Mr. Buchman?

MR. BUCHMAN: Yes, Your Honor. At this time the defendant will call Dr. Jay Nathan.

THE COURT: Let's call him in.

(At this time, the witness entered the courtroom)

THE CLERK: Remain standing. Raise your right hand.

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

THE WITNESS: I do.

J A Y N A T H A N, having been called as a witness by and on behalf of the Defendant, having first been duly sworn, was examined and testified as follows:

THE CLERK: Have a seat, please.

Doctor, state your full name for the record.

THE WITNESS: My first name is Jay J-A-Y. Last name is Nathan, N-A-T-H-A-N, M.D.

THE CLERK: And your business address.

THE WITNESS: 1118 Avenue Y in Brooklyn, New York. The zip is 11235.

THE CLERK: Thank you.

THE COURT: Thank you, doctor. Please keep your voice up. We want the jury to hear you.

THE WITNESS: Okay. Was that loud enough?

THE COURT: A little louder will help.

Did everybody in the jury hear the doctor? I want to make sure.

Your witness, Mr. Buchman.

MR. BUCHMAN: Thank you, Your Honor.

DIRECT EXAMINATION

BY DR. BUCHMAN:

Q. Good morning, sir, Dr. Nathan.

A. Good morning, sir.

Q. Dr. Nathan, prior to today have we ever met?

A. No.

Q. Prior to today have we ever spoken?

A. No.

Q. When for first time did we meet and speak?

A. This morning.

Q. Doctor, let's first start with your education. Tell the jury about your education.

A. Okay, I attended a six-year BS/MD program and I graduated from Syracuse University. That's Upstate Medical Center. I did a year of, excuse me, general surgery at what used to be called Booth Memorial Medical Center. That's in Queens. It's been renamed since then. I did four years of orthopedics at the University Hospital of Stony Brook and it's associate hospitals. I did a year of upper extremity/hand fellowship in Philadelphia. Then after that I went into

private practice for a year. And then I joined the staff of Nassau University Medical Center where I was the head of hand surgery and took trauma call there. I was with the Department of Orthopedics.

After that I joined an, approximately, 40 man group called the Musculoskeletal Institute and I was in private practice, you know, teaching residents and all of those things like that, taking calls. That group then disbanded and I am currently with Orthopedic Associates of Great Neck associated with North Shore LIJ Hospital Systems.

THE COURT: You used the term "orthopedics". Could you explain to the jury what orthopedics is in medicine?

THE WITNESS: Surely. The literal translation means "stray child", but it means that you take care of problems, maladies of people with bones and joints, arthritic problems, fracture work, nerve compression, all of those type things like that, sprains, injuries, contusions.

Q. You mentioned some of your education had to do with upper extremities. Can you explain that just briefly?

A. Well, as an orthopedist you deal with upper extremity problems all the time. People have rotator cuff injuries, sprains, fractures of the various parts. I also did training in upper extremities as in a microvascular fellowship and hand

fellowship in Philadelphia.

Q. When you say "hand fellowship", just tell us what a hand fellowship is.

A. It deals with specifically maladies of the hands and upper extremity, various fractures, congenital issues, nerve entrapment, tendon transfers and lacerations. If someone cuts their fingers off and it was appropriate to put it back on, we would do that during the fellowship.

Q. Are you board certified?

A. I am.

Q. What are you board certified in?

THE COURT: Can we back up a bit?

What does it mean for a doctor to be board certified?

THE WITNESS: Board certified, particularly American board certified, meaning that one takes a training course like a residency where they teach you your discipline and then after that there is a test. In this case, it's both written and oral saying that you have met the standards of that specific discipline, in my case orthopedics.

Q. And do you have any subspecialties?

A. I am a hand surgeon as well.

THE COURT: One other minor question. I have a feeling we might have missed it. If it's been asked, I

apologize.

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

THE WITNESS: Yes.

THE COURT: I assumed that was going to be the answer.

THE WITNESS: Yes, sir.

Q. How long have you been licensed?

A. Since 1985.

Q. When you say you have a subspecialty in hands, what part of your practice is made up of dealing with maladies of the hand and wrist?

A. Well, I mean, I do general orthopedics, but I like to do hands. And when people come with hand problems, I see them. I don't think I can give you an exact percentage. Maybe 25 percent.

Q. In your practice -- is this the first time you have testified?

A. No.

Q. How often do you testify?

A. It varies from year to year. I would say at this level, three to four times a year, approximately.

Q. Are you paid for your time to come in and testify?

A. I am.

Q. How much are you appeared?

A. $5,000.

Q. Have you ever testified for my office?

A. I don't believe so, no.

THE COURT: Do you have any academic appointments?

THE WITNESS: Yes, I am with North Shore LIJ Hospitals.

THE COURT: Are you training residents and interns?

THE WITNESS: I teach family practice residents in orthopedics, yes.

Q. Other than teach and coming to testify, tell us about your practice. What is it made up of?

A. My practice, I see patients on Tuesdays, and Thursdays, and Fridays, office hours. I take calls certain amount of times a month. Sometimes I get more calls, sometimes I get less calls, depending upon who makes up the schedule. I do surgeries usually on Fridays. And if any emergencies come in, I fit them in when it's possible.

Q. You treat patients?

A. I do.

Q. What percentage of your practice is treating your patients?

A. I would say two thirds.

Q. And the other third is doing what type of work?

A. Evaluations of claimants.

Q. Did there come a time that you examined Arvella Floyd?

THE COURT: Could you hold that thought? Are you going to move him in to be an expert?

MR. BUCHMAN: Sure, Your Honor. At this time I would like the Court to recognize Dr. Nathan as an expert in orthopedics and hand surgery.

THE COURT: Do you want voir dire, Mr. Harris, or an objection?

MR. HARRIS: No, so stipulated.

THE COURT: Okay, I will deem Dr. Nathan to be an expert in orthopedics. What this means, members of the jury, is that normally a witness cannot give opinions. A witness can testify to what they observed. However, when we have a case that involves science or a special subject in art, we allow experts to come in and that will assist you to give opinions about the facts of the case or hypotheticals that may be posed by the attorneys. So the opinions of Dr. Nathan are here to assist you.

As I will explain to you when I charge you on the law, you are not obligated to accept what Dr. Nathan tells you as being the truth necessarily, if you believe that the facts are different. His opinions are here to assist you, you can accept everything that he says as true, if you believe that he is correct. You can reject everything he

tells you or you can pick and choose.

Obviously, it is no secret that Mr. Harris is going to present another doctor who I have a feeling will have somewhat of a different opinion than Dr. Nathan. But you will listen to the experts as well as to the other witnesses and then you will make a decision. So let's continue.

MR. BUCHMAN: Thank you, Your Honor.

Q. Did there come a time that you had an opportunity to examine Arvella Floyd?

A. Yes. May I refer to my report, Judge?

THE COURT: Yes. Just don't read from it directly but certainly you can use it to refresh your recollection.

THE WITNESS: Yes.

Q. Do you recall, approximately, when you examined her?

A. I believe it was October 7th, of last year.

Q. Other than your examination, did you have any records to review?

A. Yes. They are listed on Page 2 of my report.

Q. What records did you review in assisting you in your examination?

A. I believe they were records from Kingsbrook Jewish Medical Center and they had several dates in them. I believe the dates span from January 14th of '08 to September 23rd of

2013.

Q. Did there come a time when you -- did you take a history?

A. I did.

Q. Did Ms. Floyd explain to you what had occurred?

A. Yes, I believe so.

Q. At that point did you do your examination?

A. I did as well, yes.

Q. Tell us about your exam.

A. I examined her upper extremities from the forearms to the fingertips there. Her injuries included a left wrist fracture that had surgery times two. So I examined both wrists. I used a tape measure for measuring the arm girth and wrist girth. I used a goniometer which is like a protractor to record measurements of motions. I asked her to perform certain motions which I showed her and then I measured. I tested her sensation by asking her if she felt certain things when I touched her. I checked her reflexes and her general motor strength. And then I wrote the numbers down and that's the basis of the report.

Q. What were your findings regarding Ms. Floyd's left wrist?

A. She had tenderness which was mild to the left wrist. There was no swelling, erythema which means redness or ecchymosis which means black and blue or particular swelling.

She had some decreased range of motion to that left wrist. She dorsiflexed at 45 and normal is 70. There is a small typo in my report saying what normal is there. And flexion, she also flexed at 45 which is not normal. Normal is 80. As I said, there is a typo there. The rest of her motion in terms of deviation one way or the other, radially and ulnarly, were normal. Her wrist girths were symmetric, meaning I took a tape measure and measured them. They were 19 centimeters each.

She had surgical scar from obviously having her surgeries to her hand. Her hand exams revealed normal motions without any tenderness, swelling or edema. She gripped me normally, meaning I asked her to shake my hand hard and she did so. I believe that she had some reflexes and motor strength which were generally normal. I did not observe any atrophy which means muscle shrinkage. She had some decreased sensation in her left thumb when I examined her, meaning that I asked her if she had felt me. She said that she had less feeling in her left thumb, so I recorded that. And that was the gist of the exam.

Q. Tell us about the significance -- you list a few tests in here. There's a Phalen's test, a Tinel's for the median nerve and a Tinel's for the ulnar nerve. What is the significance of those tests?

A. Besides the motions that I just described to you, there are various other tests we do about the wrists and

forearm there. Some of them have doctors' names on them because, I guess, they live throughout history by putting their name on the type of test. A Tinel's sign and a Phalen's test are tests for nerve involvement, specifically in this case the median nerve or Carpal tunnel nerves which is more layman's terms. A Phalen's test is when one flexes the wrist like this (indicating). It essentially tries to kink it. When you kink it, you have nerve irritation or nerve compression. A person will subjectively tell you that "My fingers are getting tingling or my numbness is getting worse."

A Tinel's sign is a sign for nerve regeneration and it's done by tapping over a nerve. Many nerves are right under the skin. And if you tap them and they are irritated, undergoing signs of nerve regeneration, a person will subjectively tell you, "I've got tingling in my fingers or in that nerve distribution." Other tests that were listed were what's called a Finkelstein's test. That's another doctor and that's for a tendonitis type test. A grind test is for arthritis. And what you do is you put your hand on a finger and you push it in and you grind it together. If they tell you that it's painful, that's saying you think they have arthritis in that area. That's a grind test.

Q. Now, tell me what were your findings in those tests, the Phalen's and Tinel's tests.

A. The Tinel's sign and the Phalen's test were all

negative bilaterally.

Q. So when you get those negatives tests, what does that tell you in relation to the Carpal tunnel or the median nerve?

A. Well, it can be used for the median nerve. It means that at the time that you are testing them, they don't have signs of that nerve irritation.

Q. You understand that Ms. Floyd had an open reduction and internal fixation of her wrist, correct?

A. Of her left wrist, right, for a left radius fracture, correct.

Q. Was that required given the injuries that she had and based upon the records that you reviewed?

A. Yes.

Q. Did you believe that that surgery was related to the incident she had in September of 2011?

A. Yes.

Q. Now, let's talk about what was the result of that test and what else is required.

A. I'm sorry. Could you repeat the question? I don't understand it.

Q. Sure. She had that first surgery, correct?

A. Yes.

Q. And then there came a time she came for a second surgery, correct?

A. Yes.

Q. What is the information that you have or that you discovered in your exam and review of the notes regarding the need for the second test?

A. The second surgery you mean?

Q. The second surgery. I'm sorry. Thank you.

A. Got me confused. The point was the notes reflect that she had some pain in her forearm and irritation over the hardware with some tendonitis and the hope was that with hardware removal this would help her problems and that's what my understanding was.

Q. Now, did you have an opportunity to review of any Dr. Pay's notes or the records of Kingsbrook?

A. I saw the records of Kingsbrook previously and today I saw Dr. Pay's operative notes.

Q. Were there any discussions of the Carpal tunnel issue that is the issue in this case?

MR. HARRIS: Objection to form. In what records?

THE COURT: Rephrase it.

MR. BUCHMAN: Sure.

Q. You reviewed Dr. Pay's operative reports as well as the notes of Kingsbrook which are Dr. Pay's notes, correct?

A. Dr. Pay's notes are part of the Kingsbrook records.

MR. HARRIS: Objection. Leading.

THE COURT: Sustained.

Q. Did you see Dr. Pay's notes?

MR. HARRIS: Objection. Leading.

THE COURT: He is correct. You have to rephrase.

MR. BUCHMAN: Sure.

Q. Did you review records?

A. I did.

Q. And whose records?

A. The records from Kingsbrook Jewish Medical Center on the dates that I stated.

Q. Which doctor's records did you specifically review?

A. There were several. I don't know all their names but Dr. Pay's notes were in there as well.

Q. What's the significance of Dr. Pay in this case?

A. He is the operative surgeon.

Q. In reviewing his notes, was there any significance regarding findings or no findings of Carpal tunnel issues?

MR. HARRIS: Objection. Leading.

THE COURT: Rephrase it.

MR. BUCHMAN: Sure.

Q. Did you find any issues regarding her wrist?

A. Yes.

Q. What were the issues that you saw?

A. She had a fracture. She had pain post her fixation. There were notes that there was some tendonitis of the area there. There were notes after her second surgery that her Carpal Tunnel Syndromes were improving.

Q. Explain the significance of that, if any, of the Carpal Tunnel Syndrome.

THE COURT: Better yet before you get that far, maybe there is a question as a preface. Can you explain to the jury what Carpal Tunnel Syndrome is?

THE WITNESS: Yes, certainly. One can get a compression of a nerve and there are multiple nerves in the body. Carpal Tunnel Syndrome is compression of the median nerve. It's usually reflected by people saying that they have numbing type pain which can go up to their shoulder, it can often wake them up at night. They usually get numbness in a distribution of the median nerve, meaning that what the median nerve services in terms of sensation which is usually the thumb, index, long and half of the ring finger, and pain. When that nerve gets squeezed or compressed, those are the findings that one can get clinically. You don't have to get them all, but you can get some.

Q. What, if anything, did Dr. Pay in your view of the records do regarding this finding?

A. I believe there is no real physical finding that he states. His history is that it's getting better postoperatively as of the second surgery.

MR. HARRIS: Your Honor, can we have the last answer read it back?

THE COURT: I will ask the reporter read it.

Can you read the last answer, please?

(The requested portion was read by the court reporter)

THE COURT: Let's continue.

Q. Let's just move on now to Dr. Stein, the doctor coming in to testify. Did you have an opportunity to review his report?

A. I saw it today as well.

Q. I showed it to you this morning in the room two doors over, correct?

A. Yes.

Q. And after reading Dr. Stein's report do you have any opinions or differing opinions than Dr. Stein?

A. He notes that there is a surgery and fracture associated with this times two, but I did not find any evidence of Carpal tunnel irritation on my exam. He notes that on his exam which I think is about five weeks later.

Q. You mean his exam was five weeks after yours?

A. Yes. If that's not clear, yes. He examined the person, I believe, about five weeks after I did.

Q. And Dr. Stein opines that a Carpal tunnel release surgery is recommended in this case, correct?

A. I don't recall the exact wording. I don't know if he says it's indicated or it could be indicated in the future.

Q. Do you have an opinion with a reasonable degree of medical certainty regarding from your examination and your review of the records up until the date that you examined Ms. Floyd whether a Carpal tunnel release was indicated?

MR. HARRIS: Note my objection. It's not mentioned in his report.

THE COURT: I don't have the report. I am not blessed with having the report in front of me, so I don't know whether it says it or not. If it's not in the report, then we can't get into it. Is it in the report, Mr. Buchman?

MR. BUCHMAN: To doctor --

THE COURT: I am talking about Dr. Stein.

MR. HARRIS: I am saying it's not in Dr. Nathan's report.

MR. BUCHMAN: Subject to connection.

THE COURT: I will allow it subject to connection and obviously subject to your cross. Let's move on.

Q. Did you read his report?

A. Yes.

Q. And do you have an opinion with a reasonable degree of medical certainty as based upon your examination of plaintiff and your examination of the records when you examined Ms. Floyd whether a Carpal tunnel release surgery was indicated?

A. I would say no, I found no evidence of Carpal tunnel

on my exam.

Q. Now, what if you were confronted with a positive EMG, would that change your opinion, or would you consider it, or what is your opinion on that?

MR. HARRIS: Objection to the form of that.

MR. BUCHMAN: Well, withdrawn. I will rephrase.

THE COURT: Let's back up so you can layout to the jury what an EMG is. You know, I know, Mr. Harris knows, the doctor knows, but the jury doesn't know what that is.

Q. Have you ever seen an EMG report in this case to this point?

A. No, I have not seen the report, no.

Q. Are you aware of an EMG report referenced in Dr. Stein's report?

A. I am.

THE COURT: You will go forward with what an EMG --

MR. BUCHMAN: Yes.

Q. What is an EMG?

A. It's a nerve study. It usually has two components to it when one examines nerves in general. An EMG is the abbreviation for electromyogram. Usually the second part is an NCV which means a nerve conduction velocity. So when one examine nerves, there are two basic components that one looks

for.

Imagine nerves are telegraph wires and they conduct at a search rate. Let's say, it's ten feet per second, just an example, a hypothetical. If you had nerve compression, it might only conduct at five feet per second instead of ten. In other words, it would be slowed. Electrically that's how you would see it, the impulse would be slowed. The other component of it, an EMG, is how the nerve affects the muscles because you would have some muscle changes on there. And that's what one looks at that has the two components of EMG/NCV, that's the concept.

Q. I want you to assume for this question based upon your examination and your review of the records but now we add into the fact a positive EMG, would that change your opinion?

A. No.

Q. Why is that?

MR. HARRIS: Objection, Your Honor. It's not in his report.

THE COURT: I will sustain it if it's not in the report. I don't have a report in front me. If it's not in there, he can't talk about it.

MR. BUCHMAN: Subject to connection. May I approach, Your Honor?

THE COURT: Wait a minute. Subject to connection with who, with the other doctor?

MR. BUCHMAN: Yes, Dr. Stein.

MR. HARRIS: That's my evidence, Judge. You can't connect to an opposing side's evidence.

THE COURT: I will allow it and then you can cross-examine him on it.

MR. HARRIS: Thank you, Judge.

THE COURT: Do you want to repeat the question?

MR. BUCHMAN: Could you read back?

THE COURT: Do you want to rephrase it again? Whatever you want to do.

MR. BUCHMAN: I would ask for a read back.

THE COURT: Okay, I will ask the reporter to read it back.

(The requested portion was read by the court reporter)

Q. Why would a positive EMG not change your opinion?

A. Because a study such as EMG does not change the clinical exam. Many people can have positive EMG's or even negative EMG's, but you have to correlate with what's going on clinically. Now, this EMG was actually done before the second surgery where they took the hardware out. So if the person was that symptomatic with Carpal tunnel, when the surgeon did his second operation, he could have done the Carpal tunnel release at the same time if it was indicated. So simply having a positive EMG doesn't always mean that you need to do surgery.

It's based clinically.

Q. This opinion, is it based upon a reasonable degree of medical certainty?

A. Yes.

Q. And all of the opinions you have given us up to this point, they are all based upon a reasonable degree of medical certainty?

A. Yes.

Q. What do you see as Ms. Floyd's in your opinion in connection with your examination and review of your records, more your examination, Ms. Floyd's prognosis for the future?

A. I missed the last part.

Q. Her prognosis for the future, Ms. Floyd.

A. She's had a wrist fracture on her left wrist. She's had two surgeries with it. She has subjective complaints of pain. She has decreased motion present by my exam there. There was no infection with any of her surgeries which is good and I suspect that her motion will not be normal again.

Q. And that is something we are now three years removed. Is there anything that future therapy or other things would assist her or occupational therapy?

A. I can't speak for the future. I can only talk about when I examined her. I did not see any other acute intervention going on based on my last exam.

MR. BUCHMAN: I have nothing further. Thank you,

Your Honor.

THE COURT: Thank you. Do you need to look at his report or file?

MR. HARRIS: Yes. Can I have two minutes, Judge? And I also want to make a record in the absence of the jury briefly.

THE COURT: I understand.

Members of the jury, we will take a very short break. This will allow Mr. Harris to review the doctor's file. We will come back in a few moments. Follow the instructions of the court officer.

COURT OFFICER: All rise. Jury exiting.

(At this time, the jury left the courtroom)

THE COURT: Let the record reflect that the jurors and alternates have now left the room. We will take a short break.

Off the record.

(An off-the-record discussion was held)

MR. HARRIS: Judge, the report that was exchanged dated October 7, 2013, executed by Dr. Nathan under the penalties of perjury fails to include any mention, Judge, of any opinions with regard to discounting the EMG study. So this is the first we are ever hearing that Dr. Nathan was going to come in and testify, A, that there was an EMG study that he was aware of because he didn't mention it in

his notes and, B, that he would still have the same findings if he had reviewed the EMG.

THE COURT: I believe that his report is pre your Dr. Stein, right?

MR. HARRIS: The EMG was done well before Dr. Nathan's exam.

THE COURT: It was exchanged?

MR. HARRIS: Of course. It's part Kingsbrook's records.

MR. BUCHMAN: It's not part of the records that I have that I received with an authorization. Counsel did not exchange an EMG with my office. So we have the operative reports that were exchanged but not the EMG's.

THE COURT: Where did the EMG's come from?

MR. BUCHMAN: We have never seen it. It's only been mentioned.

MR. HARRIS: We got it with the hospital records with the same authorization that we gave the defendants. I have to tell you, Judge, it's a little bit disingenuous when you say, "I have been doing personal injury litigation for 20 plus years and I only give my expert progress notes", that's what his report says, "progress notes." What about the op report? He just looked at that for the first time this morning. My client had two surgeries and their expert never saw the op report until this morning.

And wait a minute, not to mention medication administration sheets, nurses' notes. They know what a general hospital record contains. Obviously, if all they got was progress notes, a big chunk was missing and they never said, "Hey, give us a fresh authorization. We have to get the full record, not the little pieces they chose to give us the first go around", if you accept what the Mr. Buchman says is true or what his offices represents is true.

MR. BUCHMAN: You know, the word "disingenuous" gets thrown around pretty quickly. If we were refuting her injuries, if we were saying "herniation, no herniation", I might agree. We agree there was an injury. We agree there was a fracture. We agree there was a surgery and we agree there was a second surgery and they were both causally related.

THE COURT: So the disagreement is really the severity of the injury?

MR. BUCHMAN: The severity of the injury from his examination and this EMG that we have never seen.

THE COURT: Mr. Harris, I think that in your cross you can overcome whatever problems you might have. I am not striking his testimony about the EMG.

Let's have it marked evidence.

COURT OFFICER: Plaintiff's 4.

MR. HARRIS: I will have this marked as 5.

THE COURT: 4 will be the medical records, 5 will be the billing records from Kingsbrook.

(Received and marked Plaintiff's Exhibits 4 and 5 in evidence)

THE COURT: Are you ready?

MR. HARRIS: I am ready.

THE COURT: Let's bring the jury in, please.

4 and 5 are in evidence subject to redaction.

COURT OFFICER: All rise. Jury entering.

(At this time, the jury entered the courtroom)

THE COURT: Everybody please be seated. Jurors make yourselves comfortable.

Mr. Harris, your witness.

CROSS EXAMINATION

BY MR. HARRIS:

Q. Good afternoon, Dr. Nathan.

A. Good afternoon, sir.

Q. You and I have never met before, correct?

A. I have never met either of the attorneys.

Q. Now, it's true, doctor, that you are here in court under oath to dispute the severity of Ms. Floyd's injury before this jury today; is that correct?

A. No, I am not here to dispute it. I am here to talk about it.

Q. Well, you understand that a claim is being made here in addition to the loss of range of motion which you yourself have just told the jury is permanent in nature, correct?

A. I believe so, yes.

Q. That in addition to that that she has a median nerve injury that may require or in all likelihood will require surgery in the future. That's the part you disagree with, correct?

A. Correct. I didn't find any of that on my exam.

Q. Now, let's go back for a second.

How did the Pillinger firm representing the defendants here find you to hire you in connection with this case?

A. I don't know.

Q. Well, it didn't just happen with a crystal ball. There was a reason why you got involved. Somebody must have contacted you; is that correct?

A. They didn't contact me directly, sir. I have an office manager who arranged the exam. I had no direct contact.

Q. So your testimony is that an office manager somehow got wind of their need to hire you in this case and then facilitated the examination that you discussed earlier of my client, correct?

A. Yes.

Q. Now, during this little brief recess where we sent the jury out of the room, you gave me the opportunity to look at

your iPad with the electronic notes that you had reviewed in connection with this case, correct?

A. Yes.

Q. Now, the very first page of those electronic notes has to do with something called Express something of Mr. Katz. Take a look at that very first page and let's see if that refreshes your recollection on how you got involved with the case.

A. (Witness complies).

Q. What's the company, Express Limited?

A. I believe it's called Express Exams, Inc.

Q. Express Exams, Inc. Now, what is your understanding of that company, Express Exams, Inc.?

A. It's an independent medical exam company, I guess. I don't know exactly what they do.

Q. Well, you have that page on your screen?

A. I do.

Q. When you say, "independent medical exam company", so the jury understands, what does that mean?

A. I am not a lawyer. It means that they are setting up exams where you are not the treating person to that. You are supposed to be non-treating. You can't give opinions in terms of how they should do their surgery or what they should do next. The answer is, you are not allowed to give them prescriptions or book their surgery. You are simply there to

evaluate them. And there is no doctor/patient relationship with them.

Q. In other words, how would Express Exams, Inc., know -- in other words, let's assume for the purpose of this question that the Pillinger law firm contacted this company, Express Exams, Inc., and said, "Hey, we need a doctor to examine this claimant who has a personal injury case", would you agree, sir, that you would have to be on their list of doctors for them to then coordinate the exam with you?

A. I don't know how they find me. It's very possible.

Q. Well, they just don't go to the Yellow Pages, do they?

A. I don't know what they do, sir.

Q. Well, they get paid somehow, Express Exams, Inc., don't they?

A. I don't know those answers, sir.

Q. You have been testifying since 1985 you said. That's almost 30 years.

A. I didn't say I was testifying since 1985. I said that's when I got my license in New York State.

Q. How long have you been testifying for, since what year?

A. I would say, approximately, '92, '90, something like that.

Q. So for over 20 years then, fair enough?

A. Yes.

Q. And you said currently you testify three to four times a year but in the past it had been more than that, correct?

A. Well, I don't know. Every year is different. Sometimes I don't testify at all. I mean, I testify for my patients with Workmen's Comp. too. That's a different level than this obviously.

Q. What is the most you have ever testified in a given year?

A. Maybe six, seven perhaps.

Q. By the way, you know what the Jury Verdict Reporter is, don't you, doctor?

A. I'm sorry.

Q. The Jury Verdict Reporter.

A. I don't know what that is.

Q. You have never heard of the publication that reports when doctors testify during trials and what side they are testifying on and how many times they have testified and all of that, you are not familiar with that?

A. I don't know that by name. I know there's a service that does that.

Q. If that service indicated that you testified over 50 times, would you disagree with that?

A. Since 1992, probably not, no.

Q. So in the 50 -- let's call it 50. In the 50 times you have testified, tell us how many times have you gotten the

work, in other words, the patient to examine through an outside service like Medical Exams, Inc.

THE COURT: Medical Express.

Q. Medical Express, Inc. Excuse me.

A. I don't know that answer. I would say the majority.

Q. The majority. In other words, there are companies in this world that function to find you work. In other words, you said one third of your practice is examining claimants that have personal injury cases, right?

A. They are not all personal injury. As I said, I examine for Workers. Comp Board too.

Q. But those are injuries?

A. Yes.

Q. So let's not mince words here. We are talking about injury cases.

A. I am not trying to fight with you. You said personal injury which is a particular category.

Q. Let's stay on point, if we can.

MR. BUCHMAN: Objection, Your Honor. Arguing with the witness.

THE COURT: Overruled.

MR. BUCHMAN: Exception, please.

Q. I am trying to get this done by 1:00, okay. Just answer my questions, please. One third is injury cases and two thirds you said is regular practice, correct?

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A. Yes.

Q. So the one third of your business, you are saying most of the time you get that business through these third-party contractors that feed you the work, correct?

A. They arrange for them, yes.

Q. Now, how many of these third-party contractors are you affiliated with or have you been affiliated with over the 20 years that you have been doing this kind of work?

A. I would say probably ten to 12, something to that effect.

Q. Now, you are on these companies' lists and they contact you when a firm like Pillinger contacts them that they need somebody examined for a case, correct?

A. Correct.

Q. And, obviously, they get paid something. Do they get part of the $5,000 that you are getting today?

A. No.

Q. That goes in your pocket?

A. Correct.

Q. Before today you did this examination, by the way, you said October 7th. That was in the year 2013, correct?

A. Yes.

Q. So less than one year ago you did your examination. And what did you charge for that examination and the report that you prepared?

A. I don't know. They are usually about $150.

Q. $150 for the report and the exam?

A. Yes.

Q. Well, how many of these examinations and reports would you do in a different day at the Brooklyn address that you gave the jury on Avenue Y?

A. I am there twice a month. I am usually there in the afternoon from twelve to five. Perhaps there can be 15 or 17 people I see.

Q. So between twelve and five you would see 15 to 17 people. That would be in five hours. What would the math be, about one patient ever ten or 15 minutes, about?

A. I would say four to an hour. Over five hours, that would be 20 patients. That's too many. So three or four an hour probably.

Q. Three or four an hour. So you are making $450 to $600 an hour at the rate of $150 a pop, correct?

A. I wouldn't state it like that but, yes, that's correct, in other words.

Q. In other words, when you come to Brooklyn for these two afternoons a month, you are not seeing regular patients at the Brooklyn office, are you?

A. You are correct. That's not part of my patient care.

Q. In fact, you testified that all of the hospitals that you are affiliated with or the hospital that you are affiliated

with is at Nassau County, not here in Brooklyn, correct?

A. You are correct.

Q. And you live out in Nassau County, correct?

A. I don't live in Nassau County, no.

Q. Where is your main office, doctor?

A. I have two treating offices, one in Glen Cove and one in Great Neck.

THE COURT: I will take judicial notice of both, and you can agree with me, doctor, they are in Nassau County, correct?

THE WITNESS: Yes.

Q. So you just come to Brooklyn twice a month to examine patients that have personal injury claims or, as you say, Workers' Comp. claims, correct?

A. Yes.

Q. And then, by the way, I assume these reports that you prepared are typed, right?

A. Yes.

Q. In this case you prepared a two and a half page report. You don't type this yourself, do you?

A. I do not.

Q. How does that work? In other words, how does the report get prepared from what you observed during the ten or 15 minute meeting with the patient?

A. There's a dictation. It goes to a typing service

associated with that address on top.

Q. The address being the 1118 Avenue Y address here in Brooklyn?

A. Correct.

Q. Where is the typing service?

A. I don't know. The office manager hires girls to type it.

Q. And then you get it back and you review it, yes?

A. Right.

Q. And then you sign that report, as you say, under the penalities of perjury, correct?

A. Correct.

Q. What does that mean to you, doctor, "penalties of perjury"?

A. That means if you, I guess, intentionally lie, then you are bound by some kind of legal action.

Q. Well, you also say before you sign the report that you hereby affirm under the penalties of perjury that the statements contained herein are true and accurate. When you say the word "accurate", what does that mean?

A. That means you hope to be accurate or that it is correct to the best of your ability.

Q. So that earlier when you mentioned this "typo" in the report, that was on the most crucial finding in favor of the plaintiff in your entire two and a half page report, correct,

that typo?

A. Right. I corrected it and gave a bigger range of motion loss to the plaintiff, correct.

Q. That's very generous of you, doctor.

MR. BUCHMAN: Objection, Your Honor.

THE COURT: I will sustain it. Strike that last statement of Mr. Harris.

Q. Explain to the jury this typo. In other words, what was the range of motion that this typo was concerned about?

A. It said that 45 in dorsiflexion was normal and it's not. It's 70. She had 45 going back out of 70 and she had 45 out of 80 going forward. And so I corrected it. In fact, it was written that she had less loss of motion but instead it's the correct answer that she had more loss of motion.

Q. Let's break this down for a second. Correct me if I am wrong, doctor, but we are not talking about just a typo here, are we? There is another mistake besides the typo, true?

A. I don't think so but...

Q. Do you have a copy of your report in front of you. Take this one because I have another copy.

A. I think that's mine.

Q. Yes, I think this one is yours. So you hold on to that one.

I would like to direct your attention to the second page of the report under the "physical examination" section

outlining your notes, your dictated notes that went to some typist that we don't know that wound up in this report that you then later signed as being accurate and true, correct?

A. Correct.

Q. Now, you just made motions with your hands going up and down for the record, correct, like this (indicating)?

A. Correct.

Q. Now, one is dorsiflexion.

A. Right.

Q. And the other is what?

A. Palmar flexion.

Q. I can't hear you?

A. Palmar flexion.

Q. Now, which one is which? Which is the dorsiflexion and which is the Palmar flexion?

A. Dorsiflexion is going backwards and Palmar flexion is going forwards.

Q. Now, dorsiflexion for the left wrist, the one that's injured in this case, you said that the normal was 45 degrees in your report, correct?

A. That's correct.

Q. And that's the typo?

A. Correct. It's 70. That's right.

Q. Let me ask you a question. The numbers four and five just on a keyboard, let's say, that's actually two or three

keys away from the number seven. So it wouldn't be like you hit six instead of seven or eight instead of seven. This is actually saying that the normal range is 45 when, in fact, the normal range is 70, correct?

MR. BUCHMAN: Objection, Your Honor, as to the keyboard and his knowledge of the keyboard.

THE COURT: I don't know what his knowledge of the keyboard is or isn't.

MR. BUCHMAN: Right. So --

THE COURT: You made your point. He says it's a typo.

Q. Now, can we agree that 45 degrees in terms of that motion is about 40 percent loss of use of that portion of the wrist motion, correct?

A. I agree.

Q. And you also agree that she will have that 40 percent loss over the course of the rest of her life; is that correct?

A. I can't say that.

Q. More likely than not, doctor?

A. It's possible.

Q. Probable?

A. Okay, semantic words here. I mean, the answer is these motions as I explained are subjective, meaning you ask a person to do them and that's what I recorded. It's possible on another day she will have more or less. I don't know that.

Q. But assuming that she was -- you didn't find her to be a malingerer, did you, doctor?

A. I don't have anything to state that at all on my report.

Q. Okay, a malingerer, doctor, so the jury know is a patient who is faking their conditions to beef up the claim for lack of a better term, correct?

MR. BUCHMAN: Objection. Leading and testifying.

THE COURT: Guess what? It's cross. So he can ask a leading question. However, he is trying to get -- a trial, I think I said this during liability, is a search for the truth. So we are trying to get at what happened. It's acceptable phraseology.

Q. Do you agree with that, doctor?

A. I believe a malingerer is a person who doesn't represent themselves accurately, correct.

Q. In this particular case you found that she did represent herself accurately, correct?

A. I didn't say it one way or the other. I have no comment on that in my report at all.

Q. Well, doctor, if you felt somebody was misrepresenting her symptoms to you, you would note that in your report that she was a malingerer, correct?

A. I would. I didn't state it one way or the other as I stated.

Q. So can't you at least admit to us now, doctor, that you did not think that she was malingerer, and if you had, you would have put that in the report?

A. If you ask me that now, yes.

Q. Now, when she was only able to dorsiflex 45 degrees, you believed that was her limitation on October 7, 2013, about ten months ago, correct?

A. I believe that's what she did on that date. I recorded it there. I can't say whether she could do more or not. That's what she did on that date.

Q. Based on that evidence alone, doctor, can you agree that it's more likely than not that that limitation on dorsiflexion is a permanent condition in this case?

A. It would not be unusual.

Q. So the answer is yes?

A. It would not be unusual after a wrist fracture to have limitations in motion.

Q. Now, Palmar flexion, that's this one (indicating)?

A. Correct.

Q. Now, you told us before she's got a 45 degree limitation there, yes?

A. She flexed to 45 degrees, correct.

Q. But in the report that's not what it says, does it?

A. That's correct. It's a typo. I stated that.

Q. But wait, that's two typos. You told us about there

was one typo. That's my point, doctor. Do you understand?

A. I do. I explained that on the direct that there were two errors in motion and I explained it as best I could.

Q. Well, if the jury heard you explain two typos and not one, then I was not listening properly and I apologize.

A. Okay.

Q. But let's get to the second typo because, again, if you say that Ms. Floyd could Palmar flex 80 degrees when, in fact, it's 45, that's just about 50 percent loss of range of motion, correct?

A. It's a little bit less than 50 percent, yes.

Q. About 45, 46 percent loss --

A. Correct.

Q. -- of that motion.

Now, here you wrote 80, correct?

A. That's what I said, yes.

Q. Well, can we agree that since those are the two findings that you found to be permanent disabilities for this plaintiff, and those happen to be the same two typos in the report, that when you signed the bottom and you affirmed that it was true and accurate, you didn't read this at all before you signed it, did you, doctor?

A. I probably read it. I don't remember it, though. It's a long time ago.

Q. Well, did you actually sign it?

A. Yes, it's electronic.

Q. You electronically signed it. How do you electronically sign it?

A. You read it and then there is a button that you push and it signs it.

Q. It signs a prior signature that you had recorded in your computer?

A. That is correct.

Q. Now, doctor, you say you have offices in Great Neck and Glen Cove, correct?

A. I do.

Q. You have offices in Queens, correct, Rego Park?

A. They are not my offices, no, sir.

Q. Well, you have given the Rego Park office address at trial previously, correct?

A. Correct. That's not for treating. That's for examining claimants, correct.

Q. Would it surprise you when you gave the Queens address in Rego Park as your office address, that happened to be in a trial that was occurring in Queens?

A. It wouldn't surprise me, no.

Q. So then isn't it true, doctor, that when you give your address of where you conduct your practice to a jury when you come to court, in the 50 times you come to court, it typically is the address of the borough you are testifying in, correct?

In other words, you gave the Brooklyn address, you happen to be in Brooklyn?

A. It's the address of where I saw the person.

Q. Well, when you testified in Suffolk County, you gave an address of Commack, right? You have an office in Commack?

A. I don't have an office there. I examine people there.

Q. So how many offices do you actually work in besides the three you have told us about, Glen Cove, Great Neck and the Brooklyn address you gave? How many others are there?

A. I believe there are three others.

Q. Where are the others?

A. One in Commack, except it's not Commack. It's Dix Hills. One of them is in Bellmore and the other one is in the Bronx.

Q. When you go to the Bronx and testify in court, you give the Bronx address, correct?

A. If I have seen the person there, yes.

Q. But it also gives the jury a sense, agree with me or disagree with me, "Hey, this is a local guy", when, in fact, that's not true, correct?

A. I never said I was a local guy.

Q. I wasn't saying that you said. I was saying the impression that it gave. Do you understand the difference?

A. I am not trying to impress people.

Q. Are you affiliated with any hospitals currently in

Brooklyn?

A. No.

Q. Now, doctor, you mentioned that you operate on Fridays typically, correct?

A. That's my scheduled length of time, yes.

Q. When you do operations -- by the way, do you operate on other body parts besides the hand? I think you said you do maybe 25 percent the hand?

A. Correct. I do.

Q. What does the other 75 consist of?

A. It depends, you know, on the type of cases that come my way. I do shoulder scopes. I do knee scopes. I do joint replacements in hips. I do fracture work, depending on the body part that's broken.

Q. But, in other words, when you do shoulder surgeries, hips or knees, do you tell those patients, "Hey, you know what, just so you know, I am a hand specialist. I am not a shoulder specialist, a knee specialist or a hip specialist", do you tell them that beforehand?

A. Do I tell them that I am a specialist in hip surgery, is that you are saying?

Q. I am asking you, doctor, if before you operate on the other 75 percent of your patients typically that are not hand cases, do you voluntarily tell them, "Just so you know, I am a hand specialist. I am not a specialist in hips, shoulders or

knees", do you bother to tell them that information? Yes or no.

A. It's all on my card. They know it when they come in. It says it right on the door what my specialties are.

Q. Well, do you have other specialties on your card that you are a hip specialist, a knee specialist, a shoulder specialist?

A. I don't say that, no.

Q. I assume, doctor, that before you operate you always look at the X rays that were taken of the patient before you operate, correct?

A. It depends if the case requires an X ray. Other cases don't such as a Carpal tunnel release or trigger fingers. There's not always an X ray involved.

Q. And I stand corrected. Let me rephrase that question.

If there is a broken bone that you are operating on, there is always an X ray before you operate, right?

A. Yes.

Q. And the failure to review the X ray before operating on a broken bone, well, that would be malpractice, wouldn't it, doctor?

A. No, not necessarily. Many times you do the case with what's called live X ray where you can see it in front of you. You don't have to bring up an old folder with you.

Q. Well, sure. In other words, you have to have some

visual or radiological picture of the injury before you cut somebody open, correct?

A. It's a good idea, yes.

Q. Now, before you came here to testify, what actual X rays in this case did you look at?

A. I have not seen any X rays.

Q. You haven't seen any X rays at all?

A. Correct.

Q. Did you ever ask Mr. Buchman, "Hey, I am coming in to testify about a broken bone and the fracture here. I better look at the actual films before I come in"? Did you ever ask him to see the films before you testified? Yes or no.

A. I never met him until this morning, as I stated. So I couldn't call him up before to ask him, no.

Q. You only met him today so that prevented you from picking up the telephone and making a request, "send over the X rays so I can look at them before I testify", is that your testimony?

A. I have never met him before. I didn't have his number before.

Q. Did you hear my question?

A. I do. The answer is that's correct.

Q. It prevented you from picking up the phone, that's your answer?

A. No, I can always pick up the phone.

Q. That was my question. Did it prevent you from picking up the phone and calling Mr. Buchman or somebody in his office and saying, "Send over the X rays, so I can see them and won't be embarrassed when I come into court"?

MR. BUCHMAN: Objection.

THE COURT: Overruled.

Q. Did you ever make a call like that?

A. No.

Q. Well, did you review the X ray reports? In other words, so that the jury understands, when a radiologist takes an X ray of a body part, they create and dictate a report in a hospital that then becomes part of the hospital record, correct?

A. Yes.

Q. And the X ray report summarizes that doctor from the hospital's findings about what they saw at the time that the X ray was taken, correct?

A. Yes.

Q. Did you review the X ray reports even though you didn't review the X rays in connection with this case before testifying? Yes or no.

A. I don't remember. If it was part of those 254 pages, the answer would be yes.

Q. Let me short circuit looking at 254 pages. I direct your attention to what you wrote down in your report as to what

you reviewed. Take a look Page 2. What did you write?

A. I know what it says.

Q. What does it say?

A. It says that I reviewed progress notes from Kingsbrook Jewish Medical Center from I believe it was January, 2008, to some date in September of 2013.

Q. Progress notes are not X ray reports, are they?

A. They can have them in there, yes. But I don't recall them.

Q. You don't recall seeing them at all?

A. I don't recall them off the top of my head, no.

Q. So what type of fracture was this? In other words, we know it was a wrist fracture.

A. Distal radius fracture.

Q. But, doctor, was it comminuted, was it displaced, was is it non-displaced?

A. It was displaced and it was nonarticulate.

Q. Now, when you say "displaced", that means that the bones when they broke were no longer touching each other, correct?

A. It doesn't necessarily mean that. It means they are not in the correct alignment.

Q. Well, if it's non-displaced that means that a portion at the fracture site, a portion of one side of the bone is broken and is still touching the other side, correct?

A. It can be. You can get two bones like this, they can be completely displaced. They can be angulated like this (indicating). There is a variety of ways.

Q. Do you have any idea as you sit here today as to the level or the measurement of displacement that the doctors found at Kingsbrook back at the time of this accident?

A. I do not.

Q. So, in other words, you are coming to testify as an expert to give opinions and you don't even know the level of displacement?

A. We know it was displaced and she had surgery. It would not change what her clinical exam is two and a half years later.

Q. Well, doctor, we know that surgery was indicated a month later, not immediately, correct?

A. No, I believe it was indicated immediately. They splintered her, sent her out and then brought her back for surgery?

Q. When did they bring her back for surgery, how long after the initial emergency room visit?

A. I don't have the dates in front of me.

Q. Approximately.

A. I don't know.

Q. You have no idea?

A. Within a few weeks.

Q. Are you guessing?

A. I am because I don't have the dates in front of me.

Q. Do you think it's fair to guess an answer before a jury under oath?

A. Yes, I just told the truth. Correct.

Q. Now, you also testified that with regard to the operation itself done by Dr. Pay, when a surgeon like yourself does an operation -- why are you looking over there?

A. I am just seeing the time.

Q. Are you concerned about the time?

A. No, I am just wondering what it was, sir.

Q. Okay. When you perform a surgery, doctor, you create an operative note, correct?

A. Yes.

Q. What is the purpose of the operative note? Why is that important?

A. It has medical legal documentation. It states what went on during the surgery.

Q. Why is that important? Why is it important for you, the surgeon, to create a note, a typewritten note that becomes part of the medical chart itself?

A. It says what you did to the person.

Q. Why do we need to know that? Why is that important?

A. It's a documentation. It's required by the state and it explains what the problem was and how you went and fixed it.

Q. You still haven't answered why it's important, doctor. Why is it important to have it?

A. It's important so that everyone can know what was done.

Q. Exactly. So that when other doctors -- you said that you read progress notes from several different doctors including Dr. Pay, right?

A. Yes.

Q. So when Doctor A, B and C wants to know what happened to this patient, they can pick up the chart in the hospital, read Dr. Pay's operative note and know what he saw with his own eyes when that skin was opened and he is operating, correct?

A. Yes.

Q. It's the way doctors communicate with each other given the fact that they are usually not all in the same room treating the patient all at once, true?

A. Correct.

Q. And yet you who was hired back in October of last year never asked to see the operative notes from Dr. Pay until this morning, true?

A. I didn't ask for them, no. I saw them today.

Q. So prior to this morning you had no idea, for example, how many screws were drilled into Ms. Floyd's arm back at that time, correct?

A. Yes.

Q. Now, do you know how many?

A. I don't know the number. I saw it earlier today.

Q. If I were to tell you that it was six, possibly seven screws, would that sound consistent with what you read?

A. Possibly.

Q. And how does a doctor like yourself put a screw into somebody's bone?

A. Are you asking how one physically does it?

Q. Correct.

A. Okay, you use a drill which is smaller than the screw and then after you drill it through both sides of the bone, usually under X ray control but not always one goes and tightens the screw with a screwdriver.

Q. Was there any other hardware involved in this case besides the screws we have been talking about?

A. Yes, he put a plate in.

Q. What's the purpose and function of the plate?

A. It holds the screws to the bone and holds the fracture in the correct position.

Q. Now, have you ever seen the X ray films or the reports following the alignment conditions after this hardware was put in?

A. I have not seen any films, correct.

Q. Or reports?

A. Or reports, correct.

Q. So you don't know if the alignment was satisfactory or unsatisfactory when Dr. Pay got finished, correct?

A. I read the report. He said it was satisfactory, but I didn't see the plate, sir, you are correct. I have not seen the films.

Q. Well, was there any other hardware used besides the plate and screws that we talked about?

A. I don't recall the entire contents of the report. I don't believe so.

Q. Did you forget the part about the K wire?

A. That was only initially. I don't believe that was done permanently. It's a temporary cage that they use.

Q. What is a K wire? What does that do?

A. It's like a shish kebab, like a pin.

Q. Well, why would you want to use a shish kebab on somebody's bone?

A. You use it to hold the piece in place until you put the plate in.

Q. And then does the shish kebab come out?

A. Yes.

Q. Do you know whether it came out in this case?

A. I don't have the report in front of me. I don't recall.

Q. Doctor, you explained to the jury on direct that you performed a Tinel's test, right?

A. Correct.

Q. You said you test a certain area to see if the nerve is what, inflamed or --

A. Regenerating.

Q. I'm sorry?

A. Regenerating.

Q. What does that mean?

A. That means the nerve has various components to it, even acts on how we conduct impulse. A Tinel's sign is a sign of nerve irritation and regeneration.

Q. Do nerves regenerate?

A. Yes.

Q. When you did the Tinel's test on Ms. Floyd, you say that it was negative, correct?

A. Correct.

Q. And that is the predicate for your opinion that there is no nerve injury here, correct?

A. That I did not find any evidence of Carpal tunnel. That's what I said.

Q. Are you saying there's no nerve injury?

A. None that I saw clinically, no.

Q. In that 15 minute period of time?

A. That's correct.

Q. Well, now, doctor, did you tape -- did you videotape that exam?

A. I did not.

Q. So we don't know if you actually did that test. We only have your word for it that you conducted that test, correct?

A. That is correct, sir.

Q. In other words, there is no evidence that you actually performed that test, or the Finkelstein test that you said, or the Phalen's test all within 15 minutes?

And, by the way, your report indicates you did that on both hands, correct?

A. Correct.

Q. Where is the spot that you would test for Tinel's? Show us.

A. Right here (indicating).

Q. The base of the hand.

A. It's in the base of the wrist, right.

Q. You have to be a hand specialist to do that test?

A. No.

Q. You just tap on it and you see if somebody has some type of physical reaction or makes a complaint to you when you tap it, correct?

A. It's a subjective complaint as I explained, yes.

Q. So when you tapped it and it was negative, is that because you are saying Ms. Floyd said, "Oh, no, that doesn't bother me", or because you didn't see some physical reaction?

A. There's no physical reaction to it as stated. It's a subjective response. You tap the nerve. If they tell you they get tingling or pins and needles with it, that's considered positive Tinel's sign.

Q. You said that that would test for any injury to the median nerve, correct, as opposed to the ulnar nerve?

A. No, it could be any nerve. Any nerve can have a Tinel's sign.

Q. Does the ulnar nerve and median nerve that run down the arm innervate the hand, correct?

A. Yes, there's another nerve to it called the radial nerve. There's three nerves.

Q. You said that the median nerve -- we will stick with that one since that's the subject of this case -- innervates the thumb, the index, the long finger, and you said half the ring finger, correct?

A. Sensation wise, yes, correct.

Q. Did you do any other type of testing to determine whether she had lost any sensation in any of those three and a half fingers.

A. Yes.

Q. And that was positive, correct, for the thumb?

A. Correct. I asked her if she had any kind of loss of feeling and she said she felt less in the thumb.

Q. And, again, you didn't think that she was a

malingerer, correct?

A. I already answered that. The answer is I have nothing to state in my report that she was.

Q. The fact that she had tingling, gee, about over two years after the accident in the thumb, clinically, isn't that a significant finding?

A. I didn't say it was tingling. I said it was numbness and that it's a finding that I recorded, just like ranges of motion and scars.

Q. In other words, you are not going to give an opinion that that numbness is permanent, correct, in her thumb?

A. It's a subjective finding. You can't see it. They say they are numb. I take them at their word. I write it down.

Q. Well, in other words, you are willing to adopt a negative finding where the Tinel's test was negative, but you are not willing to adopt her positive findings where she reports numbness in the thumb?

A. She reported it and I wrote it down. So that's adopting it. I don't understand the question.

Q. Let me ask you this, doctor, just to clear it. Do you have an opinion with a reasonable degree of medical certainty as to whether the numbness in her thumb is permanent in nature?

A. I can't say because it's subjective. It's not like if you told me if her cut is permanent, I would say definitely. I

can measure it and see it. Her subjective feeling that it's numb there, I don't know if she is going to be numb there tomorrow.

Q. Could the numbness be from the scar tissue from the incision site?

A. It could be from a variety of things.

Q. How long is that scar that you observed when you examined her?

A. Nine centimeters.

Q. Show us with your fingers how big is that, nine centimeters.

A. I can do better than that. I have a tape measure. Nine centimeters is, approximately, like this big (indicating).

Q. That's on her wrist?

A. Yeah.

MR. HARRIS: Your Honor, can we just pause for a second? I would like the Court with my permission to bring up Ms. Floyd to show the jury her scar that he has just described and ask if that's consistent with his measurement and then I have couple of follow-up questions for the doctor about the scar.

MR. BUCHMAN: Are we doing an exam here?

MR. HARRIS: No, I just want the jury to see the actual scar. It's part of the damages here.

THE COURT: When you call her up to testify,

certainly you can have her show it to the jury or else I will take judicial notice that 2.54 centimeters is an inch. So 2.54 centimeters to an inch and it's nine centimeters, do the math. Nine divided by 2.54. Roughly, three and a half inches.

MR. HARRIS: Three and a half inch long scar.

THE COURT: In light of the hour at this point, how much more time do you need with the doctor?

MR. HARRIS: Probably another 20 minutes.

THE COURT: Let's break for lunch. We will come back 2:15 and we will finish with the doctor.

Members of the jury, please don't discuss this case among yourselves or with anybody else. We will see you 2:15. Thank you.

COURT OFFICER: All rise. Jury exiting.

(At this time, the jury left the courtroom)

THE COURT: Let the record reflect that the jurors and alternates have now left the room. Does anybody have anything to put on the record at this point?

MR. BUCHMAN: No.

THE COURT: Enjoy lunch. We will come back 2:15. I will give you a proposed verdict sheet before I leave.

(At this time, a luncheon recess was taken, and the trial adjourned to 2:15 p.m.)

* * * * *

AFTERNOON SESSION

THE COURT: Okay, are we ready?

MR. BUCHMAN: Yes, Your Honor.

THE COURT: Mr. Harris, are you ready?

MR. HARRIS: Yes, Your Honor.

THE COURT: Let's get the jury. Let's see if we can finish this.

Off the record.

(An off-the-record discussion was held)

THE COURT: Mr. Buchman, do you have any objection to the doctor being here?

MR. BUCHMAN: No. For the record, the defendants have offered $175,000 to settle this matter. We had an off-the-record discussion. Counsel rejected it. And now counsel -- it is counsel's turn.

MR. HARRIS: We counterposed a high/low offer, Judge.

THE COURT: Of how much?

MR. HARRIS: With 250 as the low and 950 as the high to fairly compensate the plaintiff based on what this jury does as well as insulate the primary carrier from excess exposure above and beyond the million in coverage. I haven't gotten a response to that suggestion at this time but for now we will keep it open.

MR. BUCHMAN: At this point I got a phone call,

an e-mail. I called them. The counterproposal was rejected -- the high/low is rejected. I will speak to them when we are done.

THE COURT: All right, it is what it is. Let's bring in the jury.

I think the high/low is a reasonable way to resolve it. I think it's within the policy limits but that's me. I can't force the parties to settle.

COURT OFFICER: All rise. Jury entering.

(At this time, the jury entered the courtroom)

THE COURT: Okay, everyone please be seated. Jurors, please make yourselves comfortable.

Mr. Harris, let's continue.

MR. HARRIS: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. HARRIS:

Q. Good afternoon, doctor.

A. Good afternoon, sir.

Q. Good afternoon, folks.

I think we left off with the EMG scar tissue and I just want to pick up in that subject matter and ask you, doctor, this is sort of the last area that I am going to be going into here with you. Did you have the opportunity over the lunch break to review the EMG study?

A. No.

Q. You still haven't seen it?

A. No.

Q. Now, the scar tissue that we were discussing, that three-inch plus area of scarring, when scar tissue forms, doctor, can we agree that typically it pushes on nerves?

A. If there is a nerve in the area, it could do that.

Q. Well, are the nerves in the area of Ms. Floyd's scar?

A. I would think so, yeah.

Q. What nerves would that be?

A. Well, in the front of the wrist there are the median and the ulnar nerves.

Q. Now, the scar tissue depending on how much somebody -- how much scar tissue forms, right, some people scar more than other people, right?

A. Yes, sir.

Q. And you never really know how much somebody is going to scar until you cut them, correct?

A. Or they get an injury that creates a scar, yes.

Q. So you have no idea as you sit here today, correct me if I am wrong, how much scar tissue in her wrist is currently pressing on the median nerve, correct?

A. I don't know how much or if any, that's correct. I have no idea.

Q. And you did no tests to discover that information, correct?

A. There's no clinical test that I could do observing her to do that, that's correct.

Q. You keep using this word "clinical", I just want to make sure that everyone understands. When you talk about "clinical", that means a test that you could do yourself in the office, as you say, tapping on somebody's wrist, that would be a clinical test, correct?

A. Yes, sir.

Q. An X ray, that would not be a clinical test?

A. That is correct.

Q. An X ray is what you call an objective study, correct?

A. Yes.

Q. In other words, you can't fool an X ray machine. The bone is either broken or it's not, correct?

A. Correct.

Q. Now, the same is true, in other words, an EMG study -- and you defined that for us earlier as an electromyogram, correct?

A. That's one part and the other is the NCV part, yes.

Q. We are talking about the EMG portion.

A. Yes.

Q. That is also an objective study, that's not a clinical test, correct?

A. It has components of both in it.

Q. Well, the EMG requires the doctor, correct me if I am

wrong, to use a needle or multiple needles to test the electric current between one spot on the body and another; is that correct?

A. That's right. That's the nerve conduction part. The EMG is to look at the quality of the muscle, correct.

Q. The quality of the muscle based upon the electrical impulses that that muscle is giving off, correct?

A. Correct.

Q. And nobody can say, "Hey, muscle in my body, give off a strong occurrence so that this test can come out more positive", correct?

A. No one can do that.

Q. That's why it's objective. In other words, it's considered an objective study because it's a machine that determines the outcome just like an X ray determines the outcome of what's to be seen on somebody's bones, correct?

A. It's similar. I stated there are some components of the EMG that are subjective.

Q. Now, since the EMG and the nerve conduction studies are, as you say, objective studies with certain, as you say, subjective components, can we agree that the EMG and nerve conduction studies would be important tests to look at to determine whether or not somebody has suffered nerve damage in that area of the body?

A. It's a good test for that. It has parts that are

important, correct.

Q. It's a good test for that?

A. Um-hum, yes.

Q. Now, you have given an opinion that there is no nerve damage here in this case, correct?

A. I gave an opinion that I did not find any Carpal Tunnel Syndrome on her exam. That's what I stated.

Q. Well, are you saying that there is not nerve damage, or that there is nerve damage, or you don't know?

A. I am saying that clinically I did not find any signs of Carpal Tunnel. Electrically there could be signs of Carpal Tunnel on an EMG.

Q. But in layman's terms that means that there would be nerve damage, correct?

A. That means there to be nerve damage on an EMG or muscle damage if they look at the EMG part but not the NCV part, correct.

Q. Now, let's take a look at the impression of the actual EMG study.

MR. HARRIS: And I showed this to counsel, Judge.

THE COURT: Any objection to that use?

MR. BUCHMAN: As long as it's in and of itself in those records which I will presume subject to connection they are, then I have no objection.

THE COURT: Fine. The records are in evidence