

**1992 WL 12541480 (N.Y.Sup.) (Expert Trial Transcript)**

Supreme Court of New York.

BURGOS,

v.

LOVELL REALTY, INC.

No. 16445/92.

1992.

**(Transcript of Ronald Mann, M.D.)**

**Name of Expert:** Ronald L. Mann, M.D.

**Area of Expertise:** Medical & Surgical >> Orthopedics

**Representing:** Unknown

**Jurisdiction:** N.Y.Sup.

Don't discuss anything about the case.

(At this time the jurors leave the courtroom. Court stands in recess for lunch until 2:45 P.M.)

**AFTERNOON SESSION**

(At this time the jurors entered the courtroom and took their respective seats in the jury box.)

THE COURT: Good afternoon.

THE JURORS: Good afternoon.

THE COURT: Dr. Mann, you want to take the stand.

DR . RONALD MANN, having previously been sworn, was recalled and testified as follows:

THE COURT: Doctor, you are still under oath.

THE WITNESS: Yes, Sir.

MR. MARSHALL: May I proceed, Judge?

THE COURT: Yes.

**CROSS-EXAMINATION**

**BY MR. MARSHALL: (Cont'd.)**

Q Good afternoon, Dr. Mann. I believe yesterday you left off, and we were discussing the anatomy and physiology of the lumbar spine. Before I go back to where we left off yesterday, I want to just change grounds and go back to the knee issue in this case. Okay?

You prepared, you prepared a report for Mrs. Burgos' attorneys, Sweeney & Calabrese in August, on August 27, 1991 regarding your care and treatment of Mrs. Burgos; is that correct?

A Correct.

Q And in that report, and at that time, it was your opinion that her knee condition was what you stated: "It is my impression that her major knee problems were due to weakness."

MR. CALABRESE: Judge, the report's not in evidence.

THE COURT: Well, he's using this by way of cross-examination. Just as a possible prior inconsistent, I gather? Otherwise it should be in evidence, if you are going to use it for its truth or what.

MR. MARSHALL: I'm using it exactly as your Honor suggested.

THE COURT: Okay. I'll allow it.

Q It was your statement, Sir, in August of 1991, that, "It is my impression that her major knee problems were due to weakness, which was secondary to the contusion to the knee which she sustained."

Is that correct?

A That's what I wrote. Yes.

Q Now again, I don't want to misstate any testimony. I don't want to say anything that wasn't said. But you correct me if I'm wrong. Yesterday, I believe on direct examination, you indicated that the knee problem was due to a weakness that resulted from her back condition. Is that correct?

A I said that is part, part of the cause of her knee condition.

Q You said it's part of the cause of her knee condition?

A Yes, Sir.

Q Well Sir, Doctor, tell me something. Did Toni Burgos ever tell you that she suffered a contusion to her knee, as a result of this fall?

A I don't recall if she used those words.

Q Well you have --

MR. MARSHALL: May I give him his records, your Honor?

Q Doctor, you brought your entire medical file. I ask that you take a look through it, and you tell me if she ever told you that she fell and bruised her knee, and if you put it in one of your office notes, especially the January 18, 1990 note, the first time you treated her?

A The records are out of order. If you'll excuse me, let me just try to --

Q Please take your time, Doctor.

A -- to straighten them out here for you. Okay.

Q Have you had an opportunity to look through them?

A No. I just put them in order.

Q Okay.

A She didn't -- I don't have in here that she used the word "contusion". No, I don't have those words. I just had the words that she had injured her knee in the fall. And that's part of the record.

Q Doctor, let me ask you if you would agree with me on this point? Would it be fair to say that if a person sustained a contusion to the knee, that's an impact to the knee; is that correct?

A No.

Q Well --

A A contusion is a diagnostic term. It means that there is injury to the area around the knee joint.

Q Okay?

A A blow to the knee would be an impact to the knee.

Q Okay. Using your definition of that word, Doctor, would it be a fair statement that if a person sustained a contusion to the knee, that there would be objective findings by the person who examines that individual within an hour and-a-half after the accident?

A The answer to that is no. Very often patients will present with an injury or a deep bruise, and there will be no physical findings at all. Objective physical findings are not always consistent.

Q Well is it your testimony, Dr. Mann, that a person who sustains a contusion to the knee, which you have testified played some role in Toni Ann Burgos' knee condition, that it would leave no symptomatology within an hour and-a-half after the incident occurred?

A I don't know what happened an hour-and-a-half after the incident. I didn't see her then.

Q I'm asking you in general, Doctor?

A But you are asking in specifics. I don't know what would have happened an hour and-a-half later. Somebody can have a blow to the joint and have almost no physical findings within the first hour, two, three, four. It's not unusual at all.

Q It's your testimony that a blow to the joint would not result in either edema -- I believe that's swelling --

A Correct.

Q -- black and blue, ecchymosis? Am I using it correctly?

A That's the right word.

Q And you would not see this with a blow to a joint, as you used it?

A Absolutely correct. I operated this morning on a woman who had a rupture of the major ligament in her knee, and she had no -- she was playing karate and was able to continue the rest of the day, and she came to the office two days later, and that's when the swelling started, a day or two later. It's not unusual at all.

Q I see. Dr. Mann, assuming this person sustained a blow to the joint, the knee joint as you said, and they presented in a hospital within nine months --

A Right?

Q -- and the physician who examined that person examined their knee and concluded that the knee examination was negative. Would that be consistent with the person sustaining a glancing blow, a blow?

A Again, it's not unusual in patients who have multiple injuries for them to concentrate on the major injury. And we see this all the time with fractures on patients who have other injuries. It's not unusual at all. That's why we can continuously re-examine and re-assess the patient.

I took care of a guy who had a collapsed lung, a ruptured spleen, a broken femur. And in all of that, we missed the fact that he broke his other wrist, for three or four days, till IV's on that side started to hurt him. It's not unusual at all. He never complained about it. And we see this again, and again, and again.

Q Dr. Mann, assuming that there was -- withdrawn.

Is it your testimony that Mrs. Burgos' knee condition is as a result of the injury, the accident that she sustained on January 10, 1990, even though the Emergency Room record from Putnam Hospital Center said her knee examination was negative, and they x-rayed the knee? There was no objective findings on the doctor's examination within an hour and-a-half when she presented herself at the hospital, and the fact that she saw a chiropractor within minutes after the accident, who also had no findings of any problem with her knee? Is that what your testimony is?

MR. CALABRESE: Judge, I object, because we have no idea what this chiropractor did.

THE COURT: There is no testimony as to the chiropractor.

MR. MARSHALL: I'll withdraw the chiropractor.

Q All other-things the same, Doctor, is that your opinion, with a reasonable degree of medical certainty?

A It is my opinion that her knee problem was, as I said before, caused by, and I stated earlier on, that it was probably cause related to the weakness due to the injury, direct trauma, and also due to the weakness because of the back injury as well. And that those things combined, have caused the chronic problem in the knee.

Q Dr. Mann, let me ask you this.

A Yes?

Q The first time that you have any complaints from Mrs. Burgos with regard to her right knee is your entry of April 11, 1990; is that correct?

MR. CALABRESE: Objection. Objection.

THE COURT: I'm sorry. I'm not certain whether that is a correct statement of the evidence.

MR. MARSHALL: Can you read the question back to your Honor?

THE COURT: Let me hear the question.

(At this time the last question was read back by the Court Reporter.)

THE COURT: Well it's the form of your question. He will either agree with it or disagree with it.

Can you answer that, Doctor?

A I believe I stated yesterday that she complained of pain in the right leg. The first time that my record, I believe, talked about her knee specifically as part of the leg was the April note.

Q The April 11th note?

A Yes, Sir.

Q Okay. Now when you say she complained of pain in the right leg, Doctor, would it not be a fair statement that that pain was the result of the back injury, which radiated into her right leg?

A That's part of it. Yes, Sir.

Q Not part of it, Doctor? Isn't that what you were referring to when you said there was pain in her right leg you weren't talking about the knee? You were talking about the pain radiating into her leg from her back condition, isn't that true?

A I'm talking about her leg.

Q Doctor --

A Now pain in the leg can be caused from many areas, as you know. And a major part of it, of course, was from her back. But then the back caused weakness in the leg and that also contributed to it.

Q Doctor, all things being equal, if she did not specifically complain of pain in her right knee to you until your note of April 11, 1990, and you learned of a factor, an incident involving Mrs. Burgos that occurred subsequent to January 10, 1990, where -- I didn't have a specific event yesterday, but I'd like to read to you what she said, and I'd like to ask you some questions to consider.

“Okay. When I first had fallen, I wasn't that active. I was trying to move around more. Okay? I hadn't knelt down on my knee since the accident, because I was afraid to get down on the floor. And it just so happened that my son fell one day, and I knelt down, and I still had that same pain behind my knee. And when I knelt down to help my son, that's when I got a sharp pain underneath my kneecap.”

This is an incident that occurred subsequent to January 10, 1990, prior to April 11, 1990 when she first complained of a problem with the knee. Would you agree, Sir, that this incident, at least to some degree, contributed to her knee problem when she presented to you on April 11, 1990?

A Well actually, what you just read confirms the fact that she had had the knee problem before that. She said she was afraid to put pressure on her knee because it was hurting her.

Q Doctor, I'm asking for a yes or no. Can you answer the question yes or no?

THE COURT: You want to have the question repeated?

THE WITNESS: I don't think this is a yes or no question here.

THE COURT: You want to have the question repeated?

MR. CALABRESE: Please, Judge?

THE COURT: Find the question, Reporter.

(At this time the last question was read back by the Court Reporter.)

Q Yes or no, Doctor?

A No.

Q This incident of sharp pain has no bearing on your opinion?

A Correct.

Q Regarding the condition of her knee?

A Correct. This incident --

Q No, please! There is no question before you, Doctor.

A Sorry.

Q Doctor, are you aware of the fact that Mrs. Burgos testified that the incident was such, that she called your office and-reported it to you? Are you aware of that?

A I've been made aware of it through this trial. Yes.

Q But you don't even have a note in your file about this, is that correct?

A It would be in our phone logs.

Q I s??bpoenaed your entire file. Are you telling me you don't have your entire file here with you?

A I don't have my phone logs.

Q This subpoena, I believe, said, "All records regarding this case."

THE COURT: Counsel, he didn't bring the phone logs.

MR. MARSHALL: Okay.

Q Dr. Mann, isn't it a fact that the pathology that you found, when you did the arthroscope, was behind the kneecap?

A Yes, Sir.

Q And it's still your opinion, that this incident played no role in the cause of Mrs. Burgos' knee problem?

A Not the incident you described. No, Sir.

Q Okay. And when I say, "No part," I mean not even one percent? It didn't contribute even one percent? That's still your opinion?

A Does something contribute anything? Living contributes to problems.

Q I'm asking you, did it contribute even one percent?

A It's a hypothetical. I can't give you an answer to that.

Q I'm asking you hypothetically, did it contribute one percent?

THE COURT: He can't give you an answer, Counselor.

A I don't have an answer.

Q Okay.

A I'm sorry about my voice. I have a little cold.

Q All right, Dr. Mann. We left off yesterday. We were discussing the anatomy of the lower back. And I believe we still have the model here, is that correct?

THE COURT: You want to use this?

MR. MARSHALL: Yes, if it becomes necessary.

Q I believe we left off with the discussion regarding the discs, the intervertebral discs, okay?

A Correct.

Q These are -- would you agree that's a soft tissue?

A It's not a bone. No, it's a cartilage. It's a cartilaginous tissue.

Q And it's located between the vertebrae?

A Yes, right here.

Q And the ones involved in this case, Mrs. Burgos' condition, it's L4-L5, L5-S1; correct?

A I believe that's correct.

Q And we also -- I believe you used on your testimony, that they act as a shock absorber; is that correct?

A That's part of their function.

THE COURT: Could I, just to help the jury. When you refer to a disc, you always name two bones to identify it's between those two bones. So when you say, "L5-L4, L5-S1," it's a disc between the lumbar bone 4 and lumbar bone 5?

THE WITNESS: That's correct.

THE COURT: And then also the disc between L5 and S1?

THE WITNESS: Correct.

THE COURT: Which means sacral 1?

THE WITNESS: Correct.

THE-COURT: And lumbar 5?

THE WITNESS: Right.

THE COURT: So just for the jury's information, that's why they also use L4-L5, meaning the disc between those two bones, L4-L5. Go ahead.

Q The model that you have in front of you, Dr. Mann, it also shows some of the nerves that emanate from that area of the back; is that correct?

A That's correct.

Q And would it be a fair statement that the model does not show all of the nerves that emanate from that portion of the back?

A It shows the nerve roots, the major nerve roots.

Q Okay. And when you deal with a disc problem, what causes the symptomatology is that there is compression on those nerve roots; is that correct?

A Yes, Sir. Not necessarily. Excuse me. Not necessarily compression, but an irritation of the nerve roots. They don't necessarily have to be compressed if they are irritated.

Q It could be caused by compression or something else, is what you are saying?

A Correct.

Q Now would you agree, Dr. Mann, that clinically speaking, and generally a bulging disc is of no clinical significance unless there is some type of compression on the nerve root?

A That's not -- that's a difficult statement to answer yes or no. The answer is that bulging discs will have different effects depending on the tissue structure around them. And what they can -- and what they will and will not cause is variable. Like anything in medicine, you have to look at the patient and examine the patient.

Q Would you agree though, Dr. Mann, that a bulging disc is something that occurs over time? It's generally due to degeneration or desiccation of the disc itself?

MR. CALABRESE: Objection. It's a compound question.

THE COURT: Break down the question.

Q Would you agree, number one, that it develops over time?

A It's not something that all of a sudden appears. It can and it cannot. It can be either way.

Q In most cases, isn't it true that the medical literature says that it takes time to develop? It's in fact in most cases, it's part of the normal aging process that we all go through?

MR. CALABRESE: Object to the compound nature of the question.

THE COURT: Just give one question at a time, Counsel, just so that we know which one he's answering.

Q Would you agree, Doctor, that generally the medical literature says that it is a process that occurs over time?

A It can be.

Q And in this type of a scenario, it's due generally to the aging process that we all go through?

A It can be.

Q And --

A But it's not always.

Q I understand that. I'm only asking what you agree with, Doctor. That's all. In this room right now, if you did a study of everybody in here, it's conceivable that a great majority of us would show clinically on an MRI a bulging disc; would you agree with that?

MR. CALABRESE: Objection. Objection.

THE COURT: Well it's a question, I assume, that you are asking ??m on average?

MR. MARSHALL: ??/verage, exactly, in this room.

THE COURT: If you took twelve people?

MR. MARSHALL: Right. A random sampling of human beings.

Q If you were going to study them -

A Uh-huh?

Q You would find in this room some people who have a bulging disc?

A Yes, Sir, and it's age related.

Q Okay. And those people that you would find a bulging disc, they might not even know that, because there is no symptoms; is that correct?

A In some patients, that's quite correct.

Q Now, you say it's age related?

A Uh-huh.

Q Would you agree that the occupation of an individual would in some way contribute to the possibility of their disc degenerating?

A I don't know if it relates specifically to a disc degenerating biochemically. It will relate to symptomatology and how it will present, and how the patient presents.

Q Let me ask you something?

A You are asking, I think, a more complex question. As I stated yesterday, discs degenerate with age. That's part of the normal aging process. Our cells lose water. And over time, all discs, as do all cells in our body, deteriorate and degenerate. Whether somebody will have a clinical symptom or problem related to it is related to many, many factors. Not just occupation, as you are trying to point out. It's related to everything that somebody does in their life.

Q All I'm asking you, Doctor, is it more likely that certain people, for instance people engaged in an occupation that is more physical in nature, such as that requires bending and lifting, would be more predisposed towards suffering from a degenerative disc condition than say a lawyer, or a doctor that does not do as much physical type of activity in their occupation or profession?

A Whether they will develop the condition or not can be related to their occupation. The amount of degeneration is probably not. But that's a very complex question. I don't think the answer is really there.

Q Well Doctor, I want you to assume these facts, okay? That a woman approximately the age of sixteen years leaves school and begins working as a nurse's aide in nursing homes and homes for the elderly. She waitresses. She does some -- both at the

same time. She works in a factory. In other words, she is not doing sedentary work. She is doing work that involves physical labor, where there would be bending, lifting, et cetera.

And in March of 1990, that same individual goes for an MRI of the lower back. And that MRI shows that there was partial dehydration and degeneration?

A Uh-huh.

Q Would you agree, Dr. Mann, that that person, at that time, was suffering from pre-existing degenerative disc disease?

MR. CALABRESE: Objection.

THE COURT: Well, I'll permit the question. Cross-examination purposes.

Would you? Would you come to that diagnosis?

THE WITNESS: I would state that the person shows evidence of degeneration on those discs. They don't have pre-existing disease. Disease means that they are having symptoms and problems. Whether you have biochemical degeneration or not is unrelated to whether -- it's not necessarily related.

As you stated quite clearly before, if we took MRIs of this group of people in this room, you will see a lot of people who have degeneration, a lot of people who have bulging discs, but they don't have disease.

Q Doctor, would it be a fair statement though, that for the period say, January 10, 1990 until March 12, 1990, the period of about two months, that a person's discs, okay, would not degenerate unless it was pre-existing? In other words, that it couldn't happen, you couldn't have that loss of water in such a short period of time?

A You will see some degeneration. And the MRI scans do show changes over time in areas that are affected pathologically. So that for example, if my knee cartilage was torn, and we did an MRI the day it tore, I would have normal signal in that knee cartilage and it would show it's torn. But if I left it torn, and it was just floating out there on a breeze, over the course of six months it would show some change, biochemical changes. Over the course of another six months, it would show further changes. So in two months, you can see some changes. How much, I can't, can't quantify, and I wouldn't even dare to try.

Q Now Doctor, let me ask you something. In addition to your treatment of Toni Ann Burgos, you sent her for a second opinion as a good doctor would, you know, to have her looked at by somebody else, and that was Dr. Duffy, the Assistant Professor of Neurology, I think you told us, at County Medical Center; right?

A Yes.

Q And as is the practice, the referring doctor will generally get a report from the physician who the patient was referred to, is that correct?

A Usually.

Q And that doctor was provided with the films from March of 1990, the MRI films of Mrs. Burgos' lower back; is that correct?

A I don't know what. It states here she brought the films.

Q You have his report in front of you, I take it?

A Yes.

Q Page 2 of his report, he indicates that, "The patient brings for my review an MRI of the lumbar sacral spine dated March 30, 1990. This reveals a moderate disc bulge of a degenerate L4-L5 disc. There is also mild L5-S1 disc bulge." Do you see that?

A Yes.

Q Dr. Mann, would you agree that Dr. Duffy's reading of this was that she presented to him on those films mere bulging of those two disc spaces with evidence of degeneration? Would you agree with that?

A That's what he wrote, right.

Q So you would agree with that?

A I'll agree that that's what is written.

Q And would you agree also, Dr. Mann, that this finding, in Dr. Duffy's report to you dated January 29, 1992, is consistent with a person who was suffering from preexisting degenerative disc disease?

A No.

Q You don't agree with that?

A No. Disease indicates symptomatology and problems. Symptoms. A biochemical change is not necessarily -- does not necessarily mean disease.

Q Essentially what you are stating?

A When we use these words, very often we use them interchangeably. A patient doesn't necessarily have a problem. I mean as you said. There are many, many people walking around with biochemical degenerative discs with bulges but are not having symptoms.

Q Dr. Mann, I don't want to engage in semantics with you. All I want to know --

MR. CALABRESE: Judge, that's argumentative already.

MR. MARSHALL: I'd like to ask a question. That's all.

THE COURT: Pose your question.

Q Dr. Mann, is your use of the word "disease" continued upon symptomatology? Is that what you are saying, that in order to suffer from degenerative disc disease, you need symptomatology?

A When we are examining a patient and using it in a context.

Q So if a physician uses the expression, "preexisting disc disease," what he's saying is, in all cases, there is always symptomatology? Is that what you are saying?

A No.

Q And that's my point, Doctor. Isn't it a fact that Ms. Burgos, prior to January 10, 1990, could have been suffering from degenerative disc disease that was quiescent, that was asymptomatic at the time? Isn't that a possibility?

A It is possible that she had biochemical changes in her disc. But she was not suffering from problems.

Q And that's all I'm saying, Doctor. I'm saying, she was -- it was asymptomatic?

THE COURT: It was not bothering her?

MR. CALABRESE: Now it's not possible anymore. Now it's become factual.

THE COURT: He's using one set of definitions and you are using another.

Q I want to make sure that we can get on the same level, Dr. Mann. Trying to do -- just trying to find a common ground that you and I have.

THE COURT: He does not agree that degeneration is necessarily a disease, unless something else is there, meaning symptoms, problems. Otherwise it's merely the natural order of degeneration of the human body; correct?

Q I just want to know --

THE COURT: Is that it?

THE WITNESS: Yes, that's it.

Q Degeneration and disease only go together where there is symptomatology? Is that the only way you put those two words together?

A I believe that's an appropriate way. But I must also say that in the medical profession, not being lawyers, we use words with a great deal of imprecision as well, and many of these reports obviously reflect that.

Q Now back in August of 1991, it was your professional opinion that Mrs. Burgos' back condition would not improve without surgery. That's what you wrote in the report to the lawyers, do you recall that?

A Yes.

Q Now there came a time when you referred Mrs. Burgos to Dr. Duffy?

A Yes.

Q And he also confirmed that impression, is that correct?

A Yes.

Q In fact, Sir, now isn't it true that Mrs. Burgos went for a repeat MRI scan back in March of 1992?

A Correct.

Q And I believe -- do you have a copy of that one in front of you?

A I'm just looking for it, since you are referring to it. Yes.

Q And that MRI scan showed that there -- first of all, do you have Paragraph 3 down there?

A Yes.

Q It showed, "The L4-L5 disc level was remarkable for a broad base central protrusion with mild thecal compression. No obvious root compression or significant canal stenosis is appreciated. The facet joints are unremarkable. A small central protrusion is also seen at the L5-S1 level unchanged in appearance. No thecal or root compression is demonstrable. No bony canal stenosis is seen."

A Correct.

Q Do you see that finding?

A Yes, Sir.

Q Would it be a fair statement, Dr. Mann, that your conservative management of Mrs. Burgos' back condition achieved a very good medical result back in March of 1992?

A I'd have to check her clinical record at that point in time.

Q You mean your March '92 notes, where you saw her?

A That era. "November '91, still significant pain."

Q I'm talking -- let's go to March. There is a March 24, 1992 note.

A I'm just -- I'm leading up to it. "Pain radiating to the right leg and left buttock. Occasional weakness in right leg." That was January '92. "March '92, back pains are occasional. Mid lumbar area. Most recent MRI was reviewed with her. I think we'll hold off on surgery at the present time."

Q Okay. Now, would you agree then, that the conservative management by you, of Mrs. Burgos' back condition, you achieved a very good medical result? Would you agree with that?

A I wouldn't say, "Very good".

Q You don't have to be, you know, embarrassed, Doctor, please. If you got a good result, you can tell us?

A I would say an acceptable medical result. What people consider very good and acceptable, it's dependent on them.

Q Let's put it this way. It was good enough where your opinion in August of 1991 changed significantly, where she needed a laminectomy and discectomy, to where you are putting this off? It was no longer required, is that right?

A Right. At that point we held off.

Q Now, that same note, Doctor, indicates, the first sentence: "Now her back -- they are in the mid lumbar area."

A Right.

Q Now isn't it true, Dr. Mann, that the mid lumbar area is not L4-L5 or L5-S1? It's above that level, isn't that true?

A No, mid lumbar means the middle of the lumbar area.

Q Can you show us on the model?

A That's a clinical thing. It's back here. It's the mid lumbar area.

Q Dr. Mann, let me show you --

A That's how I use the words.

Q You mean your imprecise use of the English language is what causes these confusions? Is that what you're saying?

MR. CALABRESE: Objection.

A There's no confusion.

THE COURT: He's saying that this is personal to him, because he's writing the note to himself.

Q I just want to be clear. Is it your testimony that in this note of March '92, when you refer to the mid lumbar area, you were talking about the lower back of Mrs. Burgos?

A Correct. The middle of her lower back. You cannot clinically, when examining somebody's back --

Q Doctor --

A -- say precisely which level a problem is at.

Q Please, go back to your January 18, 1990 note. First time you saw her?

A Yes.

Q Under "Patient," you wrote, you took the history, "While stacking milk containers, fell and hit her arm, neck and lower right back."

A Right.

Q Would you agree that there is a difference between the lower right back and the mid lumbar area, or is it still your testimony that you used the words interchangeably?

A Right lower back would be directly in the right lower back. The middle would be in the middle.

Q No, mid lumbar as opposed to lower back? Let's leave out which side. Let's just talk about the spine itself. Is -- are you telling the jury, that there is no difference when you use the words mid lumbar, as opposed to lower back that there is no distinction?

A The distinction that I draw in my notes is lower back usually means a broader base across the lower back. Midline, it's midline.

Q Not a high disc level?

A Not L2-L3, not L3-L4. No, when you examine a spine, you basically could say, lumbar area, lower thoracic, upper thoracic, cervical. You can't say it hurts here at S1. It hurts here at L3-L4.

Q Doctor --

A For example, last week I saw a little old woman who had a fracture at L1 vertebra from falling out of bed. Now her whole entire back from the middle down to the lower part here, I couldn't precisely tell you which vertebra it is. So when you are examining somebody, you are focusing in on a region more so than on a specific point in the back.

Q Dr. Mann, what I'm driving at is, would it be a fair statement that in March of 1992, Mrs. Burgos, if you accept the premise that she had a pre-existing degenerative disc disease, had affected another area of her spine? She was now having symptomatology at a level higher than L4-L5, L5-S1 level?

A I don't see the question here. I'm sorry.

MR. CALABRESE: Your Honor, may I --

MR. MARSHALL: Your Honor, may she read it back, please?

THE COURT: Esther, would you read that question back.

(At this time the last question was read back by the Court Reporter.)

MR. CALABRESE: Judge, I'm going to object to that. What -- there is no proof in the case at all that there has been an injury to the upper spine. It's Counsel's question that is the only mention in this entire case about that.

MR. MARSHALL: Judge, my question -- I'm just asking if he's talking about a different area of her back, and whether it would be consistent with degenerative disc disease.

THE COURT: I thought he answered it. I thought he was telling you or explaining what you think or thought was a deviation, that he's explained that he was not trying to be specific but was being general in his description.

Q Okay. Dr. Mann, let me ask you. A person who suffers an injury, a disc injury of the nature that you've testified Mrs. Burgos did, would you agree with the statement that the laminectomy and/or discectomy would be most advantageous to have within the first year of the injury? That you would be expected to achieve the best medical result within that period of time?

A The answer in that is not understood at this time, to be honest with you, medically.

Q Well --

A Our understanding of surgery of the spine, of when people should be operated on, who should be operated on, and when, has been changing over the last five to ten years. And I don't think there is a real hard answer. There are specific cases where it's -- it would be very useful, and where people should be operated on on the day that they have their injury. But in cases like this, I'm not sure the answer is really -- really elucidates yet.

Q Well would you agree with this statement, Dr. Mann?

A And there is the imprecision of medical science.

Q I could accept that.

A Just like all words are imprecise.

Q Would you agree that the likelihood of a person undergoing such a surgery, would become more remote, as the time passes from the date of the initial injury, as we go out into the future?

MR. CALABRESE: Objection to -- I think there is a word missing.

THE COURT: The "likelihood"?

MR. MARSHALL: Yes, the likelihood of surgery decreases as time goes by?

THE COURT: You say the likelihood for the necessity of surgery?

MR. MARSHALL: Yes, the likelihood for the necessity of surgery?

THE COURT: I'll allow it.

Q As time passes from the initial injury?

A I can't answer that. I don't know.

Q Well in this case, Doctor, you'd agree that Ms. Burgos had undergone no back surgery?

A Correct.

Q And we are now statute post five and-a-half years accident?

A Correct.

Q I'm asking you, Doctor, do you have an opinion, with a reasonable degree of medical certainty, as to whether Ms. Burgos will require the surgery that back in August of 1991 you felt she absolutely had to have to resolve her conditions?

A It's, you know, it's less likely. But I can't tell you whether she will or not.

Q Okay. Well let's start with less likely. Would you agree that it becomes more less likely as every year goes by, that she does not have the surgery, from today until you know, whatever her life expectancy would be?

A I don't have an answer. I really don't.

Q You can't answer that question?

A I don't have an answer.

Q Okay. Are you aware of the fact that Ms. Burgos has returned to her former employment as a waitress?

MR. CALABRESE: Objection.

THE COURT: Well, be more specific.

A Return to her normal work as a waitress insofar as it's relevant to the point you are making? In other words, how long is she working? Exactly what her duties are?

Q Well let me ask you this, Doctor. I'll withdraw the question.

Back in August of 1991, would it have been your opinion that she would never have returned to work as a waitress?

A At that point in time probably.

Q How about after the repeat MRI of March '92, where you decided to put off the surgery? Would that have been your opinion at that time?

A At that point in time. But I couldn't say for the future.

Q Well what about now? Do you feel that she is capable of working in gainful employment?

MR. CALABRESE: Objection, Judge.

Q Well do you have an opinion, Dr. Mann, based on a reasonable degree of medical certainty, as to whether Ms. Burgos is capable of being gainfully employed say in the position of a waitress?

A It would depend on what she is doing. I could also say that I think everybody should work. And everybody should have a job of some kind.

Q Let me add one other thing to that hypothetical. She is doing what a waitress generally does, maybe not as fast or maybe not as much, or as many hours, but she is doing what a waitress is expected to do. Serve meals, take orders, walk around. What a waitress generally does.

A I would probably advise her, and it's my advice, she should avoid any kind of heavy lifting, twisting, turning. And depending on what kind of waitressing she is doing, I would advise against it.

Q I'm sorry?

A I would advise against it. Depending on what she is doing. I don't walk in the shoes of what she is doing.

MR. MARSHALL: Excuse me one second, your Honor.

Q Would you agree, Dr. Mann, that presently Ms. Burgos presents with a mild partial disability?

MR. CALABRESE: As of the day of the last examination, Judge, or today, or --

THE COURT: You mean --

MR. CALABRESE: Put a time frame.

THE COURT: Be specific. As of what point in time?

Q You last saw her when I think it was the beginning of this year, January of '95?

A I believe so.

Q Is that what your notes say?

A Yes.

Q And the fact that she has now returned to work as a waitress, okay, would you agree that presently, or at least back in January of '95, she presented with a mild partial disability?

A I'd say partial disability. I wouldn't say mild. That's a very difficult word to quantify, "mild, moderate, severe." I can't -- I, again I can't say what that means or give you a definition of it.

Q You agree the fact that she has returned to work, as a waitress, okay, clearly takes it out of the severe disability range?

A If you want me to use that definition, sure.

Q Would you agree that it takes it out of the moderate disability range, based on the nature of the employment as a waitress?

A Depends what she is doing. How many days of work she misses. You see a lot of patients who miss days of work here and there, because of their problem. Sometimes they got good employers, they keep their jobs. Some of them lose their job.

Q I'm not talking about losing the job. I'm only talking about her disability, Dr. Mann. Dr. Mann, with respect to Ms. Burgos' prognosis, would you agree that she is going to have good days and bad days with regard to her back?

A Absolutely.

Q There could be stretches where she goes for months at a time, even conceivably years at a time, where there might not be a problem?

A It's conceivable but her past history has not been that.

Q So are you saying that you cannot prognose to date, with a reasonable degree of medical certainty, what her prognosis is for the future?

A What I can say is, I know how she has been, I know what she has done, and my experience tells me that people usually -- generally do about the same particularly five years out after the initial injury.

Q You referred Mrs. Burgos for physical therapy almost after the first visit on January 18, 1990, correct?

A That's standard protocol, yes, Sir.

Q That's part of the conservative management treatment rendered to her?

A Yes, Sir.

Q And the physical therapy group that you used was the Arnow Physical Therapy and Sports Center up in Peekskill?

A I think that's where she went to. I'll have to check the records. I'm sure that's correct.

Q Is that somebody that you would ordinarily refer a patient to for this condition?

A I refer to them, yes.

Q And isn't it true, Dr. Mann, that in order for somebody to undergo physical therapy, it's generally done under a doctor's prescription?

A Yes, Sir.

Q And that was done in this case, correct?

A Correct.

Q And would it also be a fair statement that you would receive reports from the physical therapist regarding how the patient was doing, because she is still under your care; is that true?

A Yes.

Q Now your records include, Doctor, the February 5, 1990 report from Arnow Physical Therapy; is that correct?

A Yes, Sir.

Q And Doctor, are you aware of the fact that the diagnosis set forth --

MR. CALABRESE: Judge, I'm going to object, if the document is not in evidence, that it not be referred to.

THE COURT: What are we reading from? What is this?

MR. MARSHALL: This is the Arnow reports to Dr. Mann, that I believe is in his own office records.

THE COURT: Is that part of your records?

THE WITNESS: Yes, Sir.

THE-COURT: Were you aware of it? I mean, were you aware of it when you made your opinions or rendered your opinions?

THE WITNESS: Yes.

THE COURT: I'll permit it.

Q Well were you aware, Dr. Mann, that the diagnosis sent contained in that report was lumbar disc disease?

A Yes, that would be based on my prescription.

Q I'm sorry?

A That would be based on my prescription. A physical therapist doesn't make an independent --

Q Diagnosis?

A That's correct.

Q In other words, what you are saying is, whatever you wrote on the prescription is what he would ordinarily put in his report; is tha?? correct?

A Right. That of course is after her injury.

Q Is it customary for the physical therapist to also take a history from the patient?

A Most of them do. Yes.

Q And in this case Mr. Arnow did, correct? Or his group did? Page 1, Dr. Mann?

A Yes. There is a history listed here.

Q And in that history again, would you agree that there is absolutely no reference made to an injury to the right knee, a specific injury or complaint to the right knee?

MR. CALABRESE: Judge, there is a history taken by somebody that we don't know, under what circumstances we don't know. I object to it.

THE COURT: I'll permit it. Go ahead.

A You want me to read this?

Q No. I'm just asking you to look at it. You see the first four lines under "History: Tripped over drain in the floor. Fell backwards. Landed on several cases of beer which were stacked. Got up and had immediate pain which shot up her back and went down the right leg causing her to fall again, landing on her right arm and back of head." You see that?

A Yes.

Q Would you agree that there is absolutely no reference in that history to a complaint of pain specific to the right knee?

A Talking about pain in her right leg again.

Q Okay. But again, would you agree, Sir, that that pain that he's referring to in the right leg, was as a result of the pain radiating from the back that had nothing to do with the knee?

MR. CALABRESE: Objection. How can he know the content of someone else's mind?

THE COURT: Counselor, you are asking him to analyze what somebody else wrote. And as to what that person's state of mind or the purpose.

MR. MARSHALL: I'll rephrase the question, your Honor.

Q Dr. Mann, isn't that history almost consistent with what you wrote of pain down the right leg?

MR. CALABRESE: Objection.

THE COURT: No. Overruled.

A The history is consistent.

Q And when you wrote that history, isn't it true that you were referring to the pain emanating, that was emanating down the right leg was from the back, not the knee, on that January 18, 1990 note of yours, when you first saw Mrs. Burgos?

A That's part of it.

Q Well are you telling me now that you were also referring to the knee?

A I'm saying that I don't have it listed in my note.

Q And if you don't have it listed in your note --

A Specifically.

Q -- would you say that you are a very careful doctor?

A Yes, of course I would say I'm a very careful doctor.

Q Okay. So if a patient of yours came in with symptomatology, and they said, "My knee was bothering me," or "I had a contusion to my knee," or "A blow to my knee," you would write that in your record; is that correct?

MR. CALABRESE: Objection. Objection to hypothetical.

THE COURT: I'll permit it. He's talking about his note taking habit or process.

If someone said that to you --

A As I mentioned before, very often patients don't complain of something on the first visit, and things develop as they are being under treatment.

Q Okay. Let's look at your second visit. That second visit is February 7, 1990. Again, did you write anything about Mrs. Burgos making a complaint of pain to the right knee?

A I believe I answered that already.

Q And it was "No". The next visit was March 13th, and again there was nothing. Correct?

A Again we talked about the right leg.

Q But nothing specific to the right knee? Correct?

A I answered that already.

Q And the first time was the April 11th visit where she -- where you are now aware of the fact that there was an event, where she felt pain on kneeling, directly underneath the kneecap? Isn't that correct?

A Excuse me?

MR. CALABRESE: Judge, he's incorporating in that question something that has already been gone into in a way that I think the doctor has already responded. It's sort of, "When did you stop beating your wife" type of question.

THE COURT: Let me hear the question.

(At this time the last question was read back by the Court Reporter.)

THE COURT: Well you are saying that the first time he makes note of it and it's related only to the event that she had, that he was aware of the event that she had?

MR. MARSHALL: No, just the timing.

THE COURT: Rephrase your question, because the question implies that he's relying on an event, an intervening event.

Q Doctor, what I'm asking you, is that for the three months before April 11, 1990, there was no mention of any injury to Mrs. Burgos' right knee, in your notes?

MR. CALABRESE, Judge, objection. At some point, it's been asked and answered. It's been asked and answered.

THE COURT: A number of times. He keeps saying he mentioned down the right leg. And you say, "Not specific mention of the knee."

THE WITNESS: You are right. But that's been conceded many, many, many times.

MR. MARSHALL: I have no further questions, Judge.

THE COURT: Any redirect?

MR. CALABRESE: I have a little bit, Judge.

### **REDIRECT EXAMINATION**

#### **BY MR. CALABRESE:**

Q Do you know what's mean by lumbar disc disease, as it's contained in the report of the Arnow Physical Therapy people?

A Meaning that she has lumbar disc symptoms.

Q Does the amount and type of work that an individual with a back injury can do depend in part on the amount of medications they take?

A That's part of it.

Q Is it fair to say that the more medications they take, the more activities they would be able to pursue?

A To a point, yes.

Q Mr. Marshall pointed out that Dr. Duffy described the disc herniations as bulges. It's also true that Dr. Duffy indicated that the back should be operated on?

A Yes, Sir.

Q And that it should be corrected surgically?

A Yes, Sir.

Q Mr. Marshall spoke to you about an incident where Ms. Burgos knelt down and felt something in her knee?

A Uh-huh.

Q And I believe you were about to comment as to why or what role you feel that played in her injury, and I would invite you to do so?

A In the comments that he read from Toni, she stated that when she knelt, she had not knelt down on her knee, and that when she knelt on it, she felt the pain behind her knee, which she had been feeling previous to that kneeling episode. Chondromalacia of the patella is irritation behind this kneecap. If you have a blow to the knee or weakness in the leg, that would be aggravated. So the previous injury was giving her pain behind her kneecap, and she was protecting it. And then when she knelt on it, of course she felt it severely, since that was probably the first time she had put pressure on that area, and that's where she has been continuing to have pain in her knee since the episode.

Q If it did --

A Chondromalacia of the patella or irritation under her kneecap, patella, femoral pain syndrome, these things mean the same thing. It means the upper surface of the kneecap is irritated. It could be irritated by degeneration, trauma, and it's made worse by weakness in the leg. So anything that would cause weakness in the leg would aggravate the condition. And the standard treatment for it is to brace people, to have them do exercises, to try to build up their legs. And those are some of the things we try to do. Some patients don't get better. Sometimes we look at them and do an arthroscopy, which was done in Toni's case.

Q Have you concluded?

A Yes.

Q If a disc is herniated, and that herniation is borne out by CAT scan and MRI evaluation, does that disc also become degenerative?

A Yes. Over time it will degenerate.

Q So a herniated disc becomes a degenerative disc?

MR. MARSHALL: Your Honor, could we just have not leading questions? And could we have questions framed to the --

Q Does a herniated disc become a degenerative disc?

A Over time, yes.

Q If an Emergency Room record bears a notation written by a physician of the knee, and a negative or subtraction mark in a circle, what does that mean?

A It means he examined the knee and found no major injury to it.

Q Do you know -- withdrawn. Have you ever worked in the Emergency Room?

A I've worked in emergency rooms, yes.

Q If a person comes in after sustaining multiple trauma, would you examine each and every part of their body, or would you examine those parts that are -- that the patient complains about?

A You focus in on the areas the patient complains about, with the most severely injured part first and foremost.

Q Is it a fair inference that if an Emergency Room doctor examines the body part and makes an entry into the medical record concerning his examination of that part, that the patient made a complaint about that body part --

MR. MARSHALL: Objection, Judge. That's speculative.

THE COURT: Let me hear it.

(At this time the last question was read back by the Court Reporter.)

THE COURT: I'll permit it. He's asking whether it's a fair inference, based on his experience.

A That's a fair inference. Yes, Sir.

Q Dr. Mann, is there anything in this case whatsoever, that indicates that Ms. Burgos has ever had any type of injury or symptomatology to her upper lumbar spine or lower thoracic spine?

A No, Sir.

MR. CALABRESE: Thank you, Doctor. I have nothing else.

THE COURT: You may step down.

(At this time the witness was excused.)

MR. CALABRESE: Can we take those?

THE COURT: You have any problem with that?

MR. MARSHALL: No. It's all right.

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