

CROSS - J. IOVINO - NEMWAN

383

1 (At this time, the witness entered the courtroom)

2 THE CLERK: Remain standing. Please raise your
3 right hand.

4 Do you solemnly swear or affirm that the
5 testimony you are about to give this Court and jury will be
6 the truth, the whole truth and nothing but the truth?

7 THE WITNESS: I do.

8 D R. E D W A R D T O R I E L L O, having been called as a
9 witness by and on behalf of the Defendant, having first been
10 duly sworn, was examined and testified as follows:

11 THE CLERK: Thank you. Please be seated.

12 May we have your name and business address,
13 please?

14 THE WITNESS: Edward Toriello, 78-15 Elliot
15 Avenue, Middle village, New York 11379.

16 THE CLERK: Thank you.

17 THE WITNESS: You're welcome.

18 THE COURT: Good afternoon, sir.

19 THE WITNESS: Good afternoon.

20 THE COURT: These attorneys will ask you some
21 questions. What I want you to do is let the attorney
22 finish the question before you start to answer, so you are
23 not talking at the same time.

24 THE WITNESS: Yes.

25 THE COURT: I want you to speak loud enough so

DIRECT - DR. TORIELLO - NEWMAN

384

1 everyone can hear you. If the attorney sitting down, the
2 one not asking questions, if you see that attorney stand
3 up, it means they are going to say "objection". As soon as
4 you see him stand up, I want you to stop and look to me and
5 I will let you know whether you should answer that
6 question.

7 THE WITNESS: Thank you.

8 THE COURT: We have some water there for you and
9 we will refill it.

10 THE WITNESS: Thank you.

11 MR. NEWMAN: May I inquire?

12 THE COURT: Yes.

13 DIRECT EXAMINATION

14 BY MR. NEWMAN:

15 Q. Good afternoon, Dr. Toriello.

16 A. Good afternoon.

17 Q. Could you tell us what your educational and
18 professional background is?

19 A. Sure. I went to college and graduated from Brooklyn
20 College here in Brooklyn. I went to medical school and
21 graduated from State University of New York at Downstate here
22 in Clarkson Avenue. And I then did -- I'm sorry, no. I
23 graduated from Buffalo. I did a residency program at Downstate
24 here in Brooklyn from 1980 to 1985 in orthopedic surgery.
25 Since that time I have been in private practice in orthopedic

1 surgery.

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

4 A. Yes.

5 Q. Do you hold any medical appointments at any medical
6 societies?

7 A. Yes.

8 Q. Can you tell us about that?

9 A. I am past treasurer of the American Academy of
10 Orthopedic Surgeons. I am on the board of directors of the New
11 York State Society of Orthopedic Surgeons. I am assistant
12 treasurer of the Kings County Medical Society. I am a member
13 of the Medical Society of the State of New York.

14 Q. Are you affiliated with any hospitals at this time?

15 A. Yes.

16 Q. Tell us about that, please.

17 A. Wycoff Heights Hospital and Flushing Hospital.

18 Q. Is there something called board certification in the
19 practice of orthopedic medicine?

20 A. Yes, there is.

21 Q. Can you tell us about that?

22 A. Well, board certification is a voluntary process that
23 a physician puts him or herself through. It consists of
24 finishing a qualified certified residency program successfully
25 and then completing successfully a written examination. When

1 one does that, then one is able to sit for the oral
2 examination. The oral examination is an examination that takes
3 place with the candidate facing four other physicians,
4 orthopedic surgeons who are all board certified, and they ask
5 the candidate questions. You must pass all parts including the
6 written and oral part of the examination in order to be
7 considered board certified.

8 I have sat on both sides of that table both as a
9 candidate and also as an examiner for other candidates. Board
10 certification does not last forever in orthopedic surgery.
11 It's a ten-year defined certification. So you must recertify
12 every ten years. So I certified the first time in 1988,
13 recertified in 1998, certified again in 2008 and will recertify
14 again 2018.

15 Q. Doctor, are you being paid for your time here this
16 afternoon to testify?

17 A. Yes.

18 Q. What is your compensation?

19 A. \$5,000.

20 Q. Doctor, can you tell us what your current practice
21 currently consists of?

22 A. I am an orthopedic surgeon. I see folks who injure
23 themselves, injure their bones or their muscles. Also,
24 individuals who have problems with arthritis and other problems
25 such as osteoporosis and I care for them.

1 Q. Do you currently do surgery?

2 A. No, I stopped doing surgery in November of 2007.

3 Q. Why is that?

4 A. I had a total knee replacement that got infected, so I
5 stopped doing surgery at that time.

6 Q. Do you still have your active practice today in Middle
7 Village?

8 A. Yes.

9 Q. As part of your practice do you also consult for
10 litigation purposes like this one?

11 A. Yes.

12 Q. And about what's the percentage of the practice for
13 litigation versus private patients?

14 A. Probably about 35 to 40 percent of my time is spent in
15 medical legal matters and about 60, 65 percent of my time is
16 spent seeing private practice patients.

17 Q. Doctor, can you explain for us what bursitis in the
18 shoulder is?

19 A. Well, anything that has the suffix "itis" on it in
20 medicine means inflammation of whatever it is that came before
21 it. So bursitis is an inflammation of a structure called the
22 bursa. Myositis would be inflammation of the muscle. So
23 "Itis", inflammation. Bursitis, bursa.

24 Q. Have you treated patients who have had bursitis of the
25 shoulder?

1 A. Yes.

2 Q. What's typically the genesis of shoulder bursitis?

3 A. Well, bursitis is like any other inflammation. It's
4 usually due to either, A, of two things. It could be overuse
5 or it could be from an injury.

6 Q. If it's from an injury, are there certain indications
7 done in testing and things of that nature which would separate
8 whether bursitis is caused from a single traumatic event versus
9 a repetitive motion of the shoulder?

10 A. Well, certainly, yes, there would be. A good test to
11 show that would be an MRI. An MRI is an exquisitely sensitive
12 test to show any evidence of trauma. Trauma is an injury.
13 Whenever you injure yourself, you may bleed, you may have
14 swelling. If significant enough, you will have bleeding, you
15 will have swelling. You will have pain and inflammation and
16 that all shows up on the MRI.

17 Q. If a patient has bursitis that's from a repetitive
18 motion, what would typically show up on an MRI?

19 A. Well, you would just see the bursa itself being
20 inflamed. So, in other words, if you got hit, let's say, with
21 a blunt object on your arm, well, of course, you may injure
22 your bone but also you will injure the skin, the soft tissue
23 underneath and everything else on its way down to the bone if
24 you got hit by something. So if something injures the bursa
25 inside a shoulder, for instance, then he would expect to see

1 evidence of something hitting that shoulder and causing
2 swelling, and inflammation, and bleeding to other structures
3 around that bursa that's inflamed. However, if it's just due
4 to something like repetitive syndrome or something that's just
5 a long drawn out chronic process, then just the bursa will be
6 inflamed.

7 It is the same as if you have a sweater. And if you
8 develop a hole in the sweater because you have been using your
9 sweater and as you are walking your arm touches the sweater and
10 you develop little pills in the sweater. Eventually if you do
11 it long enough, the sweater will develop a hole. Well, that's
12 a very different hole than if you were take a scissor and cut
13 the sweater. The difference would be that anyone would be able
14 to look at the sweater and say this hole is because somebody
15 was walking back and forth and caused a long drawn out injury
16 to the sweater as opposed to somebody who cut the sweater, you
17 would see a very distinct cut. That's the difference that we
18 look for in the MRI.

19 Q. Doctor, did you have an opportunity to review
20 Ms. Iovino's left shoulder MRI's that were done on October
21 20th --

22 MR. HERBERT: Objection.

23 THE COURT: What date?

24 MR. NEWMAN: October 20, 2011.

25 MR. HERBERT: Your Honor, may we approach?

DIRECT - DR. TORIELLO - NEWMAN

390

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Yes, you may.

(Off-the-record discussion held at the bench)

THE COURT: Please continue.

Q. Doctor, when did you review Ms. Iovino's left shoulder MRI films?

A. This afternoon.

Q. What did you find in reviewing them?

A. The MRI films were normal except for a very mild bursitis.

Q. Was there any indication in those films that bursitis came from one single traumatic event that occurred three weeks before the films were done?

A. No.

Q. What is the bursitis consistent with in your opinion with a reasonable degree of medical certainty?

A. Most likely repetitive use. It could also occur from sleeping in an awkward position. But there is a usual cause for this type of bursitis which is usually self-limited and goes away on its own.

Q. And did you look at the labrum that's depicted in the MRI films?

A. Yes.

Q. And what did you find when you looked at the labrum image?

A. I found no significant abnormality.

1 Q. Doctor, we have heard from Dr. Berkowitz who did the
2 shoulder arthroscopic surgery on Ms. Iovino in December of
3 2011. In evidence are his intraoperative photos which I
4 believe are Exhibits 4-A through D or E, Judge.

5 THE COURT: What is that?

6 MR. NEWMAN: The intraoperative photos.

7 THE COURT: 4-A through E.

8 MR. NEWMAN: Could the doctor be shown those?

9 THE COURT: Yes.

10 Q. Doctor, could you take a look at Exhibits 4-A through
11 E that are in evidence?

12 A. Yes.

13 Q. First, based upon your medical experience and
14 training, are you familiar with what 4-A through 4-E are?

15 A. Yes.

16 Q. Can you explain for us what they are?

17 A. These are photos that were taken during the procedure
18 that was done on Ms. Iovino's shoulder on December 28, 2011.
19 They are -- actually, they look like circles because they are
20 taken through a tube that has a light on one end that's inside
21 the shoulder and a camera on the other end which is outside the
22 shoulder and being held by the surgeon.

23 Q. Have you seen these Exhibits 4-A through E before?

24 A. Yes.

25 Q. Are these the kind of photographs that you would

1 typically do doing arthroscopic surgery on a shoulder or a knee
2 when you were doing surgery in 2007 and before?

3 A. Yes.

4 Q. Are these the type of intraoperative photos which you
5 would review as an orthopedic consultant?

6 A. Yes.

7 Q. Is there a difference between the photos done at
8 different times during the procedure?

9 A. I am not sure I understand your question.

10 Q. We heard that Dr. Berkowitz started the procedure and
11 did an evaluation of the labrum. Are there photographs
12 depicting the labrum before he continued on to do the
13 additional procedure of decompression that he did?

14 A. Yes.

15 Q. Can you pick out which exhibit is that that shows the
16 labrum?

17 A. Well, photo number eight is probably the one that
18 shows it best.

19 Q. The exhibit tabs are on the back. Can you tell us
20 what sheet you are looking at?

21 A. 4-B.

22 Q. Could you take a look at image eight on 4-B and show
23 it to the jury while you explain what we are looking at?

24 A. Sure. It's a little small. Can I go down and show
25 it?

DIRECT - DR. TORIELLO - NEWMAN

393

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: He said Exhibit 8?

THE WITNESS: No, it's picture eight.

THE COURT: You are going by the number on the right of it?

THE WITNESS: Yes, that's the eighth picture of the series. It's on 4-B.

THE COURT: The witness would like to step down. I am okay with that as long as you get to see what he is doing. Mr. Herbert, you may want to change your position.

Dr. Toriello, You may step down between the reporter and plaintiff's table. Hold up whatever it is you want to explain guided by counsel.

(At this time, the witness stepped off the witness stand and approached the jury box)

A. So I believe I was asked to show you picture number eight. This picture number eight.

Q. What is picture number eight depicting?

A. So what we are looking at is this sphere right here which is a portion of the very top part of Ms. Iovino's humerus or the bone that's in her arm. So it moves up and down. The very top of your humerus is a ball. So what we are seeing is a small portion of the ball and it looks like the top of the moon. It is very smooth. So that's this portion of the photo, all right.

Then you have to imagine that what this is on the

1 other side, on the right side of the photo, is what the arm
2 bone is articulating with or what it's touching. So the
3 shoulder, if I can explain it to you, a shoulder is a round
4 ball of the humerus, your arm, on a flat surface of your
5 shoulder blade. So it's flat and round, all right. If you
6 think about a plate with an egg on it, so an egg is round, a
7 plate is flat. Not a lot of stability there. The egg can fall
8 off. If you were somehow able to build up the sides of that
9 plate with something, then that plate would kind of become a
10 bowl and that bowl would give you more stability than you would
11 have if it's flat. The part that's built up around the plate
12 is the labrum of this shoulder. Labrum comes from Latin from
13 lips. So it's around the flat surface of the bone, of the
14 glenoid process. The flat surface of the bone is this labrum
15 that builds it up and makes it into a bowl.

16 So now you are looking at a portion of the flat
17 surface. That's this area here. You can almost see this is
18 round, that's flat. I don't know if everybody can see it. If
19 you can't, just tell me. And what you see here, on this very
20 edge here, that's the very edge of the labrum. That's the end
21 of the flat plate and the very beginning of the stuff that's
22 making it into a bowl, all right. What you can see is the
23 doctor has put in — this obviously does not belong in your
24 shoulder. This is an instrument that the doctor has placed
25 inside the shoulder. But we are very fortunate that it's there

1 because it gives us some idea of size. This is magnified.
2 It's really not that big. It's really very, very small, but
3 it's magnified for us. So if we have something that we know
4 the size of inside the shoulder, we can also tell about how big
5 the structures are that we are looking at.

6 This hole here in this instrument is one centimeter
7 long, one centimeter. A centimeter is about the size of your
8 index finger now. So that's a centimeter. If he is showing
9 you right here what he is considering to be a problem which is
10 a very small -- I don't even know what you would call it. Like
11 a frayed edge of the labrum which measures -- if you look at
12 it, it's less than that instrument. So it's less than half the
13 width of your fingernail. It's very, very small. It's really
14 a frayed edge of it. It comes from use. All of us fray. What
15 he did was he just snipped that off. Much like you would do if
16 you had a pillowed sweater, you would take the scissor and
17 smooth it out. That's what he did here. He didn't need to
18 repair it. He didn't need to fix it. If you look at the
19 surface, there is no blood there. There is no swelling. There
20 is pure white which is what you would have if you looked --

21 MR. HERBERT: Objection.

22 THE COURT: Sustained.

23 Is there a question?

24 Q. Doctor, looking at this intraoperative photo, Exhibit
25 4-B that we have been talking about, is there any indication of

1 any kind of a singular traumatic event that caused this fraying
2 as you describe it in the labrum?

3 A. No, there isn't. It's white. It's pink. This is
4 exactly what we would expect to see in a normal shoulder.

5 Q. What is the significance of the area being pink and
6 white?

7 A. Well, the white is cartilage and that's the normal way
8 that you would expect cartilage to look. The white over here
9 in the glenoid area is also cartilage and in the labrum some of
10 the pinkness is because there's blood that's right under the
11 surface. My hand is kind of reddish because there's blood
12 underneath my skin. So that's what you are looking at. It's
13 just a little bit of the blood that shows through the normal
14 glenoid.

15 Q. So other than the frayed edge there, the blood that's
16 showing through in the white area, that would be considered
17 normal labrum?

18 A. Right, exactly. There were other pictures that would
19 show something else but these definitely show --

20 Q. Then further along in Dr. Berkowitz's procedure, did
21 he do additional things inside the left shoulder?

22 A. Yes.

23 MR. NEWMAN: There are additional photos I would
24 like the doctor to explain to the jury.

25 THE COURT: Proceed.

1 Q. Doctor, could you pick out the next set of
2 intraoperative photos and tell us what exhibit tab is on the
3 back?

4 A. I am looking at Exhibits 4-D and 4-E.

5 Q. Can you tell us what images are depicted on Exhibits
6 4-D and 4-E for the jury?

7 A. Sure. So now the doctor has taken his scope. We call
8 it a scope, that long tube that he is looking through, you are
9 looking through in these pictures. He is taking it out of the
10 joint of the shoulder. Not taking it all the way out of the
11 skin, just out of the joint. And now he has it between the
12 clavicle where your collar bone is and the rotator cuff. So he
13 is outside. He is not looking at the joint anymore. He is
14 looking at the outside of the joint from above.

15 If you look in these pictures and you look at these
16 pictures, I mean, this certainly looks like there is something
17 going on here. It's all rough. It's bloody. There's stuff
18 going on here as opposed to these which are clean and pristine.
19 The reason why these are nice and clean and pristine is because
20 there is no trauma here. The reason why these are all red and
21 rough and everything else is because there is trauma here. The
22 trauma that's caused by the doctor who is doing surgery.
23 Whenever we do surgery, we take things out, we cause trauma, we
24 cause bleeding, we cause injury. It's an injury that we
25 control, but it's nonetheless injury.

1 This is what injury looks like in the shoulder, if
2 somebody has an injury. This one, though, is an injury caused
3 by the doctor. You can even see his instruments in here. As
4 he cleans up the shoulder, he is actually taking off bone. If
5 you look at the bone here, this is the inside the bone. He
6 shaved off the outer portions of the bone and you are looking
7 at the marrow inside the bone underneath the clavicle. So
8 that's why it looks all red because it's actually blood coming
9 out.

10 MR. NEWMAN: Thank you, doctor. May the doctor
11 retake the witness stand?

12 THE COURT: Yes. Would counsel please approach
13 the bench?

14 (At this time, the witness resumed the witness
15 stand)

16 (Off-the-record discussion held at the bench)

17 THE COURT: Please continue.

18 Q. And those intraoperative photos, 4-A through E in
19 evidence, other than the trauma that occurred as a result of
20 Dr. Berkowitz doing the actual surgery, is there anything
21 indicative of a trauma occurring to Ms. Iovino's left shoulder
22 prior to the date of Dr. Berkowitz's surgery?

23 A. No.

24 Q. Doctor, did you have an opportunity to review
25 Ms. Iovino's medical records in this case?

1 A. Yes.

2 Q. What records did you review?

3 A. I reviewed the operative report from the surgery we
4 just talked about. I reviewed the intraoperative films. I
5 reviewed Dr. Berkowitz's reports, a series of them, from 2011.

6 MR. NEWMAN: I don't understand.

7 THE COURT: He is supposed to stand if he is
8 going to make an objection.

9 MR. HERBERT: He is answering the question, but
10 he is not fully reading the whole sentence of what he put
11 on his document.

12 THE COURT: Overruled. You may continue.

13 A. The series of reports by Dr. Berkowitz from 2000 and
14 2012. I reviewed the report of the MRI of the left shoulder
15 dated October 20, 2011. There were a series of reports from
16 Dr. Hannan from 2011. There were hospital records from Coney
17 Island Hospital Emergency Room from October 4, 2011, and there
18 was one report by Dr. Nathan dated February 11, 2012.

19 Q. Did you also have the opportunity to conduct a
20 physical examination of Ms. Iovino?

21 A. Yes.

22 Q. When did that occur?

23 A. On the same date, February 6, 2013.

24 Q. Can you tell us how you conducted your examination,
25 physical examination, of Ms. Iovino?

1 A. Well, in the physical examination, I examined her
2 neck, her shoulders, her elbows, her wrists and her hands. Do
3 you want me to go through the entire examination or do you want
4 me to just do certain parts?

5 Q. Let's restrict it to the left shoulder. Before I get
6 to that let me ask you, is there a difference between a
7 subjective complaint that a plaintiff or a complainant is
8 making and objective findings?

9 A. Yes.

10 Q. Can you tell us what the difference is?

11 A. Well, subjective and objective. Subjective is
12 something that I ask you to do that's completely under your
13 control and objective is something that I observe that's not
14 under your control. So an example, subjective would be if I
15 asked you to "raise your hand all the way up over your head" or
16 if you asked me "raise your hand over your head", and I said,
17 "I can only raise it this high." You have no way of knowing
18 whether I can raise it that high or not because it's under my
19 complete control. So that's subjective. Objective is
20 something that I can't control. So for instance --

21 THE COURT: You mean that the patient can't
22 control?

23 THE WITNESS: Right, the patient can't control.
24 That's right. Thank you.

25 And what that would be would be something like

1 muscle atrophy. Your muscles if you work out get bigger
2 and the opposite happens if you don't use them at all.
3 They get smaller. But you can't sit here today and make
4 your muscles get bigger and smaller like that. It's just
5 not under your control. They either are or they aren't.
6 That's the same thing with reflexes. There are a number of
7 things you can't control. That's the difference between
8 subjective complaint and objective finding.

9 Q. Your examination of Ms. Iovino, was that done of her
10 left shoulder as well as other body parts?

11 A. That's correct.

12 Q. Can you explain how you did your examination of the
13 left shoulder?

14 A. So with Ms. Iovino standing facing me I asked her with
15 her arms down at her side to bring her arms up over her head as
16 best she could and down, bring her two thumbs together in front
17 of her and up over her head, touch the back of her head, bring
18 her arms to her side and out to the side, touch the back of her
19 back and touch the opposite shoulder. And in doing this what I
20 am doing is checking the range of motion of her shoulders.

21 Ms. Iovino had a decrease in several ranges of motion.
22 When I asked her to bring her arm up over her head, she was
23 able to bring her arm up this high. That's 90 degrees. When I
24 asked her to bring her arm up this way in front of her, flexion
25 it's called, it was only 90 degrees as well. So she was able

1 to bring it about halfway normal. The rest of the examination
2 of the left shoulder was normal. That is, there was no
3 swelling. There was no bruising. There was no tenderness when
4 I pressed on her shoulder. There was no evidence of any
5 atrophy of the muscles that we were talking about earlier, none
6 of them were atrophied. There was no weakness of the muscles.
7 She had no evidence of instability of the shoulder.

8 Some people's shoulders dislocate. Hers didn't. I
9 checked for what's called impingement, a special kind of test.
10 That was normal as well. But she did have a scar on her
11 shoulder which was well healed from the surgery that was done.

12 Q. When you asked her to raise her arm above 90 degrees,
13 what was her response to that?

14 A. Well, she was only able to raise it up to this high,
15 at least that's what she told me. But as physicians we look to
16 see if there are any objective --

17 THE COURT: Doctor, since you are demonstrating
18 why don't you state what that is, this way the record will
19 reflect it.

20 THE WITNESS: So she was only able to raise her
21 arm to 90 degrees, about half of normal. And flexion to 90
22 degrees, about half of normal (indicating).

23 THE COURT: The record should reflect that
24 Dr. Toriello extended his arm straight out and then also
25 extended his arm straight forward.

1 Q. Was there any objective confirmation that she could
2 only raise her arm to 90 degrees in those directions?

3 A. No, there were no objective findings that would
4 support that subjective complaint.

5 Q. So when you do your exam, if the patient or the
6 claimant says they have pain in a certain level, that's the way
7 you would record the limitation of range of motion, correct?

8 A. Absolutely, yes.

9 Q. You don't force the arm above that trying to force it
10 into a greater motion, correct?

11 A. Force it, no, I would never do that, no.

12 Q. Why is that?

13 A. Well, for instance, if it really is that's all she can
14 raise it up, I don't want to hurt her any more. So I wouldn't
15 do it any further.

16 Q. Doctor, did you formulate an opinion with a reasonable
17 degree of medical certainty as to what injury, if any,
18 Ms. Iovino sustained in this accident of October 3, 2011?

19 A. Yes.

20 Q. What was that?

21 A. My opinion was that she had evidence of a resolved
22 left shoulder strain and that she had evidence possibly of
23 carpal tunnel syndrome of her left hand.

24 Q. When you say "carpal tunnel syndrome", were there
25 certain objective tests that are done to confirm whether or not

1 a patient has carpal tunnel syndrome?

2 A. Yes.

3 Q. By the way, what is carpal tunnel syndrome?

4 A. There are three nerves that go to your hand. One of
5 them is the called median nerve. They all have to fit through
6 a relatively small spot of your wrist, have to go through your
7 wrist. It's kind of like a funnel going from your arm down to
8 your narrowed wrist and then out to your hand. It's at the
9 wrist that that nerve, the median nerve, can get squeezed by
10 other things. It doesn't usually, but it could. If it does,
11 it causes symptoms affecting the first two and a half fingers
12 of your hand. And that's what carpal tunnel syndrome is.

13 Q. What typically is the cause of carpal tunnel syndrome?

14 A. Well, there are many different causes. It could be
15 caused by hyperthyroidism, pregnancy, tumors, repetitive
16 stress, trauma. And many of it is idiopathic, meaning we don't
17 know why some people get it.

18 Q. Someone who is an administrative assistant for many
19 years and types at a keyboard every day and regularly for many
20 years, is that typically someone who would be a candidate to
21 develop carpal tunnel syndrome?

22 A. It could be, yes.

23 Q. Are there certain tests that are done to objectively
24 diagnose a condition of carpal tunnel syndrome?

25 A. Yes.

1 Q. What are they? What is it, or they, or those tests?

2 A. They are called an EMG nerve conduction velocity
3 study.

4 Q. Explain for us what that is.

5 A. Just briefly what it is, it is a test that uses
6 electrical impulses to test the nerves going from the neck in
7 this case into the arms and it would basically look to see if
8 there is a spot along the route of a nerve that became
9 abnormal. And if it becomes abnormal in the wrist area here,
10 that would be consistent with carpal tunnel syndrome.

11 Q. Is that an objective test?

12 A. Yes.

13 Q. In the medical records that you reviewed of Ms. Iovino
14 after this accident, did you see any evidence where she ever
15 went for a test such as that, an EMG?

16 A. No, I didn't.

17 Q. Was that significant to you in diagnosing whether or
18 not Ms. Iovino has or doesn't have carpal tunnel syndrome?

19 A. Well, without that test I am not a hundred percent
20 sure that she has it. I am going according to the test that I
21 did, clinical examination that I had during my physical
22 examination. But I would like to see an objective or a more
23 objective test of that, the EMG nerve velocity study, before I
24 definitively said that she had carpal tunnel syndrome. But she
25 has findings that are consistent.

DIRECT - DR. TORIELLO - NEWMAN

406

1 Q. Can you determine the cause of that positive Tinel's
2 sign test?

3 THE COURT: I'm sorry. Can you repeat that,
4 Mr. Newman?

5 Q. Can you determine the cause of that positive Tinel's
6 sign testing?

7 THE COURT: Can you or did you?

8 MR. NEWMAN: First, can you.

9 A. Based on the medical records that I have, I don't
10 think I could, no.

11 Q. Doctor, did you formulate an opinion with a reasonable
12 degree of medical certainty as to whether or not Ms. Iovino
13 sustained any permanent disabling injuries as a result of this
14 accident of October 3, 2011?

15 A. Well, once again, as it relates to her shoulder I
16 didn't think she had any permanent disabling injuries. Once
17 again, I wasn't able to see if she had the EMG nerve velocity
18 study but based on the medical records that I have now I would
19 say that she doesn't seem to, no.

20 Q. Can you explain the reasoning or basis for your
21 opinion?

22 A. Well, we don't have any objective findings that would
23 definitively say that she's got a carpal tunnel syndrome. We
24 have objective findings that says she has a mild bursitis in
25 her shoulder from the MRI. We have emergency room records that

1 are consistent with a mild bursitis or an injury to the
2 shoulder that could be consistent with that. And we also have
3 the operative reports and intraoperative findings which are
4 completely consistent with a mild bursitis.

5 Q. And that mild bursitis in your opinion, doctor, is
6 that permanent?

7 A. No, bursitis is something that we all develop, many of
8 us develop, and it's usually self-limited.

9 Q. And the mild bursitis, is that disabling?

10 A. No.

11 MR. NEWMAN: Thank you, doctor. I have nothing
12 further.

13 THE COURT: You may cross-examine.

14 MR. HERBERT: Thank you, Your Honor.

15 CROSS EXAMINATION

16 BY MR. HERBERT:

17 Q. Good afternoon, doctor.

18 A. Good afternoon.

19 Q. Doctor, you come to court to testify a lot of times,
20 correct?

21 A. On average I come to court, approximately, 12 to 15
22 times per year.

23 Q. Would you able to say for the ladies and gentlemen of
24 the jury how many hundreds of times you have testified in
25 court?

1 A. Like I said, it's about 12 to 15 times a year and I
2 have been coming to court probably since about 1990.

3 Q. So 1990, 2000, 2010, almost 25 years?

4 A. Yeah, 24, 25 years.

5 Q. And we said, approximately, 12 to 15? I apologize.

6 A. That's correct.

7 Q. Twelve to 15 times 24 years. So, approximately, 24
8 times 12 to 15, would that be correct?

9 A. Yes.

10 Q. So we are somewhere above 300 times, correct, doctor?

11 A. Whatever the number is, yeah.

12 Q. Have you ever heard of what's called the Jury Verdict
13 Reporter?

14 A. I have heard of it, yes.

15 Q. Do you know that that's a reporting every time that
16 you have testified in court; is that correct, doctor?

17 MR. NEWMAN: Objection.

18 THE COURT: Sustained.

19 Q. If I said that you have testified in Kings County --
20 strike that.

21 Do you know what Kings County Supreme Court is?

22 A. Yes.

23 Q. This is Kings County Supreme Court, correct?

24 A. That's correct.

25 Q. If I told you according to the Jury Verdict Reporter

1 you have testified over 155 times just in Kings County Supreme
2 Court, would that refresh your recollection?

3 A. Refresh my recollection as to what?

4 Q. Isn't it true that you have testified over 155 times
5 just in Kings County Supreme Court?

6 A. I really have no idea how many times I have testified
7 here. I can tell you, as I said, about 12 to 15 times a year
8 for about 25 years.

9 Q. If I said during that time period you have testified
10 over 155 times in Kings County Supreme Court, that would be
11 correct, right, sir?

12 MR. NEWMAN: Objection. That's the fourth time
13 he was asked.

14 THE COURT: You are asking does he have any
15 reason to dispute that number?

16 Q. Do you have any reason to dispute that number, doctor?

17 A. I don't have any knowledge. I don't know. It might
18 be right. It might not be right.

19 Q. During over that 155 times in Kings County Supreme
20 Court you have testified mostly on behalf of defense firms,
21 correct?

22 A. Yes.

23 Q. And you have testified before in Queens County Supreme
24 Court, correct, sir?

25 A. That's correct.

1 Q. You have testified in Westchester Supreme court?

2 A. I don't believe so, no.

3 Q. You have testified in Kings Civil Court?

4 A. Yes.

5 Q. You have actually testified before Judge Rivera before
6 in the past few times, correct?

7 A. I might have. I am not sure I remember him but...

8 Q. You have testified in Nassau Supreme Court?

9 A. I believe once or twice.

10 Q. You have testified in Richmond Supreme Court?

11 A. Maybe once or twice.

12 Q. You have testified in mediations?

13 A. Yeah, a few times.

14 Q. You have testified in Federal Court?

15 A. A few times, yes.

16 Q. You have testified in New York County Supreme Court?

17 A. I don't recall. I don't think so.

18 Q. You have testified at arbitrations?

19 A. I thought that was mediations. Actually, arbitrations
20 is what I did.

21 Q. You have testified in Federal Court in Newark,
22 correct?

23 A. Once.

24 Q. You have testified for all different types of
25 accidents, correct?

1 A. Well, mostly car accidents.

2 THE COURT: I'm sorry. Is this related to Newark
3 or in general?

4 MR. HERBERT: In general.

5 A. There were various different types of accidents.

6 Q. And you said you get paid I believe you said \$5,000.
7 You testified to that, correct?

8 A. For the time out of my office it's \$5,000, that's
9 correct.

10 Q. So if I said just for Kings County Supreme Court, just
11 focusing on Kings County Supreme Court, if we do 155 times
12 which is conservative times \$5,000, you have made over \$775,000
13 just testifying in Brooklyn Supreme Court; isn't that correct,
14 doctor?

15 A. Over the last 24 years?

16 Q. Yes.

17 A. It's possible. If the numbers are correct. Whatever
18 the numbers are, that's what they are.

19 Q. In your career of testifying which we said is mostly
20 for the defense firms, you made over two million dollars at
21 least testifying in court, correct, just testifying in court?

22 A. Oh, I am not sure. Maybe. I am not sure.

23 Q. Well, we can say millions, correct?

24 A. It's possible.

25 Q. And you also get paid for generating a report. We

1 didn't talk about that either, right, you get paid for
2 generating a report?

3 A. Yes.

4 Q. How much did you get for generating this report for
5 Ms. Iovino? How much did you get paid?

6 A. That I don't know.

7 Q. Do you have any notes in front of you?

8 A. No. Well, I have notes in front of me, yes, but not
9 related to how much I was paid.

10 Q. Would you be able to approximate for the ladies and
11 gentlemen of the jury how much you got paid for generating this
12 report for Ms. Iovino?

13 A. No.

14 Q. If I said a few hundred dollars, would that be
15 approximate?

16 A. It's possible, but I don't know.

17 Q. You have no idea how much you got paid?

18 A. I really don't know.

19 Q. How many times a week do you see patients to generate
20 a report?

21 A. You mean reports of this nature?

22 Q. Yes.

23 A. Probably about 35 to 40 times a week.

24 Q. And we said those times, 35 to, approximately, 40
25 times a week are for the defense, correct?

1 A. No, they are both for plaintiff and defense.

2 Q. Would you agree with me that it's mostly for the
3 defense?

4 A. I am not really sure. It probably is, but I don't
5 know for sure.

6 Q. So just for these reports on a given year, how much
7 money do you make besides testifying in court just for
8 generating these reports?

9 A. I don't know. I am sure you have it on your yellow
10 page. Tell me. I don't know.

11 Q. A lot of money, right, doctor?

12 A. Whatever the numbers come to.

13 Q. And you have testified before on behalf of Richard
14 Lau's office, the defense firm, correct?

15 A. I believe so, yes.

16 Q. And you want to keep Richard Lau happy so they use you
17 in the future, correct, doctor?

18 MR. NEWMAN: Objection. I also object to counsel
19 pointing to me as Richard Lau. I am not Richard Lau.

20 THE COURT: Your name is Newman, isn't it?

21 MR. NEWMAN: Yes.

22 THE COURT: That's Mr. Newman.

23 MR. HERBERT: Yes, Your Honor. I didn't mean --

24 THE COURT: There is a question. You can answer
25 the question.

1 A. In my view of what I do for Mr. Lau and every other
2 person that I do these reports for is to tell the truth and
3 that's what keeps them happy. If it's not what keeps them
4 happy, then I don't do reports for them.

5 Q. Your office is in Queens, correct, doctor?

6 A. My office, yes.

7 Q. And you come to brooklyn to testify, you don't come to
8 treat patients, correct?

9 A. You mean today? I am coming here to testify, you are
10 absolutely right.

11 Q. But you don't have an office in Brooklyn to treat
12 patients, correct?

13 A. That's correct.

14 Q. Ms. Iovino is not your patient, correct?

15 A. That's correct.

16 Q. And there is no patient/client, there is no
17 patient/doctor relationship between you and Ms. Iovino,
18 correct?

19 A. That's correct.

20 Q. And no one is going to make a treatment plan based
21 upon your report that you generated, correct?

22 A. Oh, I don't know. I generated my report as I would
23 any second opinion that I do for private patients as well as
24 for medical legal purposes. What's done with that is, you
25 know, up to whoever is reading it. I would like them to have

1 done the EMG nerve conduction velocity study. That's what I
2 asked for.

3 Q. Did you ever follow-up with the patient? You never
4 followed up with Ms. Iovino in terms of treatment after you saw
5 her, correct?

6 MR. NEWMAN: Objection.

7 MR. HERBERT: Withdraw.

8 Q. You saw Ms. Iovino for, approximately, five minutes
9 when you did your examination, correct, doctor?

10 A. Oh, I don't examine in time. My examinations they
11 take as long as necessary to get the information that I need to
12 write an accurate report.

13 Q. If I told you, approximately, five minutes, would that
14 refresh your recollection of how long you actually saw
15 Ms. Iovino in the room for?

16 A. Once again, I really don't know. Whatever time was
17 necessary to get the information I needed.

18 Q. Now, doctor, I want to look at your report that you
19 generated.

20 A. Sure.

21 Q. Now, you generated this report in February of 2013,
22 correct?

23 A. Yes, February 6, 2013.

24 Q. Almost a year and a half after the date of accident,
25 correct?

1 A. Yes.

2 Q. And on the top you wrote Richard T. Lau & Associates.
3 Is that who you were addressing this report to?

4 A. Well, I didn't address it to anybody. My staff did.
5 I wrote the report, but I don't address anything, no. But
6 that's who the report is written to, yes.

7 Q. Now, reading down the report, doctor, on the first
8 page where it says "surgical history", do you see that? Below
9 the "history".

10 A. Yes.

11 Q. And it says she has no past medical history. What
12 does that mean, doctor?

13 A. Well, I asked her if she has a problem with high blood
14 pressure, diabetes, heart disease, kidneys, lungs. She told me
15 no.

16 Q. Isn't it also true that no past medical history also
17 means regarding the left shoulder, left arm and left hand?

18 A. Any past medical history. Like I said, she doesn't
19 have high blood pressure in her whole body. So that would
20 include every part of her body. Diabetes, all that would be
21 no.

22 Q. Let me ask you a question, doctor. In the past when
23 you have worked with defense law firms and there was a problem
24 for a prior injury to a body part that was claimed in this
25 case, wouldn't that defense firm provide you with those prior

CROSS - DR. TORIELLO - HERBERT

417

1 documents or prior medical records or anything to draw your
2 attention to anything they wanted you to see?

3 MR. NEWMAN: Objection.

4 THE COURT: You can answer.

5 MR. NEWMAN: Judge, may we approach?

6 THE COURT: Sure. You can approach

7 (Off-the-record discussion held at the bench)

8 THE COURT: I reversed the decision. The

9 objection is sustained. Please continue.

10 Q. In the past you have been given documents to review
11 before writing your report, correct?

12 A. I was given medical records you are talking about, I
13 was given in this case as well.

14 Q. And if there was something that they wanted you to
15 see, they would provide you with medical records in the past,
16 correct?

17 MR. NEWMAN: Objection. Same question.

18 THE COURT: It is sustained.

19 Q. In this case with Ms. Iovino, was there any prior left
20 shoulder, left arm or left hand records provided to you from
21 before this accident?

22 A. No.

23 Q. In this case, was there any prior right shoulder
24 documents provided to you for you to look at when you wrote
25 your report?

1 A. No.

2 Q. In this case, was there any neck prior injury provided
3 to you when you wrote this report for Ms. Iovino?

4 A. I'm sorry, you said any what?

5 Q. Neck.

6 A. Neck, no.

7 Q. In this case for Ms. Iovino, were there any records of
8 back injury before you wrote this report for Ms. Iovino?

9 A. No.

10 Q. Looking at the report, doctor, under "current
11 complaints", when you say "current complaints", what does that
12 mean, doctor?

13 A. That's an answer to my question when I ask an
14 individual, I say, "In general, what kind of problems are you
15 having, in general?" And then they list all the problems that
16 they are having in general. Not that specific day but "in
17 general, what kind of problems are you having presently?"

18 Q. And what was the response, doctor?

19 A. Well, Ms. Iovino's response was she told me she had
20 numbness in her thumb, her index and middle fingers of the left
21 hand and she also told me she had pain in her left shoulder
22 that had radiated into her neck.

23 Q. So now we are, approximately, a year and a half after
24 the date of accident, right, doctor?

25 A. Yes.

1 Q. And Ms. Iovino is complaining to you about still pain
2 in the left shoulder, is that correct, and the neck?

3 A. That was her complaint, yes.

4 Q. And, doctor, what is chronic pain syndrome?

5 A. I am not sure I understand the question. Chronic pain
6 syndrome I guess would be pain that lasts a long time.

7 Q. And at this point, a year and a half after the date of
8 accident and Ms. Iovino is complaining to you in your office
9 regarding left shoulder pain, would you consider that chronic
10 pain?

11 MR. NEWMAN: Objection.

12 THE COURT: Overruled. You may answer.

13 MR. NEWMAN: Judge, may we approach?

14 THE COURT: No, you may not.

15 A. If you are asking me if it's chronic pain syndrome or
16 just chronic pain because I am not familiar with the term
17 "chronic pain syndrome." There may be a whole list of things
18 necessary for it to be considered a syndrome. If you are
19 asking me if it's just considered chronic pain, that's a
20 different question. Which question are you asking me?

21 Q. Are you saying you are not familiar with the term
22 "chronic pain syndrome"?

23 A. Not as chronic pain syndrome. There is a syndrome
24 called complex regional pain syndrome. I don't know if that's
25 what you are referring to but chronic pain syndrome, I am not

1 familiar with that term.

2 Q. Doctor, you have testified in other cases before we
3 talked about earlier, correct?

4 A. Yes.

5 Q. And you testified -- does the name Mary Marlene Balise
6 sound familiar?

7 A. No.

8 Q. In June of 2004, you were asked questions on the
9 stand. Do you recall that?

10 A. No.

11 Q. Do you remember a patient by the name of Mary Marlene
12 Balise?

13 A. No, I really don't. I'm sorry.

14 Q. I would like to refer to Page 47 of the transcript.

15 MR. NEWMAN: Objection.

16 THE COURT: We will take a short recess. Please
17 do not discuss the case. Keep an open mind, form no
18 judgements about the case. You may follow Ms. Armstrong.

19 COURT OFFICER: Jury exiting.

20 (At this time, the jury left the courtroom)

21 THE COURT: Dr. Toriello, can you go outside for
22 about five minutes? Don't stray far because this will not
23 be very long. Thank you very much.

24 (At this time, the witness left the courtroom)

25 THE COURT: Mr. Newman, you raised an objection.

CROSS - DR. TORIELLO - HERBERT

421

1 You wanted to approach on it. I figured it may be
2 pertinent to what's happening next. So why don't you put
3 it on the record. Is that all right?

4 MR. NEWMAN: Sure, Judge.

5 The prior objection was related to the fact that
6 there is no claim in the Bill of Particulars of chronic
7 pain syndrome that Ms. Iovino is claiming that she
8 sustained as a result of this accident. The objection to
9 counsel reading this transcript is, A, Dr. Toriello doesn't
10 remember the plaintiff, doesn't remember testifying in the
11 case. I have never seen the transcript. I don't know if
12 the transcript is accurate, certified or anything else. So
13 reading out of a transcript that counsel got from someplace
14 to this witness when he says he has no recollection of the
15 case or no recollection of testifying in it is an improper
16 foundation for allowing the plaintiff to use the
17 transcript.

18 THE COURT: I am hearing two objections. The
19 first objection is to eliciting information regarding
20 chronic pain syndrome and the second objection is to his
21 intention to read from a transcript.

22 MR. NEWMAN: Right.

23 THE COURT: I will deal with them one at a time.
24 Did you complete your argument on both?

25 MR. NEWMAN: Yes.

CROSS - DR. TORIELLO - HERBERT

422

1 THE COURT: However, the objection to chronic
2 pain syndrome, I have already -- did I sustain it?

3 MR. NEWMAN: No, you overruled my objection, but
4 the doctor testified he is not familiar with the term.

5 THE COURT: Well --

6 MR. NEWMAN: But in any event there is no claim
7 in the Bill of Particulars.

8 THE COURT: Well, I understand. But I believe
9 that when he was asked about chronic pain syndrome, he
10 indicated that it was pain that would last for a long time.
11 So he described what he thought it meant.

12 MR. NEWMAN: Well, no. He said that chronic
13 pain --

14 THE COURT: I will not say verbatim what he said,
15 but the question wasn't changed. Mr. Herbert asked him is
16 he familiar with the term and he said, "Well, it means pain
17 that lasts for a long time."

18 MR. NEWMAN: That's chronic pain as opposed to
19 chronic pain syndrome.

20 THE COURT: Mr. Newman, when he then reaches and
21 asks the question again with the word "syndrome" in the
22 question, then the witness seemed to treat it differently.

23 MR. NEWMAN: Yes.

24 THE COURT: And indicated that he wasn't familiar
25 with it. But chronic pain is an issue in this case, isn't

1 it?

2 MR. NEWMAN: Well, there is no claim of chronic
3 pain syndrome. That's what I was objecting to.

4 THE COURT: You are beginning your objection
5 operating on a premise that chronic pain and chronic pain
6 syndrome are two different things.

7 MR. NEWMAN: That's what he said.

8 THE COURT: Do you accept that or not?

9 MR. NEWMAN: In his explanation he said a
10 syndrome may involve other things beyond simply someone
11 having pain for a long period of time.

12 THE COURT: Mr. Newman, it has to be beyond
13 question that the plaintiff is claiming an injury that she
14 is claiming still hurts her.

15 MR. NEWMAN: I don't disagree.

16 THE COURT: And that it is hurting her for a long
17 time.

18 MR. NEWMAN: Absolutely.

19 THE COURT: So I hope we are not wasting time
20 arguing about that.

21 MR. NEWMAN: No, it's just the word --

22 THE COURT: Which would mean that the doctor when
23 he is being asked about chronic pain, that's not
24 irrelevant. It's certainly an issue here.

25 MR. NEWMAN: And I don't object to that.

CROSS - DR. TORIELLO - HERBERT

424

1 THE COURT: Which would mean, once again, that
2 the description "chronic pain syndrome", you are treating
3 it as something different than chronic pain?

4 MR. NEWMAN: Yes.

5 THE COURT: And the witness has testified to
6 there being a difference --

7 MR. NEWMAN: Yes.

8 THE COURT: -- to the two.

9 What's wrong with him explaining the difference
10 so that I can tell whether or not it's relevant or not?

11 MR. NEWMAN: I don't object to the question about
12 chronic pain. Chronic pain syndrome says it involves
13 something else that he is not familiar with and there is no
14 claim in the Bill of Particulars of chronic pain syndrome.

15 THE COURT: I understand that.

16 MR. NEWMAN: That's my objection.

17 THE COURT: I don't think there is anything wrong
18 with the question as to chronic pain syndrome under these
19 circumstances when the plaintiff is complaining of chronic
20 pain and with the doctor explaining that it's different,
21 it's perfectly okay for him to explain there is a
22 difference. That objection is overruled and I stand by my
23 prior ruling.

24 With the reading of the transcripts, I would have
25 to address that now. What is your plan?

CROSS - DR. TORIELLO - HERBERT

425

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. HERBERT: He was asked questions in a deposition on direct.

THE COURT: You intend to read from a prior transcript?

MR. HERBERT: Yes, Your Honor.

THE COURT: This is a transcript of this witness?

MR. HERBERT: Yes, Your Honor.

THE COURT: At a different proceeding involving different people?

MR. HERBERT: Yes, Your Honor.

THE COURT: That transcript, was it provided to him for him to go over and make corrections for him to sign?

MR. HERBERT: I don't know.

THE COURT: Was this a deposition transcript?

MR. HERBERT: It was trial testimony.

THE COURT: So this is a trial of a litigation in a different matter?

MR. HERBERT: Yes.

THE COURT: The transcripts that you have, are they certified by the reporter who prepared them?

MR. HERBERT: Yes, Your Honor.

THE COURT: Okay. What is it that you intend to do?

MR. HERBERT: It asks what is chronic pain

CROSS - DR. TORIELLO - HERBERT

426

1 syndrome and he gives an explanation of what chronic pain
2 syndrome is.

3 THE COURT: By him?

4 MR. HERBERT: Yes, Your Honor.

5 THE COURT: What does he say?

6 MR. HERBERT: "QUESTION: What is chronic pain
7 syndrome?

8 ANSWER: Something that we don't understand very
9 well. It happens in some people who have a very, very big
10 pain response to something that ordinarily wouldn't cause
11 pain. It could be after surgery to injury. Some people
12 will recover and do fine. Some people develop a
13 hypersensitivity to it in that area and have pain in that
14 area and then that causes a whole series of things that
15 happen."

16 THE COURT: All right, I got it. So is there
17 anything about his testimony now where he says chronic pain
18 injury is not the case here that you are trying to impeach?

19 MR. HERBERT: I was going to go there.

20 THE COURT: You intend to impeach him?

21 MR. HERBERT: I know I do.

22 THE COURT: So does that mean that you are trying
23 to put an issue in this case chronic pain syndrome?

24 MR. HERBERT: Yes.

25 THE COURT: Counsel is indicating that you have

1 given no notice of chronic pain syndrome as one of the
2 areas of injury or damages that you are claiming.

3 MR. HERBERT: Well, I was under the impression as
4 Your Honor that chronic pain is over a long period of time.
5 This report was almost two years after date of accident
6 where he is still eliciting complaints of pain in the left
7 shoulder.

8 THE COURT: I understand. Would it be fair to
9 say that you presumed pain that lasts a long time is
10 chronic pain syndrome?

11 MR. HERBERT: Yes.

12 THE COURT: Did you have an expert discuss that
13 with you?

14 MR. HERBERT: No, Your Honor.

15 THE COURT: Your orthopedist that you produced,
16 was he broached about the issue of chronic pain syndrome?

17 MR. HERBERT: No, Your Honor.

18 THE COURT: So then all I have is your layman's
19 understanding?

20 MR. HERBERT: Yes, Your Honor.

21 THE COURT: Which means the only expert I heard
22 on the issue is the expert on the stand who is indicating
23 that chronic pain and chronic pain syndrome are not the
24 same thing. Agreed?

25 MR. HERBERT: Yes, Your Honor.

CROSS - DR. TORIELLO - HERBERT

428

1 THE COURT: If it's not the same thing, then the
2 fact that you have alleged continuous long lasting pain
3 does not mean that you made out a case of chronic pain
4 syndrome. That means that their objection to the area of
5 inquiry is proper since it is not an area in this case
6 unless you somehow intend to make it relevant to this case.

7 MR. HERBERT: No, Your Honor.

8 THE COURT: Do you intend to call another expert
9 to explain how her chronic pain syndrome is relevant to her
10 shoulder or arm injury?

11 MR. HERBERT: No, Your Honor.

12 THE COURT: Then what other purpose can you see
13 for the relevance of this line of inquiry?

14 MR. HERBERT: Because he stated he never heard of
15 chronic pain syndrome and he gave an answer in another
16 proceeding what chronic pain syndrome is. It sounds like
17 the same exact situation that we have in this case.

18 THE COURT: I see. Well, it sounds to me -- that
19 response indicates what chronic pain syndrome is from him?

20 MR. HERBERT: Yes, Your Honor.

21 THE COURT: There is nothing wrong with you
22 asking, "isn't chronic pain syndrome" quote, as opposed to
23 show that his answer is inaccurate. But it doesn't affect
24 his credibility, not really. It's on an issue that's far
25 removed from what we are dealing with which we sorted out

1 now. Do you still wish to go there?

2 MR. HERBERT: No, Your Honor.

3 THE COURT: Then I assume he won't be reading
4 from these transcripts.

5 MR. NEWMAN: I withdraw my objection.

6 MR. HERBERT: While we are on that portion of the
7 transcript, there was a portion of the transcript that I
8 did intend to go to if I needed to. Do you want me to
9 bring it up now just in case?

10 THE COURT: I am listening.

11 MR. HERBERT: There was a portion in the
12 transcript that stated that surgery as opposed to MRI's are
13 100 percent when a doctor can see inside the body with an
14 arthroscopic surgery as compared to just MRI films.

15 THE COURT: Well, here's the thing, because of
16 the transcript, where it was obtained and what the issues
17 were, it can't be used as direct evidence of anything. It
18 can only be for impeachment. Since it's for impeachment
19 purposes at best, he has to say something to impeach first.
20 And you have yet to ask him whether or not a doctor viewing
21 the operative field is in a better position to know what's
22 there over someone reading an MRI film. I seriously doubt
23 he will disagree with you.

24 MR. HERBERT: Okay, thank you, Your Honor.

25 THE COURT: All right, you cannot read from that

1 portion absent conflicting testimony and then that makes
2 right for review whether you can use the transcript for
3 that purpose. Just to make things simple, do you have the
4 section of the transcript you want to read from in front of
5 you? Do you have it?

6 MR. HERBERT: Yes, Your Honor.

7 THE COURT: I would like for you to hand it over
8 to Mr. Newman so he can see it. Mr. Newman, you can
9 satisfy yourself whether it is a certified transcript and
10 then I will hear what your objections are assuming the
11 foundation is laid.

12 Let's get the doctor and bring the jury out. I
13 would like for you to finish with this doctor so we can be
14 done with him before we break.

15 MR. HERBERT: Yes, Your Honor.

16 (At this time, the witness resumed the witness
17 stand)

18 THE COURT: We are ready for the jury.

19 Dr. Toriello, you can take a seat. Everybody
20 else can be seated. Just Mr. Herbert needs to stand.

21 COURT OFFICER: Jury entering.

22 (At this time, the jury entered the courtroom)

23 THE COURT: Everyone will remain seated except
24 for Mr. Herbert.

25 All members of the jury panel are present.

1 Mr. Herbert, you may continue.

2 Dr. Toriello, you are still under oath.

3 THE WITNESS: Yes.

4 CONTINUED CROSS-EXAMINATION

5 BY MR. HERBERT:

6 Q. Now, doctor, in the February of 2013 report that you
7 generated, approximately, a year and a half after date of
8 accident you took measurements or range of motion of the left
9 shoulder, correct, doctor?

10 A. That's correct.

11 Q. In your range of motion test that you took regarding
12 the left shoulder, approximately, a year and a half after date
13 of accident, you took six range of motion tests to the left
14 shoulder, correct?

15 A. Yes.

16 Q. And out of those six range of motion tests you took in
17 the left shoulder, approximately, a year and a half after the
18 date of accident you found two out of the six to have decreased
19 range of motion of 50 percent in Ms. Iovino's left shoulder,
20 correct?

21 A. That's correct.

22 Q. So two out of six or one third of the range of motion
23 tests you have taken a year and a half later of Ms. Iovino's
24 left shoulder you found 50 percent decreased range of motion,
25 correct?

1 A. That's correct.

2 THE COURT: I'm sorry, I am at a little bit of a
3 loss. When you say 50 percent --

4 THE WITNESS: It wasn't really 50 percent.
5 Actually, she was able to move about 90 degrees. Normal is
6 150 degrees. So it's a little bit more than 50 percent.
7 But he is saying 50 percent of the normal. I expect that's
8 what he is saying.

9 THE COURT: Just so I understand, you have a
10 normal range in mind.

11 THE WITNESS: 150 degrees. So about that high
12 (indicating).

13 THE COURT: So 150 is actually normal and her
14 finding was?

15 THE WITNESS: She came up to about 90. So that
16 high (indicating). Lacking about maybe 60 percent -- well,
17 I mean doing about 60 percent. Lacking less than 60
18 percent.

19 THE COURT: About 40 percent?

20 THE WITNESS: Probably about 40 percent was
21 abnormal. She was missing 40 percent.

22 THE COURT: I guess what I am getting at is, when
23 you give the number of the restriction, are you talking
24 about the percentage that they don't move to normal or are
25 you talking about what they actually can do?

CROSS - DR. TORIELLO - HERBERT

433

1 THE WITNESS: What they are actually able to
2 move. So that would be -- 90 degrees would be here
3 (indicating).

4 THE COURT: I understand. So now that we get it,
5 you can continue.

6 MR. HERBERT: Thank you, Your Honor.

7 Q. So let's just break that down. So what percentage
8 decreased range of motion did you have of Ms. Iovino's left
9 shoulder a year and a half after date of accident when you did
10 your range of motion tests?

11 A. So 90 minus 150 is 60 degrees. And 60 over 150 is
12 probably -- I am just estimating. If you have the math there,
13 you can do it. It's probably about 40 percent maybe.

14 THE COURT: So that means there is a 40 percent
15 range of motion --

16 THE WITNESS: Loss, deficit.

17 THE COURT: What do you call that range of
18 motion, that particular one?

19 THE WITNESS: There were two. They are both the
20 same. Abduction, A-B duction, to the side. And flexion,
21 in front.

22 THE COURT: Did you give those numbers on the
23 front?

24 THE WITNESS: They are the same. Ninety degrees
25 is what she was able to move which represents, I guess,

CROSS - DR. TORIELLO - HERBERT

434

1 about a 40 percent deficit. Subjective finding.

2 THE COURT: This means abduction, straight out
3 like a cross. And forward as if you are saying stop, we do
4 we call that?

5 THE WITNESS: Flexion.

6 THE COURT: Please continue.

7 Q. So just to recap. There was two that you found 40
8 percent decreased range of motion for Ms. Iovino a year and a
9 half after date of accident, correct?

10 A. That was her finding, yes.

11 Q. And would you agree with me that a patient who has
12 decreased range of motion of 40 percent or two out of six range
13 of motion tests you took year and a half after date of
14 accident, wouldn't that be permanent decreased range of motion
15 for the left shoulder?

16 MR. NEWMAN: Objection.

17 THE COURT: Wouldn't that be what?

18 MR. HERBERT: Wouldn't that be a permanent
19 finding?

20 THE COURT: You can answer that.

21 A. I need some clarification. Does that same person have
22 an MRI that just shows bursitis? Does that same person have
23 any atrophy? Does that same person have any objective findings
24 that would support --

25 THE COURT: Here's what we are going to do, we

1 are going to have the questions only come in one direction.
2 The question that is put before you is based on what you
3 found. Can you answer that question? You either can or
4 you can't.

5 THE WITNESS: Okay, so I need further
6 clarification. I thought that was hypothetical, by the
7 way.

8 THE COURT: No. Counsel is asking you what you
9 found and he is asking based on what you found whether that
10 shows --

11 MR. HERBERT: Permanent injury, decreased range
12 of motion.

13 THE COURT: Does that show permanent range of
14 motion restriction?

15 THE WITNESS: In this case?

16 THE COURT: Yes.

17 THE WITNESS: No.

18 Q. So a year and a half after date of accident with 40
19 percent decreased range of motion in two out of the six range
20 of motion tests you took for the shoulder and that's not
21 permanency?

22 A. In this case?

23 Q. Yes.

24 A. No.

25 Q. You found scarring on Ms. Iovino's left shoulder?

1 A. Yes.

2 Q. Would you be able to describe how big the scarring
3 was?

4 A. The usual arthroscopic scars about a centimeter or so.

5 THE COURT: I'm sorry. For us, could you tell us
6 what a centimeter is? Is it like a inch?

7 THE WITNESS: So there are about two and a half
8 centimeters, 2.54 centimeters in an inch. So easily a
9 centimeter is about the size of your fingernail.

10 Q. How many did you find of those?

11 A. I don't recall but there's usually three. They were
12 all well healed.

13 Q. But you saw some scarring?

14 A. Yes.

15 THE COURT: You found three one-centimeter cuts
16 or a three-centimeter cut?

17 THE WITNESS: No, I don't know how many there
18 were. There usually are three and they are about the size
19 of a centimeter which is about the size of your fingernail.

20 THE COURT: Less than an inch?

21 THE WITNESS: Yes.

22 Q. And there were three of those?

23 A. Usually there's three.

24 Q. Would you agree with me that a year and a half after
25 date of accident when you took your report when you saw three

1 of these scars that would be permanent scarring?

2 A. The scars are going to be there forever, yes.

3 Q. Now, doctor, I want to go over your review of medical
4 records in your report. Can you turn to that page?

5 A. Sure.

6 Q. Are you ready?

7 A. Yes.

8 Q. First, you said you examined the operative report
9 dated December 28, 2011, correct?

10 A. Yes.

11 Q. And that revealed a labrum tear; is that correct?

12 A. That was what the operative report said, yes.

13 Q. Did you ever put anywhere in your report that you
14 generated at the time you did the report that there was no
15 labrum tear present?

16 A. Did I use those exact words, no.

17 Q. Did you put "labrum tear" or any other word that means
18 a labrum? Did you say any words in your report that you
19 generated for this case to represent labrum, that there was no
20 labrum tear?

21 A. Like I said, no.

22 Q. No, you did not put anything in here to say there was
23 no labrum tear, correct?

24 A. That's correct.

25 Q. And when you got up here today and you said there was

1 no labrum tear in front of the ladies and gentlemen of the
2 jury, that's the first time you are saying there's no labrum
3 tear for Ms. Iovino. There was no written report that you said
4 that.

5 MR. NEWMAN: Objection.

6 THE COURT: Can I have you up here for a second?

7 (Off-the-record discussion held at the bench)

8 THE COURT: You may answer the question.

9 Q. Isn't it true, doctor, that prior to today you never
10 documented that there was a labrum tear or no labrum tear for
11 Ms. Iovino?

12 MR. NEWMAN: Objection.

13 THE COURT: What do you mean by that?

14 Q. Did you ever write a report for defense counsel
15 stating that there was no labrum tear for Ms. Iovino?

16 MR. NEWMAN: Objection.

17 THE COURT: You may answer that.

18 A. To my knowledge, I didn't. That's correct.

19 Q. I'm sorry?

20 A. To my knowledge, that's correct.

21 Q. Isn't it true, doctor, that you never wrote a report
22 to defense counsel that there was a labrum tear or that there
23 wasn't a labrum tear for Ms. Iovino?

24 MR. NEWMAN: Objection.

25 THE COURT: You mean to anyone?

CROSS - DR. TORIELLO - HERBERT

439

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. HERBERT: Yes.

THE COURT: Well, you said to defense counsel,

MR. HERBERT: To anyone.

A. I am not aware of being asked that question in writing and asking for the report. So if I wasn't asked for the report, I don't think I wrote one.

THE COURT: I think the question is, did you write a report to anybody, anybody, that there was or wasn't a labrum tear?

THE WITNESS: And to my knowledge --

THE COURT: Yes or no.

THE WITNESS: Well, I don't know. I don't think so, but I don't know.

THE COURT: You don't know. Okay.

Q. So the first time that you could recollect saying that there was a labrum tear or no labrum tear was just now before the ladies and gentlemen of the jury, correct?

MR. NEWMAN: Objection.

THE COURT: You may answer that.

A. I think we might have spoken about it outside too but once I saw the intraoperative photos I knew what it was.

Q. So that was the first time you ever said there was a labrum tear or wasn't a labrum tear, correct?

A. It might have been the first time I was asked the question in which case I would answer it. If I wasn't asked

1 the question, I wouldn't answer it.

2 Q. But you were asked to write a report regarding
3 Ms. Iovino, correct?

4 A. That's correct.

5 Q. And you knew when you were writing your report
6 regarding Ms. Iovino that there was a surgery to repair a torn
7 labrum, correct?

8 MR. NEWMAN: Objection. May I approach again?

9 THE COURT: No. You may answer.

10 A. There was no surgery to repair a torn labrum. There
11 was a surgery that debrided a labrum and that's what I
12 addressed was the question what injury she had sustained as a
13 result of the accident. And that's what I wrote in the report.

14 Q. So you didn't think it was important, doctor, that you
15 saw there was a surgery to repair the labrum to comment in your
16 report that you were hired, paid a few hundred dollars, paid
17 \$5,000 to come into court today, you didn't think that was
18 important to put in your report when you reviewed the documents
19 regarding Ms. Iovino?

20 MR. NEWMAN: Objection.

21 THE COURT: Bad form.

22 Q. It wasn't important to conclude if there was a labrum
23 tear or there wasn't a labrum tear for this report after you
24 saw there was an operative report for Ms. Iovino?

25 MR. NEWMAN: Objection.

CROSS - DR. TORIELLO - HERBERT

441

1 THE COURT: He can answer that.

2 A. Once again, I answered the questions that I was asked
3 to answer. There was no labral repair done. There was a
4 debridement. You keep saying "repaired." it wasn't. It was a
5 debridement. There was a debridement of the labrum. I was not
6 asked that question. Therefore, I can't answer questions I
7 wasn't ask.

8 Q. Who asked you questions, what questions?

9 A. Questions that are asked in the report which are I am
10 asked to identify if there are any injuries related to the
11 accident, if the individual has any disability related to those
12 accident injuries and if the individual needs more treatment.

13 Q. And who asked you those questions?

14 A. Whoever asked me to do the report.

15 Q. Can you see from looking at the report who asked you
16 those questions?

17 A. No.

18 Q. Do you want to take a look at your report?

19 A. No, but I don't know who asked me the questions.

20 That's what you were asking me.

21 Q. But does the report that you wrote refresh your
22 recollection of who asked you these questions you are talking
23 about?

24 A. No.

25 Q. Don't you want to look at your report?

1 A. I know it's not there. I've looked at my report. I
2 know it's not on there. Who asked me the questions, I don't
3 know.

4 Q. If I said Richard Lau's office, would that sound
5 familiar?

6 A. They may have, but they may not have. It may have
7 been someone else.

8 Q. Do you think it's curious, doctor, that Ms. Iovino had
9 a labrum debridement from Dr. Berkowitz? Is that what you
10 said, correct, a debridement?

11 A. That's what he wrote too.

12 Q. And you didn't comment on the debridement in your
13 report, isn't that correct, doctor?

14 MR. NEWMAN: Objection.

15 THE COURT: Are you asking if it is curious or
16 are you asking did he comment on it?

17 Q. Did you comment on it, doctor?

18 A. I did not comment on it, no.

19 Q. Okay, let's move on. You mentioned on the review of
20 medical records there were copies of intraoperative films, but
21 they were poor quality. What does that mean, doctor?

22 A. They were poor quality. I couldn't read them.

23 Q. So does that mean the first time you saw the
24 intraoperative photos of Ms. Iovino was maybe a half hour ago,
25 an hour ago?

1 A. No.

2 Q. When was the first time you saw them, doctor?

3 A. Oh, I can't tell you, but I have them in my records.

4 THE COURT: I'm sorry, counselor. Are you
5 referring to the ones that are poor quality or something
6 else?

7 MR. HERBERT: Thank you, Your Honor.

8 Q. When did you first review the ones of poor quality?

9 A. Oh, that date.

10 Q. Did you ever see since that date other photographs?

11 A. Yes.

12 Q. When was that, doctor?

13 A. I don't know.

14 Q. You don't know?

15 A. No.

16 Q. Well, you can look at your report. When does it say
17 you reviewed other photographs?

18 MR. NEWMAN: Judge, again, may we approach?

19 THE COURT: No. You may answer.

20 MR. NEWMAN: Then I object.

21 THE COURT: I understand. Overruled.

22 A. The photographs were shown to me some time between
23 that date and today.

24 Q. When was that?

25 A. It wasn't two minutes ago.

1 Q. When was that?

2 A. I don't know. It was in my records. I might be able
3 to tell you. I have it in my computer. I can look to see if I
4 have an actual date that it came to me. I can do that.

5 Q. Isn't it true that the first time you saw the
6 intraoperative photos was in the hallway after lunch when you
7 were waiting to come in here?

8 THE COURT: I'm sorry, counsel. Do you mean the
9 ones that were presented to him today?

10 MR. HERBERT: Yes.

11 THE COURT: Well, then ask that question.

12 Q. Isn't it true that the first time you saw the
13 intraoperative photos for Ms. Iovino in this case was when we
14 were on lunch break and you were waiting to come into this
15 room?

16 A. Absolutely not.

17 Q. Well, the MRI films.

18 A. The MRI films I saw today, yes.

19 Q. But not the intraoperative photos?

20 A. The intraoperative photos I have seen time a long time
21 ago.

22 Q. Okay. So those you saw a while ago, but the films you
23 saw during the lunch break in the hallway, correct?

24 A. The MRI films?

25 Q. Yes.

1 A. Yes.

2 Q. And nowhere in your report does it say you saw the MRI
3 films; is that correct, doctor?

4 A. How could I put it in my report? I wrote it months
5 ago. I don't understand --

6 Q. At the time you wrote this report, isn't it true that
7 you never saw or reviewed the MRI films?

8 MR. NEWMAN: He said he saw them today for the
9 first time. I don't understand.

10 THE COURT: No, the question was not for the
11 first time. You may clarify.

12 A. Could you repeat the question? I'm sorry.

13 Q. Okay. Isn't it true that when you wrote your report
14 for Ms. Iovino you did not have the films with you when you
15 were generating this report?

16 A. That's correct.

17 Q. And the first time you saw the films was in the
18 hallway with defense counsel during lunch break a few minutes
19 before we started the proceedings, correct?

20 MR. NEWMAN: The MRI films.

21 MR. HERBERT: Yes.

22 THE COURT: You may answer that.

23 A. Yes, that's the first time I saw the MRI films.

24 Q. So the first time you saw the MRI films were in the
25 hallway, but the intraoperative photos you saw a while ago?

1 A. That's correct.

2 Q. You never wrote another addendum to your report to
3 talk about -- strike that.

4 Did you ever tell anybody, did you ever generate a
5 document for anybody regarding the intraoperative photos?

6 MR. NEWMAN: Judge, this is objectionable.

7 THE COURT: Overruled. You may answer.

8 MR. NEWMAN: May we approach again?

9 THE COURT: You may not at this time.

10 A. Not to my knowledge, no.

11 Q. Let me ask you another question, doctor.

12 When you were in the hallway a few minutes before we
13 got started, you didn't have the light box when you were
14 looking at the films, correct?

15 A. No, I did not have a light box.

16 Q. You were using the films in the air, on the side,
17 trying to find the labrum, correct?

18 MR. NEWMAN: Objection.

19 A. Not at all. I was looking at them --

20 I'm sorry. Am I supposed to stop?

21 THE COURT: Is there an objection?

22 MR. NEWMAN: Yes, to the form of the question.

23 THE COURT: Overruled.

24 The question is how did you look at them, right?

25 THE WITNESS: Sure. I looked at them through the

1 big picture window. The sun coming in is the same as the
2 shadow box. It's fine.

3 Q. So looking outside the window of the courthouse is the
4 same as using a shadow box to read the MRI films; is that
5 correct, doctor?

6 A. Yes. The only thing that you need to read films is
7 light coming through the film and that's what I had.

8 Q. How big did we say that labrum was on the MRI film,
9 doctor? How big?

10 A. There was no labral tear in there so there is -- you
11 asked me how big was the tear?

12 THE COURT: The labrum.

13 THE WITNESS: Oh, the labrum. The labrum is
14 small.

15 Q. About how small is it, doctor?

16 A. You have to take out a film and I can show you about
17 how small it is. It's small.

18 Q. It's pretty small?

19 A. Yes.

20 THE COURT: Well, you used the term "centimeter"
21 before. Can you help us with that? Is it a centimeter, is
22 more than a centimeter?

23 THE WITNESS: Well, the labrum itself I know how
24 big a labrum is.

25 THE COURT: That's what he is asking you. Just

1 answer that.

2 THE WITNESS: He asked me on the film how big is
3 it.

4 THE COURT: Is that what you are asking?

5 MR. HERBERT: No, I am asking in general.

6 THE WITNESS: Oh, I'm sorry. I misunderstood
7 that. How big is the labrum?

8 Q. Yes.

9 A. Well, it's a circular piece of tissue. If you are
10 asking me -- what are you asking me, circumference? I am not
11 sure what you are asking me.

12 Q. Okay. In the MRI films how big is a labrum that's
13 depicted?

14 A. Small. I can't tell you exactly how big. It depends
15 on the film itself.

16 Q. Less than a fingernail?

17 A. It's probably about a fingernail, depending on the
18 cut.

19 Q. A little bit less?

20 A. No, it's about a fingernail depending on the cut.

21 Q. Just so we are clear for the ladies and gentlemen of
22 the jury and the Court, when you came in today, this afternoon,
23 and you testified with counsel on direct and you said you
24 reviewed the films and you said there was no tear in the labrum
25 which is smaller than a finger, you really did that outside on

1 the window of the courthouse is how you are making your
2 determination for the ladies and gentlemen of the jury; is that
3 correct, doctor? Do I got that correct?

4 A. Yes, I will do it on a view box too. It's the same
5 thing.

6 Q. I am not asking you to do that. I am asking you when
7 you made your opinion earlier for this Court, that's how you
8 rendered your opinion.

9 A. Looking through a view box, not through a lighted
10 screen. Yes, through a window.

11 Q. Do you think that's the best way to make an open
12 statement in court for the ladies and gentlemen of this case
13 that's been going on for a week to tell them that there was no
14 tear in the films, that's how you base your opinion on?

15 MR. NEWMAN: Objection. Can counsel stop with
16 the theatrics? It's really not necessary.

17 THE COURT: Overruled. You may answer.

18 A. I am very comfortable with my ability to look at an
19 MRT film with light coming through it. It doesn't really make
20 any difference what the source of the light is, whether it's a
21 lightbulb or if it's the sun. As long as I have adequate light
22 I can make a judgment. So it doesn't really make any
23 difference.

24 Q. Let's keep on moving, doctor.

25 Other than these medical records that you reviewed,

1 you said a series of reports by Dr. Berkowitz from 2011 and
2 2012 were reviewed. Do you see that?

3 A. Yes.

4 Q. What dates are the documents that you reviewed?

5 A. Well, I would have to get them off my computer. I can
6 get them for you, if you would like.

7 Q. But you didn't list on this report what document dates
8 you reviewed, correct?

9 A. No. I listed the dates of the years that I saw them,
10 from 2011 and 2012. The exact date, no.

11 Q. Isn't it true that you never reviewed any documents
12 from Dr. Berkowitz from 2013?

13 A. That's correct.

14 Q. It is correct that you did not review any of
15 Dr. Berkowitz's records from 2013?

16 A. That's correct.

17 Q. And you stated that the MRI film did show bursitis,
18 correct?

19 A. Mild bursitis, yes.

20 Q. That's when you made the determination outside by the
21 window to see the mild bursitis too?

22 A. Using the light of the window that's what I saw, yes.

23 Q. And that mild bursitis that you saw, how big was that?
24 Half a finger, a quarter of a finger, a third of a finger?

25 A. Once again, it depends on the cut that's made.

1 Q. In this case by the window, how big was that that you
2 saw?

3 A. Bursitis probably about that long (indicating)?

4 THE COURT: Please indicate for the record.

5 THE WITNESS: Two to three centimeters, four
6 centimeters.

7 Q. Two or three fingers?

8 THE COURT: Fingernails you mean?

9 MR. HERBERT: Fingernails.

10 A. Yes.

11 Q. And we said earlier that bursitis can also be caused
12 by trauma, correct, for instance, a car accident?

13 A. It could be hypothetically, not in this case, though.

14 Q. But it could be?

15 A. Hypothetically, it could be, yes.

16 Q. The hospital records you reviewed, doctor, from Coney
17 Island Hospital, at which time she complained of pain in the
18 left arm radiating into her fingers. Do you see that, doctor?

19 A. Yes.

20 Q. That would be consistent with her treatment and her
21 findings from Dr. Berkowitz, correct?

22 A. No, an injury to the shoulder would not cause pain
23 radiating into the fingers. A neck injury might but not a
24 shoulder injury, no. And certainly not a tear such as the
25 nature we have seen on those intraoperative photos, no.

1 Q. Did you see it anywhere in this report, doctor, that
2 this was not consistent with the hospital records?

3 A. What wasn't consistent?

4 Q. What you just testified, you said that it was not
5 consistent.

6 A. Once again, I wasn't asked that question. I can't
7 answer questions that I am not asked.

8 Q. So some questions the law firm asked you, you answered
9 and some questions you didn't answer, is that what you are
10 saying?

11 MR. NEWMAN: Objection.

12 A. I answered it --

13 THE COURT: Sustained.

14 Q. You didn't put anywhere in this report that the
15 hospital records weren't consistent with Ms. Iovino's injuries,
16 correct?

17 A. No, I think they are consistent with a left shoulder
18 strain.

19 Q. Going down to the impression, doctor, "the claimant",
20 that's Ms. Iovino, correct?

21 A. That's right.

22 Q. "Reveals evidence of a resolved left shoulder strain.
23 She has evidence of a possible carpal tunnel syndrome in the
24 left hand", correct, doctor?

25 A. Yes.

1 Q. And isn't it possible that carpal tunnel syndrome can
2 be caused by trauma?

3 MR. NEWMAN: Objection.

4 THE COURT: You may answer.

5 A. Hypothetically, it could be, yes.

6 Q. You actually during this visit encouraged or wanted
7 Ms. Iovino to follow-up with more testing, correct?

8 A. Well, I wrote that in my report, yes.

9 Q. Because you felt, approximately, a year and a half
10 after date of accident when you were seeing Ms. Iovino for your
11 report that she still needed some more testing and more
12 documentation to follow-up on what's going on with her,
13 correct?

14 A. I did not know whether she needed it as a result of
15 the accident. What I found was evidence of carpal tunnel
16 syndrome by clinical examination. I didn't know why she may
17 have had that finding and I don't even know if she has carpal
18 tunnel syndrome because we haven't gotten the test. My sense
19 was is that she might have carpal tunnel syndrome and that she
20 would benefit from the EMG nerve conduction velocity study to
21 find out if she had it.

22 Q. You know of no prior history of any injury to
23 Ms. Iovino's left hand; isn't that correct, doctor?

24 A. That's correct.

25 Q. And the first time you have any medical records of any

1 injury or trauma to Ms. Iovino's left hand is from this
2 accident, correct?

3 MR. NEWMAN: Objection.

4 THE COURT: You may answer that.

5 A. Yes.

6 Q. So isn't it fair to believe then if there was no prior
7 injury or prior trauma to the left hand and then all of a
8 sudden there is a car accident and then all of a sudden there's
9 problems with the left hand, wouldn't that be consistent to say
10 that the left hand injury came from this trauma?

11 A. Not at all. The fact of the matter is that we don't
12 know when she started having findings that were consistent with
13 carpal tunnel syndrome. I don't think any of her doctors found
14 any findings consistent with carpal tunnel syndrome. For all I
15 know, she may have developed it a week before I actually saw
16 her. So it is assuming a lot to say it was due to this one
17 particular accident, particularly if none of her other doctors
18 even brought up that suggestion and hadn't treated her. So I
19 would say probably not.

20 Q. When you treat your patients, doctor, and you see that
21 there is an injury to the left hand, for instance, and you find
22 out there is no prior trauma, prior injury to that left hand,
23 doesn't it come to you to believe that the left hand injury
24 trauma came from the accident then?

25 A. I need a lot more information than what you have just

1 given me.

2 THE COURT: Are you asking whether or not that's
3 a suspicion that you need to rule out?

4 MR. HERBERT: Yes.

5 THE COURT: Then why don't you ask that.

6 Q. Would that a suspicion that you need to rule out?

7 A. If indeed --

8 THE COURT: That's a yes or no question.

9 THE WITNESS: I need to explain my answer.

10 THE COURT: I need you to answer yes or no or say
11 you can't answer it yes or no.

12 THE WITNESS: I can't answer it yes or no.

13 THE COURT: All right, next question.

14 Q. Continue reading, doctor. You stated, "She has a mild
15 partial disability due to the injury in her left hand." Do you
16 see that, doctor?

17 A. Yes.

18 Q. So now we are, approximately, a year and a half after
19 date of accident and you find there is a disability, a mild
20 partial disability, due to the injury in her left hand. Do you
21 agree with that, doctor, that you wrote that?

22 A. I wrote that related to the carpal tunnel syndrome
23 that we don't know she even has. But if she does have carpal
24 tunnel syndrome that we don't know what it was due to, in my
25 opinion probably not due to the accident that she has a mild

1 partial disability because of that possible carpal tunnel
2 syndrome. I was giving her the benefit of the doubt that she
3 may actually have carpal tunnel syndrome.

4 Q. If there's been no history anywhere documented that
5 she has had any prior carpal tunnel syndrome, any prior injury
6 or damage to the left hand and then she has this accident,
7 isn't it simple as that, doctor, that the injury and the
8 partial disability due to the injury of her left hand came from
9 this accident?

10 A. Once again, if she has been seeing doctors for a year
11 and a half and no one doctor has even brought up the
12 possibility of carpal tunnel syndrome, then it's very unlikely
13 that that carpal tunnel syndrome has been missed by everybody,
14 has been present all of this time because of this accident.
15 And what's more likely is that it occurred subsequent to the
16 accident for some other reason, if it even exists. We still
17 don't know if it exists. No one did an EMG nerve conduction
18 velocity study. We are talking about a possibility.

19 THE COURT: Much more, counsel?

20 MR. HERBERT: Just a few more minutes, Your
21 Honor.

22 Q. Continue reading, doctor. You wrote, "She is able to
23 work but unable to perform activities that require pushing,
24 pulling or lifting more than ten pounds with the upper
25 extremity or fine motor skills with her left hand." Did you

1 write that, doctor?

2 A. Yes.

3 Q. So you wrote a year and a half after the date of
4 accident that she is able to work, but she is unable to perform
5 activities that require pushing, pulling or lifting more than
6 ten pounds, correct, doctor?

7 A. I wrote that. That's right.

8 Q. And you said, "with the upper extremity." And doesn't
9 "upper extremity" mean the left arm/shoulder portion of
10 Ms. Iovino?

11 A. Well, the left extremity is arm, yes.

12 Q. So you found a year and a half later disability with
13 Ms. Iovino for her left arm and shoulder that she couldn't push
14 or pull more than ten pounds, correct?

15 THE COURT: How many times does he have to say
16 it? This is the third time you asked the same question.
17 Let's move along.

18 MR. HERBERT: Okay.

19 Q. You also found -- continue reading, doctor -- "based
20 on the history as given by the claimant, review of records and
21 the physical examination, the injuries appear to be causally
22 related to the accident", isn't that true, doctor?

23 A. The injury related to her left shoulder, yes.

24 THE COURT: I think he is quoting and wants to
25 know if you wrote that.

CROSS - DR. TORIELLO - HERBERT

458

1 THE WITNESS: Oh, if I wrote that. I wrote that,
2 yes.

3 THE COURT: Did he read it out exactly as you
4 wrote it?

5 THE WITNESS: Yes.

6 THE COURT: Next question.

7 Q. So isn't it true, doctor --

8 THE COURT: Excuse me. Can I have you both up
9 here?

10 (Off-the-record discussion held at the bench)

11 THE COURT: Anything further?

12 MR. HERBERT: Let me just review my notes, Your
13 Honor.

14 Q. Isn't it true, doctor, that Dr. Berkowitz, the
15 treating orthopedic surgeon from the date of the accident --

16 THE COURT: You said you didn't review his
17 records, right?

18 THE WITNESS: Dr. Berkowitz, yes, I did from 2011
19 and 2012.

20 THE COURT: Oh, you did?

21 THE WITNESS: Yes.

22 THE COURT: Okay, finish.

23 Q. Isn't it true, doctor, that Dr. Berkowitz, the
24 treating orthopedic surgeon of Ms. Iovino from the date of the
25 accident up until today, would be in a better position than you

1 to diagnose and treat Ms. Iovino?

2 A. No, that's the reason why we go to second opinions.
3 He is not any better than I am. We are both board certified
4 orthopedic surgeons. Given the same information we both can
5 come up with a conclusion and it would be equally valid.

6 Q. Do you have all the information, doctor? Do you have
7 all the records from Dr. Berkowitz?

8 A. I have all the information I need to make a
9 determination including the MRI, the Coney Island medical
10 records, the intraoperative films and the intraoperative
11 reports as well as his report.

12 THE COURT: There are a lot of opportunities to
13 simply answer the question yes or no. If he wants an
14 explanation, let him ask for it. But, apparently, you want
15 to stay on the witness stand a long time. So keep giving
16 responses that nobody asked for.

17 Please continue.

18 Q. Isn't it true, doctor, that there was no history of
19 left shoulder, left arm or left hand for Ms. Iovino prior to
20 the date of accident and then the accident takes place and
21 there is treatment of her left arm, her hand --

22 THE COURT: It sounds like you are going to be
23 asking three questions in one.

24 MR. NEWMAN: Which have all already been asked
25 several times.

REDIRECT - DR. TORIELLO - NEWMAN

460

1 THE COURT: I didn't ask for any help from you.

2 MR. NEWMAN: I'm sorry.

3 THE COURT: Go ahead.

4 Q. Isn't it simple, doctor, that the cause of the pain
5 and injury was after the accident and you are making it more
6 complicated than it really is? There is no evidence of left
7 shoulder pain or problems before this accident --

8 THE COURT: Sustained as to form.

9 MR. NEWMAN: Thank you.

10 MR. HERBERT: No further questions.

11 THE COURT: You may redirect.

12 MR. NEWMAN: Thank you, Judge.

13 REDIRECT EXAMINATION

14 BY MR. NEWMAN:

15 Q. Doctor, again, the loss of range of motion that we
16 referred to earlier of 60 degrees, 90 degrees and 150 degrees,
17 that was based upon Ms. Iovino's subjective complaints to you
18 that at that point she had pain, correct?

19 A. Those were all subjective complaints, that's correct.

20 Q. Is there any objective evidence that she had, in fact,
21 those limitations in ranges of motion?

22 A. There are no objective findings that would support
23 those subjective complaints, no.

24 Q. Doctor, could you explain your opinion that counsel
25 elicited from your report about Ms. Iovino's numbness in her

1 left hand?

2 A. I'm sorry, can I explain what now?

3 Q. The way you wrote your report about the numbness in
4 her left hand.

5 A. Well, she complained about numbness in her hand and my
6 clinical findings made me suspect that she might have carpal
7 tunnel syndrome. So my feeling was that as a result of that
8 possibility she should get further tests to find out for sure
9 if she has it or not. But pending those tests, I felt that we
10 should allow her to have a mild partial disability as a result
11 of the carpal tunnel syndrome that might be present. But in my
12 opinion she didn't have any disability related to her shoulder.

13 Q. Did you see any records where she was treated for
14 carpal tunnel syndrome from the date of this accident up until
15 the date you did your examination in February of 2013?

16 A. No, I found none.

17 Q. Was there any record of Dr. Berkowitz treating for her
18 for carpal tunnel syndrome in the left hand?

19 A. No.

20 Q. Now, doctor, the original set of intraoperative photos
21 that you were sent before you did your February of 2013 report,
22 in what condition were those intraoperative photos?

23 A. They were like Xeroxed copies of these. So they were
24 black and white and grainy. So I really didn't have the detail
25 I felt was necessary to make a decision.

1 Q. Did you request a better set of intraoperative photos
2 to review?

3 A. Yes.

4 Q. Did my office send you those better set of
5 intraoperative photos in October of 2013?

6 A. Somebody sent it to me and it might have been October
7 of 2013. I am not sure.

8 MR. NEWMAN: Can we have this marked as an
9 exhibit, Judge?

10 THE COURT: That will Exhibit I for
11 identification.

12 (Received and marked Defendant's Exhibit I for
13 identification)

14 MR. HERBERT: May we approach?

15 THE COURT: Yes, come up.

16 (Off-the-record discussion held at the bench)

17 THE COURT: Please continue.

18 Q. Doctor, again, were you able to evaluate what was
19 contained in those intraoperative photos when you did your
20 report in February of 2013?

21 A. Yes.

22 Q. The ones you had when you did your report in February
23 of 2013, the black and white ones.

24 A. I'm sorry. No, I was not able to evaluate those, no.

25 Q. Were you subsequently sent color copies of

1 intraoperative photos in October of 2013, by my office or
2 someone else?

3 A. Yes.

4 Q. Did you review those color operative photos at that
5 time?

6 A. Yes.

7 Q. What was your opinion based upon your review of the
8 color operative photos that you received in October of 2013?

9 A. That there was no evidence of any causally related
10 injury to her shoulder that would have required surgery.

11 MR. NEWMAN: Thank you, doctor.

12 THE COURT: Anything further?

13 RE CROSS EXAMINATION

14 BY MR. HERBERT:

15 Q. What counsel just asked you about the intraoperative
16 photos that you saw that there was no problems, you never put
17 pen to paper, you never documented that, you never took a note
18 of that?

19 MR. NEWMAN: That's improper recross. It's
20 already been gone through. I didn't ask anything else on
21 redirect.

22 THE COURT: Sustained. Anything further?

23 MR. HERBERT: No, Your Honor.

24 THE COURT: You may step down. You are free to
25 go.