SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS : CIVIL TERM : PART 88

- - - - - - - - - - - - - - - - - - - -X

ERIC ZELWIAN and ZULEMA ZELWIAN : INDEX NO.: 002179/2013

PLAINTIFFS :

- against - :

BATYA POLINSKI and AZIZ BASALELY :

DEFENDANTS : TRIAL

- - - - - - - - - - - - - - - - - - - -X

Kings County Supreme Court
Brooklyn, New York 11201
July 27, 2017

BEFORE: HONORABLE DAWN JIMINEZ-SALTA,
Presiding

APPEARANCES:

MARC D. CITRIN, ESQ.
Attorney for Plaintiffs
14 Mamaroneck Avenue
White Plains, New York 10601

PICCIANO & SCAHILL, P.C.
Attorney for Defendants
1065 Steward Avenue, Suite 210
Bethpage, New York 11714
BY: THOMAS R. CRAVEN, JR., ESQ.

JEANMARIE EPISCOPIA
SENIOR COURT REPORTER

THE COURT: Good morning everyone. Please be seated. Mr. Citrin, your next witness.

MR. CITRIN: Yes, your Honor. Thank you. The plaintiff calls Jerry Lubliner, M.D.

D R. J E R R Y L U B L I N E R, having been called as a witness by and on behalf of the Plaintiff, having first been duly sworn, was examined and testified as follows:

COURT CLERK: Please be seated. Give your name and address for the record.

THE WITNESS: Jerry Lubliner J E R R Y L U B E L I N E R 215 East 73rd Street, New York, New York 10021.

THE COURT: Thank you, Doctor. Please keep your voice up. You need to project out to the jury and you have some water there. If you need anything, just ask.

THE WITNESS: Thank you.

THE COURT: Counsel.

DIRECT EXAMINATION

BY MR. CITRIN:

Q. Good morning, Doctor.

A. Good morning.

Q. Are you a physician duly licensed to practice medicine?

A. I am.

Q. Could you let the Court know which jurisdiction you are licensed in and when you obtained those licenses?

A. I am licensed in New York. I have obtained that license in December of 1980. And I am licensed in New Jersey and California. And I retained those licenses in 1984.

Q. For the purpose of the jury and the Court, can you give us a little bit of your CV in terms of your educational background that lead you to medical practice?

A. Yes. I graduated Syracuse summa cum laude in 1976. That is the same year I started medical school here in New York at State University Downstate campus in Brooklyn. I graduated in June of '80. In July of 80, I started a one year surgical internship at Beth Israel Hospital in Manhattan graduating June of '82. In July of '82, I started a four-year residency program in orthopedic surgery at NYU Hospital for Joint Diseases. I graduated June of '85.

In July of '85, I travelled to Canada where I did post-graduate studies called a fellowship. There I studied with the team doctor for the Toronto Blue Jays and the team doctor for the Canadian olympic team. I became studying orthopedics and microsurgery.

I came back to New York in 1986 to start a private practice. In 1986 I was allowed to take part in one of the tests to become board certified. It is a written test. I

passed. In 1987 I was allowed to take part two of the test to become board certified. That is an oral exam. I passed that.

After meeting all the requirements, one of which is being in practice for two years, I was board certified in 1988. In 2008 the boards came out with a certification in sports medicine. So I am certified in orthopedic surgery and in sports medicine.

Q. Now, at the present time, are you in private practice?

A. I am.

Q. Does the practice have a name?

A. It is called New York Orthopedic and Sports Medicine.

Q. Where is your practice located?

A. On 215 East 73rd Street.

Q. Now, with respect to your current practice, could you describe for the jury, first of all, what is orthopedics?

A. Orthopedics is the branch of medicine that deals with the spine, the neck and the back and deals with the extremities, the arms and the legs. We deal with broken bones called fractures, herniated discs in the back and we deal with meniscal tears, ruptured ligaments, arthritis, tumors. Any problem you have in the spine, the arms or the

legs, you come to the orthopedic surgeon.

Q. And at the present time through that practice, you mentioned you treat patients?

A. Of course.

Q. And also with respect to your present practice, you are retained as an expert with respect to orthopedics?

A. Yes.

Q. Can you just define for us what percentage of your practice is treating patients or clinical or what percentage of your practice is expert?

A. About 85 to 90 percent is treating and clinical and about ten to 15 percent is for examining patients who have cases such as this.

Q. Have you testified in court in the past?

A. Yes.

Q. How often have you testified say in an annual basis in court in the past?

A. Six to ten times.

Q. And with respect to the testimony that you give, do you testify after being retained as an expert on behalf of both plaintiffs and defendants?

A. Yes.

Q. Okay, could you tell the jury what percentage of your practice you are retained by plaintiffs attorneys like me and what percentage of your practice you might be

retained by defense attorneys such as Mr. Craven?

A. If you count my own patients which are plaintiffs it is about 60 percent plaintiff's, 40 percent defense.

MR. CITRIN: Your Honor, at this time point in time I would ask the Court to certify Dr. Jerry Lubliner as an expert witness in this matter with respect to orthopedic surgery.

MR. CRAVEN: No objection.

THE COURT: Okay, so certified.

Q. All right, now Dr. Lubliner, did there come a time when the lawyer I am working for, Charles Hammer, requested that you conduct an evaluation of Mr. Zelwian?

A. Yes.

Q. And did he come to your office on a specific date?

A. Yes, he came to my office June 2, 2015.

Q. After appearing at your office, did you conduct an examination of Mr. Zelwian?

A. Yes.

Q. What parts of his body did you examine?

A. I examined his neck, his arms, his lower back. Both legs. Both hips. Both knees. Both thighs.

Q. And following that examination, did you review records with respect to Mr. Zelwian's treatment?

A. Oh, yes, a lot of records.

Q. And following your review of records, did you

conduct any type of testing?

A. Yes, I took x-rays of the patient.

Q. What parts of the body did you x-ray?

A. His lower back and his knees.

Q. Now Doctor, with respect to the records you reviewed, we are go to doing this chronologically, starting with an MRI that was taken on January 3rd of 2011, did you ever have a chance to review that?

A. I did.

Q. And where was that MRI taken?

A. MRI was valley Hospital.

Q. Okay, that is in New Jersey, right?

A. Yes.

Q. And with respect to that particular MRI, first of all, let me ask you one question. Were you advised of the date of the accident that is the subject of this lawsuit?

A. Of course.

Q. What was the date of the accident?

A. The date of the accident was July 15, 2010.

Q. And were you advised of whether Mr. Zelwian had any agreement between July 15, 2010 and the date the MRI was done in January 2011?

A. Yes.

Q. What kind of treatment did he have?

A. The day after the accident, he was seen by a

chiropractor by the name of Danny Altman and he complained of pain in his neck, his back, his left arm, his hips and his knees.

Q. That was the day after the accident?

A. Day after the accident.

Q. Did he have treatment with Dr. Altman, the chiropractor, between July 16th, the day after the accident and the day of the this MRI?

A. Yes.

Q. Are you aware of how many treatments he had?

A. About a dozen visits.

Q. That would be through July into December?

A. Yes.

Q. Then into January?

MR. CRAVEN: I am sorry, your Honor, I didn't catch that.

(The requested portion was read by the court reporter.)

Q. Between the time of the accident and the day of the MRI, did he see any other physicians?

A. Yes.

Q. Who else did he see?

A. Dr. Klempner, neurosurgeon.

Q. That is Dr. Klempner located in New Jersey?

A. Yes.

Q. And was it Dr. Klempner who ordered the MRI?

A. Yes.

Q. Do you know when the first visit with Dr. Klempner was?

A. I know it was December 2010. It was December 16th.

Q. And Dr. Klempner ordered the MRI?

A. Yes.

Q. The MRI was of what part of his body?

A. Lumbar spine.

Q. Let's talk a little bit about the MRI. First of all, could you explain to the jury what part of the body was being examined by this MRI?

A. It was the lower spine called the lumbar spine.

Q. And could you explain to the jury what an MRI is as compared to say an x-ray?

A. Okay, we will do the x-ray first because it historically came before the MRI. An x-ray is an x-ray beam that goes through your body that gets displaced by calcium, which is in bone and by metal. So it is very good at seeing bone, which we call hard tissue. An MRI is a magnetic beam that bounces off the water molecules. All living tissue has water, so it can see not only hard tissue but also soft tissue.

So, if you have a spine which is a combination of

bone and soft tissue, discs and nerves and ligaments, the MRI gives you more information. So an x-ray and a CAT scan is for the bone, hard tissue, and the MRI is basically for soft tissue although it always sees bone.

Q. And now with respect to Dr. Klempner's scheduling this MRI, was that based upon anything in the records the patient told him?

A. Because he had pain in his back. He was getting worse since the accident.

Q. So the MRI was done in the hospital and what were the findings in the MRI?

A. The MRI showed that and I have a model to show the jury.

MR. CITRIN: May the doctor use a model, your Honor?

THE COURT: Any objection?

MR. CRAVEN: No objection.

A. Can everybody see? So the MRI showed that there was an L3-4, a disc bulge and superimposed on this disc bulge was a disc herniation.

Q. What does that mean?

A. So this is an anatomically correct model of the spine. And this is your sacrum, which you are sitting on. You can understand if you put your hand behind your back above your buttock, this is what you are feeling. And there

is five bones, the vertebral bodies. The L1,2,3,4,5.

Now, the spine has the job of giving you rigidity, so you can stand up and not fall over. It also houses the spinal cord and spinal sac. These are very important because all nerve function originates from the spinal cord. It is connected to the brain, goes all the way down. So the back encompasses this whole cord with bone, so you won't injure it. It is so important it doesn't want to be injured. You cannot move bone.

So in between each bone, the body has areas of movement called disc spaces. The disc space is composed of two structures. Inside is the nucleus, which has the consistency of the vanilla filling of an oreo cookie. It is a little firm, but you can squeeze it and the outside is called the annulus.

Now, if you look under the microscope, the annulus looks like a weave, like a bag you would buy in the Caribbean. When you weave it together and it make those weaves. And the annulus, which is made of different properties, holds the nucleus in and everything moves around. So when you move side to side, forward and back, you are moving these areas. The nucleus moves within the annulus. The annulus is supposed to keep the nucleus in place. Through age and through trauma, the annulus opens up sometimes and let's the nucleus through. And that is called

a herniation. If the disc moves and pushes on the annulus, but doesn't come through, that is called a bulge.

Why is this important? Because behind the discs are the nerves. And you see I can't even stick my finger in because there is not a lot of space. The average disc herniations is the size of a pencil eraser, which is not that big, but it hurts because it can touch a nerve.

You might have heard the term pinched nerve. Anyway, when you touch a knife with a disc, that becomes a pinched nerve. That can give you pain. So what they found is two things, at L3-4, which is right where my finger is, they find the bulge, but superimposed on the bulge they found a herniation. That part of the disc came through the annulus. They went to L3-4 and they found the same thing. A disc bulge and a secondary herniation, which means the bulge went on to herniation in two areas. And at L5-S1, which is down here, they found a bulge with some arthritis. Okay, so that is what they found on this MRI.

Q. Now, you do mention the term arthritis, what is arthritis?

A. Okay, so gravity hits the bones every time you walk, you stand up and over time it makes, it puts pressure on the disc spaces. And over time, sometimes the disc spaces get closer to each other. When this happens, they rub against each other and the body responds by making more

bone. And when you see that more bone on the x-ray, that is called arthritis.

Q. Now, are you familiar with the term degeneration?

A. Of course.

Q. Can you tell us what is degeneration as it relates to say, let's start with the lumbar spine?

A. Okay. The degeneration means that the annulus gets frayed. Just like a shirt that you wear and wear and wash and wash and wash and wear. Degeneration also means that you have arthritis and arthritis is what I just said, extra bone in the back. Anywhere you have extra bone you have arthritis.

Q. This is an MRI of a 53-year-old man at the time the MRI was taken, is it unusual to find degeneration in a 53-year-old man?

A. Not at all, but this --

MR. CRAVEN: Objection, your Honor. It goes beyond the scope of the question. He answered the question.

THE COURT: I will sustain. Strike it. Ask the question again. Just get the answer to the question.

Q. And with respect to the degeneration, does degeneration definitely cause pain in the patient?

MR. CRAVEN: Objection, your Honor. Leading

question.

THE COURT: Rephrase, please.

Q. What symptoms would one have with respect to degeneration in the lumbar spine?

A. Well, you can have no symptoms whatsoever. In fact, over the age of 50, degeneration is common because if you look at people who have MRIs who don't have pain in a specific area, you will see degeneration many, many times.

It is at age 40 you will see degeneration at 40 percent of patients. At age 50, over 50 percent of patients you will see degeneration. Most of it is asymptomatic, meaning the patient is feeling no pain. Eventually if you get tons of arthritis, you will get pain, but you can have arthritis and not have any pain whatsoever.

You cannot tell from a film how much pain a patient is having. Okay, you could suspect that the more arthritis they have the more pain they have, but you can't tell for sure because everybody is different and at age 50, you will expect degeneration.

Q. So now, following the MRI, did the plaintiff receive further treatment?

A. Well, he had a CAT scan and then he had surgery.

Q. Okay, let's talk about that. Where was the surgery done?

A. The surgery was done at Valley Hospital.

Q. Who was the surgeon?

A. The surgery done at the Valley Hospital, the surgeon was William Klempner, July 14th 2011.

Q. What type of surgery was done on the plaintiff by Dr. Klempner?

A. He had what is called a multilevel -- I am reading from the operative report in evidence. A multilevel lumbar laminectomy decompression at L3, L4, L5, S1 nerve roots all under magnification using microsurgical techniques.

Q. So, can you explain in lay terms what that procedure involved?

THE WITNESS: May I step down?

THE COURT: Yes, you may.

Q. So, if I am looking at you from the front, this is the part of the spine I see and this is the vertebral bodies. I am looking from the back. It makes a circle around the spinal cord. So in order to get to the nerves to decompress them, meaning take away the disc problem, you have to go through bone. Where my finger is, it is called the lamina of the bone. This is the anatomic portion of the bone called the lamina. What he did was he removed the lamina with the spinous process and L3, L4, L5 to gain access to the spinal cord and the spinal sacs to gain access to the nerve roots that come out at each level and he took away the herniated disc and some arthritis in order to

decrease the pressure on the nerves. And later you see an x-ray that shows that.

Q. Now, I would like you to direct your attention, specifically, to Dr. Klempner's surgical report. The operative report. And I am going to take you down to the bottom of the first page and there is a sentence which I would like you to explain to the jury. The sentence is at L3-4, do you see that?

A. Yes.

Q. "There was a possible herniated disc. This turned out to be only a large disc ridge complex", what does that mean?

A. So, on the MRI they had evidence of a herniated disc and what he says is it was a calcified disc. That a disc ridge complex means that the disc herniation was calcified and turned to bone.

Q. Now, going up to the preoperative and postoperative diagnosis, they appear to be the same, can you read them and then describe what that is?

A. Pre-op diagnose is lumbar spondylosis and lumbar radiculopathy. Post-op diagnosis is lumbar spondylosis and lumbar radiculopathy.

Q. And could you explain to the jury what the terminology is?

A. Lumbar spondylosis means arthritis of the spine and

lumbar radiculopathy means pinched nerves.

Q. Do the pinched nerves have symptomatology?

A. Yes.

Q. Thank you. What are those?

A. A pinched nerves means you have pain that comes from the lower back that radiates down the leg.

Q. Now, following this particular surgery, did Mr. Zelwian receive additional care with respect to his spine?

A. Yes, he had additional care with Dr. Klempner for his spine. He also had treatment with Dr. Felix Rogue.

Q. What kind of treatment, I think it is Roque, Dr. Roque testified Tuesday?

A. Okay.

Q. What kind of treatment did he have?

A. Injections.

Q. Okay?

A. He had epidural steroid injections and a medial branch block.

Q. This was after the surgery?

A. Correct.

Q. Okay, what is the purpose of administering those injections?

A. He still had pain after surgery and the injections, the epidural steroid injections is a cortisone injection right into the spine and you are trying to decrease

swelling, okay, because swelling takes up space and the whole idea is to reduce the space pinching of the spine. You can pinch a spine with a disc if after a while it gets calcified. You can pinch a spine with arthritis. You can pinch a spine with ligaments that get tight.

So, sometimes injections will help to decrease the swelling, which will decrease the pinching.

Q. With respect to the lumbar spine treatment that the plaintiff had, I am going to ask you what is called a hypothetical question. I am going to ask you to assume facts that have been adduced, as they say, at trial. There has been testimony in evidence.

I would like you to assume that the plaintiff was a 53-year-old owner of a business back in July of 2010. I would like you to assume that was a chandelier business. And he was the long term owner of that business and on July 15, 2010, he found himself on the Harlem River Drive in Manhattan and the driver of a van that was involved in an accident.

I would like you to assume that the accident involved five vehicles. And there has been testimony that the accident occurred as follows: All the vehicles were in the same lane, the left lane. And it was, essentially, a chain reaction or domino-type of accident where the vehicle in the back struck the vehicle immediately in front of it

heavily pushing that vehicle into the vehicle in front of that, heavily pushing that vehicle into the plaintiff's van. Pushing plaintiff's van into a livery cab that ultimately, for whatever reason, left the scene.

I would like to you assume that the plaintiff described the two impacts as heavy. I would like to you further assume that the plaintiff described, as a result of the first impact, his body, his left arm, hit the window. His knee struck the dashboard. His right knee.

I would like you to further assume that after the second impact his left arm struck the steering wheel -- sorry, between the first and second impact as he tried to stop his van from being pushed forward into the car in front he slammed on the brakes and felt a pop in his knee.

I would like you to assume the attempt to stop the vehicle was unsuccessful and he hit the back of the livery vehicle and as a result of that, his left arm struck the steering wheel.

I would like you to further assume that the plaintiff did not go to the hospital after the accident, but went home later that evening and I would like you to assume that the following day he went to see a chiropractor who you mentioned, Danny Altman, that the plaintiff testified that he had a substantial amount of treatment due to the pain he complained about which were to his neck, to his back and to

his right knee over the course of the next several months.

I would like you to further assume that some time in December with his visits to the chiropractor and his pain increasing he went to see Dr. Klempner and as you say, Dr. Klempner as you aware from having testified, ordered an MRI in January of 2011 and he underwent a laminectomy in July 2011. He had further treatment to his back by way of injections as you described. He had further treatment in terms of pain medication over time, that he saw Dr. Roque for pain medication through 2011 and that he returned to see Dr. Roque for a additional pain treatment in 2013. And that he continued, he came back to see Dr. Roque again, in early 2017 and is continuing to see Dr. Roque for pain medication.

I would like you to consider the examination that you did, I would like you to further consider that with respect to prior medical history the plaintiff testified that he had no prior complaints or treatment with respect to his low back, his right knee and his left hip and now we are just focusing on the back, but I don't want to ask this question more than once and I will refer to it.

Based upon your review of the records, based upon your examination, do you have an opinion based upon the history I gave you, do you have an opinion as to whether the surgery to the back and the complaints the plaintiff made prior to surgery and after surgery are causally related to

the accident I described to you that occurred on July 15, 2010?

MR. CRAVEN: Objection, your Honor. Beyond the scope of his report. May we approach?

THE COURT: The report or 3101(d) I have the report.

MR. CRAVEN: The report.

THE COURT: Please approach.

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

THE COURT: I am overruling the objection and you can answer.

Q. So, Doctor, just briefly without going through that whole hypothetical again, do you have an opinion as to whether the complaints of the plaintiff, the symptoms he suffered with respect to his lower back, the surgery he underwent and the post surgical care was related to the accident?

A. I do.

Q. And what is your opinion, Doctor?

A. It is related to the accident.

Q. And could you explain to the jury how you reached that conclusion?

A. A couple of things. Number one, he had no history of any back pain before this accident. Never saw a doctor

for back pain. Number two, if you look at the MRI report, it does show evidence that he had some arthritis, but he had superimposed herniated discs at various levels. That means the baseline was the arthritis and the disc bulge and then superimposed in addition it says, there was a left paracentral herniated disc on L4-5. So that means that it took the basic body parts and you can see that it changed.

Now, when you are 53-years old and you have an accident, you are going to have more damage than if you are 23-years old and you sustain the same forces because the musculature and the body can withstand more force at this time. So based on the fact of the history, based on the fact that there were superimposed disc herniations, I feel it was related to the accident.

Q. Now, do you hold that opinion with a reasonable degree of medical certainty?

A. Of course.

Q. Now, with respect to your evaluation of the plaintiff, you saw him in June of 2015; is that correct?

A. Correct.

Q. All right, based upon your evaluation of the plaintiff almost five years after the accident, do you have an opinion with respect to any permanency relating to the back that resulted from the accident of July 2010?

A. Yes.

Q. Okay and what is your opinion, sir?

A. Well, in the exam that I made on the patient of that date he had loss of range of motion and he had pain in his back. It is five years after the accident and three-and-a-half years after his surgery, four years after surgery, and I felt that would be permanent because usually we wait a year after the surgery to make a determination for permanency, so when a doctor looks at a patient to predict what the medical basis is, if they are going to have permanent impairment, we wait a year after the surgery and I saw him four years after.

Q. So, Doctor, do you hold that opinion with a reasonable degree of medical certainty?

A. Yes, I do.

Q. So just to wrap up the back, is it your opinion that the accident was the competent producing cause of the injuries you found?

A. Yes.

Q. You hold that opinion with a reasonable degree of medical certainty?

A. Yes.

Q. As it relates to the back?

A. Correct.

Q. All right, now, in chronological order, I would like to next move on to the left hip.

Did you continue to review records relating to the treatment of the plaintiff's left hip?

A. Yes.

Q. And with respect to those particular records, did you have the opportunity to review the Valley Hospital surgical record?

A. I did.

Q. And other than the surgical record, did you have the opportunity to review the intake notes by the surgeon Dr. Joseph Pizzurro?

A. I did.

Q. So with respect to the admission note, could you relate to us what the history, the pertinent history, of the physical findings were noted in the history note from Valley Hospital, what the date was and who made those notes?

A. You mean the history for the surgery?

Q. Yes.

A. I don't have that particular note in front of me.

MR. CRAVEN: Your Honor, I object. Can we approach?

THE COURT: Yes.

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

THE COURT: Was there an objection?

MR. CRAVEN: Yes, your Honor.

THE COURT: Okay, so that is sustained.

MR. CRAVEN: Thank you.

Q. Let's go on to the operative report which you do have. Who was the surgeon and when was the operation done?

A. The surgeon was Joseph Pizzurro and the operation was done December 19th 2011.

Q. And what type of surgery was it?

A. Total hip replacement left.

Q. Now, could you explain to the jury what a total hip replacement is?

A. Total hip is when you take out bone on both sides of the joint and replace it with metal on one side and plastic on the other. In this particular case, it was a non-cemented total hip, which means no cement was used so the bone grows into the metal. So you have metal on the cup, metal on the stem and in between is a high density polypropylene insert to where movement occurs.

This is when the doctor feels that the patient won't respond to medications or injections.

Q. Now, was there any diagnostic test that you reviewed before the surgery was done in December of 2011?

A. Yes.

Q. Okay what was those diagnostic tests?

A. He had x-rays taken at Valley Hospital in December of 2010, December 18th, 2010, showing osteoarthritis of both

hips. Left greater than right.

Q. That would have been five months after the accident?

A. Correct.

Q. Now, with respect to the surgery you describe, is that major surgery?

A. Yes.

Q. And are you able to determine from your records that you have how long he was in the hospital?

A. A few days after the surgery.

Q. And with respect to the surgical report, does it indicate that the doctor in making that hip replacement made various findings with respect to the original hip that was there?

A. Yes.

Q. What were the findings Dr. Pizzurro made with respect to the hip once he opened up the surgical area.

A. He found that advanced arthritis.

Q. Now, with respect to the surgery, approximately, how long did it take, if you are able to determine?

A. I am not able to determine.

Q. Are you aware if after the surgery based upon your review of the records, the plaintiff had post surgery --

MR. CRAVEN: Objection. It is a leading question.

Q. Did the plaintiff have post surgical care following the hip replacement?

A. Yes.

Q. What kind of post surgical care was administered to this plaintiff after the hip surgery?

A. Physical therapy and obviously he had medications for his pain.

MR. CRAVEN: Objection, your Honor, there is no basis for that.

THE COURT: I will sustain the commentary about obviously there were medications. It is stricken from the record. The jurors are to disregard.

MR. CRAVEN: Thank you.

Q. Now, based upon your review of the hospital record for the surgery of the left hip, based upon your review of -- did you have a chance to review the x-ray reports from December 2010?

A. Yes.

Q. Based upon the hypothetical question that I put to you which I am not going to repeat because I will never get it right and it is on the record, also based upon your examination of the plaintiff in June of 2015, do you have an opinion as to whether the surgery that was performed, that left hip replacement, was necessary and whether the accident -- well strike necessary. Whether the accident described

was the competent producing cause of the injury that required the surgery?

A. I do have an opinion.

Q. Okay, what is your opinion with respect to left hip surgery?

A. That he had arthritis that existed prior to the accident, okay and it was advanced, it just wasn't bothering him. The accident did not make the arthritis, the accident made the arthritis hurt, so he had surgery on that date in December of 2011. And maybe he would have had surgery on the hip without the accident at another date, but because of the accident, he had that operation in 2011. It exacerbated a previously asymptomatic condition to his hip. It did not create the arthritis.

Q. And in terms of, do you hold that opinion with a reasonable degree of medical certainty?

A. All my opinions I am giving today are within reasonable medical certainty.

Q. Now, I don't have to reask that hypothetical question, based upon your evaluation of him in June of 2015, so some four-and-a-half years after the surgery, do you have an opinion with respect to his condition as of that date as it relates to the left hip?

A. Yes.

Q. What is your opinion with respect to the condition

of the left hip?

A. I felt that his condition of his left hip was improved from surgery. That he had a pretty good result from the operation. He complained of the occasional pain, that was five out of ten, but when I saw him he didn't have that much pain in his left arm.

Q. Based upon your review of the reports and your evaluation of him, do you have an opinion to any prognosis as it relates to the left hip?

A. When I saw him I thought he had a good result from the total hip replacement.

Q. And my last question with respect to the left hip, did you find, do you believe, that the accident was the competent producing cause of the need for surgery for the left hip?

A. It was a competent producing cause, among others, for the need for surgery to his left hip.

Q. Is there any significance in the fact that prior to the surgery he had no left hip complaints and post surgery he did and there was an x-ray done six months after the accident with respect to the left hip?

A. Yes. You see, when you have a potential problem sometimes you need an event to cause --

MR. CRAVEN: Objection, your Honor.

THE COURT: I am going to sustain the

objection. The answer is stricken. That last portion of the answer is stricken. The first part of the answer to the question that was presented to the witness and the rest of it was not necessary. You can continue, counsel.

MR. CRAVEN: Thank you.

Q. I think the question was competent producing cause.

THE COURT: He answered it. He answered it, so the rest of it is --

MR. CITRIN: I understand.

Q. DO you have any opinion that you hold with a reasonable degree of certainty with respect to any permanency regarding wither the low back or the left hip?

A. Repeat the question, please.

Q. Do you have an opinion that you hold with a reasonable degree of medical certainty as to whether there is any permanency with respect to the low back or left hip?

A. Yes, the back has permanent impairment. He has scarring. He has loss of range of motion. He has recurring pain. In regard to the left hip, he has scarring. His motion is equal to his other side and he wasn't in much pain the day I examined him.

Q. Now, I would like to turn to the next body part, that would be the right knee.

A. Okay.

Q. First of all, with respect to the right knee in terms of the records you reviewed, did you review the operative reports relating to the right knee?

A. Yes.

Q. Okay, when was the first operation on the right knee?

A. Did you say when or where?

Q. When.

A. The first operation to the right knee was on September 20 2012.

Q. And who performed that surgery?

A. Doctor Steve Kwak K W A K.

Q. Where was it performed?

A. At Englewood Hospital.

Q. What was the nature of the procedure that was performed on the right knee?

A. Right knee arthroscopy and partial medial meniscectomy. Chondroplasty, medial femoral condyle and lateral femoral condyle and removal of the loose bodies.

Q. That is great. Would you be able to narrow that down or at least interpret so that the jury could understand what you were referring to?

A. Yes. So the operative report indicated that the patient had significant grade three to four chondromalacia

of the medial femoral condyle on the weight bearing surface on the posterior aspect. So I brought here an anatomically correct model of the right knee and I would like to show it so the jury can understand the medical jargon.

MR. CRAVEN: No objection.

THE COURT: You can step down if you would like.

THE WITNESS: Thank you.

A. Okay, the knee is a hinge joint. It is where the thigh bone, called the femur and the calf bone, called the tibia meet. You also have an outside bone called the fibula that takes up some of the pressure. Movement in the knee are made basically extension which is making the knee straight and flexion. You can twist the knee a little bit, it doesn't twist that much because ligaments hold it into place. There are menisci, which is a special type of cartilage between the knee to protect the cartilage, articular cartilage, on the knee.

So the menisci help in moving of stress and he had a little tear in the menisci from the accident, but more importantly, he had a defect on the weight bearing portion of the medial femoral condyle. That means right here where my finger is because when I go like this and I stand, that is getting the weight from the floor. And what happens when you are like driving and the knee is flexed and you hit the

dashboard, the knee cap bangs against that area. That is the main damage that was found in the knee.

The covering of the bone is called articular surface. It is also called chondral surface. And chondromalacia is a disease of the chondral surface. And he had grade three to four, which means that the piece was basically knocked off and the loose bodies means that he just picked out the pieces that were knocked out to clean out the area.

So that was the major portion of the operation. In the operation they found a small cartilage tear, but that by itself was not the main portion.

Q. Okay, thank you.

Now, with respect to the right knee, the surgery was in September of 2012, right?

A. Correct.

Q. At Valley Hospital?

A. Yes.

Q. Were there diagnostic tests done before that?

A. Yes.

Q. What were the diagnostic tests done?

A. Holy Name Medical Center was where the first diagnostic test was done to the right knee.

Q. What kind of test was it, when was it done?

A. An MRI was done October 18, 2011.

Q. And was there a second diagnostic test with respect to the right knee?

A. Yes, another one was done after that surgery at Diagnostic Radiology Associates of Englewood Cliffs on 8/29/12.

Q. Now, assuming the facts in evidence that I previously stated and upon your review of the operative report as dictated by Dr. Kwak, that was surgery on September 20 of 2012, including the fact that, just to reiterate, the plaintiff did testify that he struck his right knee against the dashboard and that he did complain about his right knee the following day to the chiropractor, do you have an opinion that you hold with a reasonable degree of medical certainty, also based upon any evaluation you did when you examined him, as to whether the accident described was the competent producing cause of the injuries that Dr. Kwak found in the right knee at the time of surgery?

A. I do.

Q. What is that opinion, Doctor?

A. I feel that the accident of 2010 was the cause for the injuries that Dr. Kwak found at the time of surgery.

Q. And can you explain how you reached that conclusion?

A. Basically, the MRI also showed a defect of 12

millimeters, which is about half of an inch over the medial femoral condyle. Then when you hit the knee cap against the dashboard, that is the area it goes into. It also shows that he had some damage to the knee cap, but most of the damage was taken by the backbone of the femoral bone. And that was the main problem in the surgery.

Also, he had a small cartilage tear, but if you had a cartilage tear that is that small he would have gotten even better, you know what I mean. The reason he didn't get better was when you take out this tear from that cartilage the body tries to make more cartilage, but it is very hard for the body to make more cartilage. When it does, it makes scar tissue cartilage and that sometimes doesn't hold up. That is what happened in this case.

Q. Now, following the surgery on September 20 of 2012 or two years and two months after the accident, did Mr. Zelwian have further care to his right knee?

A. He had a total knee replacement on January 15th at the Valley Hospital done by Mark Pizzurro. Same last name, but different than the Joseph Pizzurro.

Q. You said there was a total knee replacement, have you reviewed the operative report regarding that?

A. Of course.

Q. And now, could you explain to the jury what is involved in a total knee replacement?

A. You take out bone and you put in metal and in between the metal, you put in a piece of plastic so the metal doesn't rub against metal. And that we have a picture of.

Q. Okay, we will get to the picture at the end of your testimony.

Is that major surgery?

A. Yes.

Q. That is not same day surgery?

A. No.

Q. How long did he stay in the hospital in Valley Hospital; if you know?

A. I don't know for sure.

Q. Following the surgery in Valley Hospital, well let me go back to the operative report. Were there findings made during the replacement of the knee by Dr. Mark Pizzurro with respect to the original knee and the condition of that knee that lead to the surgery?

A. Yes.

Q. Okay, can you explain that to the jury?

A. The right knee had severe degenerative disease with various deformity medial plateau and eburnated bone, complete loss of cartilage. Also of note, eburnated bone present in the distal aspect of the posterior aspect of the medial femoral chondyle.

Q. And with respect to the hip, would you translate that to the best of your ability in terms of those findings to the jury?

A. Okay, eburnated bone, we call a cue ball bone. Like a cue ball, it is very hard and very white. That is because there is no cartilage over it. All right, so all the stress goes to this area of the bone and because of all the stress, it becomes very hard, all right, and very white.

What is eburnated bone? It means it lost all its cartilage and is at the end stage of arthritis. He had it in two areas of the knee. One of those two areas was where he had the original surgery and the other one of those two areas is where that piece hit on the other side of the joint. So inside of the joint where weight bearing occurs, the bone was eburnated.

It also showed that he was in varus because he lost bone. What happens is if the knee is straight and you lose bone on the inside the knee is going to tilt in because of the lost space. That is varus. So he lost bone, he became eburnated and that is what he found in the surgery.

Q. Is that condition that the doctor found before doing the placement, does that cause pain in patients?

A. Yes.

Q. Does that condition, the varus, does that affect their walking?

A. Yes.

Q. How does it change their walking if you have varus?

A. When you have a varus knee the knee bulges out. Okay, so the whole idea of walking is no longer in effect because you are supposed to walk and the forces go to the middle of the knee, but if it is bowed out all the forces go to the inside of the knee, just on the natural way. So you are getting concentration of forces. So the arthritis causes collapse, collapse causes varus, varus causes stress and aggregation of the inside of the bone.

Q. Going back to the hypothetical question that I asked you, assuming all those facts into evidence, assuming the first surgery on the knee 2012 and the second total knee replacement in January of 2015 and the findings made by Dr. Kwak as a result of the first surgery in September of 2012 and Dr. Mark Pizzurro with respect to second surgery in January of 2015, do you have an opinion that you hold with a reasonable degree of medical certainty as to whether the accident described to you and what happened to the plaintiff's knee in the accident is a competent producing cause of the injuries they found which required the surgery you just told us about?

A. I do.

Q. What is your opinion?

A. I feel the accident caused the problem in his knee.

I feel that chondral defect on the bone or the weight bearing that was found on the arthroscopy and then because it didn't get better, created further destruction of the joint. He didn't have this destruction on the first operation. He didn't have all that arthritis on the MRI. The MRI of October of '11 did show a 12 millimeter loss of cartilage of the chondral surface of the weight bearing surface. I feel that was from the this accident because that is a common knee injury in an accident when a knee cap goes against the bone behind it.

Q. Do you hold that opinion with a reasonable degree of medical certainty?

A. I thought you weren't going to ask that.

Q. You are correct.

A. I hold the opinion with a reasonable degree of medical certainty.

Q. Now, you had a chance to examine him in June 2015, which was five months after the knee replacement, what did your examination reveal with respect to his right knee some five months after the knee replacement?

A. Not surprisingly, his right knee was very swollen and not surprisingly, he had a lot of loss of range of motion to his right knee, because it was five months later. I feel that over time this swelling would go down and the motion might increase because it wasn't a year later.

In fact, he was treated for the swelling by his treating doctor after surgery. His knee swelled up so much. He had a lot of swelling in the knee. When I saw him and I did only see him once, I can't say if he is swollen today. I would expect after five months that the swelling would get better because that is a lot, three centimeters.

Q. Is there a surgical scar?

A. Of course.

Q. Did you --

A. I measured it.

Q. You measured it?

A. 17 centimeters.

Q. We are still on the ancient English system, so 17 centimeters is?

A. Six and a half to seven inches.

Q. Thank you, Doctor. Now, with respect to the knee replacement that took place in January, 2015, do you have an opinion of whether there is any permanent effect on his knee or his ability to ambulate as far as the total replacement is concerned?

A. Yes.

Q. What is your opinion?

A. First of all, when you have a total knee replacement, automatically you have a permanent impairment because you are taking out normal bone and you are putting

in metal and plastic. Okay, so by definition you have at least 25 percent impairment of that extremity.

Then based on a year later, which I didn't do, you do a disability report for permanency. You check range of motion. You check swelling. You check strength. It could go up to 50, but at least by normal orthopedic standard the fact that he had that is a 25 percent loss.

Q. 25 percent loss, that 25 percent loss as a result of that surgery, is that a permanent loss?

A. Yes, but I am saying that the minimal loss is 25 percent. It could go up to 50 percent.

Q. With respect to that patient, you can testify it was at least 25 percent?

A. I can because that is the minimum you give automatically when you have a total knee replacement. Minimal is 25 percent.

Q. And when you say 25 percent loss, what functions in the knee are you referring to that suffer a 25 percent loss?

A. Well, you can't bend the knee more than 120 degrees after the total knee replacement. Usually normal is 140, okay. In his case it would be 130 because the other side was 130.

The way the components are made, they are only stable for 120 degrees. So automatically you lose motion by the fact you have a total knee. Number two, you have a

large scar, what does that mean, scar tissue afterwards. Scar tissue automatically means that you are going to have less strength after. You may get back to the 95 percent, you are not going to get 100 percent.

So the fact that you are invading the knee, the fact that you are removing the bone, the fact that you are putting in metal cement, polyethylene, gives you the reason for that.

Q. Let's move on to the next body part.

A. Okay.

Q. The final body part. With respect to the plaintiff's left arm, his elbow and his left wrist, did you review medical records that indicated a prior history?

A. Yes.

Q. Okay, let's start with the prior history of his left arm down to his wrist. What is the prior history, which means before the accident?

A. From what I reviewed in the medical record from the history and two previous surgeries to the left elbow and one previous surgery on the left wrist.

Q. So with respect to the left wrist, was there a -- left arm, was there a post-accident surgery?

A. Yes.

Q. Do you have that operative report?

A. I do.

Q. Okay, would you be able to just briefly pull it out?

A. I am looking at it.

Q. Where was the operation done and who did it?

A. Teaneck Surgical Center by Dr. Jen Lee.

Q. What was the nature of the procedure?

A. Okay, the nature of the procedure done on March 14, '13 was an excision of the olecranon bursa, medial epicondylectomy and fasciotomy, decompression of the ulnar nerve. Left wrist carpel tunnel release and tenosynovectomy of the flexor tendon.

Q. That surgery was done almost three years after the accident?

A. Correct.

Q. How does that surgery that was done on March 14, 2013 by Dr. Lee compare to the earlier surgeries that were done, was it the same procedure, the same type?

A. Same type of procedures. Redo.

Q. Now, I want you to focus on with respect to the hypothetical question that I asked. I did mention that left arm struck two things during the course of the accident, it struck the window or the left driver's door and it struck the steering wheel and based upon those specific facts, plus all the other things I asked you to consider, do you have an opinion as to whether the accident had any, first of all,

had any affect upon his left arm and left elbow and left wrist?

A. I don't know.

Q. I am sorry, you don't know?

A. I know he had an injury to it, but I don't know if the injury was enough to cause the need for more surgeries. He was the driver, which means when he hit his arm he hit it on the side of his arm?

MR. CRAVEN: Objection. He answered the question.

THE COURT: Objection sustained.

Q. Now, Doctor, I think you brought about five x-rays, if you can show the jury, of the back and the knee?

A. Yes.

Q. Would you be able to show the jury those x-rays now?

A. Sure.

MR. CITRIN: May we dim the lights, please?

A. Okay, is this is a view of the spine that I took in my office on June of '15. And you are looking at it like you are looking from the front and I just wanted to show you what laminectomy looks like. If you look above here, this is L1-2 you see all the white. You see the spinous process. You see the lamina. Then when you go down here, L 3-4-5, you see this black hole, so he is missing all this bone.

This is what a laminectomy looks like after the surgery.

Then we are going to look from the side view because doctors like to see more than one view. You don't notice it as much here, but down here he is missing some bone and you can see it at L4-5. I can see that right here that bone is missing.

I wanted to show you what a total knee looked like and this is his right knee and this is his left knee. This is the metal piece that you put on the end of the femoral bone. This is the metal piece that you put on top of the tibial bone. In between those two bones you see a little space and that is represented by the insert that goes into the bone. So there is less friction between the metal. You don't like to have, in most cases, metal touching metal.

And I am going to show you another view of the total knee replacement from the side. You can see how this fits over the bone. They had to cut bone to get this to fit and finally one last view, this is the left knee without the total knee replacement. Normal looking and this is the right knee with it.

MR. CITRIN: Thank you, Doctor.

Q. All right, now a few more questions.

You were able to quantify a minimal loss of use of 25 percent for the right knee based upon your examination and all the reports and everything I asked you to assume

into evidence, are you able to quantify whether the plaintiff suffered any limitation, permanent limitation, with respect to his lumbar spine as a result of the injuries and surgery in the accident treatment?

A. Yes, he has permanent limitation.

Q. Are you able to quantify that limitation?

MR. CRAVEN: Objection, your Honor. Beyond the scope of his report.

THE COURT: Okay, you indicated lumbar spine, is that what you said?

MR. CITRIN: Yes.

THE COURT: Okay, I am going to sustain the objection.

Q. Right hip. I am sorry, right knee, you were able to quantify, you say there is limitation with respect to the lumbar spine; is that a permanent limitation?

A. Yes.

Q. With respect to the hip, is there a limitation as a result of the hip replacement?

A. By definition a replacement is at least 25 percent.

Q. That would be both hip and the knee?

A. Yes. Any hip or knee or shoulder replacement, ankle replacement, is at least 25 percent.

Q. And a permanent limitation?

A. Yes.

MR. CITRIN: Thank you.

Q. Now, obviously you prepared for this testimony?

A. Of course.

Q. And you have taken time off from your practice to come here today to testify in front of the jury?

A. Yes.

Q. And based upon the time you may or may get out of here by lunch hour you have to come back this afternoon we will see, were you compensated for your time and your preparation with respect to this particular case?

A. Absolutely.

Q. The first question is with respect to your June 15th examination and the review of the records we talked about, did you receive a fee from Charlie Hammer's office, the lawyer I am trying this case for?

A. Yes.

Q. And how much did you receive in terms of the fee for your examination in June 2015?

A. $900.

Q. And with respect to today and any prep leading up to today, any time you may be spending this morning into the afternoon, have you received a fee from Charlie Hammer's office?

A. Yes.

Q. How much did you receive?

A. $7,500.

Q. That will cover the entire day if we go into the afternoon?

A. Yes.

Q. You received that fee in advance of your testimony?

A. Correct.

Q. Now, have you ever testified before on my behalf as the attorney?

A. No.

Q. Have you ever examined or testified on behalf of any clients of Charlie Hammer?

A. I examined a handful of cases, but never testified.

Q. Okay, in terms of the handful of cases, less than five?

A. That is what I am thinking.

Q. You weren't called to testify any at any of those cases?

A. Correct.

Q. Have you, the Picciano and Scahill, Tom's firm, have you ever done any work, just yes or no, for Picciano & Scahill?

A. Not to my knowledge.

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

THE COURT: Cross?

MR. CRAVEN: Yes, thank you.

CROSS EXAMINATION

BY MR. CRAVEN:

Q. Good afternoon, Doctor.

A. Yes, it is afternoon.

Q. Doctor, you testified on direct examination that you testified only about six or eight times a year; isn't that true?

A. Last couple of years six to eight times, correct.

Q. As early as last year you were testifying once a month though, correct?

A. Last year I think I did not do once a month.

Q. Do you recall giving testimony before Judge Martin Ritholtz in Supreme Queens on March 8th, 2016?

A. Yes, I remember going to see Judge ritholz.

Q. Do you recall giving testimony that you testified in court about once a month, that was last year?

A. I had previously testified about once a month, but lately it has been less.

Q. But that was just last year though, correct?

A. That was last year talking about the years before.

Q. I am not talking about that. I am asking you, currently, you testified on direct examination that you only testify six or eight times; is that correct?

A. Yes. Last year.

Q. Yes. And last year, just one year ago, you testified that you testified in court once a month; is that correct, yes or no?

A. I don't recall exactly what I mentioned to Judge Ritholtz. I have no reason to doubt that.

Q. Okay. So if you have no reason to doubt it, I don't need to read the testimony to you; is that correct?

A. Correct.

Q. Okay. Now, when you saw the plaintiff, you knew this was a lawsuit, right?

A. Absolutely.

Q. You knew you may have to testify at trial?

A. Correct.

Q. When you saw the plaintiff, it was about five years after the accident, correct?

A. Yes.

Q. That was more than two years ago?

A. Yes.

Q. So you have no idea what his condition is as he sits here today, correct?

A. Correct.

Q. So your prognosis as to permanency as to anything going forward in the future, that is based on a one-time exam two years ago, correct?

A. Correct.

Q. And you did not see him as a patient, correct?

A. Correct.

Q. Right, you saw him in a capacity as a medical legal consultant, correct?

A. Correct.

Q. Charlie Hammer sent him to you, right?

A. He did.

Q. You never prescribed a course of treatment for him?

A. No.

Q. I generally make a statement and then I ask if it is correct or not, then you answer no, it makes me assume that I am not correct. So am I correct, yes or no, that you never prescribed any treatment for the plaintiff?

A. I did not prescribe any treatment for him. I am not his treating doctor.

Q. You are not his treating doctor, correct?

A. Correct.

Q. Often times lawyers come to you and ask you to review records and examine their clients, right?

A. Yes.

Q. In fact, you have testified in court more than 250 times, correct?

A. Over 30 years, correct.

Q. Over those 30 years, over those 250 times, you know how the procedure is, right?

A. Correct.

Q. So if I ask you a yes or no question, you know to give me a yes or no answer, correct?

A. I can't answer that question the way you crafted it.

Q. If I ask you a yes or no question, please just answer yes or no?

A. If I am able to, yes.

Q. That was a yes or no question. You didn't give me just a yes, so my question is this, if I ask you a yes or no question, can you answer it yes or no?

A. I can't answer that question the way you crafted it.

Q. If I ask you a straight yes or no question, you can't tell this jury if you can answer yes or no?

A. If it is a yes or no question, I will answer yes or no. But if I can't answer yes or no, maybe it is a maybe answer, I will have to answer maybe.

Q. But my question to you is if I asked you a yes or no question, you can answer it yes or no? Yes, you would be comfortable with that?

A. If I know the answer that is a yes or no, correct.

Q. If you can't answer a question yes or no, let me know and I simply will rephrase it; are you okay with that?

A. I am fine. I have done this before. I know how to

answer yes or no.

Q. You do not perform spinal surgery currently, correct?

A. Correct.

Q. In fact, you haven't done so for more than 15 years?

A. Correct.

Q. In fact, your practice focuses on shoulders and knees now, right?

A. Extremities. We focus on shoulders and knees correct.

Q. Your practice has a website?

A. Yes.

Q. That website says the things that you treat are shoulders and knees, correct?

A. Correct.

Q. So your practice focuses on shoulders and knees, correct?

A. Correct.

Q. Not hips, correct?

A. Correct.

Q. And, in fact, you believe that the knee takes the hardest beating, correct?

A. That question I can't answer the way you crafted it.

Q. Is it on your website that the knee takes the hardest beating, yes or no?

A. In what field? I mean, I don't say in running it takes the hardest beating.

Q. Doctor, it is a very simple question. On your website do you indicate that "the knees take the hardest beating", quote end quote?

A. Can I see that?

Q. You don't know the answer?

A. I can't answer. That website changes every month and I don't write it.

MR. CRAVEN: Your Honor, may I show it to the witness to refresh his recollection?

THE COURT: You may.

A. Yes, with reference to the knee, correct.

Q. Okay. So on your own website it says that the knee quote, "knees takes the hardest beating", right?

A. It is reference to sports. That is why I wanted to see it.

Q. Under the category knee treatments, the first sentence on your website is quote "the knees take the hardest beating", correct, yes or no?

A. Out of context, correct.

Q. Okay. Then it says especially if you are an athlete or physically active, correct?

A. Correct.

Q. So if somebody is an athlete or if somebody is physically active, the knees take the hardest beating, correct?

A. That's correct.

Q. Are you aware that the plaintiff played football in high school?

A. No.

Q. Are you aware that he played semi-pro football after high school?

A. No.

Q. That would affect the knees, wouldn't it?

A. It might if he had an injury.

Q. But if he did those activities, his knees would be taking a beating, correct?

A. His body would be taking a beating.

Q. His knees would be taking a beating, correct, Doctor?

A. What are you saying? Are you saying the knees take a beating and no other part takes a beating?

Q. No, I am just focusing on --

A. Fine, that is good because the knees do take a beating --

THE COURT: Doctor, you have to answer the question as it is presented to you. You cannot ask a

question. You can't ask questions of the attorney. Just listen to the question that is being asked and answer that question. There will be redirect. Mr. Citrin will ask any questions he feels necessary to ask, okay?

THE WITNESS: Yes, thank you.

Q. So you would agree with me that somebody who plays football in high school and semi-pro football, their knees would take a beating, yes?

A. Correct.

Q. So that was easy. You are also aware that the plaintiff did intensive labor work for his job, right?

A. He was a laborer.

Q. Are you aware that he climbed ladders a lot during his job?

A. I am.

Q. And we spoke about a lot of the doctors that the plaintiff saw, did you ever speak to Dr. Klempner?

A. No.

Q. Did you ever speak to Dr. Mark Pizzurro?

A. I haven't spoken to any of his treating doctors.

Q. Is that a yes or no?

A. I haven't spoken to any of these treating doctors.

Q. Is that a yes or no?

A. Repeat the question.

Q. Sure. Have you ever spoken Dr. Mark Pizzurro?

A. No.

Q. Have you ever spoken to Dr. Kwak?

A. No.

Q. Have you ever spoken to Dr. Lee?

A. No.

Q. Have you ever spoken to Dr. Altman?

A. No.

Q. Have you ever spoken to Dr. Roque?

A. No.

Q. In fact, as you testified, I believe you have never spoken to any medical provider that the plaintiff has seen after the accident of July 2010; is that correct, yes or no?

A. That is correct.

Q. Since you haven't spoken to them at all, it is fair to say that you never discussed his condition with any of these treating doctors after the accident of July 2010; is that correct?

A. Correct.

Q. How many records did you review?

A. It is listed in my report. I reviewed approximately, 30. 30 sets of records.

Q. 30?

A. Yes.

Q. You would agree with me that the plaintiff had

preexisting degenerative conditions in his back, correct?

A. Yes.

Q. You would agree with me that he had a preexisting degenerative condition in his hip, correct?

A. Left hip, correct.

Q. Both hips, right?

A. Correct.

Q. You would agree with me that he had a preexisting degenerative condition in his right knee, correct?

A. No evidence of that, no.

Q. You don't believe that he had a preexisting degenerative condition in his right knee; is that your testimony?

A. I can't answer the question the way you crafted it.

Q. Yes or no, do you believe that the plaintiff had a preexisting degenerative condition in his knee, yes or no?

A. I can't answer the question the way you crafted it.

Q. You can't answer what you believe in?

A. I can. You are not allowing me to.

Q. It is a yes or no, do you believe --

A. I can't answer the question the way you crafted it.

Q. Do you believe that he had a preexisting degenerative condition in his right knee, yes or no?

A. I cannot answer the question the way you crafted it.

Q. Do you believe that he had a preexisting degenerative condition in his right knee before the accident of July 15, 2010, yes or no?

A. I cannot answer the question the way you crafted it.

Q. You can't or you don't want to?

A. (No response given.)

MR. CRAVEN: Judge, I withdraw that question.

A. I don't know which way you want me to --

THE COURT: There is no question before you.

Mr. Craven, next question.

MR. CRAVEN: Thank you.

Q. And yes or no, do you believe that the preexisting degenerative conditions that he had played a role in all of the surgeries that he had subsequent to the accident that we have discussed today?

A. All except one.

Q. Which one? And that is because you are not sure, correct, if he had a preexisting condition in his right knee?

A. You don't allow me to explain, so I can't do that, but I am sure my opinion you wouldn't allow me to elicit.

Q. I am sure if plaintiff's attorney wants to ask you questions about that he will have an opportunity to do so.

Now, when you saw the plaintiff that one time, you

took a history of him, correct?

A. I did.

Q. History is very important, correct?

A. All histories are important.

Q. He did not tell you about a motor vehicle accident in April of 2011, did he?

A. No.

Q. Did you review any records from Desert Springs Hospital?

A. Not to my recollection.

Q. Did you review any hospital records from Scottsdale Health Center?

A. No.

Q. Did you review any records from Englewood Hospital?

A. I did.

Q. You did?

A. The surgery was in Englewood Hospital.

Q. I believe the surgery was Valley Hospital, correct?

A. He had three surgeries in Valley, one surgery in Teaneck and one surgery in Englewood. The right knee surgery that he had on his knee, the first one was in Englewood Hospital by Dr. Kwak.

Q. Other than the operative report?

A. And hospital records.

Q. Okay, did you look at any ER records from Englewood

Hospital?

A. No.

Q. Do you know how many times he went to the ER at Englewood Hospital?

A. No.

Q. Did you review any of Dr. Roque's medical records?

A. Yes.

Q. I am going to emphasize the word medical records, yes or no?

A. I will look. Yes.

Q. You reviewed a medical record, do you have it with you here today?

A. I do.

Q. Can you show me the medical record that you looked at from Dr. Roque?

A. I looked at a couple. Right here.

MR. CRAVEN: May I?

THE COURT: Yes.

Q. Other than the records indicating that he had the injections, did you look at any other medical records of Dr. Roque?

A. No.

Q. In fact, the only documents that you have listing any of Dr. Roque's treatment of the plaintiff is a letter that Dr. Roque wrote to plaintiff's attorney, correct?

A. These are medical records of Dr. Roque that I showed you. In addition to that I have something he wrote to Mr. Hammer.

Q. Right, the only information that you had concerning any treatment that Dr. Roque gave to the plaintiff besides the injections was from a letter that Dr. Roque wrote to plaintiff's attorney, yes or no?

A. Yes.

Q. Yet a letter to an attorney is not a medical record, correct?

A. Correct. It is a legal record.

Q. It is a legal record, right? Yet you listed in your report as a narrative, correct?

A. Yes.

Q. Now a narrative is a medical record, yes?

A. No, a narrative is what a doctor does when he writes a letter to an attorney.

Q. But when you wrote it in your report as to what you reviewed, you listed it as narrative, you didn't define it as a letter to an attorney, correct?

A. That is the definition of a narrative report, a letter to an attorney.

Q. You do narratives all the time that don't go to attorneys, correct?

A. They are not narratives if they are not to an

attorney. The term implies a letter to an attorney.

Q. The only records that you reviewed concerning Dr. Rogue's treatment were the two injection procedures that you just showed me, correct?

A. That was his treatment. That was treatment that he gave to him. Those are the records I reviewed of his.

Q. He also prescribed medications for him, didn't he or you don't know?

A. He said so. I didn't review it in his medical records.

Q. Right, because you don't have his medical records, right, yes or no?

A. I have two medical records that I showed you.

Q. Right, you showed --

A. Other than that I don't have medical records. I have a narrative report.

Q. You don't know all the treatment that Dr. Roque gave to the plaintiff, correct?

A. It is listed in the narrative report. Which is a legal record.

Q. Now, you indicated that you reviewed the operative report of the back, correct?

A. Yes.

Q. You reviewed the operative report of the knee, correct?

A. Two of the operative reports of the knee.

Q. Operative report of the hip, correct?

A. Yes.

Q. You reviewed the operative report of the elbow, correct?

A. Elbow and wrist.

Q. Elbow and wrist, right, you are agreeing with me there is no indication of trauma in any of those operative reports, yes or no?

A. No.

Q. You don't agree with me?

A. I don't.

Q. Would you agree with me there isn't any indication of trauma in the lumbar spine operation report?

A. Yes.

Q. Would you agree with me there is no indication of trauma in the left hip total replacement operation report?

A. Yes.

Q. Would you agree with me that there is no indication of trauma in the September 20, 2012 right knee operation?

A. That is what I see, trauma.

Q. You saw trauma? Would you agree with me there is no indication of trauma in the January 15, 2015 right knee replacement?

A. Correct.

Q. Would you agree with me there is no indication of trauma in the left arm surgery?

A. Yes.

Q. And the only indication of trauma that you find in any of the operations was that there was that 12 centimeter gap, I believe you called it; am I correct?

A. No, 12 millimeters.

Q. You believe that that 12 millimeters is an indication of trauma?

A. Yes.

Q. But you would agree with me in every one of the operative reports there is significant indication of degeneration, right?

A. When he had the surgery the surgeons reported the degeneration.

Q. Is that a yes?

A. Well, three out of four. The wrist, the elbow and wrist didn't have degeneration the others did.

Q. Do you agree with me that the procedures to his elbow and wrist have nothing to do with the accident?

A. I don't know.

Q. But there is no way for you to say they are related to the accident, right?

A. Correct.

Q. But these were the same procedures that he had

before?

A. Not exactly the same, but similar.

Q. You testified on direct examination the word, "same", you said the same, would that be accurate or no?

A. The same, but not exactly.

Q. When asked by the plaintiffs attorney you actually just said same?

A. I meant it as similar.

Q. Okay, I see. Now desiccation, could you describe to the jury what desiccation is?

A. Desiccation is devoid of moisture.

Q. And that is a Hallmark of degeneration, correct?

A. Degeneration has desiccation. Other things have desiccation too.

Q. It is a yes or no question.

A. I couldn't answer that yes or no.

Q. Desiccation is Hallmark of degeneration, yes or no?

A. No.

Q. It is not. Do you recall testifying last year at a trial before Judge Ritholtz that it was?

A. I said it can be. It is not always.

Q. And loss of height, what is that?

A. I don't know what you are referring to.

Q. Loss of height of disc, you know we are talking about the back, what is loss of a disc?

A. Number one, I didn't know we were talking about the back.

Q. When we were talking about desiccation, you know that I was talking about the lumbar spine.

A. No.

Q. You randomly used the word desiccation at that trial?

A. Yes.

Q. Is there desiccation in the hip?

A. Yes.

Q. All right, now let's talk about the lumbar spine.

A. Yes.

Q. Getting back to my initial question, do you recall being asked this question and giving this answer on March 8th 2016 before Justice Ritholtz.

"Question. Is that impression desiccation, loss of height and bulging, is that all the Hallmarks of degeneration?

Answer. Bulging no. Desiccation, loss of height." Do you remember being asked that question and giving that answer?

A. No.

Q. Would that be inaccurate?

A. No.

Q. You gave truthful testimony right here, yes or no?

A. Of course I did.

Q. Right, so last year under oath before a judge in Supreme Queens you said desiccation is a Hallmark of degeneration, yes or no?

A. Of the spine, yes.

Q. Well, that is what we are talking about, Doctor.

A. I didn't know that you were talking about that spine. You just said desiccation is a Hallmark of --

Q. All right. Loss of height in the lumbar spine, discs, that is a Hallmark of degeneration too, correct?

A. Yes.

Q. Spondylosis, that is a Hallmark of degeneration, correct?

A. Yes.

Q. Now, you would agree with me, Doctor, that the left hip replacement was due to advanced degenerative arthritis, correct?

A. Correct.

Q. That is not traumatic in nature is it?

A. No.

Q. I believe you already testified earlier today that he had osteoarthritis in both hips, which is noted in a film of December 18th, 2010, correct?

A. Yes.

Q. That December 18th, 2010 film was taken almost

exactly five months after the accident, correct?

A. Yes.

Q. Isn't it true that you would not find osteoarthritis five months after the incident if that incident was the cause of osteoarthritis?

A. It is possible if you broke it, but he didn't break it.

Q. In this case osteoarthritis, right, five months after the accident was not because of the accident, correct?

A. Correct.

Q. So the osteoarthritis that he had in both hips predated the accident?

A. Correct.

Q. Now, he had a right knee replacement four-and-a-half years after the accident; is that true?

A. Yes.

Q. In the reason for that right knee replacement was quote, "severe degenerative disease", correct?

A. Yes.

Q. And you did not review any diagnostic testing, other than your own x-rays, concerning this plaintiff, right?

A. You mean actual images?

Q. Yes?

A. Yes, I reviewed images of the CAT scan taken

7/19/12. I reviewed images of the pelvis taken 10/30/11.

Q. All right, let's talk about the pelvis. The X-ray of the pelvis was taken on 10/30/11, correct?

A. Right.

Q. And that showed osteoarthritis in both hips, correct?

A. Right.

Q. That just kind of confirmed the finding of about a year before, right?

A. Yes.

Q. You did not look at any of the MRI's of the lumbar spine, correct?

A. No.

Q. You did not look at any MRI's of the knee, correct?

A. No.

Q. Did you not look at any MRI's of his left hip, correct?

A. I don't think there was an MRI of the left hip.

Q. If there was an MRI of his left hip you did not see it?

MR. CITRIN: Objection. If there was he didn't see it? That begs the question of whether there was. It is a trick question.

THE COURT: Sustained. Can we move on?

MR. CRAVEN: I will move on.

Q. Doctor, would you agree with me that a surgeon is in a better position to identify a condition than somebody who is reading an MRI?

A. Yes.

Q. You reviewed the lumbar operative report of Dr. Klempner, correct?

A. Yes.

Q. And he specifically stated that although there was an MRI indicating there was a herniation, he found no herniation; is that true?

A. No, that is not what he said.

Q. Did he say that there was no herniations at L3-4?

A. That is what he said. No herniation at L3-4. He didn't mention L4-5.

Q. Okay, well is there anywhere in the operative report that he says there was a herniation at L4-5?

A. No.

Q. Right, so his operative report does not confirm the MRI reading, correct?

A. He doesn't confirm it at L3-4. It is silent on L4-5. It doesn't confirm it at L3-4 and it is silent at L4-5.

Q. It being silent, it doesn't confirm it, correct?

A. That is another one I can't answer the way you crafted it.

Q. Does the operative report have Dr. Klempner confirm an MRI finding of a herniation at L4-5, yes or no?

A. No.

Q. You reviewed the operative report of the knee of September 20, 2012, correct?

A. Yes.

Q. In fact, you believe that the operative report is a very important document, right?

A. Yes.

Q. In fact, I think you used the term it is, quote "very important", correct?

A. It is.

Q. In fact, you used the phrase, "it is the most important medical record there is", right?

A. In most cases it is, yes.

Q. You still hold that belief today that the operative report is the most important medical record there is, correct?

A. It is a very important medical record.

Q. Okay, do you recall giving testimony under oath that it was quote, "The most important medical record there is"?

A. You are taking it out of context. In most cases the operative report is the most important medical record. There are five operative reports here. The most important

medical record. I am sure there is a time when the operative report is not the most important. At that time on that particular case it was. In this particular case it is.

Q. I didn't hear the last word you said?

A. I agree, in this particular case the operative report is the most important medical record.

Q. Thank you. That is because the surgeon actually sees what is happening, sees what is going on in the body, sees what is going on in the body?

A. Is that a statement or question?

Q. It's a question. That is because the surgeon actually sees what is going on, correct?

A. Yes.

Q. So in the interest of time, would it fair to say all those doctors that performed the surgeries are in a better position to say what the condition was than you, correct?

A. At the time they operated, yes.

Q. Even today, right, they would be in a better position to say what the plaintiff's condition was because they performed the surgery as opposed to you who just reviewed some records, correct, yes or no?

A. I said yes.

Q. Okay. You are aware that there was an MRI of the right knee on October 18, 2011?

A. Yes, I mentioned that.

Q. Right, there was a knee tear on October 18, 2011, correct?

A. You mean meniscal tear?

Q. Yes.

A. Yes, correct.

Q. That was 11 months before the surgery, correct?

A. Yes.

Q. Then about a month before the surgery there was another MRI, correct, on August 29, 2011?

A. Yes.

Q. And that showed there was a meniscal tear, right?

A. Yes.

Q. Do you know why that MRI was taken?

A. Because the first one did not show a tear.

Q. I am sorry?

A. The first one didn't show you a tear.

Q. Isn't it true that the MRI of August 29, 2012 was taken because the plaintiff injured himself stepping out of bed?

A. I was not aware of that. It says it there, but I wasn't aware.

Q. Do you have the MRI report with you today?

A. Yes.

Q. Can you show it to me, please?

A. Yes.
Q. Can you read to the jury what the history is?
A. Injury stepping out of bed.
Q. That is the MRI of August 29, 2012, right?
A. Correct.
Q. That is the one that was done right before the surgery a month later, correct?
A. Correct.
Q. Now, Doctor, when you give a preoperative diagnosis, you would list the most important things first and then go down from there; is that correct?
A. That is what I do. I don't know how Dr. Kwak does it.
Q. Dr. Kwak put right knee meniscal, medial meniscal tear, as the number one reason for the surgery, correct?
A. No, he did he say that is the pre-operative diagnosis.
Q. That is what I am asking, is the pre-op diagnosis why somebody is doing the surgery?
A. Yes.
Q. Didn't he put the reason he did the surgery as the number one reason, right knee medial meniscal tear?
A. Yes.
Q. Then the second thing he put was the chondromalacia that you discussed, correct?

A. Yes.
Q. You examined the plaintiff, correct?
A. Yes.
Q. You took his height and his weight, correct?
A. Yes.
Q. Did you determine his BMI?
A. No.
Q. Based on his height and weight, can you tell the jury what his BMI is?
A. It is basically a metabolic index. A body metabolic index. I don't know the BMI offhand.
Q. Isn't the body mass index, kind of goes to the person's height, person's weight?
A. Yes.
Q. It is to determine medically if somebody is obese, correct?
A. Yes.
Q. Right, anything over a score of 30 is obese?
A. 35.
Q. I am sorry?
A. 35 is obese, not 30.
Q. It is your testimony that it is not 30, that it is 35 that is simply obese?
A. It is not -- you know, you are asking my opinion.
Q. I am not asking your opinion, it is medically

defined.

A. There is no medical agreement defined that 30 or 35 is obese.

Q. Did you believe when you examined him that he was obese, medically speaking?

A. No.

Q. Did you think he could lose a few pounds?

A. Anybody can lose a few pounds.

Q. Would you agree with me that obesity affects the lumbar spine though, right, yes or no?

A. Yes.

Q. You would agree with me that obesity affects ones hips, yes or no?

A. Yes.

Q. You would agree with me obesity affects ones knees, correct?

A. Correct.

Q. In your examination you performed range of motion testing, right?

A. Yes.

Q. And you also agree with me that a range of motion that somebody exhibits is subjective, right?

A. It can be subjective if the range of motion is limited by pain.

Q. It is limited by the person telling you that they

are in pain, which is subjective, correct?

A. No, most of the time you just can't go anywhere. There is no pain. That is not subjective. If the patient -- the only way it is subjective is if the patient tells you it hurts and he won't go any further.

Q. Isn't that what you just said, you don't go any further because of pain? And that is the patient telling you that, correct?

A. That is not what you said before. You said is it a subjective and I said it can be. It can be when they complain of pain, but when you do range of motion you get to the end and they don't complain of pain, that is objective.

Q. But if they stop before what is considered normal they say that is because of pain; that is subjective, right?

A. Correct.

Q. You have no way of knowing if they can go further, correct?

A. Correct.

Q. You have to take them at their word, right?

A. Correct.

Q. In fact I believe you believe that range of motion testing is not exact?

A. Is that a question?

Q. Yes. Is that what you believe, that range of motion is not exact, yes or no?

A. Range of motion is not done in the office. It is not an exact science.

Q. You also believe in determining if the cause of a condition that it is important if somebody has immediate complaints of pain, correct?

A. I am sorry. You will have to repeat the question.

Q. Isn't it true that you believe that whether or not somebody has immediate complaints of pain is important in order for you to determine the causal relationship between that complaint of pain and whatever they are saying it was?

A. It can be very important.

Q. You are aware that the plaintiff did not have any immediate complaints of pain in this case, correct?

A. Define immediate.

Q. Right after the accident.

A. I don't know, he came in the next day complaining of pain. You will have to ask him if he had immediate. The documentation was one day later.

Q. I want you to assume that he testified he did not have pain at the scene of the accident?

A. Okay.

Q. Would that be immediate?

A. Yes.

Q. I want you to assume, Doctor, he did not have pain the remainder of the night, would that be immediate?

A. Yes.
Q. That is an important aspect, isn't it?
A. It is.
Q. You also believe that it is important if somebody goes to a hospital or not after an accident, correct?
A. It can be important.
Q. Okay, and you are aware that he did not go to a hospital; is that correct?
A. Correct.
Q. That is important in this case, correct?
A. It is important in every case. It is to seek medical attention, it doesn't have to be a hospital.
Q. The opinions that you gave, both in your report and on direct examination, those were based largely on the history he gave you, correct?
A. Correct.
Q. You rely on this history, right?
A. We all do.
Q. So, if that history was inaccurate it would change your opinion, right?
A. It would.
Q. So it was your understanding that he did not have any prior back complaints, correct?
A. Correct.
Q. And because he told you that he did not have prior

back complaints, you took his word for that, correct?

A. Yes, I did.

Q. You based your opinion that the accident was causally related to his back based on that, correct?

A. And another things.

Q. Had you reviewed Dr. Roque's notes which indicate that he had back pain that predated the accident, that would change your opinion, wouldn't it?

A. It might.

Q. Let's talk about the hip. You know that he did not seek any medical attention for the hip for a few months after the accident, right?

A. Correct.

Q. That is significant, isn't it?

A. He complained of hip pain the next day.

Q. He did not obtain any medical attention for a few months after the accident?

A. He had chiropractic treatments for his complaints, so when you call that medical, chiropractors are not medical doctors, but he had chiropractor treatment after.

Q. He didn't have chiropractor treatment for his hip, did he?

A. I don't know.

Q. I want you to assume that he had chiropractor treatment for his neck and back and not his hip?

A. Yes.

Q. Now, would you agree with me he didn't have any medical attention or chiropractic attention for a couple of months after the accident to his hip?

A. If that is the case, yes.

Q. Let's talk about the knee for a second. Isn't it true that he didn't seek medical attention for the knee, specific attention, for the knee until 15 months after the accident in October of 2011?

A. He complained about his knee to a medical doctor before then, but he didn't get treatment until after his back was done.

Q. Right, in fact, on October 11, 2011 he reported a quote, "new problem" to the right knee; isn't that true?

A. I don't know what new meant and I don't recall seeing that. Do you want to show me that?

Q. What does new mean to you?

A. Recent.

Q. Recent, is 15 months recent?

A. No.

Q. Right.

A. To the day of the accident?

Q. Right.

A. He complained of pain in his right knee the day after the accident.

Q. Right, he didn't receive any medical treatment for it, he did not continue to complain about it; isn't that true?

A. Dr. Altman's note says differently that he continued to complain of pain in his right knee.

Q. He only saw Dr. Altman for a few months, right?

A. Correct.

Q. So after that a year went by before he had any complaints about his right knee, correct?

A. I have to check that. I am going to check that for a second.

Q. Please, just as a point of reference, I am talking about October 11, 2011, which is seven days before the MRI that was done that we discussed already?

A. I don't have the medical record after he saw Dr. Altman that he complained of his knee.

Q. Right, so it would make sense to you that he had an MRI on 10/18/2011, if he made a complaint about a new, right, knee problem seven days before does that make sense time-wise?

A. I can't answer the question the way you crafted it.

Q. When you send somebody for an MRI it is usually done within a week; would that be fair?

A. I send people for MRIs many times because they are not getting better. I send people for MRIs for new pain.

Sometimes I send them the same week or sometimes a month in advance, so I don't have a routine about that.

Q. But it makes sense that if he made a complaint of a new pain on October 11 and then would have an MRI seven days later, would that make sense, correct?

A. I didn't prescribe his MRI. I don't know if it makes sense or not.

Q. Are you aware he was involved in a motor vehicle accident on March 13, 2015?

A. No.

Q. And that was about four months before he saw you or three months before he saw you, correct?

A. That's correct.

Q. So he didn't tell you about the April 2011 motor vehicle accident and now you are telling the jury that he didn't tell you about the March 13, 2015 motor vehicle accident; is that true?

A. Yes.

Q. Would you find it important to know that he was involved in another motor vehicle accident?

A. It is important to know what the injuries were, if any.

Q. Is it important to know that after the March 2015 accident he went to a hospital?

A. It is important to know all the information that

you can know about the incident.

Q. Right, you didn't have that all that information, right?

A. Agreed.

Q. So there is lots of medical records that you didn't have, yet you still are coming here and testifying and saying that the surgeries that he had are connected, other than potentially the elbow, right, yes or no?

A. Given the fact that you --

Q. Yes or no?

A. I can't answer the question the way you crafted it. Without seeing the medical records from those accidents I can't answer that question.

THE COURT: Can we brake here?

MR. CRAVEN: I have three questions left.

THE COURT: Fine.

Q. Are you aware that he fell off a ladder last month?

A. No.

Q. That could affect your prognosis of how he is going to be going on in the future, correct?

A. I gave the prognosis in 2015, anything that happened after, obviously, I don't know about.

Q. Okay, are you aware that the fall from the ladder hurt his back?

A. I am not aware of any fall.

Q. Are you aware that he had a right hip replacement last year in 2016?

A. No.

Q. Would it surprise you that he had a right hip replacement in 2016, given that there was a diagnostic test of osteoarthritis as far back as 2010?

A. No.

Q. And having a right hip, total right hip replacement in 2016, would still affect him today, correct, as far as his walking?

A. Yes.

MR. CRAVEN: Thank you.

THE COURT: Okay, we have to break for lunch. We will come back and do redirect and recross.

Doctor, you are still under oath. Please do not discuss any of your testimony with anyone, attorneys or anyone else. Please be back here at 2:15. Do not discuss any of the testimony you heard at trial. Thank you.

(Whereupon, the jury exits the courtroom.)

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

COURT OFFICER: All rise. Jury entering.

(Whereupon, the jury enters the courtroom and is seated in the jury box.)

THE COURT: Thank you, everybody. Have a

seat. Mr. Citrin?

MR. CITRIN: Thank you, your Honor

REDIRECT EXAMINATION

BY MR. CITRIN:

Q. Hello again, Doctor.

A. Good afternoon.

Q. I hope you had a pleasant lunch.

A. Thank you.

Q. You were questioned at some length by defense counsel about the records of Dr. Roque that you had in your file, and you indicated you had a narrative report, which you said is not a medical record; is that correct?

A. Correct. It is a legal record.

Q. Is there information contained within a narrative report that would be valuable to you as a physician?

MR. CRAVEN: Objection, your Honor. It is a leading question.

THE COURT: Rephrase.

Q. What information is available in Dr. Roque's narrative report that was valuable to you as an examining physician?

A. Well, the narrative report summarized his findings on the patient. Summarized the office visits and summarized what he did for the patients. So basically it is a shortened version of all his notes.

Q. And you reviewed that as part of your examination of the plaintiff?

A. Yes.

Q. Now, you were also asked whether you spoke to any of his doctors?

A. Yes.

Q. Is it necessary to speak to the treating doctors as an examining physician?

A. In all my years I never had one phone call from any other doctor who had asked me over a year later about treatment. That is what medical records are there for, so when people want to know what my thinking was way back then we give them the medical records. It is not normally done. In fact, I have never seen it done. It is not that they remember everything about the record. They say these are my medical records or I will send you the study. It is not done in the course of usual medical business.

Q. In this patient, can there be more than one cause of his pain to the body parts we have been talking about?

A. Yes.

Q. Would you describe the different causes with respect to pain with respect to the three body parts, excluding the left arm, that caused the pain in this patient?

A. Well, you know, I was asked a lot of questions

about history. History is important. When you take a history it is to arrive at a conclusion. Obviously if he gave me a different history I would have a different conclusion.

In any case, in regard to the back, which he told me he had no injuries to before the accident or injuries after. I heard he had car accidents, that doesn't mean he had another back injury in these car accidents. He had no pain. He had on the MRI report a superimposed disc herniation at L4-5, that is a new finding. You can say the arthritis and maybe the preexisting bulge. The superimposed disc herniation to me is a new finding. He also had pain corresponding to that disc herniation.

So when someone comes in our office claiming of pain, of course pain is subjective. Subjective means you can't measure it. No one here can feel someone else's pain. No one can measure someone else's pain. The doctor's job is to make a diagnosis, takes some tests to find out where the pain is coming from. They did that for his back. And the pain down his leg went away after his surgery. Even though he still had back pain when I saw him, he did not have pain down the leg. But he had that before the surgery, so he may have had some arthritis before, but that arthritis by history was not bothering him after the accident. He had clear consistent care.

As far as the right knee is concerned, he complained about it right away. He complained to Dr. Altman. He had an MRI in October of '11. The defense counsel said it is for new pain. There was no new pain.

MR. CRAVEN: Objection, your Honor.

THE COURT: Sustained. The statement is stricken. Move on.

Q. Please continue, you were describing the multiple causes of the pain that he could have. You talked about the back and then the knee, then the hip.

A. The knee he had no pain before. He had the accident and the MRI found defect in the bone. The defect in the bone was verified, not on the MRI, but at the operation. The defect is where you would expect it from a car accident with the knee hitting the dashboard. Exactly where you would expect it. This defect progressed, but at the time of 2015, he had arthritis in both sides of the knee and he had various deformities.

This is progression after an acute accident. The accident has to be related. That defect didn't appear by itself.

In regard to the hip, he definitely had all the arthritis before. The accident did not make more arthritis. By the history, the arthritis was painful after the accident. And that is why I feel that the accident is a

competent cause for the need for surgery.

MR. CITRIN: Can we mark this portion of the medical hospital record as Plaintiff's Exhibit 19?

MR. CRAVEN: May you see it, your Honor?

THE COURT: Yes, of course.

MR. CRAVEN: It goes beyond the scope of his report, your Honor.

MR. CITRIN: Your Honor, he opened the door with the cross-examination question regarding the March --

THE COURT: Let's talk in the back.

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

THE COURT: I am going to sustain the objection. Is there anything else?

MR. CITRIN: One moment, your Honor. That concludes my redirect, your Honor.

THE COURT: Any recross?

MR. CRAVEN: Yes, your Honor.

RECROSS EXAMINATION

BY MR. CRAVEN:

Q. You indicated there was a defect in the knee; is that correct, that caused chondromalacia?

A. Yes.

Q. Isn't it true that the defect that you saw was on

the weight bearing portion of the bone?

A. Medial femoral condyle.

Q. That was the weight bearing portion of the bone, correct?

A. That is where the injury occurred.

MR. CRAVEN: Thank you.

THE COURT: That is it. Thank you. You are excused. Thank you, very much.

* * * * *

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE MINUTES TAKEN IN THE ABOVE-CAPTIONED PROCEEDING.

JEANMARIE EPISCOPIA
SENIOR COURT REPORTER