosiarek had?
A I don't know whether or not she had an IV sedation or if she had a general for it.
Q They can do it without putting you under, they can do it just with a local anesthetic, correct?

0156

A You can. It's pretty painful if you do it under local.
Q When you are finished they put a Bandaid over the punctate hole and you go home?
A They put a dressing over the incision area and you are discharged.
Q Do you feel that was appropriate treatment for Ms. Kosiarek?
A Yes.
Q That was to relieve the pain that she was having in the lower back?
A To try to decrease the two things that we spoke about which were the back problem and the nerve problem.
Q When you saw her in July of 2009 you wanted to get your own MRI; is that right?
A Yes.
Q And you wanted to get your own MRI with contrast material, correct?
A Actually I think I ordered a plain MRI with gadolinium, correct, intravenous contrast for the MRI, yes.
Q That contrast material allows both the radiologist and you as the orthopedic surgeon to get a better, true view of the pathology in the lumbar spine at the disc level; is that correct?
A Contrast differentiates between scar tissue and non

0157

scar, also between tumor and non tumor. In this case we weren't looking for a tumor.
Q Do you have that report from the MRI that was done at Stand Up MRI on September 10, 2010?
A Yes, I do.
Q I ask you to refer to that report. It talks about

loss of disc signal at several levels?
MR. PLATTA: Counsel is referring to doctor's report or Stand Up MRI report? I'm not sure.
THE COURT: This is an MRI done 2010. Two MRIs we weren't going to bring in.
MR. SCAHILL: This is 19 and 20.
THE COURT: May be the same issue. Do you have an objection?
MR. PLATTA: Only to clarify whether counselor means the report or whether doctor reviewed his report or his own report. That is all I'm not sure about the question. I want clarification.
THE COURT: MRI done earlier than the ones in 2010 -- is this report from the radiologist who did it or report that the witness did while he was doing his own --
MR. PLATTA: That is what I want to clarify.
Q You ordered this MRI?
A Yes.
Q The MRI was sent back to you? The report was sent

0158

back to you?
A Yes.
Q The report is part of your chart?
A Yes.
MR. SCAHILL: I move to have that report in evidence.
MR. PLATTA: Objection.
THE COURT: Same issue as the other reports. They were sent back to doctors who we're not going to have here. We're not going to put them into evidence. The witness is reviewing the MRI and I think the closest question is we don't have the radiologist here. We can get him or her if we have to. Go ahead.
Q Did you concur with the results as stated in the MRI report? Without stating the results, did you concur with the results?
A I make my own interpretation of the MRI.
Q Did you concur with the results of the radiologist?
MR. PLATTA: Objection.
THE COURT: We're not going to get to the radiologist report unless the radiologist walks in the door here. You can ask him what his views were.
Q I'll ask you your views, as the judge suggested. Did you agree that the MRI showed loss --
MR. PLATTA: Objection.

0159

THE COURT: Don't read. Can you ask the witness he saw the MRI? He testified he does his own.
MR. PLATTA: I want the record to reflect counsel right now influencing in front of the jury in a way that is improper. It's improper.
THE COURT: It's great if you go through a trial and lawyers don't pop up. As much as I love them, it happens. You try to anticipate some of the things.

Sometimes we do things outside of the jury. Sometimes I refine my thinking on something. It's always a process. Things are never black and white. Whether it's good or bad, I don't know.

MR. PLATTA: I agree.

THE COURT: Both sides try to influence the jury. We try to do it within the confines of the rules of law.

Ask this witness what his own view of the MRIs were without referencing the report, the radiologist who is not in court.

Q This is the MRI up on the screen, correct?

A Yes.

Q I'm talking about the loss of disc signal, meaning that the MRI shows the disc to be black --

A I gave the interpretation of the MRI this morning when I reviewed it.

0160

Q I didn't finish --

THE COURT: Let him finish.

MR. SCAHILL: I didn't finish my question.

THE COURT: You notice I interrupted a few times to allow him to finish the answer. He should finish. The question wasn't finished. Sometimes cross will take something done on direct and ask it in a different frame or different way.

Q I'm talking about the color of the disc.

THE COURT: You can step down.

Q You see the MRI the color of the disc is black?

A What disc are we talking about?

Q The lumbar disc. This is a sagittal view, correct?

A There are one, two, three, four, five, six discs here and sequestered sacral disc. Which disc are we talking about disc is black?

Q First of all color shown in an MRI --

A Which disc?

Q Let's follow this line of questioning.

THE COURT: Let counsel go in the direction he wishes. You'll get a chance through your counsel on a later question.

Q The color of the disc is indicative of certain things; is that correct, shown on a MRI?

A Disc color is indicative of water content on an MRI

0161

which we talked about earlier this morning when we talked about degenerative discs.

Q Disc color is also shown on a color scale from bright white to dark black; is that true?

A Depends on which MRI scan you are looking at. There is different what are called sequences on an MRI. It depends on whether you are looking at a T1 sequence or T2 sequence.

Q This particular MRI there was sagittal views taken in the T1 and T2 references; is that correct?

A Correct, yes.
Q The disc shows up as black in the majority of the disc in the lumbar spine. Is that fair to say?
A The disc color, the majority of the discs in the lumbar spine are.
THE COURT: You can step down.
(Witness approached the shadow box.)
THE WITNESS: On this particular MRI the discs that are black are the L4/5 and L5/S1 disc.
(Witness resumed the stand.)
Q Any disc above and below that black?
A No, actually shades of gray. So the 3/4 disc is gray. The 2/3 disc is also gray. The 1/2 disc is gray and the 12/1 disc is also gray on this film. What I'm comparing that with is the shade of black that you see on 4/5 and 5/1.

0162

Q If we took an MRI of an 15 year old athlete that 15 year old athlete the disc would be bright white?
A If we took an MRI of a 15 year old and depending on the sport he played the MRI might come up as black particularly if he is a football player or wrestler.
Q What about a 15 year old non athlete, would you expect the disc to be white?
A In a 15 year old non athlete you would see gray signals throughout all these disc. They wouldn't turn you up as white. If the disc were white you would be worried about a condition called discitis.
Q The color of the disc, when the disc turns black shown on MRI that means it's losing water; is that correct? Dehydrating?
A When the shade of gray becomes darker as you get more dark on the T1 image it indicates loss of water signal to the disc.
Q Would it be fair to say Ms. Kosiarek's MRI of the lumbar spine showed loss of water signal throughout each and every disc of the lumbar spine? Would that be fair to say?
A No.
Q It's your interpretation of this MRI that the MRI findings are not either all gray or all black throughout her lumbar spine?
A No. Each of those disc has a separate signal.

0163

Q Now, your interpretation to have this MRI, did you see a loss of disc height, meaning the height between the two cerebral bodies throughout the lumbar spine?
A Loss of disc height primarily at the L5/S1 segment.
Q Did you see that loss of disc height throughout the lumbar spine?
A No.
Q Did you also see the fact that there was no herniations of the disc space and, in fact, that these abnormalities are disc bulges and not herniations?
A I would read them as herniations based on the definition of what we saw before which is either symmetrical

or asymmetrical protrusion of disc material beyond the borders of the vertebral body.
Q Disc herniation or bulging are terms that are somewhat subjective for spinal surgeons or --
A No. I try to make them as objective as possible by giving specific definition. If there is asymmetrical protrusion there is herniation. If it's symmetry with protrusion it could be a bulge. They could objectively be quantified and defined based on symmetry.
Q A finding on this MRI -- if you looked at this MRI alone you never saw the patient, would you be able to say the findings on this MRI were caused by an accident or caused by the normal aging process?

0164

A If I looked at this MRI alone and never saw the patient I would be a radiologist. And by looking at the MRI I would give you a descriptive literature-based interpretation of the film.
Now, whether or not you asked me about whether there is evidence of trauma on the film itself, the film doesn't really tell us about mechanism. It's a snapshot in time, a two-dimensional image without patient history or records to review. That film in and of itself is a piece of the puzzle.
Q I'll ask it in a different way.
Can the exact same finding be shown on a 54 year old woman with or without a motor vehicle accident?
MR. PLATTA: Objection, your Honor. That is speculative.
THE COURT: It may well have been asked before but I'll allow it.
Go ahead.
THE WITNESS: In general, if we're just talking in general, MRI findings without a patient, those MRI findings without a patient, knowing only their age, you can basically have just about anything based on what you see on the film.
Q Is that a yes that these findings can be in a 54 year old woman with or without a car accident?

0165

A Based solely on the film itself? Yes.
Q And these findings were similar to the findings that you believed that occurred in Ms. Kosiarek's cervical spine, her neck, meaning she had a traumatic disc herniation to the neck?
A Yes.
Q Despite all the history I pointed out to you this afternoon?
A Despite our brief review of the limited amount of medical records, yes.
MR. SCAHILL: Thank you, Doctor. Nothing further, your Honor.
THE COURT: Can we limit redirect and recross to ten minutes each?

MR. PLATTA: I need a little more time. This was extensive.
THE COURT: Let me ask you a question. Do you have another doctor scheduled?
MR. PLATTA: Yes.
THE COURT: We're going to go today till about a quarter to five.
MR. PLATTA: I'll try to be as brief as possible.
THE COURT: Do you want to just work with this witness and that is it and tomorrow you bring in --

0166

MR. PLATTA: I'm afraid of the schedule tomorrow. My client is supposed to --
THE COURT: Can't we go to maybe 4:10 and start on Dr. Kaisman and pick it up tomorrow?
MR. PLATTA: Whatever your Honor wishes. I just don't know the schedules with the doctor but I will work to make sure he can.
THE COURT: I don't want to be repetitive. The more we talk the less time we have. Try to limit to fifteen, twenty minutes.

REDIRECT EXAMINATION

BY MR. PLATTA:

Q Doctor, you reviewed Dr. Krishna's records, right?
A Yes.
Q Who is Dr. Krishna?
A He is a treating neurologist for this patient.
Q I'm going to show you what is marked as Plaintiff's Exhibit #1, part of Dr. Krishna's chart and I'll ask you to look at this with us. It says please be advised the patient, Teresa Kosiarek, was examined November 17, 2008 for neurological consultation. The following is a report of my findings and recommendations.

It further goes to state that this 54 year old right-handed female was involved in a motor vehicle accident as a pedestrian. She states while crossing the street she

0167

was struck by a car. On impact she sustained injuries to her neck, lower back and right knee.

Did you review this note?
A Yes.
Q And this note was prepared as a result of the exam that took place on November 17, 2008.

Doctor, this accident happened on November 11?
A Yes.
Q Less than a week. Does it have any significance to you?
A Correct. There is evidence of cervical issue here with the treating neurologist.
Q And, in fact, this treating neurologist actually asked her to undergo the MRI of the cervical spine that was done on December 12, 2008; is this correct?
A Yes.

Q That would be around a month later?
A Correct.
Q And this MRI we went over during your direct so I'm not going to repeat this in front of the jury to make this look larger.
But this is the MRI and the defendant knew about the MRI and knew about the note and you as a doctor, as a treating physician, as a doctor who recommended the surgery, you knew about the note as well, correct?

0168

MR. SCAHILL: Objection.
THE COURT: I don't know about the defendant part of the thing but you can ask if the witness knew about the note on the screen.
Q Doctor, when you operate on a patient I've heard a lot of questions from Mr. Scahill questioning your voracity. I do want to address it. I'm a --
MR. SCAHILL: Objection.
THE COURT: Cross examination is a fair probing.
MR. PLATTA: Right.
THE COURT: Sometimes I'll read a transcript and it's not clear exactly what's being questioned or how the answer is. It's just like when we wrestle if something is inconsistent on a prior deposition. You can do it in closing. Don't comment now on this and I'll hold Mr. Scahill to the same standard. Go ahead.
Q Doctor, you are under oath, you understand that?
A Yes.
Q You also have an obligation to this patient, right?
MR. SCAHILL: Objection.
THE WITNESS: Yes.
MR. PLATTA: You questioned the doctor --
THE COURT: It's not proper to come back on this on redirect, new material.

0169

MR. PLATTA: He was questioning this witness about his treatment, about the way -- how he was treating. I need to ask this doctor what are his obligations.
THE COURT: Specific questions about MRI, how you compare -- it's up to the jury to decide. You don't have to go back to the basics.
MR. PLATTA: I have only one question about it, only one.
THE COURT: Let me hear it. I may not allow it. The questions you may get it, you may not.
Q Doctor, what are your responsibilities to this patient?
MR. SCAHILL: Objection.
THE COURT: I don't want to go there. Let's not go into that.
Q Doctor, do you have legal responsibilities --
THE COURT: Let's not go there, counsel. You

can ask questions about the treatment, things that came out on cross that you feel didn't come out on direct.
Q Doctor, I point your attention to another part of the chart from the Staten Island University Hospital marked as Exhibit 9 and in this chart that wasn't shown to you by the defendant I saw a note that plaintiff received -- Ms. Kosiarek received Morphine I believe it says

0170

four milligrams and she received it at 9:00 a.m. before any examinations took place.
Can you tell me what significance, if anything, is of that?
A Morphine is a narcotic medication and it basically decreases your pain response.
Q And also another page that Mr. Scahill didn't show you which I would like to show to the jury right now is another portion of the chart Staten Island University Hospital it says Polish speaking, right?
A Yes.
Q Do you have any indication who actually spoke to the staff about Ms. Kosiarek's condition?
A Not on the chart, no.
Q Were you able to speak to Ms. Kosiarek directly whenever she saw you?
A Usually she came in with the family. They were providing translation services for me.
Q Doctor, another chart from Staten Island Hospital that states that on the discharge she actually received Vicodin. What is Vicodin?
A Vicodin is a narcotic medication that is combined with Tylenol.
Q Would you give it to someone, as a doctor, who has bruises only?

0171

A No. It's indicated for significant pain.
Q That was given in the hospital, right, in the place where she went after the accident, right?
A Yes.
Q What is the indication of that?
A The indication for that is significant pain.
Q Would it state which part of the body the pain would be coming from or not?
A No. To give the medication it's generally given for pain and it can be for pain from any multiple portions of your body.
Q Let me ask you this, when she received Morphine at 9:00 a.m., right after the accident, was she actually able to feel anything?
A Morphine depresses the pain response. So it's a pain -- actually it's a narcotic pain reliever.
Q Would it mean if she had pain, for example, in more parts of the body than initially mentioned because the shock came off and she now feels more would she not feel this pain because of Morphine?

MR. SCAHILL: Objection, your Honor.
THE COURT: You can't testify -- you can't really lead because you are essentially under the same rules as direct. I know the cat is out of the bag. Can you tighten the question up a bit?

0172

MR. PLATTA: Sure, your Honor. Thank you.
Q Doctor, what would have four milligrams of Morphine have on a patient who is admitted into the emergency room and any follow-up treatment she received and any examinations she received afterwards?
A The effect is to make you not feel pain.
Q So if she is asked by a doctor can you move your head either way would she feel pain?
MR. SCAHILL: Objection.
THE COURT: I'll allow it. Given the dosage that is a question.
Go ahead.
THE WITNESS: Given the 4-milligram dose for Ms. Kosiarek you would have no response to pain in particular body parts with that type of narcotic medicine.
Q Doctor, this chart that she was released with, Vicodin, does it have the same effect or stronger or less?
A It's the same effect. In fact, it's administered with Tylenol in it, it's a compound and it adds to the effect of the narcotic.
Q Even though given this medication, two days later she still complained of pain to her lower back, right?
A Yes.
Q What about six days later when she didn't have any

0173

more of this medication she started feeling her neck pain; is this correct?
A Correct, yes.
Q And that's when she saw Dr. Krishna?
A Yes.
Q Doctor, Mr. Scahill asked you about radiologist. I'm going to go even further.
What is the difference between radiology and neuroradiology?
MR. SCAHILL: Objection.
THE COURT: So beyond the scope of redirect.
MR. PLATTA: He was questioning witness about radiologist. I want to ask about the difference.
THE COURT: If I had time I'd ask for the offer of proof. You prevailed on this issue. He is not a radiologist but he is a practicing orthopedic spine surgeon. He can testify about and order his own MRIs and interpret independently and rely on his own interpretation. Move on.
MR. SLAWEK: Your Honor, this is neuroradiology case and defendant is relying on radiology.
THE COURT: Let's say that is true, it should

have come out on direct not redirect. Please move on, counsel. I'm paying attention here. It's not like I'm missing too much.

0174

Q Dr. Merola, I'm going to go a step further than the defendant did with my client.

Let's assume for the purpose of his argument that she has all this herniations, neck, back, everything, dehydration, you name it she has it before the accident, right. Mr. Scahill I think it was he was --

MR. SCAHILL: Objection.

THE COURT: The question is fine up to where you said "right, Mr. Scahill". You can ask the question the way you have it. Ask the question. Go ahead. You are assuming herniation desiccation.

MR. PLATTA: Yes.

Q Let's assume she has everything that he says but she never did she ever go to a doctor. Did she ever have an MRI, CAT scan, go to emergency room, did she ever complain to anyone about any pain before?

A No.

Q Did you see any records that would indicate that the defendant showed you today or at any time any records indicating -- medical records indicating she had any problems with her spine before?

A No, none.

Q As a doctor do you have to assume that there is nothing that was there before?

MR. SCAHILL: Objection.

0175

THE COURT: Sustained.

Don't answer that.

Move on, counsel.

Q Doctor, one last question.

Mr. Scahill asked you about the fact that there has been a couple of years since the time of the accident, two years since you started treating my client, Ms. Kosiarek, yet she didn't have the surgery, right?

A Correct.

Q And can you tell me if you know, if you know, if there is any other reason that she didn't have surgery?

MR. SCAHILL: I object to this. This is clearly improper.

THE COURT: What is this thing?

MR. PLATTA: The statement the doctor made on the record before the back surgery would cost 125,000 to do it.

THE COURT: We can't have that. The reason is you can ask the plaintiff, Ms. Kosiarek, that question.

MR. SCAHILL: Can we take down the plaintiff's own made up --

THE COURT: It's not in evidence. We don't have things shown to the jury not in evidence.

Disregard it.

MR. PLATTA: Sure.

Q Doctor, do you know the reason why Ms. Kosiarek didn't have the surgery?

THE COURT: I already denied that. We'll ask that through your client when she takes the stand.

MR. SLAWEK: Mr. Scahill asked the doctor she didn't have the surgery. I'm asking for the reason, if he knows the reason.

THE COURT: We don't want to go there.

MR. PLATTA: No problem.

MR. SLAWEK: Doctor, thank you very much.

THE COURT: Hang on. Any recross?

MR. SCAHILL: Just a few, your Honor.

RECROSS EXAMINATION

BY MR. SCAHILL:

Q Doctor, is it your explanation why Ms. Kosiarek made no complaint of neck pain in the hospital is that she was administered Morphine? Is that your explanation why she made no reference to the problem in the neck?

A That is one of the problems with administering Morphine is that it blurs the pain response and complaints of pain thereafter.

Q She was able to make clear complaints regarding tenderness to her abdomen, complaints of right hip pain and complaints of lower back pain with Morphine but she wasn't able to make a complaint of neck pain because she had the Morphine. Is that your explanation?

A She was able to render some of the complaints and symptoms, yes.

Q She could say back, right hip, abdomen but she couldn't say neck because of the Morphine? Is that what you are saying?

A Depends on the severity of the pain, yes.

Q And you are aware based on the hospital chart that her family was with her in the hospital and was translating for the doctors the same way that they did in your office?

MR. PLATTA: This is beyond --

THE COURT: I'll allow it.

Q You are aware of that as well, correct?

A We know her family was with her. I don't know if they translated everything or not, no.

Q Her family was with her the same way they were with her when they came to see you?

MR. PLATTA: Objection.

THE COURT: I don't want to go into this. We can get into this a little later. You can call family members if there is an issue.

Anything else?

MR. SCAHILL: No, your Honor.

Thank you, Doctor.

THE WITNESS: Thank you.

THE COURT: Doctor, thank you for coming in.
(The witness was excused.)
THE COURT: We're going to call the next witness. Let's take a ten minute recess.
(Whereupon a recess was taken, after which Senior Court Reporter Frances Royce was relieved by Senior Court Reporter Francesca Bush.)
(Continued on page 179.)

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THE CLERK: COME TO ORDER. REMAIN SEATED. COME TO ORDER.
THE COURT: GO AHEAD. MR. PLATTA, YOU HAVE AN APPLICATION?
MR. SCAHILL: COULD WE HAVE THE DOCTOR STEP OUT, JUDGE?
THE COURT: YES. LET THE DOCTOR -- DR. KAISMAN, WOULD YOU STEP OUTSIDE FOR A MOMENT? IT'S CUSTOMARY.
(WHEREUPON, DR. KAISMAN EXITED THE COURTROOM.)
THE COURT: GO AHEAD.
MR. PLATTA: YOUR HONOR, I HAVE AN APPLICATION TO EXCLUDE ANY TESTIMONY OF DR. KAISMAN REGARDING HIS EITHER SEXUAL HARASSMENT OF ANY PERSON OR LAWSUIT NOT RELATED TO THIS TREATMENT OF THE PATIENT, OF MISS KOSIAREK.
THE COURT: I THOUGHT I DECIDED THIS ON THE RECORD ALREADY OR DID I NOT GIVE YOU GUYS A CHANCE --
MR. SCAHILL: NO, I'D LIKE TO BE HEARD, JUDGE, BEFORE YOU MAKE YOUR DECISION.
THE COURT: ALL RIGHT.
MR. SCAHILL: DR. KAISMAN HAS BEEN THE SUBJECT OF A LAWSUIT FILED BY THREE OF HIS COWORKERS FOR SEXUAL HARASSMENT, WHICH INCLUDED ADMISSIONS BY HIM THAT HE DID, IN FACT, SEND SEXUALLY EXPLICIT E-MAILS TO HIS STAFF, INCLUDING THE THREE WOMEN WHO ARE SUING HIM.
THAT CASE HAS BEEN THE SUBJECT OF APPELLATE

0180

DECISIONS WHERE THEY'VE TAKEN JUDICIAL NOTICE THAT DR. KAISMAN HAS ADMITTED TO THIS.

I HAVE THE CASES THAT I COULD SHOW TO YOUR HONOR, AND IT'S A SUBJECT OF A COLLATERAL ATTACK, AND I'M ALLOWED TO QUESTION HIM ON COLLATERAL MATTERS WITH RESPECT TO CONDUCT OF HIS OFFICE AND HIS ETHICS AND MORALS.

IT'S CERTAINLY A QUESTION FOR THE JURY TO DECIDE WHETHER OR NOT A DOCTOR WHO IS SENDING EXPLICITLY PORNOGRAPHIC MATERIAL TO PEOPLE THAT HE WORKS WITH IS -- IS SOMEONE WHOSE CREDIBILITY CAN --

THE COURT: I DON'T MEAN TO SHUT YOU DOWN. LET ME ASK YOU SOMETHING. WE'RE NOT GOING TO FINISH --

MR. PLATTA: CAN WE GET THE WITNESS OUT OF THE COURTROOM?

THE COURT: HE'S A PARTY. WE'RE NOT GOING TO FINISH THIS DOCTOR TODAY, ARE WE?

MR. PLATTA: I HOPE WE DO. I HOPE WE DO.

THE COURT: IF WE DO, ALL RIGHT.

MR. PLATTA: THIS LAWSUIT --

THE COURT: I'LL LOOK AT THE CASE.

MR. PLATTA: YOUR HONOR, THIS LAWSUIT WAS DISMISSED.

THE COURT: I'LL LOOK AT WHAT HE'S GIVING ME. IF I HAVE TO -- MY INCLINATION -- I DON'T WANT TO SHUT YOU DOWN.

0181

LET ME GIVE YOU A DIFFERENT EXAMPLE. I'M NOT SURE I WOULD STILL DO IT. IT'S PART OF A LAWSUIT. HE FILES PERJURIOUS INFORMATION. MAYBE THAT GOES TO HIM AS A WITNESS.

THE LAWSUIT WAS DISMISSED?

MR. PLATTA: YOUR HONOR, THEY TRIED THIS ON EVERY CASE THAT DR. KAISMAN TESTIFIED. IT NEVER -- IT NEVER WAS AN ISSUE --

MR. SCAHILL: THAT'S NOT TRUE, YOUR HONOR.

MR. PLATTA: IT IS TRUE IF YOU CAN SHOW ME.

THE COURT: LET ME SEE WHAT HE HAS. MY INCLINATION -- I CUT YOU OFF A LITTLE, MR. SCAHILL. YOU HAVE CASES. FORTUNATELY, I CAN LOOK AT IT LATER, JUST AS I WENT BACK AND LOOKED AT SOME OF THOSE -- THE MRI CASES ARE SO SUBTLE, HOW THEY RELY ON.

I MADE A LITTLE COMMENT ON THE -- WHAT'S THE NAME OF THE CASE -- THAT MAYBE IT WAS DECIDED BECAUSE IT WAS A CHIROPRACTOR, YOU KNOW, NOT A SURGEON, ON WAGMAN V. BRADSHAW. THAT WAS MY COMMENTS. IT'S SUBTLE. LET ME SEE WHAT HE HAS HERE.

MR. PLATTA: YOUR HONOR --

MR. SCAHILL: HERE'S THE APPELLATE DIVISION DECISION HERE, APPELLATE DIVISION FIRST DEPARTMENT. CITATION IS 77 AD3D 516. IT WAS -- IT WAS ISSUED ON OCTOBER 21ST, 2010.

0182

THE COURT: LET ME TAKE A QUICK LOOK AT IT.

(HANDING TO THE COURT.)

THE COURT: HOLD ON.

MR. SCAHILL: I ALSO HAVE AN APPELLATE DIVISION

DECISION FROM THE FIRST DEPARTMENT, 61 AD3D 565, DATED APRIL 23RD, 2009.

DURING THE BODY OF THE DECISION IT STATES, IN MOVING TO DISMISS THAT ACTION, DR. KAISMAN ADMITTED HAVING SENT SEVERAL E-MAILS TO THOSE DEFENDANTS, INCLUDING A VIDEO OF A SEXUALLY SUGGESTIVE ACT. THAT'S FROM THE APPELLATE DIVISION DECISION.

HERE'S THE UNDERLYING DECISION FROM THE COURT BELOW, FROM NEW YORK COUNTY, JUDGE JANE SOLOMON, WHERE IT SPECIFICALLY INDICATES, HIS ADMISSION -- REFERRING TO DR. KAISMAN -- TO SENDING SEXUALLY EXPLICIT IMAGES TO THE MOVING DEFENDANTS AS E-MAIL ATTACHMENTS DEFEATS HIS CLAIM FOR ECONOMIC LOSS AND EMOTIONAL DISTRESS.

APPARENTLY DR. KAISMAN, IN A RETALIATORY MODE, SUED THE -- THE WOMEN FROM HIS OFFICE WHO WERE SUING HIM FOR EMOTIONAL DISTRESS, AND THAT'S THE CASE THAT WAS DISMISSED. SO --

THE COURT: I'LL LOOK AT THIS. LET ME TELL YOU MY -- I HAVE TO DECIDE.

MR. SCAHILL: AND I ALSO HAVE AN AFFIDAVIT FROM THE DOCTOR WHERE HE ADMITS IT, WHICH WAS PART OF THE RECORD

0183

IN THE APPELLATE DIVISION.

THE COURT: WELL, YOU KNOW, IF THIS WERE A HEARING ON HE WAS DENIED HOSPITAL PRIVILEGES SOMEWHERE, WHERE THERE WAS AN ACTION TO REMOVE HIS LICENSE, MAYBE IT WOULDN'T COME IN.

I'LL READ THE CASES. REMEMBER NOW -- AND IT DOESN'T MEAN THAT IT DOESN'T HAVE SOME POTENTIAL PROBATIVE VALUE. BUT, YOU KNOW, YOU HAVE TO OUTWEIGH THE PREJUDICE AGAINST THE VALUE.

REMEMBER NOW HOW CAREFUL WE ARE WITH CONVICTIONS. A PERSON CAN BE ARRESTED TEN TIMES, WE CAN'T USE IT. IF HE HAS A CONVICTION, WE CAN USE IT.

MR. PLATTA: DIFFERENT STORY.

MR. SCAHILL: THIS IS AN ADMISSION, JUDGE. IT'S SOMETHING DIFFERENT. IT'S AN ADMISSION BY A MEDICAL PROFESSIONAL THAT HE IS SENDING SEXUALLY EXPLICIT E-MAILS TO PEOPLE IN HIS OFFICE.

IT CERTAINLY GOES TO HIS CREDIBILITY.

THE COURT: IT MAY PROVE THAT HE'S NOT THE MOST IDEAL PERSON. I COULD SAY, IN A MORE COLLOQUIAL WAY, MAY PROVE HE'S A JERK, BUT IT DOESN'T PROVE HE'S A BAD DOCTOR, AND IT DOESN'T PROVE THAT HE'S SOMEONE WHOSE TESTIMONY ISN'T RELIABLE HERE.

MR. PLATTA: EXACTLY.

THE COURT: LET ME GO BACK A STEP. WE KNOW THAT

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WHEN THEY TALK ABOUT IMPEACHING A WITNESS FOR A PRIOR CRIMINAL ACT, THE COURTS DON'T SAY -- UNLESS IT'S A VERY, VERY PRECISE, UNUSUAL CRIMINAL PATTERN -- THEY DON'T SAY, BECAUSE HE DID THIS, HE'S GOING TO DO THIS. OR SHE.

WHAT THEY'LL SAY, THIS PROVES HE PUTS HIS INTERESTS ABOVE SOCIETY'S.

SO, IN FAIRNESS, THERE'S A LITTLE BIT IN MR. SCAHILL'S ARGUMENT THAT -- THAT HE'S BEING VERY SELFISH, ETC.

I JUST HATE TO GO THIS ROUTE NOW. I'LL GO BACK TO THE OFFICE. I'LL READ CASES. IF HE'S BACK HERE, YOU CAN TELL HIM THE KIND OF PERSON -- I'M WILLING TO CHANGE MY MIND. I DON'T FEEL IT UNDERCUTS MY AUTHORITY. I FEEL IT ENHANCES MY AUTHORITY.

BUT RIGHT NOW, IF WE GET OFF THIS WITNESS BY QUARTER TO 5:00, THIS STUFF IS NOT COMING IN. IT'S HIGHLY PREJUDICIAL.

I'LL READ THE CASES. ARE THERE COPIES FOR ME?

MR. SCAHILL: YOU CAN KEEP THAT.

THE COURT: YOU CAN TAKE AN EXCEPTION. I COULD BE WRONG. I'LL LOOK AT THE CASES. I'LL LOOK AT OTHER CASES.

READY?

THE CLERK: READY FOR THE JURY?

THE COURT: YES.

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THE CLERK: LINE THEM UP?

THE COURT: YES.

THE CLERK: YOU CAN ASK THE DOCTOR TO COME BACK IN.

(WHEREUPON, THE PROSPECTIVE WITNESS, DR. ARDEN KAISMAN, REENTERED THE COURTROOM.)

THE CLERK: DOCTOR, YOU CAN TAKE THE STAND. YOU ALREADY CALLED HIM, RIGHT? SAVE A LITTLE TIME.

THE COURT: THANK YOU, DOCTOR. THANKS FOR BEARING WITH US.

MR. SCAHILL: CAN WE TAKE A SECOND TO TALK ABOUT TOMORROW, JUDGE?

THE COURT: I DON'T WANT TO SLOW THE JURY DOWN. I DO WANT TO TALK ABOUT THE SCHEDULE. WE MAY HAVE TO DO IT OFF THE RECORD WHEN THE STAFF IS GONE. LET'S DO IT WHEN WE FINISH HERE.

OKAY. I'M GLAD TO DO IT. I HAD A NOTE TO MYSELF TO DO IT. I WANT TO LET THE JURY KNOW WHAT THE SCHEDULE IS. I THINK IT'S FAIR WE TOLD THEM ABOUT WEDNESDAY.

THE COURT OFFICER: READY FOR THE JURY?

THE COURT: YES.

THE COURT OFFICER: JURY IS ENTERING.

(JURY ENTERED.)

THE CLERK: ALL JURORS PRESENT. ALL PARTIES ARE PRESENT. COUNSEL WAIVES THE READING OF THE ROLL.

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CASE ON TRIAL CONTINUES. YOU MAY BE SEATED. COME TO ORDER.

COUNSEL, YOU CAN CALL YOUR WITNESS.

MR. PLATTA: MY WITNESS IS DR. ARDEN KAISMAN.

THE CLERK: DOCTOR, PLEASE STAND. RAISE YOUR RIGHT HAND.

DR. A R D E N K A I S M A N, CALLED AS A WITNESS ON BEHALF OF THE PLAINTIFF, HAVING BEEN FIRST DULY SWORN BY THE

CLERK OF THE COURT, WAS EXAMINED AND TESTIFIED AS FOLLOWS:
THE CLERK: YOU MAY BE SEATED. IN A LOUD, CLEAR VOICE, STATE YOUR FULL NAME.
THE WITNESS: ARDEN, A-R-D-E-N, KAISMAN, K-A-I-S-M-A-N.
THE CLERK: OKAY. YOU SAID THAT SO FAST I'LL GET IT FROM YOU LATER. AND YOUR OCCUPATION?
THE WITNESS: PHYSICIAN.
THE CLERK: AND YOUR BUSINESS ADDRESS.
THE WITNESS: 18 WEST 21ST STREET, SUITE 900, NEW YORK, NEW YORK 10010.
THE CLERK: THANK YOU.

DIRECT EXAMINATION

BY MR. PLATTA:

Q. GOOD AFTERNOON, DOCTOR.

A. GOOD AFTERNOON.

Q. DR. KAISMAN, CAN YOU TELL ME WHAT SCHOOL DID YOU

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GRADUATE FROM, MEDICAL SCHOOL?

A. ALBERT EINSTEIN COLLEGE OF MEDICINE IN 1984.

Q. AND WHEN DID YOU BECOME A DOCTOR?

A. I BECAME LICENSED IN NEW YORK STATE IN 1985.

Q. AND HAVE YOU SPECIALIZED IN ANYTHING?

A. YES, I DID A RESIDENCY TRAINING PROGRAM IN -- IN GENERAL SURGERY AND THEN FINISHED OFF IN ANESTHESIOLOGY, AND I'M BOARDED IN ANESTHESIOLOGY AND IN PAIN MANAGEMENT.

Q. WHAT DOES IT MEAN THAT YOU ARE BOARDED IN ANESTHESIOLOGY AND PAIN MANAGEMENT?

A. IT'S A TESTING PROCESS INVOLVING EITHER WRITTEN OR ORAL EXAMS WHICH ALLOWS YOU TO THEN BE -- WHEN YOU PASS THOSE EXAMS, TO BE A CONSULTANT TO OTHER PHYSICIANS.

Q. AND, DOCTOR, HAVE YOU TREATED MISS TERESA KOSIAREK?

A. YES.

Q. WHEN WAS THE FIRST TIME THAT YOU SAW HER?

A. ON NOVEMBER 13, 2008.

Q. WHAT KIND OF TREATMENT DID YOU RENDER FOR HER?

A. ESSENTIALLY I'M A PAIN MANAGEMENT PHYSICIAN, AND THAT INVOLVES MOSTLY -- MOST OF THE TREATMENT IS PATIENTS WITH CHRONIC PAIN, AND THAT -- MY PRACTICE IS INTERVENTIONAL PAIN MANAGEMENT, WHICH ESSENTIALLY INVOLVES TREATING PATIENTS WITH INJECTIONS AND/OR MINOR SURGERIES INVOLVING THE LUMBAR/CERVICAL SPINE.

Q. IN FACT, DID YOU ADMINISTER ANY INJECTIONS TO

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MRS. KOSIAREK?

A. YES.

Q. WHAT INJECTIONS DID YOU ADMINISTER?

A. I DID WHAT IS CALLED A LUMBAR EPIDURAL STEROID INJECTION, WHICH IS AN INJECTION OF CORTISONE MEDICATION.

WHAT I DO IS I TAKE A PATIENT IN MY OFFICE, AND I HAVE AN X-RAY MACHINE CALLED A FLUOROSCOPE, AND WHAT I DO IS I PUT THE PATIENT SUPINE, LAYING DOWN, AND PICK A SPECIFIC LEVEL OF THE LUMBAR SPINE, GIVE SOME LOCAL ANESTHETIC, AND THEN PUT THE NEEDLE IN AND INJECT SOME CORTISONE OR STEROID MEDICATION, WHICH

IS AN ANTIINFLAMMATORY.
AND THE GOAL IS FOR THE CORTISONE TO GET AROUND THE NERVES IN THE SPINAL CORD THAT GO DOWN THE LEG AND LESSEN THE INFLAMMATION OF THOSE NERVES.
Q. USING THIS MODEL, CAN YOU EXPLAIN US WHAT IT MEAN BY CORTISONE GOING AROUND THE SPINAL NERVES?
A. YEAH. ESSENTIALLY I THINK -- HAVE YOU GONE THROUGH THE SPINE MODEL AT ALL?
Q. YES.
A. YES. OKAY. SO THIS IS A BONE, THIS IS THE DISC. I DO THE INJECTION POSTERIORLY IN THIS REGION (INDICATING).
Q. MEANING?
A. IN THE BACK. THIS IS THE PATIENT'S BACK. THIS IS THE SPINAL CORD. THESE ARE THE NERVES COMING OFF THE SPINAL CORD. WHAT WE'RE TREATING HERE IS THE INFLAMMATION OF THESE NERVES

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COMING OFF THE SPINAL CORD GOING DOWN THE LEG.
AND THE GOAL IS TO PUT SOME CORTISONE MEDICATION IN THE AREA BEHIND THE SPINAL CORD, LET IT SEEP AROUND TO THE NERVES, AND IT'S SORT OF LIKE PUTTING MOTRIN IN THE SPINE.
AND THAT WAS DONE ON TWO OCCASIONS WITH THE PATIENT, AND WE COULDN'T DO A THIRD OCCASION BECAUSE OF BLOOD PRESSURE ISSUES.
Q. WHY -- WHAT IS THE PROBLEM WITH HIGH PRESSURE AND HAVING STEROID INJECTIONS?
A. CORTISONE, THE KENALOG THAT I USE, MAKES YOU RETAIN WATER. AND FOR PATIENTS THAT ARE, YOU KNOW, HAVE HIGH BLOOD PRESSURE, IT MAKES THE -- IT CAN MAKE THEIR BLOOD PRESSURE GO UP. AND FOR HER IT WENT UP VERY HIGH.
Q. AND, DOCTOR, WHAT WAS THE NEXT COURSE OF TREATMENT THAT YOU ADMINISTERED FOR HER?
A. NEXT COURSE OF TREATMENT AFTER THE EPIDURAL INJECTION DIDN'T WORK, WE DID WHAT'S CALLED A PERCUTANEOUS LUMBAR DISCECTOMY.
AND THAT INVOLVED PLACEMENT OF A NEEDLE INTO THE SPINE, AND THROUGH THE NEEDLE WE PUT A DEVICE CALLED A STRYKER DECOMPRESSOR, WHICH IS A MACHINE ESSENTIALLY THAT SUCKS OUT THE DISC.
IF YOU DISCUSSED THE DISC, THE DISC IS SORT OF LIKE A JELLY DONUT. AND WHEN THERE IS A HERNIATION, THE JELLY COMES OUTSIDE THE DONUT. WHEN THERE IS A BULGE, IT GOES LARGER.

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THE GOAL IS -- IS TO DECOMPRESS IT BY PUTTING A NEEDLE AND SUCKING OUT AND PUTTING CORTISONE. YOU ARE DOING TWO THINGS, SHRINKING THE SIZE OF THE DISC, AND SECOND THING IS NEUTRALIZING THE ENZYMES IN THE DISC, WHICH IS ALSO A CAUSE OF INFLAMMATION WHEN THEY LEAK OUTSIDE IN THE JELLY OF THE DISC.
Q. CAN YOU TELL US WHAT LEVEL YOU DID THE SURGERY?
A. IF I COULD CHECK MY NOTES.
THE COURT: SURE. GO AHEAD.
A. THAT WOULD BE AT L4 AND L5, AT L5-S1; THE TWO LOWER LUMBAR LEVELS WHICH YOU CAN SEE HERE ON THE MODEL, WHICH IS THIS LEVEL AND THIS LEVEL (INDICATING).
Q. WOULD IT CORRESPOND WITH BASICALLY THESE TWO LEVELS

RIGHT HERE (INDICATING)?
A. WHERE THE TWO ARROWS ARE, CORRECT.
THE COURT: WHAT'S THAT EXHIBIT THAT YOU POINTED TO? IT'S ON THE SCREEN.
MR. PLATTA: THIS IS THE EXHIBIT.
THE COURT: 21-A?
MR. PLATTA: FOR -- THIS WAS ACTUALLY 21-B, YOUR HONOR.
THE COURT: 21-B --
MR. PLATTA: YES.
THE COURT: -- IS WHAT COUNSEL POINTED TO FOR THE WITNESS. GO AHEAD.
Q. YES. DOCTOR, WHAT WAS THE REASON WHY YOU HAD TO

0191

ACTUALLY GO INSIDE AND OPERATE?
A. THE PURPOSE IS, YOU KNOW, THERE -- THERE ARE DIFFERENT KINDS OF CAUSES OF NERVE INJURY. ONE OF THE CAUSES IS WHERE A NERVE IS -- IS -- THE JELLY COMES OUT, AND IT'S PUSHING ON THE NERVE ITSELF, AND THAT'S CALLED IMPINGEMENT, AND THAT REQUIRES OPEN SURGERY TO CLEAN AROUND THE NERVE FOR THOSE THAT WE DON'T SEE.
OBVIOUS IMPINGEMENT, THE THOUGHT IS THAT WHAT HAPPENS IS THERE ARE ENZYMES LEAKING OUT OF THE NERVES (SIC) THAT ARE CAUSING INFLAMMATION, SO BY GOING IN THERE AND SUCKING OUT PART OF THE DISC, YOU'RE DECOMPRESSING IT. YOU'RE TAKING SOME OF THE PRESSURE OUT OF THAT AREA THEREBY PREVENTING THE ENZYMES FROM LEAKING OUT AND CAUSING INFLAMMATION.
Q. IS IT FAIR TO SAY THAT YOU BASICALLY TOOK THIS PORTION OF THE DISC THAT WAS HERNIATING AND SOME OF THE INTERIOR SIDE OF THIS DISC (INDICATING)?
A. I GO INTO THE CENTER OF THE DISC. WHAT HAPPENS IS WHEN I SUCK OUT THE DISC, IT THEN SHRINKS DOWN IN SIZE. SO PART OF THE AREA WHICH IS PUSHING OUT WILL COME BACK IN.
Q. OKAY. AND WHAT HAPPENS ONCE YOU REMOVE THE INTERIOR OF THE DISC?
A. WELL, YOU LOSE THE DISC HEIGHT.
Q. OKAY.
A. YOU KNOW, YOU HAVE TO THINK OF LIKE A BALLOON WHEN YOU TAKE THE AIR OUT. WHEN YOU TAKE THE AIR OUT OF A BALLOON, THE

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BALLOON GETS SMALLER.
Q. AND WHAT HAPPENS THEN?
A. WELL, WE DON'T TAKE OUT A LOT. THAT'S ONE OF THE REASONS I LIKE THIS PROCEDURE, BECAUSE YOU CAN TAKE OUT A SMALL AMOUNT OF DISC AND HOPEFULLY NOT PREDISPOSE SOMEBODY TO END UP HAVING A LOT OF LOSS OF DISC MATERIAL.
AND AS THEY GET OLDER -- REMEMBER, AS PATIENTS GET OLDER -- THEIR DISCS STARTS OFF AS FILLED WITH WATER, AND THEN IT -- IT'S CALLED DESICCATION. IT SHRINKS DOWN IN SIZE. AND THAT'S NORMALLY PART OF THE AGING PROCESS.
SO YOU DON'T WANT TO TAKE OUT TOO MUCH WHEREAS WHEN THEY GET OLDER THEY'RE GOING TO END UP IN PROBLEMS. BUT WE HAVE TO TAKE OUT A CERTAIN AMOUNT; A MINIMUM AMOUNT.
Q. AND, DOCTOR, HOW MANY SURGERIES DID YOU DO SO FAR?

A. WHAT DO YOU MEAN?
Q. LIKE HOW MANY PERCUTANEOUS DISCECTOMIES DID YOU PERFORM?
A. THIS PAST YEAR I PROBABLY DID OVER 100, MAYBE 150.
Q. OKAY. AND --
A. AND WE DO THEM IN THE CERVICAL SPINE SOMETIMES AS WELL.
Q. OKAY. AND, DOCTOR, IN THIS PARTICULAR CASE, IN MRS. KOSIAREK'S L4-L5 HERNIATED DISC, WHAT WAS THE REASON TO ACTUALLY REMOVE THIS DISC? WHAT WAS THE REASON FOR THAT?
A. I MEAN I JUST SAID THAT ESSENTIALLY TO DECOMPRESS IT

0193

SO THE ENZYMES ARE NOT COMING OUT.
Q. WHAT DO YOU MEAN BY DECOMPRESSING SO THE ENZYMES --
A. SHRINK IT DOWN TO A SIZE SO IT'S NOT PUTTING PRESSURE AROUND IT AND RELIEVING PRESSURE FROM WITHIN THE DISC.
Q. AND THE PRESSURE IS PUT TOWARDS WHICH PART OF THE SPINAL COLUMN WHEN THERE IS HERNIATION?
A. THE PRESSURE GOES IN -- IN -- LITERALLY IN EVERY DIRECTION. IT CAN BE PRESSURE AROUND NERVES, BUT -- BUT THERE'S PRESSURE WITHIN THE DISC. THAT WHEN THERE'S AN OPENING AND THE DISC PUSHES THE MATERIAL IN THE DISC OUTSIDE THE DISC. THAT CAUSES INFLAMMATION TO THE NERVES COMING OFF THE SPINAL CORD.
Q. AND WHAT'S THE BIG DEAL ABOUT INFLAMMATION OF THE NERVES?
A. REPEAT THAT AGAIN.
Q. WHAT IS THE BIG DEAL ABOUT INFLAMMATION OF THE DISC, OF THE NERVES?
A. WELL, A NERVE IS LIKE A FIBEROPTIC CABLE, SO, YOU KNOW, DIFFERENT NERVES -- YOU MAY HAVE DISCUSSED IT BEFORE -- GO TO DIFFERENT PARTS OF YOUR BODY.
SO THE OUTSIDE OF THE NERVE IS SENSORY FIBER. INSIDE IS MOTOR FIBERS. SO IF YOU GET SOME MINOR INFLAMMATION, LESSER INFLAMMATION, YOU CAN GET SENSORY ABNORMALITIES WHICH CAUSES NUMBNESS, TINGLING PAIN DOWN YOUR LEG.
AND THE POINT WHERE YOU GET A LOT OF PRESSURE ON THE NERVE, YOU GET MOTOR WEAKNESS AND YOU GET WEAKNESS IN WHEREVER

0194

THAT NERVE GOES.
Q. AND, DOCTOR, WHAT IS YOUR OPINION, MEDICAL OPINION, ABOUT MRS. KOSIAREK TREATMENT, FUTURE TREATMENT IN REGARDS TO HER CONDITION IN HER LOWER BACK?
MR. SCAHILL: OBJECTION.
THE COURT: LET'S DO A LITTLE MORE FOUNDATION. WE'LL PROBABLY LET YOU GET THERE.
MR. PLATTA: OKAY. THANK YOU.
Q. DOCTOR, DO YOU HAVE THAT OPINION AS TO ANY FURTHER TREATMENT THAT MISS KOSIAREK WILL NEED IN THE FUTURE?
A. YES.
MR. SCAHILL: OBJECTION.
THE COURT: THAT'S NOT FOUNDATION. GO BACK A LITTLE BIT. HE'S TREATED THIS INDIVIDUAL, I THINK, ABOUT TEN -- ASK HOW MANY TIMES HE'S SEEN HER AND WHAT HE FEELS THE BACK LOOKS LIKE NOW.

AND THEN WE'VE DONE A -- DONE A FAIR AMOUNT ON THE DISC, AND WE'LL GO FROM THERE.
MR. PLATTA: I WAS TRYING TO BE AS BRIEF AS MUCH AS POSSIBLE.
THE COURT: I UNDERSTAND. HIS OBJECTION STILL STANDS. LET'S SEE IF THE FOUNDATION IS LEFT TO YOUR OPENING QUESTION. GO FORWARD. GO AHEAD.
Q. DOCTOR, WHEN YOU SAW MISS KOSIAREK AT THE FIRST -- FOR THE FIRST TIME ON NOVEMBER 13, HOW MANY TIMES DID YOU SEE HER

0195

FOLLOWING THIS DATE?
A. IF I COULD COUNT.
THE COURT: GO AHEAD.
Q. MORE OR LESS?
THE COURT: LET HIM COUNT.
A. ABOUT TEN TIMES, UNLESS YOU WANT ME TO COUNT.
Q. OKAY. AND DID YOU -- WHAT DID YOU DO FOR HER DURING THOSE TEN TIMES?
A. ESSENTIALLY I EVALUATED HER FROM A PAIN MANAGEMENT PERSPECTIVE, WHICH IS INTERVENTIONAL TO EVALUATE WHETHER SHE WOULD NEED INJECTIONS, WHICH SHE DID, AND THEN THE PROCEDURE THAT I DID, PERCUTANEOUS DISCECTOMY.
AND THEN I SAW HER AFTERWARDS AFTER THAT WAS DONE WITH A FOLLOW-UP MRI TO SEE IF THERE WAS ANYTHING INTERVENTIONAL THAT I COULD DO.
Q. AND WHAT WAS YOUR OPINION ONCE YOU SAW THE MRIS?
A. WELL --
MR. SCAHILL: OBJECTION, YOUR HONOR.
THE COURT: I'LL --
MR. PLATTA: HE JUST TESTIFIED.
THE COURT: LET ME ASK YOU THIS: WHAT MRI -- JUST GO BACK ON THE DATES AND THE -- WHICH MRI HE IS TALKING ABOUT. AND THEN IF THERE'S AN OBJECTION, I WILL RULE ON IT. LET'S DO THAT ONE PIECE.
Q. DOCTOR, WHICH MRI DID YOU REFER TO?

0196

A. SEPTEMBER 9, 2010.
Q. AND IT'S AN MRI OF WHAT?
A. LUMBAR SPINE THAT WAS DONE AFTER MY PROCEDURE.
Q. AND DID YOU REVIEW THE FILM OR DID YOU REVIEW THE REPORT OR --
A. BOTH.
Q. OKAY. DO YOU BASE YOUR OPINION ON THE REPORT OR ON THE FILMS?
A. ON THE FILMS.
Q. OKAY. AND WHAT WAS YOUR OPINION BASED ON THOSE FILMS?
A. WELL, WHAT WAS SIGNIFICANT NOW IS THAT THERE WAS A SIGNIFICANT LOSS, GREATER PERCENT -- GREATER THAN 50 PERCENT LOSS OF DISC HEIGHT L5-S1, WHICH IS THE LOWER LEVEL. SOME LOSS AT L4-L5, BUT NOT AS SIGNIFICANT AS THE L5-S1 LEVEL.
Q. THAT IS INDICATIVE OF WHAT?
A. THAT -- WELL, IT SHOWS THAT THERE'S DISC INJURY DISEASE, BUT YOU HAVE TO PUT IT IN LINE WITH THE PATIENT'S COMPLAINTS AND SYMPTOMS, WHICH IS THAT SHE WAS STILL COMPLAINING

OF LOW BACK PAIN RADIATING TO HER RIGHT LEG, AS I RECALL, TO HER RIGHT LEG -- AND RADIATING TO HER RIGHT LEG.
AND THE POINT AT THIS POINT IS THAT THE EPIDURAL INJECTIONS HAD NOT WORKED, THE PERCUTANEOUS DISCECTOMY HAD NOT WORKED, SO THE ONLY -- AND SHE COULDN'T HAVE EPIDURAL INJECTIONS ANYMORE BECAUSE OF HER BLOOD PRESSURE ISSUES.
SO SHE ASKED ME WHAT TO DO AT THE TIME, AND I SAID AT

0197

THAT POINT YOU WOULD HAVE TO TECHNICALLY REMOVE THE DISC, WHICH IS WHAT THE SPINE SURGERY -- THE ORTHOPEDIC SURGEON DOES, REMOVE THE DISC AND REPLACE IT WITH BONE AND METAL HARDWARE.
Q. WHY WOULDN'T SHE BE ABLE TO HAVE ANOTHER PERCUTANEOUS DISCECTOMY TO REMOVE ANOTHER PORTION?
A. BECAUSE THE BONE IS COLLAPSING ON THE OTHER BONE IF I DO THAT. THEN IT'S A SEPARATE ISSUE. YOU KNOW, THE NERVES COME OFF THE SIDE. THE NERVES ARE GOING TO BE COMPRESSED, WHICH I THINK THEY'RE PARTIALLY BEING COMPRESSED NOW BY THE LOSS OF DISC HEIGHT AT THAT LEVEL.
Q. AND WHAT THEN?
A. WELL, YOU GET EVEN WORSE PAIN.
Q. OKAY. DOCTOR, DID YOU CONCENTRATE ON ONE PART OF THE SPINE IN YOUR TREATMENT OF MRS. KOSIAREK?
A. THE LUMBAR SPINE -- I WAS TREATING THE LUMBAR SPINE. I SAW HER A COUPLE OF TIMES JUST TO -- EXAMINATIONS OF THE CERVICAL SPINE, BUT I NEVER REALLY TREATED THE CERVICAL SPINE.
Q. WHY YOU DIDN'T TREAT HER CERVICAL SPINE? WAS THERE ANY REASON?
A. I -- I DON'T RECALL.
Q. OKAY. DO YOU KNOW IF SHE TREATED ACTUALLY WITH ANY OTHER DOCTORS FOR HER CERVICAL SPINE PRECISELY?
A. I KNOW SHE WAS SEEING A NEUROLOGIST --
Q. OKAY.
A. -- FOR HER NECK AND HE WAS DOING TREATMENT.

0198

Q. ARE YOU REFERRING TO DR. KRISHNA?
A. YES.
Q. OKAY. AND BASED ON YOUR TREATMENT OF THIS PATIENT, OF MRS. KOSIAREK, DO YOU HAVE ANY FURTHER RECOMMENDATIONS FOR HER FUTURE TREATMENT?
MR. SCAHILL: OBJECTION.
THE COURT: I'LL ALLOW IT.
A. YEAH. WE'VE DISCUSSED SPINE FUSION, AS I MENTIONED, AND SHE HAS DECLINED BECAUSE -- AND WHEN I DISCUSSED THE SURGERY AND SHOWED HER THE VIDEO, SHE'S AFRAID OF THE SURGERY.
Q. LET'S SAY SHE HAS THE SURGERY DONE. WOULD THERE BE ANYTHING FROM YOUR PERSPECTIVE, FROM PAIN MANAGEMENT PERSPECTIVE, THAT WOULD NEED TO BE DONE FOR HER IN THE FUTURE?
MR. SCAHILL: OBJECTION.
THE COURT: YOU KNOW WE CUT OFF ANY TREATMENT AFTER FUTURE SURGERY. IT'S ULTIMATELY UP TO THE JURY TO DECIDE WHETHER THERE'S GOING TO BE FUTURE SURGERY OR NOT.
MR. PLATTA: EXCEPT FOR THE FUTURE SURGERY.
THE COURT: THE ONLY THING I'M A LITTLE LEER -- IF SOMETHING IS BEING DONE NOW THAT WILL CONTINUE IN THE

FUTURE, THAT'S ONE THING, RATHER THAN SOME NEW KIND OF TREATMENT AFTER THE SURGERY.
THAT, I THINK, GETS US TO LIKE A SECOND LEVEL OF SPECULATION WITH THAT IS SORT OF THE RULE, ALTHOUGH IT MAY NOT PLAY OUT AS CLEANLY AS I THINK. LET'S TRY IT THAT WAY.

0199

MR. PLATTA: SURE.
THE COURT: IF THERE'S SOMETHING THEY'RE DOING NOW THAT WILL STILL HAVE TO BE DONE EVEN IF SHE HAS THE SURGERY, THAT PIECE I WILL ALLOW. YOU CAN TAKE AN EXCEPTION.
Q. EVEN IF SHE HAS THE SURGERY, WOULD THERE BE ANYTHING ELSE YOU HAVE TO DO FOR HER IN THE FUTURE?
A. NOT FOR ME.
Q. SO YOUR TREATMENT WOULD BE COMPLETED ONCE SHE HAS THE SURGERY?
A. MY COMPLETE -- TREATMENT IS ESSENTIALLY DONE. I MEAN, SHE'S JUST COME BACK TO JUST TO SEE IF THERE'S ANYTHING ELSE TO BE DONE, AND I TOLD HER MY TREATMENT IS DONE.
Q. OKAY. SO IT IS YOUR MEDICAL OPINION THAT THE ONLY THING THAT SHE CAN ACTUALLY DO IS THE SPINAL FUSION?
MR. SCAHILL: OBJECTION.
THE COURT: I'LL ALLOW IT. JUST KIND OF RECAST IT. I THINK WE HEARD IT, BUT YOU CAN ASK WHAT THEN WOULD HE RECOMMEND. GO AHEAD.
Q. WHAT WOULD YOU RECOMMEND FOR HER?
A. THE OPTIONS. SHE CAN CONTINUE WITH PAIN MEDICATIONS AND THERAPY OR SPINAL FUSION.
Q. OKAY. DOCTOR, FROM YOUR PERSPECTIVE, FROM YOUR TREATMENT OF MRS. KOSIAREK, DO YOU HAVE ANY OPINION ON HER WORK RESTRICTIONS?

0200

A. BASED ON, YOU KNOW, HER COMPLAINTS JUST FROM THE LUMBAR SPINE, IT WOULD BE DIFFICULT FOR HER TO WORK.
Q. WHY? WHY IS IT DIFFICULT?
A. BECAUSE SHE HAS SEVERE LOW BACK PAIN RADIATING TO HER RIGHT LOWER EXTREMITY.
Q. WOULD SHE BE ABLE TO SIT FOR EXTENDED PERIOD OF TIME?
A. NO.
Q. WOULD SHE BE ABLE TO LIFT HEAVY ITEMS?
A. NO.
Q. WOULD SHE BE ABLE TO DO MANUAL WORK? AND I WANT YOU TO ASSUME THAT SHE HAS POSITIVE RADICULOPATHY IN HER NECK.
MR. SCAHILL: OBJECTION TO THAT, JUDGE. HE NEVER TREATED THE NECK.
MR. PLATTA: I BELIEVE HE MENTIONED THAT HE SAW HER ONCE OR TWICE OR A COUPLE OF TIMES THAT SHE COMPLAINED ABOUT IT, BUT THAT'S TRUE HE DIDN'T TREAT HER FOR THE NECK.
THE COURT: WELL, YOU ARE MAKING ASSUMPTION ABOUT SOMETHING THAT HASN'T COME IN THROUGH THAT WITNESS. IS IT IN EVIDENCE?
MR. PLATTA: YES, IT'S IN THE RECORDS, YOUR HONOR.
THE COURT: HAS IT COME IN SO FAR TODAY OR IS IT

GOING TO COME IN?
MR. PLATTA: IT'S GOING TO COME IN.
THE COURT: WHAT YOU'RE ASKING IS ABOUT WHAT SHE
0201
CAN DO AT WORK. WE DON'T REALLY NEED TO GO INTO THIS.
WHY DON'T YOU MOVE ON?
MR. PLATTA: FAIR ENOUGH.
Q. DOCTOR, IS THERE ANYTHING SHE CAN DO AT WORK DO YOU THINK?
A. NO, I DON'T BELIEVE SO BASED ON HER COMPLAINTS, THE MRI FINDINGS AND WORK THAT I'VE DONE WITH HER, THE TREATMENT.
Q. AND, DOCTOR, WITH A REASONABLE DEGREE OF MEDICAL CERTAINTY, DO YOU HAVE ANY OPINION ABOUT PERMANENCY OF HER INJURIES?
A. BASED ON MY REVIEW OF THE RECENT MRI, THIS IS PERMANENT, THE LUMBAR SPINE INJURIES.
Q. AND WHAT ABOUT CAUSAL RELATIONSHIP TO HER ACCIDENT? DO YOU HAVE AN OPINION OF A REASONABLE DEGREE OF MEDICAL CERTAINTY WHETHER HER LUMBAR CONDITIONS IS RESULTING FROM THIS ACCIDENT?
MR. SCAHILL: OBJECTION.
THE COURT: I'LL ALLOW IT. GO AHEAD. THIS WITNESS -- THIS DOCTOR SAW THE WITNESS ON NOVEMBER 13, 2008, TWO DAYS --
MR. PLATTA: YES. YES.
THE COURT: GO AHEAD.
A. I BELIEVE THE LUMBAR SPINE INJURY IS CAUSALLY RELATED TO THE ACCIDENT OF NOVEMBER 11, 2008.
Q. AND, DOCTOR --
0202
A. THAT'S -- I WANT TO STATE THAT THE NERVE DAMAGE AND RADICULOPATHY.
Q. RIGHT. DOCTOR, WHEN YOU SAID IT'S RELATED, DID YOU EVER SEE ANY RECORDS, ONE PAGE, ANYTHING, TEST RESULT, X-RAY, MRI, DOCTOR'S VISIT, THAT SHE HAD BEFORE THE ACCIDENT COMPLAINING ABOUT HER LOWER BACK? ANYTHING AT ALL?
A. I HAVE NOT SEEN ANYTHING, NO.
Q. OKAY.
MR. PLATTA: I HAVE NOTHING FURTHER, YOUR HONOR.
THE COURT: HANG ON, DR. KAISMAN. MR. SCAHILL TO CROSS-EXAMINE.
MR. SCAHILL: THANK YOU, JUDGE.
CROSS-EXAMINATION
BY MR. SCAHILL:
Q. DOCTOR, GOOD AFTERNOON.
A. GOOD AFTERNOON.
MR. SCAHILL: CAN WE SHUT THIS --
THE COURT: SURE.
MR. SCAHILL: -- PROJECTOR OFF?
Q. DOCTOR, YOU FIRST SAW THIS PLAINTIFF TWO DAYS AFTER THE ACCIDENT, IS THAT CORRECT?
A. CORRECT.
Q. AND HOW DID SHE COME TO YOUR OFFICE? HOW DID YOU COME TO SEE MRS. KOSIAREK?

A. I'M NOT SURE. I DON'T RECALL.
0203
Q. ISN'T IT A FACT THAT YOU WERE ALREADY TREATING HER SON LUCAS (PH)?
A. THAT -- YEAH, I WAS TREATING BOTH HER SONS LUCAS AND MARKSON (PH). TWO OF HER SONS I WAS TREATING PRESENTLY.
Q. AND YOU ARE AWARE THAT THEY WERE BOTH INVOLVED IN PERSONAL INJURY --
MR. PLATTA: OBJECTION, YOUR HONOR.
Q. -- LAWSUITS?
MR. PLATTA: OBJECTION, YOUR HONOR.
THE COURT: I DON'T WANT TO GO THERE. OBJECTION SUSTAINED.
Q. DID YOU KNOW MR. PLATTA BEFORE YOU SAW MISS KOSIAREK?
A. YES.
Q. HOW DID YOU KNOW MR. PLATTA?
MR. PLATTA: OBJECTION, YOUR HONOR.
THE COURT: I'LL ALLOW IT.
MR. PLATTA: I AM NOT A PARTY TO THIS LAWSUIT, YOUR HONOR.
THE COURT: I'LL ALLOW IT. GO AHEAD.
A. I TREATED ONE OF HIS CLIENTS A NUMBER OF YEARS AGO WHEN I -- AND I WENT TO COURT WITH HIM ONE TIME. I DON'T REMEMBER HOW MANY YEARS AGO IT WAS, BUT I WENT TO COURT WITH HIM.
Q. AND THE -- WHEN MRS. KOSIAREK CAME TO YOU, DO YOU KNOW IF SHE WAS INVOLVED IN A MOTOR VEHICLE ACCIDENT?
0204
A. I WOULD IMAGINE SO. SHE TOLD ME ON THE FIRST VISIT. I KNOW SHE ALWAYS CAME WITH HER SONS WHO TRANSLATED FOR HER, SO I IMAGINE.
Q. DID SHE TELL YOU THAT MR. PLATTA WAS HER ATTORNEY AT THAT TIME?
A. I -- I DON'T RECALL THE CONVERSATION, BUT I WOULD -- I WOULD IMAGINE THAT HIS NAME GOT MENTIONED AT SOME POINT BECAUSE OF HER SONS.
Q. OKAY. SO WHEN SHE CAME TO YOUR OFFICE, SHE CAME AND SHE TOLD YOU THAT MR. PLATTA IS HER ATTORNEY. THAT'S TWO DAYS AFTER THE ACCIDENT?
MR. PLATTA: OBJECTION, YOUR HONOR.
THE COURT: THE WITNESS DIDN'T -- WASN'T SURE WHEN --
Q. IS IT WRITTEN --
THE COURT: -- HE HEARD IT, BUT APPARENTLY HIS TESTIMONY WAS AT SOME POINT HE LEARNED.
Q. IS IT WRITTEN ON YOUR INTAKE SHEET?
A. I --
THE COURT: TAKE A LOOK AT THE RECORD.
A. LET ME SEE. NO, I JUST SEE HER SON'S NAME ON HERE.
Q. IS MR. PLATTA'S NAME ANYWHERE IN YOUR CHART?
A. I HAVE TO GO THROUGH THE WHOLE THING AND SEE IF THERE'S ANY REQUESTS FOR RECORDS.
Q. WELL, HOW LONG AFTER YOU FIRST SAW MRS. KOSIAREK DID
0205

YOU UNDERSTAND THAT SHE WAS INVOLVED IN A PERSONAL INJURY LAWSUIT?
A. I DO NOT RECALL. I DO NOT RECALL.
Q. AT SOME POINT DURING YOUR TREATMENT OF THIS PLAINTIFF YOU REALIZED THAT SHE'S INVOLVED IN A PERSONAL INJURY LAWSUIT?
A. ABSOLUTELY.
Q. AND YOU SAID THAT SHE WENT TO SEE YOU RECENTLY. WHEN SHE CAME TO SEE YOU RECENTLY, SHE TOLD YOU THAT THE CASE IS COMING UP TO TRIAL?
MR. PLATTA: OBJECTION, YOUR HONOR.
THE COURT: I'LL ALLOW IT.
MR. PLATTA: IT'S PUTTING SOMETHING IN FRONT OF THE JURY THAT IS NOT EVEN A QUESTION, YOUR HONOR.
THE COURT: NO, I'LL ALLOW THE QUESTION. GO AHEAD.
A. SHE WAS -- ACTUALLY SHE WAS SEEN ABOUT A WEEK AND A HALF, TWO WEEKS AGO. SHE CAME TO MY OFFICE.
Q. SHE TOLD YOU HER CASE WAS COMING UP FOR TRIAL AND YOU WERE GOING TO BE ASKED TO TESTIFY?
A. THAT THERE WAS A TRIAL, CORRECT.
Q. AND THAT'S THE REASON SHE CAME TO SEE YOU, CORRECT?
MR. PLATTA: OBJECTION, YOUR HONOR.
THE COURT: HOLD ON. IF THE WITNESS CAN ANSWER, GO AHEAD.
A. I BELIEVE THE LAST VISIT WAS BECAUSE THEY KNEW THE

0206

TRIAL WAS COMING UP TODAY.
Q. OKAY. THE LAST VISIT --
A. THE PREVIOUS ONES NOT.
THE COURT: IF -- THERE'S AN OBJECTION OUT THERE, BUT I OVERRULED IT. I JUST WANT TO HAVE IT FOR THE RECORD ON THAT LAST QUESTION.
MR. PLATTA: THANK YOU.
THE COURT: GO AHEAD.
Q. THAT LAST VISIT WAS WHEN?
A. I THINK LAST WEEK.
Q. AND PRIOR TO THAT, WHEN WAS THE LAST TIME YOU SAW HER?
A. IF I COULD CHECK MY NOTES, PLEASE.
THE COURT: GO AHEAD.
A. MAY 19, 2011.
Q. MAY OF 2011?
A. CORRECT.
Q. OKAY. AND PRIOR TO THAT, WHEN WAS THE LAST TIME YOU SAW HER?
A. SEPTEMBER 23, 2010.
Q. SO YOU SAW HER IN SEPTEMBER OF 2010, MAY OF 2011?
A. CORRECT.
Q. AND THOSE WERE TO EVALUATE HER, CORRECT?
A. CORRECT. THOSE WERE SHE WAS COMING IN TO SEE IF SHE CAN GET INJECTIONS AGAIN.
Q. OKAY. AND THE -- THE LAST VISIT WAS NOT TO EVALUATE

0207

HER, BUT IT WAS BECAUSE HER CASE WAS COMING UP FOR TRIAL?
MR. PLATTA: OBJECTION.

THE COURT: WE'VE HEARD IT. WE'VE HEARD IT A COUPLE OF TIMES. MOVE ON. YOU DON'T HAVE TO ANSWER, DOCTOR.

Q. NOW, WHEN SHE FIRST CAME TO YOU, SHE CAME IN TWO DAYS AFTER THE ACCIDENT, IS THAT CORRECT?

A. CORRECT.

Q. AND YOU WERE THE PHYSICIAN WHO FOLLOWED HER THROUGHOUT THE COURSE OF HER TREATMENT, IS THAT ALSO CORRECT?

A. NOT REALLY. SHE WENT TO DR. KRISHNA WHO REALLY FOLLOWED HER. YOU KNOW, I MAY HAVE --

Q. DOES KRISHNA SHARE AN OFFICE WITH YOU?

A. NO.

Q. DID HE AT ANYTIME?

A. NO.

Q. DID HE -- DID SHE SEE KRISHNA AND YOU ON THE SAME DAY?

A. I DO NOT KNOW. I HAVE NO CONNECTION TO HIM. BUT I DO NOT FOLLOW PATIENTS ON A REGULAR BASIS. REALLY I JUST DO INTERVENTIONAL PAIN MANAGEMENT, WHICH I SEE THEM FOR EVALUATION FOR PAIN MANAGEMENT, INJECTIONS OR SURGERIES, AND THEN I SEND THEM BACK TO WHATEVER REFERRING PHYSICIAN THEY CAME FROM.

Q. BUT FOR HER THERE WAS NO REFERRING PHYSICIAN. HER SON WAS THE PERSON WHO BROUGHT HER IN, IS THAT CORRECT?

A. I KNOW HER SON CAME WITH HER, AND HER SON CAME WITH

0208

HER ALMOST PROBABLY EVERY TIME I SAW HER.

Q. BUT THERE WAS NO REFERRING PHYSICIAN?

A. NO.

Q. YOU WERE -- YOU WERE THE FIRST MEDICAL PROVIDER THAT SHE SAW OUTSIDE OF THE HOSPITAL?

A. CORRECT.

Q. OKAY. AND WHEN YOU SAW HER -- AND WE WENT THROUGH THIS. AT SOME POINT WHEN YOU SAW HER FOR THAT FIRST TIME, WHAT WERE HER COMPLAINTS TO YOU? WHAT WAS SHE COMPLAINING ABOUT?

A. SHE WAS COMPLAINING ABOUT RIGHT HIP PAIN GOING TO THE KNEE, RIGHT SIDED LOW BACK PAIN.

Q. ANYTHING ELSE?

A. NO, NOTHING ELSE.

Q. OKAY. SO THERE WAS NO COMPLAINT --

A. ELBOW PAIN, RIGHT ELBOW PAIN.

Q. OKAY. SO THERE WAS NO COMPLAINTS REGARDING HER RIGHT KNEE. IT WAS RIGHT HIP?

A. NO.

Q. IS THAT CORRECT?

A. RIGHT HIP RADIATING TO HER RIGHT KNEE.

MR. PLATTA: JUDGE, OBJECTION. THIS IS BEYOND THE SCOPE OF DIRECT AT THIS POINT.

MR. SCAHILL: I'M SORRY. THIS IS CROSS-EXAMINATION.

THE COURT: I'LL ALLOW IT. WE HAD DISCUSSED THIS

0209

ON THE THINGS ON THE FIRST VISIT. GO BACK.

DID YOU MENTION THE KNEE BEFORE OR NO?

THE WITNESS: RIGHT HIP RADIATING TO THE RIGHT KNEE.

Q. THERE WAS NO COMPLAINT OF RIGHT KNEE PAIN. IT WAS RIGHT HIP PAIN, IS THAT CORRECT?
A. CORRECT. WELL, THE PAIN RADIATES TO HER RIGHT KNEE, SO THE PAIN GOES --
Q. BUT THE SOURCE OF THE PAIN WAS THE RIGHT HIP, NOT THE RIGHT KNEE?
A. ON THE FIRST VISIT I HAVE NO CLUE.
Q. WELL, DID YOU EXAMINE HER?
A. I EXAMINED THE SPINE.
Q. WELL, YOU ALSO EXAMINED THE ENTIRE PERSON. YOU MADE AN ASSESSMENT, IS THAT CORRECT, DOCTOR?
A. YES.
Q. AND THAT ASSESSMENT WAS LOW BACK PAIN, RIGHT HIP PAIN, AND RIGHT ELBOW PAIN?
A. CORRECT.
Q. IS THAT CORRECT?
A. CORRECT.
Q. YOU DIDN'T MENTION ANYTHING ABOUT HER RIGHT KNEE --
A. CORRECT.
Q. -- IN YOUR ASSESSMENT?
A. CORRECT.

0210

Q. SO THE PAIN WAS EMANATING FROM HER HIP?
A. CORRECT.
Q. IS THAT CORRECT?
A. CORRECT.
Q. SO THERE WAS NOTHING ANATOMICALLY WRONG WITH HER KNEE. THERE WAS NOTHING AN --
MR. PLATTA: OBJECTION, YOUR HONOR.
THE COURT: I'LL ALLOW THE QUESTION IF THE WITNESS CAN EXPLAIN. BECAUSE HE SAID IT RADIATED TO HER KNEE BUT DIDN'T ORIGINATE THERE. LET THE WITNESS --
A. YEAH, THERE WAS --
Q. THERE WAS NOTHING ANATOMICALLY WRONG WITH HER KNEE AND THERE WAS NOTHING ANATOMICALLY WRONG WITH HER SHOULDER AT THAT TIME, IS THAT CORRECT?
A. I --
MR. PLATTA: OBJECTION.
THE COURT: LET THE WITNESS ANSWER. IT'S TWO QUESTIONS, BUT TAKE THEM ONE AT A TIME.
A. FIRST OF ALL THE ANSWER IS THAT I'M A SPECIALIST OF SPINE, NOT KNEES OR SHOULDERS. I REALLY CAN'T MAKE ANY COMMENT ON WHETHER THERE WAS ANATOMIC ABNORMALITIES BECAUSE IT'S NOT MY AREA OF EXPERTISE AND IT'S NOT WHAT I TREATED SO --
Q. IF SOMEBODY CAME INTO YOUR OFFICE -- NEVER MIND MRS. KOSIAREK -- AND THEY SAID: I WAS IN A CAR ACCIDENT. I INJURED MY RIGHT KNEE. I INJURED MY RIGHT SHOULDER. I HAVE

0211

SIGNIFICANT PAIN IN MY RIGHT KNEE. I HAVE SIGNIFICANT PAIN IN MY NECK.
YOU WOULD RECORD IT IN YOUR ASSESSMENT, CORRECT?
A. CORRECT.
Q. OKAY. AND IN THIS PATIENT YOU RECORDED AS YOUR INITIAL ASSESSMENT, FROM THE DAY YOU FIRST SAW HER -- WHICH IS

NOVEMBER 13 -- SORRY -- NOVEMBER 13, 2008 -- YOU RECORDED AN INITIAL ASSESSMENT OF LOW BACK PAIN, RIGHT HIP PAIN, AND RIGHT ELBOW PAIN?
A. CORRECT. ABSOLUTELY.
Q. OKAY. AND THAT WAS BASED ON HER COMPLAINTS TO YOU TWO DAYS AFTER THE ACCIDENT?
A. CORRECT.
Q. WHERE SHE COMPLAINED -- THE PATIENT COMPLAINED -- IF I COULD JUST GET HER COMPLAINT. SHE COMPLAINED OF RIGHT SIDED LOW BACK PAIN, RIGHT HIP PAIN RADIATING TO HER RIGHT KNEE, AND SHE ALSO COMPLAINED OF RIGHT ELBOW PAIN?
A. CORRECT.
Q. ALL RIGHT. SO THAT WAS YOUR INITIAL ASSESSMENT?
A. CORRECT.
Q. YOU SAW HER AGAIN SIX WEEKS LATER IN DECEMBER OF 2008. DO YOU RECALL WHAT YOUR ASSESSMENT WAS SIX WEEKS LATER?
A. THE SAME; LOW BACK PAIN, RIGHT HIP PAIN, RIGHT ELBOW PAIN.
Q. SO SIX WEEKS LATER THERE'S NO COMPLAINT TO THE NECK,

0212

THERE'S NO COMPLAINT TO THE RIGHT KNEE, THERE'S NO COMPLAINT TO THE RIGHT SHOULDER, IS THAT FAIR TO SAY?
A. YES.
Q. NOW, DID YOU ALSO HAVE THE OPPORTUNITY TO LOOK AT HER HOSPITAL RECORD?
A. I DO NOT RECALL.
Q. WELL, IN -- IN TERMS OF TREATING A PATIENT, YOU WOULD WANT TO SEE --
MR. PLATTA: OBJECTION.
Q. -- AS --
THE COURT: I'LL ALLOW IT.
MR. PLATTA: IS IT A QUESTION OR A STATEMENT? BECAUSE IT SOUNDS LIKE A STATEMENT RIGHT NOW.
THE COURT: IT MAY END UP WITH A QUESTION, AND IF IT DOES, I'LL ALLOW IT. GO AHEAD.
Q. IN TERMS OF TREATING A PATIENT, YOU WOULD WANT TO SEE AS MUCH RECORDS ON THAT PATIENT AS YOU POSSIBLY CAN, IS THAT CORRECT?
A. NOT -- NOT EVERY RECORD IS RELEVANT.
Q. WELL, WOULD YOU SAY THE HOSPITAL RECORD FROM THE DATE OF THE ACCIDENT IS RELEVANT?
A. USUALLY NOT.
Q. IT'S USUALLY NOT?
A. CORRECT. BECAUSE USUALLY WHEN THE PATIENT --
Q. I DIDN'T ASK YOU THAT. I'M --

0213

MR. PLATTA: YOUR HONOR, CAN HE --
Q. I'LL GET INTO THAT IN A SECOND.
MR. PLATTA: CAN THE WITNESS FINISH HIS ANSWER, PLEASE.
THE COURT: JUST WAIT. I'LL GIVE IT TO YOU ON REDIRECT. THE ANSWER IS USUALLY NOT -- YOU'LL GET A CHANCE TO ELABORATE THROUGH YOUR LAWYER OR DOWN THE ROAD.
Q. IS IT YOUR TESTIMONY THAT MRS. KOSIAREK SUSTAINED A

SERIOUS INJURY TO HER RIGHT KNEE AS A RESULT OF THIS ACCIDENT?
A. I HAVE NO COMMENT ABOUT THE RIGHT KNEE.
Q. HOW ABOUT HER RIGHT SHOULDER? DO YOU HAVE ANY IDEA IF SHE SUSTAINED A SERIOUS INJURY TO HER RIGHT SHOULDER AS A RESULT OF THE ACCIDENT?
A. I HAVE NO IDEA.
MR. PLATTA: OBJECTION.
THE COURT: OBJECTION IS OVERRULED.
Q. YET YOU SAW --
THE COURT: THE QUESTION STANDS.
Q. YET YOU SAW HER FOR THE FIRST SIX WEEKS POST ACCIDENT, AND SHE MADE NO COMPLAINTS REGARDING THE RIGHT SHOULDER, THE RIGHT KNEE?
A. CORRECT.
Q. WOULDN'T IT BE FAIR TO SAY TO YOU, AS A PHYSICIAN, THAT SHE HAD NO INJURY TO HER RIGHT SHOULDER OR RIGHT KNEE --
MR. PLATTA: OBJECTION.

0214

Q. -- BECAUSE SHE --
THE COURT: I'LL ALLOW IT.
MR. SCAHILL: CAN I PLEASE CONTINUE A QUESTION?
THE COURT: LOOK, I'M PAYING ATTENTION HERE. IF YOU WANT A LINE OF OBJECTIONS, FINE. BUT GO ON. LET'S NOT INTERRUPT THE FLOW. TRY -- THERE'S ALWAYS A BALANCE.
I WANT TO GIVE YOU THE RIGHT TO OBJECT, BUT I WANT TO HAVE IT FLOW SO THE JURY CAN HEAR IT ONE WAY.
AHEAD OF TIME, BEFORE THE JURY COMES IN, YOU CAN SAY, I HAVE A SERIES OF OBJECTIONS. WHY DON'T YOU LAY OUT A RULING, JUDGE? AND WE'LL DO IT.
GO AHEAD, COUNSEL.
Q. IS IT FAIR TO SAY THAT MRS. KOSIAREK HAD NO INJURY TO HER RIGHT KNEE AND RIGHT SHOULDER BECAUSE SHE DIDN'T COMPLAIN TO YOU ABOUT IT EITHER ON NOVEMBER 13, 2008 OR ON DECEMBER 18, 2008?
THAT HER COMPLAINTS CENTERED ON HER LOW BACK, RIGHT HIP, AND RIGHT ELBOW? IS THAT FAIR TO SAY?
A. NOT REALLY. IT'S NOT FAIR TO SAY BECAUSE, AGAIN, MY FOCUS IS ALWAYS ON THE SPINE AND THE THINGS RELATED TO THE SPINE. SO I DON'T -- I DON'T KNOW. I JUST DON'T KNOW.
Q. WHEN SOMEBODY COMES INTO YOU, DON'T THEY TELL YOU WHAT'S WRONG WITH THEM? WHAT'S HURTING?
A. NOT ALWAYS. PEOPLE COME TO ME FROM ORTHOPEDIC SURGEONS AND THEY HAVE KNEE INJURY OR SHOULDER INJURY, AND THEY

0215

DON'T DISCUSS THAT WITH ME AND DON'T DISCUSS THEY'RE GOING TO HAVE KNEE SURGERY OR SHOULDER SURGERY.
Q. THIS IS TWO DAYS AFTER THE ACCIDENT. YOU'RE THE FIRST DOCTOR THAT SHE SAW. WOULD YOU EXPECT HER TO TELL YOU WHAT'S BOTHERING HER?
A. ABSOLUTELY. ON THE FIRST VISIT, ABSOLUTELY.
Q. AND WHAT DID SHE SAY TO YOU ON THE FIRST VISIT?
A. ON THE FIRST VISIT SHE TALKED ABOUT THE LOW BACK, THE HIP, AND THE ELBOW.
Q. OKAY. SO IS IT FAIR TO SAY, BASED ON YOUR FIRST VISIT

WITH HER AND YOUR PHYSICAL EXAMINATION, THAT SHE HAD NO INJURY TO THE RIGHT KNEE? THAT SHE HAD NO INJURY TO THE RIGHT SHOULDER? IS THAT FAIR TO SAY?
A. IT'S NOT FAIR TO SAY BECAUSE --
THE COURT: OKAY. I THINK WE'VE HEARD THIS QUESTION AND ANSWER AND WE CAN MOVE ON.
Q. OKAY. WHAT ABOUT TO HER NECK? YOU DO TREAT THE NECK, CORRECT?
A. CORRECT.
Q. ALL RIGHT. IS IT FAIR TO SAY THAT SHE HAD NO INJURY TO HER NECK IN THIS ACCIDENT?
A. I SAY THERE WAS NO -- THERE WAS NO COMPLAINTS OF CERVICAL SPINE WHEN SHE CAME TO ME THAT DAY.
Q. HOW ABOUT WHEN SHE CAME TO YOU SIX WEEKS LATER? WAS THERE ANY COMPLAINT TO THE CERVICAL SPINE?

0216

A. NO.
Q. OKAY. SO IS IT FAIR TO SAY THAT SHE DIDN'T INJURE HER NECK IN THIS ACCIDENT?
MR. PLATTA: OBJECTION.
THE COURT: I'LL ALLOW IT. GO AHEAD.
A. I CAN'T SAY THAT SHE DIDN'T INJURE HERSELF IN THE ACCIDENT. I'M SAYING SHE DIDN'T COMPLAIN TO ME. I DON'T KNOW WHAT SHE COMPLAINED TO HER PHYSICIANS OR OTHER DOCTORS.
Q. WELL, DOCTOR, YOU SAID THAT YOU SPECIALIZE IN THE SPINE, CORRECT?
A. ABSOLUTELY.
Q. AND THAT'S NECK AND BACK?
A. CORRECT.
Q. OKAY. SO DID YOU ASK HER DID YOU HAVE ANY PROBLEMS WITH HER NECK?
A. I WOULD USUALLY TALK ABOUT, THE FIRST VISIT, WHAT AREA OF THE SPINE DID YOU INJURE. AND I WOULD AGREE WITH YOU ON THE FIRST VISIT THAT SHE MADE NO COMPLAINTS OF THE CERVICAL SPINE, AND I WOULD ASK THAT QUESTION ABSOLUTELY.
Q. OKAY. DID YOU EXAMINE THE CERVICAL SPINE?
A. I DID NOT EXAMINE THE CERVICAL SPINE BECAUSE SHE MADE NO COMPLAINTS OF CERVICAL SPINE PAIN ON THE FIRST VISIT. ABSOLUTELY.
Q. WHAT ABOUT WHEN YOU SAW HER ON DECEMBER 18?
A. AT THAT POINT WE WERE TREATING THE LUMBAR SPINE, SO I

0217

DON'T KNOW IF THE -- SECOND VISIT USUALLY IS BASED ON MY EVALUATION FROM THE FIRST VISIT.
I DON'T ASK EACH TIME THEY COME IN IF ANOTHER AREA OF THE BODY HURTS. I ASK IT THE FIRST TIME.
Q. OKAY.
A. I ASK THE FIRST TIME.
Q. AND HER RESPONSE TO YOU THE FIRST TIME WAS WHAT?
A. SHE DIDN'T COMPLAIN ABOUT THE NECK.
Q. OKAY.
A. ABSOLUTELY.
Q. SO WOULD -- WOULD IT -- BASED ON THAT REPRESENTATION THAT SHE MADE TO YOU, WOULD YOU AGREE THAT SHE HAD NO INJURY TO

HER NECK IN THIS MOTOR VEHICLE ACCIDENT?
MR. PLATTA: OBJECTION. ASKED AND ANSWERED LIKE TEN TIMES, YOUR HONOR, ALREADY.
THE COURT: I'LL ALLOW IT. GO AHEAD.
A. I CAN'T SAY THAT. I CAN SAY THAT SHE MADE NO COMPLAINTS TO ME. I DON'T KNOW WHAT HAPPENED OUTSIDE OF MY OFFICE. BUT FOR ME SHE MADE ABSOLUTELY NO COMPLAINTS, AND I ABSOLUTELY WOULD HAVE ASKED THAT QUESTION.
Q. WELL, DOCTOR, LET'S TRY TO BREAK IT DOWN. YOU'RE THE FIRST DOCTOR THAT SHE SAW AFTER SHE GOT OUT OF THE HOSPITAL?
A. CORRECT.
Q. AND HER SON BROUGHT HER THERE BECAUSE YOU'RE TREATING HER SON?

0218

A. CORRECT.
Q. SO SHE OBVIOUSLY HAD SOME TRUST IN YOU AT THAT POINT, CORRECT?
A. OKAY.
Q. ALL RIGHT. WOULD YOU -- WOULD YOU EXPECT A PATIENT THAT COMES TO A DOCTOR FOR THE FIRST TIME TO GIVE -- GIVE THE COMPLAINTS THAT HAPPENED IN THE ACCIDENT?
A. I WOULD -- I WOULD HOPE THEY WOULD GIVE THE COMPLAINTS, BUT, YOU KNOW, FIRST TIME THE PATIENTS COME TO MY OFFICE SO SOON AFTER AN ACCIDENT THERE'S ALWAYS THIS CERTAIN DEGREE OF CONFUSION, LANGUAGE BARRIER, ETC.
Q. WELL, SHE HAD HER SON THERE TO TRANSLATE, AND YOU WERE ALREADY TREATING HER SON?
A. RIGHT. AND THE SON'S ENGLISH IS NOT THE BEST ENGLISH, AND THE MOTHER DOESN'T SPEAK VERY MUCH ENGLISH.
Q. HOW ABOUT COMMUNICATING TO YOU SIX WEEKS LATER? WAS THERE ANY BARRIER IN THE COMMUNICATION SIX WEEKS LATER?
A. AGAIN, THE SECOND TIME THE PATIENT CAME THE PATIENT WAS REALLY STICKING TO THE COMPLAINT OF THE FIRST PART OF THE SPINE THAT WE DISCUSSED, WHICH IS LUMBAR.
Q. SHE BROUGHT UP THE RIGHT ELBOW AGAIN AND SHE BROUGHT UP THE RIGHT HIP AGAIN?
A. CORRECT. CORRECT.
Q. OKAY. THAT'S NOT THE LUMBAR SPINE?
A. WELL, THAT'S -- THAT'S THE QUESTION; IF IT'S RADIATING

0219

PAIN FROM THE BACK, WHETHER THE HIP WAS RELATED TO THE LUMBAR SPINE OR NOT.
Q. OKAY.
A. IN MY MIND IT COULD BE RELATED TO THE SPINE.
Q. YOU DON'T SAY -- YOU DON'T SAY TO THE PATIENT, HOW ARE YOU FEELING WHEN THEY COME INTO YOUR OFFICE AND THEY'RE SITTING IN THAT LITTLE ROOM AND THEY'RE IN A GOWN OR WHATEVER THEY'RE -- WHATEVER THEY'RE IN? YOU DON'T ASK THEM HOW ARE THEY FEELING?
A. I ASK THEM HOW THEIR BACK IS DOING.
Q. OKAY. YOU DON'T ASK WHAT THEIR COMPLAINTS ARE? YOU DON'T ASK ANYTHING ELSE?
A. NOT THE -- NOT THE COMPLAINTS OF OTHER AREAS OF THE BODY.
Q. JUST HOW --

A. MY PRACTICE IS FOCUS --
THE COURT: LET THE WITNESS FINISH.
A. MY PRACTICE IS REALLY FOCUSED ON THE SPINE.
Q. JUST HOW THE LOWER BACK IS, THAT'S IT?
A. CORRECT.
Q. OKAY.
A. THOUGH AT A LATER POINT SHE DID COME IN AND MENTION ABOUT THE NECK, BUT I WAS NOT TREATING THE NECK.
Q. OKAY.
A. SHE WAS BEING TREATED BY DR. KRISHNA.
Q. WHEN YOU SAY "LATER POINT", WHEN DID SHE BRING UP THE

0220

NECK TO YOU?
A. THAT'S IN JANUARY 19, 2009. SHE CAME IN WITH AN MRI OF THE CERVICAL SPINE AT THAT POINT.
Q. SO THREE MONTHS LATER POST ACCIDENT WAS THE FIRST TIME THAT SHE COMPLAINED TO YOU, HER PAIN MANAGEMENT PHYSICIAN, OF ANY PAIN IN THE NECK?
A. CORRECT.
Q. IS THAT FAIR TO SAY?
A. YES.
Q. AND HOW MANY TIMES HAD YOU SEEN HER UP TO THAT POINT?
A. HOW MANY TIMES HAVE I SEEN HER UP TO THAT POINT? TWICE.
Q. DID YOU EVER HAVE AN OPPORTUNITY TO EXAMINE THE HOSPITAL RECORD?
A. I DON'T BELIEVE SO, NO.
Q. AND --
MR. PLATTA: ASKED AND ANSWERED, YOUR HONOR.
WE'VE --
THE COURT: I THOUGHT IT WAS ASKED, BUT I'LL ALLOW IT. HE SAID I DON'T BELIEVE SO. GO AHEAD.
Q. AND IT'S YOUR POSITION THAT THE HOSPITAL RECORD FROM THE DATE OF THE ACCIDENT HAS LITTLE OR NO SIGNIFICANCE?
A. NO, WHAT I'M SAYING IS WHAT'S IMPORTANT TO ME WHEN A PATIENT COMES TO THE OFFICE IS WHAT HURTS. I'M TREATING WHAT HURTS AT THAT POINT IN TIME.

0221

IT DOESN'T -- AN MRI HELPS ME, AN EMG MAY HELP ME. PATIENT COMPLAINTS, A PHYSICAL EXAMINATION HELPS ME, BUT A NOTE FROM A -- AN EMERGENCY ROOM DOESN'T NECESSARILY HELP ME IN TERMS OF DIAGNOSING AND TREATING THE -- TREATING THE PATIENT OR MAKING A DECISION WHAT I'M GOING TO DO WITH THE PATIENT.
Q. WELL, IS IT YOUR TESTIMONY THAT MRS. KOSIAREK HAD INJURIES THAT ARE SPECIFIC TO THIS CAR ACCIDENT? THAT THIS HAPPENED IN THE CAR ACCIDENT?
A. CORRECT. THAT WOULD BE THE LUMBAR SPINE.
Q. AND THAT'S IT?
A. I -- I HAVE NO KNOWLEDGE ABOUT ANYTHING ELSE.
Q. OKAY. SO YOU HAVE NO OPINION ABOUT THE RIGHT SHOULDER, THE RIGHT KNEE?
A. NO.
Q. THE NECK?
A. NO.

Q. THE ONLY THING YOU ARE CONCERNED ABOUT IS THE LOWER BACK?
A. THAT'S WHAT I -- THAT'S WHAT SHE CAME TO ME FOR AND THAT'S WHAT I TREATED.
Q. ARE YOU AWARE THAT SHE HAD NO COMPLAINTS OF NECK PAIN IN THE HOSPITAL RECORD?
A. I AM NOT AWARE OF THAT.
Q. WOULD THAT CHANGE YOUR -- WOULD THAT CHANGE YOUR DIAGNOSIS OR YOUR IMPRESSION?

0222

MR. PLATTA: OBJECTION, YOUR HONOR. HE JUST SAID HE DIDN'T TREAT HER FOR THE NECK AND NOW HE'S BEING QUESTIONED ABOUT THE NECK.
THE COURT: I THINK WE'VE ALREADY GOT THIS. THE WITNESS ALREADY TESTIFIED CONSISTENT WITH THAT LINE, SO WHY DON'T YOU MOVE ON? GO AHEAD, COUNSEL.
BY MR. SCAHILL:
Q. DID YOU SEND HER FOR MRIS?
A. NO, DR. KRISHNA SENT HER FOR THE MRI.
Q. DO YOU KNOW THE FIRST MRI THAT SHE HAD?
A. I'M NOT SURE WHAT YOU'RE ASKING.
Q. DO YOU KNOW WHICH PART OF THE BODY SHE WENT TO FIRST FOR AN MRI?
A. I SEE FROM MY NOTE HERE NOVEMBER 21ST WAS AN MRI OF THE RIGHT SHOULDER.
Q. AND DO YOU KNOW WHAT ELSE AFTER THE RIGHT SHOULDER?
A. I HAVE AN MRI OF THE CERVICAL SPINE DECEMBER 12TH, AN MRI OF THE LUMBAR SPINE DECEMBER 30.
Q. THE FIRST TWO MRIS WERE THE MRI OF THE RIGHT SHOULDER AND MRI OF THE RIGHT KNEE.
A. OKAY.
Q. DID YOU SEND HER FOR THOSE?
A. NO, I DID NOT.
Q. DID YOU REVIEW THOSE MRI FINDINGS?
A. NO.

0223

Q. DID YOU EVER --
A. I -- I --
Q. DID YOU EVER --
A. I'M NOT CAPABLE OF REVIEWING THOSE MRIS. I MEAN, I CAN'T READ THEM. I CAN'T READ THEM.
Q. DID YOU EVER LOOK AT THE MRI REPORTS?
A. OF JUST -- OF THE RIGHT SHOULDER. I SAW THE MRI REPORT OF THE RIGHT SHOULDER.
Q. DID YOU EVER LOOK AT ANY OTHER MRI REPORTS THAT MRS. KOSIAREK HAD?
A. CERVICAL AND LUMBAR SPINE.
Q. AND DID YOU INCORPORATE THE FINDINGS OF THE MRI IN YOUR ASSESSMENT OF WHAT THE -- WHAT HAPPENED TO MRS. KOSIAREK?
MR. PLATTA: OBJECTION, YOUR HONOR. THIS IS BEYOND THE SCOPE OF DIRECT, AND I BELIEVE THIS WAS ALREADY DISCUSSED.
THE COURT: LET HIM GET INTO THESE UNDERLYING REPORTS. HE CAN ASK THE WITNESS IF HE EVALUATED THE MRIS ON

HIS OWN. I THINK THE ONE ON SEPTEMBER 9, 2010 WE'VE DONE THAT ALREADY.

AND I WANT TO GO BACK TO THESE MRI REPORTS, NOT THE ACTUAL MRI FILMS THAT WE DECIDED WE'RE NOT GOING TO DEAL WITH BECAUSE WE DON'T HAVE THE RADIOLOGIST HERE.

GO AHEAD.

Q. DID YOU EVER ASSESS MRS. KOSIAREK WITH A DISC MALADY OF THE NECK? WAS THAT EVER PART OF YOUR ASSESSMENT?

A. IT -- IT IS PART OF MY ASSESSMENT, BUT I -- YOU KNOW, THE FACT THAT I SAW HER ONCE OR TWICE, THAT IS CORRECT.

Q. WELL --

A. THAT WAS BASED ON THE MRI REPORT.

Q. OKAY. SO IS IT FAIR TO SAY THAT YOU USED THE MRI IN YOUR ASSESSMENT OF WHAT HAPPENED TO MRS. KOSIAREK?

A. IT -- I USED THE MRI TO -- AS PART OF MY ASSESSMENT WHAT SHE WAS COMPLAINING OF.

Q. ASSESSMENT OF WHAT SHE WAS COMPLAINING OF?

A. YEAH, WHAT HER --

Q. DON'T YOU PUT DOWN IN -- HER COMPLAINTS, AND YOU PUT YOUR ASSESSMENT IN A DIFFERENT SPOT ON YOUR NOTES?

A. THE ASSESSMENT IS THE DIAGNOSIS --

Q. OKAY. SO --

A. -- BASED ON HER COMPLAINTS.

THE COURT: LET THE WITNESS FINISH. GO AHEAD, DR. KAISMAN.

A. THE ASSESSMENT IS THE DIAGNOSIS BASED ON HER COMPLAINTS.

Q. OKAY. SO I'D ASK YOU TO LOOK AT THE APRIL 20, 2009 REPORT THAT YOU PREPARED.

A. APRIL 20, 2009. OKAY.

Q. YOU PREPARED AN ASSESSMENT OF THIS PATIENT AFTER YOU REVIEWED -- AFTER YOU EXAMINED HER AND AFTER YOU REVIEWED THE REPORT, CORRECT?

A. CORRECT.

Q. AND IS YOUR ASSESSMENT OF THE PATIENT, DID THAT INCORPORATE THE MRI FINDINGS?

A. YES.

Q. AND WHAT'S YOUR ASSESSMENT OF THE PLAINTIFF IN APRIL OF 2009?

A. THE ASSESSMENT WAS HERNIATED DISC C5-C6 WITH CERVICAL RADICULOPATHY AND MYOFASCIAL PAIN SYNDROME; AND HERNIATED DISC L4-L5; DISC PROTRUSION L5-S1 WITH A LUMBAR RADICULOPATHY AND MYOFASCIAL PAIN SYNDROME.

Q. SO WE JUST TALKED ABOUT THE NECK IN DETAIL, AND THERE WAS NO COMPLAINTS ON HER FIRST VISIT. AND WHEN SHE CAME BACK TO YOU IN DECEMBER, THERE WAS NO MENTION OF THE NECK. YOU SAID YOU CONCENTRATED ON THE LOWER BACK.

YET FOUR MONTHS LATER, IN APRIL OF 2009, YOU WERE GIVING HER AN ASSESSMENT OF A HERNIATED DISC. DO YOU FEEL THAT THAT HERNIATED DISC WAS CAUSED IN THIS ACCIDENT?

A. I CANNOT STATE THAT.

Q. WHY DID YOU PUT IT IN YOUR ASSESSMENT?

A. BECAUSE THAT'S WHAT SHE CAME IN COMPLAINING OF, AND SHE ASKED ME ABOUT THE NECK.
Q. YOU'RE SAYING THAT MRS. KOSIAREK CAME TO YOU AND SAID, I HAVE A HERNIATED DISC IN MY NECK AT C5-C6 WITH CERVICAL RADICULOPATHY AND MYOFASCIAL PAIN SYNDROME?

0226

THAT'S WHAT YOUR PATIENT SAID TO YOU?
A. MY PATIENT SAID SHE HAD NECK PAIN WITH RADIATION.
Q. OKAY. AND WAS THAT THE FIRST TIME THAT SHE MENTIONED THE NECK PAIN TO YOU?
A. THE FIRST TIME THAT SHE MENTIONED THE NECK PAIN TO ME WAS IN JANUARY 19, 2009.
Q. OKAY. AND IN JANUARY 19 -- JANUARY 19. SO THE FIRST TIME SHE MENTIONED ANYTHING REGARDING HER NECK WAS THREE MONTHS POST ACCIDENT?
A. TO ME, CORRECT.
Q. OKAY. AND HOW MANY TIMES HAVE YOU -- HAD YOU SEEN HER BEFORE THAT?
A. TWICE.
Q. THIS SPECIFIC REFERENCE TO HERNIATED DISC IN YOUR APRIL 20, 2009 REPORT, WAS THAT BASED ON MRI REPORTS?
A. CORRECT. I NEVER SAW THE FILM.
Q. AND IS IT FAIR TO SAY, DOCTOR, THAT YOU'VE SEEN PATIENTS IN YOUR PRACTICE OF THE SAME AGE, THE SAME DEMOGRAPHICS -- MEANING HEIGHT, WEIGHT -- AS MRS. KOSIAREK, THAT HAVE THE SAME FINDINGS, HERNIATED DISC OF THE NECK AND THE BACK, THAT HAD SUFFERED NO TRAUMA WHATSOEVER?
IS THAT FAIR TO SAY?
A. ABSOLUTELY. ANYBODY THE AGE -- OVER THE AGE OF 40 CAN HAVE A BULGING OR A HERNIATED DISC.
Q. WHY IS THAT? EXPLAIN THAT TO THE JURY. HOW DOES THAT

0227

HAPPEN?
A. WHAT HAPPENS IS AS PART OF THE AGING PROCESS -- THE DISC STARTS OFF, IT'S WELL HYDRATED. AND THEN AS YOU GET OLDER, IT DESICCATES OR DRIES OUT.
SO AS ONE GETS ABOVE THE AGE OF 40, THE DISC CAN START BECOMING DAMAGED AND BULGE OUT OR IT CAN BECOME HERNIATED AT SOME POINT IN TIME.
Q. AND THAT COULD HAPPEN TO AN INDIVIDUAL WITH OR WITHOUT A MINOR CAR ACCIDENT?
A. ABSOLUTELY.
Q. AND YOU SEE THAT IN YOUR PRACTICE ON A REGULAR BASIS?
A. ON A REGULAR BASIS.
Q. AND YOU CONDUCT THE SAME TYPE OF TREATMENT PLAN FOR PEOPLE THAT HAD -- HAD TRAUMA AND DID NOT HAVE TRAUMA AND THEY HAVE THE SAME SYMPTOMS, IS THAT FAIR TO SAY?
A. YES, BUT THE -- THE INJECTION IS DONE FOR NEUROPATHY, WHICH IS THE NERVE DAMAGE FROM THE NERVE GOING -- PAIN GOING DOWN THE LEG. THAT'S WHAT THE INJECTION WAS FOR AND THE SURGERY WAS FOR.
Q. PEOPLE HAVE THAT CONDITION WITH OR WITHOUT A TRAUMA, IS THAT TRUE?
A. ABSOLUTELY. ABSOLUTELY.

Q. YOU'RE EMPHATIC ABOUT THAT BECAUSE IT HAPPENS ALL THE TIME?
A. ABSOLUTELY.

0228

Q. ALL RIGHT. SO THIS INDIVIDUAL WITH AN INITIAL ASSESSMENT AND A SUBSEQUENT ASSESSMENT OF RIGHT HIP PAIN, LOW BACK PAIN, RIGHT ELBOW PAIN, THAT -- THAT IS SOMETHING THAT COULD NOT HAVE CAUSED OR COULD HAVE CAUSED THE HERNIATED DISC?
IN OTHER WORDS, YOU HAVE NO MEDICAL OPINION AS TO WHETHER OR NOT THIS -- THESE CONDITIONS, THE HERNIATED DISC IN THE NECK AND THE BACK, WERE CAUSED BY THIS ACCIDENT?
A. CORRECT. BECAUSE IF I DON'T HAVE AN MRI -- IF I DON'T HAVE AN MRI JUST BEFORE THE ACCIDENT, I DON'T KNOW WHETHER THE DISC WAS DAMAGED PRIOR TO THE ACCIDENT OR NOT. I JUST DON'T KNOW.
I DON'T HAVE AN MRI JUST BEFORE THE ACCIDENT, AND THE PATIENT WAS OVER THE AGE OF 40. SO I CAN'T STATE WITH A REASONABLE DEGREE OF MEDICAL CERTAINTY THAT THE DISCS WERE NORMAL OR NOT NORMAL BEFORE THE ACCIDENT. I CAN'T STATE THAT.
Q. OKAY. AND THE -- IF A MEDICAL PROFESSIONAL TOOK THE STAND AND THEY SAID THAT THAT HERNIATION WAS DUE TO THIS CAR ACCIDENT DUE TO THE FORCES ON THE SPINE, THAT WOULDN'T BE CORRECT, IS THAT TRUE?
MR. PLATTA: OBJECTION, YOUR HONOR.
THE COURT: YES. SUSTAINED. LET THE WITNESS SPEAK FOR HIMSELF. GO AHEAD.
A. IT CAN BE.
THE COURT: YOU DON'T HAVE TO -- YOU DON'T HAVE TO ANSWER. I'VE STRUCK THE QUESTION AND ANSWER. GO AHEAD.

0229

Q. IN -- IN TERMS OF THE LUMBAR SPINE THAT YOU WERE TREATING, MRS. KOSIAREK HAD A CONDITION CALLED RETROLISTHESIS. ARE YOU FAMILIAR WITH THAT TERM?
A. YES.
Q. THAT'S A CONGENITAL CONDITION THAT SHE HAD?
A. WHAT HAPPENS IS WHEN YOU'RE FOUR OR FIVE YEARS OLD THERE ARE LIGAMENTS THAT HOLD THE SPINE IN PLACE. LIGAMENTS CAN LOOSEN AND ONE BONE SLIPS FORWARD OVER THE OTHER BONE, AND THAT IS SOMETHING THAT HAPPENS WHEN YOU'RE LIKE FOUR OR FIVE.
Q. DIDN'T HAPPEN IN THIS CAR ACCIDENT?
A. ABSOLUTELY NOT. PREEXISTING, ABSOLUTELY.
Q. THAT CONDITION PUTS PRESSURE ON THE -- ON THE VERTEBRAE AND THE DISC SPACES IN THE LUMBAR SPINE, IS THAT CORRECT?
A. IF IT'S GRADE ONE IT REALLY DOESN'T PUT PRESSURE ON ANYTHING.
Q. WELL, IT PREDISPOSES A PERSON TO A DISC HERNIATION OF THE LUMBAR SPINE, IS THAT CORRECT?
A. IT'S AN ABNORMALITY THAT CAN MAKE YOU MORE LIKELY, IF YOU ARE INJURED, THAT DAMAGE WILL OCCUR BECAUSE IT'S AN ABNORMAL DISC TO BEGIN WITH.
Q. YOU SAY ABNORMAL DISC. IT'S A POSTERIOR DISPLACEMENT, MEANING ONE DISC IS BACK FARTHER THAN THE OTHER?
A. NO, IT'S THE -- THE ONE BONE IS SLIPPED ADJACENT TO

THE OTHER. THE DISC IS IN THE SAME POSITION. SO MANY PEOPLE
0230
HAVE RETROLISTHESIS GRADE ONE. THEY'RE MADE BY DIFFERENT GRADES DEPENDING ON HOW DISPLACED THE BONE IS.
SO WHEN THE DISC IS IN THE MIDDLE -- USUALLY THINK OF IT AS A BALLOON OR DONUT. SOMETIMES THE DONUT STAYS INTACT. SOMETIMES THE DONUT GETS MANIPULATED.
THINK ABOUT SITTING ON A BALLOON AND SOMETIMES IT PUSHES BACKWARDS, SOMETIMES IT PUSHES FORWARDS. EVERYBODY IS DIFFERENT.
Q. DID YOU ORDER X-RAYS WHEN SHE CAME IN THE FIRST DAY?
A. I HAD X-RAYS DONE, YEAH.
Q. DID YOU FIND --
MR. PLATTA: BEYOND THE SCOPE OF DIRECT. I OPPOSE THIS RIGHT NOW. WE WILL GO FOREVER. THIS IS NOT FAIR.
THE COURT: TALKING ABOUT THE FIRST DAY. I DON'T WANT TO RUSH ANYONE. I THINK IF WE NEEDED MORE TIME, THIS WITNESS ONLY TOOK THE STAND 3:50, BUT I'M GETTING THE SENSE THAT WE CAN PROBABLY FINISH EVERYTHING.
TAKE A MINUTE OR TWO, AND MAYBE DO THREE OR FOUR MINUTES FOR REDIRECT AND RECROSS.
IF YOU CAN'T OBVIOUSLY DO IT -- CAN YOU WRAP IT UP IN A COUPLE OF QUESTIONS?
MR. SCAHILL: I WILL, YOUR HONOR.
THE COURT: IF YOU CAN.
Q. DID YOU TAKE X-RAYS ON THE FIRST DAY?
0231
A. YES.
Q. AND DID YOU FIND A RETROLISTHESIS THAT WAS FOUND IN THE HOSPITAL?
A. NO, I DID NOT.
Q. OKAY. ARE YOU AWARE THAT IN THE HOSPITAL THE RETROLISTHESIS WAS DIAGNOSED ON THE DATE OF THE ACCIDENT?
A. I THINK -- ALSO I THINK IT WAS ON THE MRI, IF I RECALL. I DON'T REMEMBER IF IT WAS SEEN ON THE MRI AS WELL, BUT IT WAS SMALL.
Q. BOTH ON THE X-RAY AT THE HOSPITAL AND THE MRI IT WAS FOUND TO BE RETROLISTHESIS, IS THAT CORRECT?
A. CORRECT.
Q. NOW, AS FAR AS THE FIRST TIME YOU SAW HER, DID YOU PUT A PLAN TOGETHER TO TREAT HER?
A. INITIALLY IT WAS TO DO THERAPY AND TAKE ANTIINFLAMMATORY MEDICATIONS.
Q. WHAT DID YOU TELL HER TO TAKE?
A. I THINK SHE WAS ALREADY TAKING ALEVE, IF I REMEMBER.
Q. OKAY. YOU DIDN'T PRESCRIBE ANY NARCOTICS, CORRECT?
A. NO, SHE HAD TAKEN -- THERE'S A NOTE HERE THAT SHE HAD TAKEN VICODIN AND STARTED HAVING PALPITATIONS.
Q. OKAY. DO YOU KNOW HOW LONG SHE TOOK THE VICODIN?
A. I DO NOT KNOW.
Q. SO YOUR PLAN FIRST DAY YOU SAW HER, TWO DAYS AFTER THE ACCIDENT, WAS PHYSICAL THERAPY, CORRECT?
0232

A. CORRECT.
Q. HOT AND COLD PACKS TO THE LOW BACK, RIGHT ELBOW, AND THE RIGHT HIP?
A. RIGHT.
Q. TO TAKE ALEVE, TO DO EXERCISES, AND TO COME BACK IN ONE MONTH?
A. CORRECT.
Q. IS THAT THE ASSESSMENT AND PLAN OF SOMEONE WHO IS SERIOUSLY INJURED IN A CAR ACCIDENT, THAT'S --
MR. PLATTA: OBJECTION, YOUR HONOR.
Q. -- THAT'S GOING TO -- THAT'S GOING TO --
MR. PLATTA: YOUR HONOR, I OBJECT.
THE COURT: LET ME HEAR THE QUESTION, THE WHOLE QUESTION. I KNOW THERE IS AN OBJECTION OUT THERE.
Q. IS THAT THE ASSESSMENT AND THE PLAN FOR SOMEONE WHO IS SERIOUSLY INJURED IN A CAR ACCIDENT, THAT'S GOING TO NEED BOTH CERVICAL AND A LUMBAR DISCECTOMY AND FUSION?
IS THAT THE ASSESSMENT AND PLAN?
THE COURT: YOU CAN ASK THE SECOND PART OF IT. FORGET ABOUT THE ACCIDENT. YOU CAN ASK WHETHER THEY NEED A FUSION AND A LUMBAR DISCECTOMY.
Q. YEAH.
A. I'M STILL NOT SURE WHAT THE QUESTION IS.
THE COURT: GO AHEAD.
Q. YOU SAW HER TWO DAYS AFTER THE ACCIDENT?

0233

A. CORRECT.
Q. YOU PUT TOGETHER AN ASSESSMENT AND A PLAN. THERE'S BEEN TESTIMONY IN THIS CASE, I'D LIKE YOU TO ASSUME, THAT SAYS THAT MRS. KOSIAREK WAS SERIOUSLY INJURED FROM THIS CAR ACCIDENT AND IS GOING TO NEED BOTH CERVICAL AND LUMBAR DISCECTOMY AND FUSION.
IS YOUR ASSESSMENT AND PLAN THAT OF AN INDIVIDUAL THAT SUFFERED A SERIOUS INJURY?
THE COURT: DON'T CITE THE SERIOUS INJURY. ASK IF THAT ASSESSMENT IS OR IS NOT CONSISTENT WITH THE TWO SURGERIES AND PROCEDURES THAT WERE OTHERWISE RECOMMENDED.
A. I CAN'T TALK ABOUT THE CERVICAL SPINE. I DIDN'T SEE THE MRIS. I CAN TALK ABOUT THE LUMBAR SPINE.
MR. PLATTA: THANK YOU, YOUR HONOR.
A. AND THE ANSWER IS YES, TAKING INTO CONSIDERATION THE TRACK OF HER TREATMENT FOR THE LUMBAR SPINE. REMEMBER, YOU'RE TALKING ABOUT A PATIENT THAT'S NOW SEVERAL YEARS INTO THE INJURY, AND ALSO I REMOVED SOME DISC MATERIAL FROM THE SPINE.
SO THE MRI HAS CHANGED PARTIALLY DUE TO THE PROGRESS OF -- WE TALKED ABOUT AGING, PARTIALLY DUE TO THE FACT THAT I REMOVED DISC MATERIAL.
SO THE NEW MRI OF THE LUMBAR SPINE IS VERY DIFFERENT FROM THE ORIGINAL MRI OF THE LUMBAR SPINE. THE ORIGINAL, IN MY OPINION, DID NOT REQUIRE FUSION, BUT THE NEW MRI REQUIRES FUSION BECAUSE NOW THERE IS SIGNIFICANT LOSS OF DISC.

0234

Q. WOULD IT BE FAIR TO SAY THAT MRS. KOSIAREK COULD BE IN THE EXACT SAME POSITION SHE IS TODAY WITH OR WITHOUT THIS CAR

ACCIDENT?
A. NO, YOU CANNOT SAY THAT BECAUSE THE PROBLEM IS YOU HAVE A PATIENT THAT'S ASYMPTOMATIC PRIOR TO THIS NOW HAS RADIATING PAIN.
Q. I'M JUST TALKING ABOUT THE ABNORMALITIES THAT SHE'S COMPLAINING ABOUT.
A. YOU KNOW, I DON'T THINK YOU CAN SAY THAT BECAUSE I THINK WHAT YOU HAVE TO TAKE INTO CONSIDERATION IS WHETHER IT WAS PREEXISTING OR NOT PREEXISTING. WE DON'T KNOW. I DON'T KNOW. I DON'T KNOW.
Q. WELL, I'LL ISOLATE IT TO THE NECK. WHAT ABOUT TO THE NECK?
A. I HAVE NO COMMENT ABOUT THE NECK.
Q. WELL, YOU JUST TOLD ME THAT -- WELL, WITHDRAWN. DO YOU THINK THAT MRS. KOSIAREK IS REQUIRED TO UNDERGO CERVICAL DISCECTOMY AND FUSION BASED ON THIS CAR ACCIDENT BASED ON WHAT YOU KNOW?
A. I HAVE NO COMMENT. I DON'T KNOW. I DON'T KNOW.
Q. YOU SENT HER TO DR. ABRAMS AND PIAZZA FOR CHIROPRACTIC CARE, IS THAT CORRECT?
A. NO, I DID NOT.
Q. HOW DID SHE GET TO DR. ABRAMS AND PIAZZA FOR CHIROPRACTIC CARE?

0235

A. I DO NOT KNOW, BUT I DID PROBABLY GIVE HER A PRESCRIPTION. I'M NOT SURE HOW SHE GOT TO THEM. I DON'T KNOW WHO THEY ARE.
Q. OKAY. IN YOUR EXPERIENCE -- OH, BY THE WAY, DO YOU KNOW WHAT THE -- WHAT THE DIAGNOSIS WAS IN THE HOSPITAL ON THE DATE OF THE ACCIDENT?
MR. PLATTA: YOUR HONOR, OBJECTION. HE TESTIFIED HE DIDN'T REVIEW THE NOTE.
THE COURT: LET'S MOVE ON. OBJECTION SUSTAINED.
Q. AS FAR AS THE TREATMENT WITH DR. ABRAMS AND PIAZZA, YOU HAD RECOMMENDED EXERCISE AND PHYSICAL THERAPY BECAUSE IN YOUR EXPERIENCE THAT HEALS PATIENTS THAT HAVE THESE SYMPTOMS, IS THAT CORRECT?
A. CHIROPRACTIC THERAPY IS FINE TOO. THAT'S ALL -- IT'S ALL GOOD. ACUPUNCTURE IS GOOD. IT'S ALL GOOD. WHATEVER HELPS THE PATIENT.
Q. AND THE REASON -- THE REASON I'M SAYING THAT IS BECAUSE IN YOUR EXPERIENCE THAT -- THAT COURSE OF TREATMENT HELPS PATIENTS?
A. OH, ABSOLUTELY. MOST PATIENTS GET BETTER AND DON'T NEED INJECTIONS.
Q. OKAY. DID MRS. KOSIAREK EVER BENEFIT FROM THE TREATMENT THAT YOU PRESCRIBED?
A. I THINK FROM THE -- YOU KNOW, I -- SOMETIMES SHE COMES IN SHE'S FEELING A LITTLE BETTER AND SOMETIMES SHE'S FEELING

0236

WORSE.
SO SHE DID GET SOME -- NOT FROM THE EPIDURALS. FROM THE EPIDURALS SHE GOT NO IMPROVEMENT. THAT WAS CLEAR. BUT I DO BELIEVE THAT SHE GOT SOME BENEFIT FROM THE PERCUTANEOUS

DISCECTOMY. THAT HELPED FOR A CONSIDERABLE AMOUNT OF TIME.
Q. IS IT UNUSUAL, DOCTOR, THAT YOU HAVE A -- A PATIENT THAT DOESN'T RESPOND AT ALL TO THE TREATMENT PROTOCOL THAT YOU HAVE PRESCRIBED?
A. NO, IT'S VERY VARIABLE. ARE YOU TALKING ABOUT THE EPIDURAL INJECTIONS OR ABOUT THE PERCUTANEOUS DISCECTOMY?
Q. BOTH.
A. THE EPIDURAL INJECTIONS ARE VARIABLE. WE HAVE PATIENTS THEY GET NO RELIEF TO PATIENTS THAT GET LONG-TERM RELIEF.
MOST PATIENTS ARE IN THE MIDDLE AND GET RELIEF FROM ANYWHERE FROM A MONTH TO A YEAR AND A HALF.
Q. WELL, EVERYTHING THAT YOU PRESCRIBED FOR MRS. KOSIAREK HAD NO HELP FOR HER, CORRECT?
A. NO, I THINK THAT THE -- THE EPIDURALS FOR SURE DID NOT HELP. I THINK SHE GOT SOME RELIEF FOR A WHILE FROM THE PERCUTANEOUS DISCECTOMY. THAT HELPED FOR A CONSIDERABLE AMOUNT OF TIME.
Q. OKAY. BUT WHAT ABOUT THE PHYSICAL THERAPY, THE MEDICATIONS, THE ADVICE TO HER WITH RESPECT TO EXERCISE? NONE OF THAT HELPED HER?

0237

A. WELL, YOU HAVE TO DIFFERENTIATE WHAT YOU'RE TREATING. THE PHYSICAL THERAPY DOESN'T HELP FOR THE NERVE PAIN. IT REALLY HELPS FOR THE MUSCLE PAIN, THE SPASM IN THE BACK.
AND THAT CLEARLY HELPS AND THAT ALWAYS HELPS WITH PATIENTS. AND THE ANTIINFLAMMATORIES WORK AS WELL.
AND THE SURGERY, THE SURGERY IS REALLY -- YOU KNOW, FUSION IS ACTUALLY FOR BOTH BACK, BUT YOU KNOW IT -- FUSION DOESN'T TAKE CARE OF THE MUSCLE PAIN IN THE BACK. THAT'S TOTALLY SEPARATE FROM THE NERVE PAIN IN THE BACK GOING DOWN TO YOUR LEG.
THEY ARE TWO DIFFERENT TREATMENTS AND TWO SETS OF CIRCUMSTANCES.
Q. LET'S BREAK IT DOWN. YOU WERE HER PAIN MANAGEMENT DOCTOR, CORRECT?
A. CORRECT.
Q. DID ANY OF THE TREATMENTS YOU PRESCRIBED ALLEVIATE HER PAIN?
A. I THINK THAT --
THE COURT: THIS WAS ASKED. THIS WAS ASKED AND ANSWERED.
MR. PLATTA: THANK YOU, YOUR HONOR.
THE COURT: I DON'T WANT TO RUSH YOU, COUNSEL, BUT I THINK THERE'S A CHANCE WE CAN FINISH TODAY WITH THIS WITNESS.
NOT BECAUSE I'M LOOKING AT THE CLOCK, BECAUSE I'M

0238

EVALUATING WHAT I'M HEARING, HOW FRESH IT IS AND WHETHER IT WAS ASKED ON --
Q. ARE YOU FAMILIAR --
THE COURT: WE'VE GOTTEN TO IT. GO AHEAD.
Q. ARE YOU FAMILIAR WITH A CONCEPT KNOWN AS SECONDARY GAIN?

A. YES.
Q. THEY TEACH IT IN MEDICAL SCHOOL, CORRECT?
A. YES.
Q. CAN YOU EXPLAIN TO THE JURY WHAT SECONDARY GAIN IS?
MR. PLATTA: OBJECTION, YOUR HONOR. OBJECTION.
THE COURT: JUST COME UP HERE. I DON'T KNOW WHAT THIS IS. I HATE TO GO BACK TO MEDICAL SCHOOL THIS LATE IN THE AFTERNOON, BUT I JUST WANTED TO HEAR THIS ANSWER.
(WHEREUPON, A SIDE-BAR DISCUSSION WAS HELD.)
THE COURT: THANKS FOR YOUR PATIENCE, EVERYBODY.
Q. WOULD YOU CONSIDER, DOCTOR, ANY OF THE COMPLAINTS THAT WERE MADE BY MRS. KOSIAREK TO BE SUBJECTIVE?
A. OH, ABSOLUTELY. ABSOLUTELY. PAIN IS SUBJECTIVE.
Q. BY "SUBJECTIVE", THAT MEANS THAT THE PATIENT IS REPORTING THAT TO YOU BUT YOU CANNOT VERIFY IT, IS THAT CORRECT?
A. CORRECT.
Q. NOW, IN TERMS OF THE DIFFERENCE BETWEEN WHAT SHE WAS COMPLAINING OF AND THE OBJECTIVE SIGNS THAT YOU FOUND, THERE WAS A WIDE CHASM BETWEEN WHAT SHE WAS COMPLAINING OF AND WHAT YOUR

0239

FINDINGS WERE, CORRECT?
A. I'M NOT SURE WHAT YOU MEAN.
Q. WAS THERE ANY DIFFERENCE BETWEEN WHAT SHE WAS COMPLAINING TO YOU ABOUT AND WHAT YOU FOUND TO BE AN OBJECTIVE SIGN?
A. NO, THAT'S -- I JUST DON'T UNDERSTAND WHAT YOU ARE ASKING. COULD YOU BE SPECIFIC ABOUT WHAT YOU ARE TALKING ABOUT? WHAT YOU'RE ASKING ME IN TERMS OF WHAT THIS --
Q. YOU SAW HER TEN TIMES?
A. CORRECT.
Q. AND DURING THOSE TEN VISITS SHE COMPLAINED TO YOU ABOUT MANY THINGS, CORRECT?
A. WELL, WE CAN STICK WITH THE LUMBAR SPINE. SHE HAD -- I MEAN --
Q. IS THAT THE ONLY THING THAT SHE COMPLAINED TO YOU ABOUT?
THE COURT: WE'VE HEARD A LOT --
MR. PLATTA: OBJECTION. OBJECTION.
THE COURT: WE'VE HEARD A LOT OF THIS. YOU CAN PURSUE A LITTLE BIT FOR ANOTHER MINUTE FOR LUMBAR SPINE, SUBJECTIVE VERSUS OBJECTIVE. NOT SURE YOU SHOULD USE THE WORDS "WIDE CHASM", BUT YOU CAN USE SUBJECTIVE AND OBJECTIVE ABOUT HER COMPLAINTS ON THE LUMBAR SPINE, AND I THINK WE OUGHT TO PROBABLY WRAP UP CROSS. GO AHEAD.
Q. CAN YOU ANSWER THAT QUESTION, DOCTOR?

0240

A. I CAN'T ANSWER THE QUESTION THE WAY YOU ASKED IT.
Q. OKAY. WAS THERE ANY DIFFERENCE BETWEEN WHAT SHE REPORTED TO YOU AND WHAT YOU FOUND ON THOSE TEN VISITS?
A. IF YOU COULD GIVE ME SOMETHING SPECIFIC THAT YOU'RE POINTING TO. BECAUSE, YOU KNOW, I CAN GO THROUGH MY PHYSICAL EXAMINATION AND GO -- ONE BY ONE, IF YOU WOULD LIKE.
Q. WELL --
A. BUT --

Q. LET'S GO BACK TO THE FIRST ASSESSMENT HERE.
A. OKAY.
Q. LOW BACK PAIN, RIGHT HIP PAIN, RIGHT ELBOW PAIN.
A. OKAY.
Q. AND YOU SAID -- YOU SAID THAT IN DECEMBER -- YOU SAID THAT IN NOVEMBER. WAS THAT WHAT SHE WAS COMPLAINING TO YOU ABOUT, JUST THAT?
A. YES, BUT THE PHYSICAL EXAMINATION WAS NOTEWORTHY FOR SIGNIFICANT ABNORMALITIES OF THE RIGHT LOWER EXTREMITY, SENSORY ABNORMALITIES WHICH WERE QUITE PROMINENT.
Q. WHICH WAS RELATED TO WHAT? THE BACK OR THE HIP?
A. THE BACK. THE BACK.
Q. HAD NOTHING TO DO WITH THE KNEE?
A. I DO NOT BELIEVE -- I BELIEVE IT WAS RADIATING PAIN FROM THE BACK.
Q. OKAY.
MR. SCAHILL: I HAVE NOTHING FURTHER, JUDGE.

0241

THE COURT: ALL RIGHT. DO YOU HAVE ANY REDIRECT? OKAY. GO AHEAD.
MR. PLATTA: THANK YOU.
REDIRECT EXAMINATION
BY MR. PLATTA:
Q. DOCTOR, I WANT YOU TO ASSUME FOR PURPOSES OF THIS QUESTION THAT MRS. KOSIAREK IN THE HOSPITAL RECEIVED FOUR MILLIGRAMS OF MOTRIN (SIC) IN THE HOSPITAL AND ON DISCHARGE SHE RECEIVED VICODIN.
PRETTY MUCH SHE WAS TAKING VICODIN UNTIL SHE SAW YOU. WOULD THERE BE ANY DIFFERENCE IN HER COMPLAINTS ABOUT DIFFERENT PARTS OF HER BODY?
FOR EXAMPLE, CAN SHE FEEL LESSENED PAIN TO HER NECK AND TO HER BACK OR TO ANY OTHER PORTION OF THE BODY THAT WOULD BE -- THAT WOULD BE ALLEVIATED BY THIS MEDICATION?
A. I CAN SAY PAIN CAN BE ALLEVIATED BY VICODIN, ABSOLUTELY.
Q. WHAT ABOUT MOTRIN?
A. MOTRIN AS WELL.
Q. WHICH ONE IS STRONGER?
A. VICODIN.
Q. OKAY. AND DO YOU KNOW THAT SHE WAS TAKING VICODIN FOR 48 HOURS -- AT LEAST 48 HOURS BEFORE SHE SAW YOU DURING THOSE TWO DAYS BEFORE THE HOSPITAL DISCHARGE AND YOUR FIRST VISIT?
DO YOU KNOW THAT?

0242

A. I KNOW SHE HAD TAKEN VICODIN, BUT, YOU KNOW, I DON'T KNOW WHAT THE DOSAGE.
Q. AND MY LAST QUESTION: LET'S ASSUME THAT SHE HAS EVERY SINGLE CONDITION THAT MR. SCAHILL WANTS HER TO HAVE.
MR. SCAHILL: OBJECTION, YOUR HONOR.
THE COURT: I DON'T WANT TO PHRASE IT THAT WAY.
MR. PLATTA: FAIR ENOUGH.
THE COURT: IT'S THE LAST QUESTION. CLEAN IT UP.
Q. LET'S SAY THAT SHE HAS EVERY CONDITION THAT MR. SCAHILL MENTIONED IN HER SPINE. YOU ARE HER SON'S DOCTOR,

RIGHT? YOU TREATED HER SON?
A. BOTH OF THEM, CORRECT.
Q. BOTH OF THEM. AND SHE HAS ALL THESE CONDITIONS THAT SHE HAS. DID SHE EVER COME TO YOU WITH HER SONS TO SEEK HELP EVER?
THE COURT: DID SHE COME WHAT? I DIDN'T HEAR THE QUESTION.
Q. DID SHE EVER COME TO YOUR OFFICE WITH HER SONS EVER TO SAY: DOCTOR, YOU KNOW, I HAVE PAIN. I HAVE ALL THESE CONDITIONS. I HAVE PAIN. DID SHE, BEFORE THE ACCIDENT?
A. NO. BEFORE THE ACCIDENT, NO. SHE CAME AFTER THE ACCIDENT. I MEAN, THEY DRAGGED HER IN, YOU KNOW.
Q. AND YOU SAW HER SONS ON MORE THAN ONE OCCASION, RIGHT?
A. YES.
Q. AND, DOCTOR, YOU HAVE YOUR CHART WITH YOU TODAY,

0243

RIGHT?
A. YES.
Q. AND YOU HAVE YOUR BILLING RECORDS IN THERE?
A. YES.
Q. HOW MUCH ARE HER BILLING RECORDS RIGHT NOW?
MR. SCAHILL: OBJECTION, YOUR HONOR.
THE COURT: YOU SHOULD HAVE DONE THIS ON DIRECT.
MR. PLATTA: I WILL JUST MOVE THIS INTO EVIDENCE, YOUR HONOR, THE ENTIRE CHART.
THE COURT: LET'S NOT DO IT IN FRONT OF THE JURY. LET'S ADMIT HIS RECORD. ARE HIS RECORDS ADMITTED?
MR. PLATTA: I WOULD ASK THAT HIS CHART BE ENTIRELY ADMITTED, THE ONE HE BROUGHT TODAY.
MR. SCAHILL: I DIDN'T HAVE AN OPPORTUNITY TO LOOK AT IT.
THE COURT: I'LL DO THIS WITH THE LAWYERS, AND IF I DEEM IT TO COME IN, IT WILL COME IN. IF I DO, THE JURY WILL SEE IT. IF NOT, NOT. ANYTHING ELSE, COUNSEL?
MR. PLATTA: NO.
THE COURT: COUNSEL?
MR. SCAHILL: NO.
THE COURT: THANK YOU VERY MUCH. I KNOW YOU HAD TO WAIT A WHILE IN THE HALL. THE -- ALL RIGHT. THANKS FOR COMING IN.
THE WITNESS: OKAY. THANK YOU.

0244

(WITNESS EXCUSED.)
THE COURT: WE'RE GOING TO HAVE THE JURY START AT 9:30.
MR. PLATTA: THAT'S CORRECT.
THE COURT: THEY SHOULD COME NEXT DOOR. THE JURY WILL GO TO THE ROOM, THE BEAUTIFUL ROOM NEXT DOOR AT 9:30. WE'LL TRY TO GET OFF THE GROUND AS SOON AS WE CAN.
ALL RIGHT. THANK YOU VERY MUCH. DON'T DISCUSS THE CASE. DON'T RESEARCH IT OR READ A BLOG, FACEBOOK, WHATEVER.
THE COURT OFFICER: JURY EXITING.
(JURY EXITED.)

THE COURT: OKAY. I WANT TO GET EVERYONE OUT OF HERE AT 5:00. YOU KNOW, MY RULING STANDS ON THE -- ON THE CASES.

LET ME JUST ASK ONE THING. WAS IT MOTRIN OR MORPHINE?

MR. PLATTA: OH, MY GOODNESS. MORPHINE, YOUR HONOR.

THE COURT: MORPHINE.

MR. PLATTA: MORPHINE.

THE COURT: IT WAS MORPHINE.

MR. PLATTA: I -- I THINK I USED THE WORD, MOTRIN.

THE COURT: YOU CAN BRING IT UP WITH ANOTHER

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DOCTOR, BRING IT UP IN CLOSINGS.

MR. PLATTA: THANK YOU, YOUR HONOR, FOR POINTING IT OUT. I WAS RUSHING.

THE COURT: WE'RE GOING TO GET THE BILLING AND DECIDE WHETHER IT COMES IN OR NOT.

MR. PLATTA: SURE.

THE COURT: WE'LL DO THAT TOMORROW.

MR. PLATTA: SURE.

THE COURT: I'LL TAKE A LOOK AT IT WHEN I COME IN. IS THIS THE RECORDS RIGHT HERE?

MR. PLATTA: YES.

THE COURT: YOU KNOW WHAT, I'LL LEAVE THEM HERE. YOU HAVEN'T SEEN THEM, HAVE YOU, MR. SCAHILL?

MR. SCAHILL: NO, JUDGE. I'LL LOOK AT THEM IN THE MORNING.

THE COURT: LET ME LEAVE THEM IN THE WITNESS CHAIR SO WE KNOW, AND THEN I MAY GET IN EARLY. BUT THAT'S WHERE THEY ARE, ALL RIGHT? THANK YOU.

MR. PLATTA: THANK YOU, YOUR HONOR.

THE COURT: WE'RE DONE. THANKS.

(WHEREUPON, THE TRIAL WAS ADJOURNED TO THE 18TH DAY OF OCTOBER 2011 AT 9:30 A.M.)

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IT IS HEREBY CERTIFIED THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT OF THE PROCEEDINGS.

FRANCES ROSE ROYCE
SENIOR COURT REPORTER

FRANCESCA BUSH
SENIOR COURT REPORTER