Ora RAFAELOVA,
v.
THE CITY OF NEW YORK, Andrew Ho, Domingo Corsino and Jose Corsino

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Supreme Court of New York.
Ora RAFAELOVA,
v.
THE CITY OF NEW YORK, Andrew Ho, Domingo Corsino and Jose Corsino.
No. 1997-111321.
1997.

(Transcript of Dr. Aric Hausknecht)

DR. ARIC HAUSKNECHT called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

COURT CLERK: For the record, in a loud clear voice, can we have your name and address.

THE WITNESS: My name is Aric Hausknecht. My place of business is 225 West 35th Street, New York, New York.

DIRECT EXAMINATION

BY MS. CONDE da SILVEIRA:

Q Good afternoon, Doctor.

A Good afternoon.

Q Doctor, are you a physician licensed to practice medicine in New York?

A Yes, I am.

Q When were you licensed?

A I received my license to practice medicine and surgery in the year 1992.

Q Can you tell us a little bit about your educational background and medical training starting with college?

A Certainly. I graduated from Duke University in 1976 with a Bachelor of Arts in physical anthropology.

I proceeded directly to medical school and graduated in 1991 with my medical degree from Mt. Sinai Medical Center.

I completed one year of neuro general medical internship at Beth Israel. I then completed one year of neurology residency training at Mt. Sinai and I finished my final two years of training at New York Hospital Cornell Medical Center and Memorial Sloan Kettering Cancer Center.

Q Are you a member of any professional societies or professional organization?

A Yes, I am a member of several societies including the American Academy of Neurology, the American Academy of Pain Management and the National Multiple Sclerosis Society.

Q Can you tell us a little bit about the societies and organizations that you are a member of?

A Certainly. The American Academy of Neurology is a group which is dedicated towards the maintenance of the field of neurology. Neurology is the field which specializes in the treatment and evaluation of disorders of the nervous system. The nervous system includes the brain, the spinal cord and the nerve roots.

So, typical disorders that a neurologist deals with strokes, seizures, multiple sclerosis as well as neck and back injuries, neck and back pain.

The American Pain Management is the society which is dedicated towards the treatment and evaluation of pain. A pain management specialist takes care of people that have pain as well as the consequence that that pain has on different aspects of their life.

Q Do you presently hold any teaching position?

A Yes. I am currently in private practice. I'm affiliated with several different hospitals including Beth Israel Medical Center, Long Beach Medical Center and Peninsula General Hospital.

I am one of the teaching neurologist at those facilities.

Q Do you have any publications to your credit?

A I don't have any publications presently. I did some research during medical school for the National Institute of Health.

Q Have you previously been qualified to testify as an expert in a court of law?

A Yes. I'm double Board Certified. I'm certified in neurology by the American Board of Psychiatry and Neurology. I'm certified in pain management by the American Academy of Pain Management and I have qualified as an experts before.

Q Doctor, where do you maintain your office?

A I have an office in Manhattan and I maintain an office in Queens.

At the time I saw Ms. Rafaelova, I also had offices in Brooklyn, Nassau and Suffolk.

Q What does your practice consist of?

A Neurology and pain management practice. I see individuals with all dfferent types of neurologic disorders including neck and back pain and provide treatment and evaluation for those patients.

Q Can you estimate how many patients you have?

A I'm not sure. Usually I'll see between 75 and 100 patients per week.

Q Per week?

A Per week.

Q Can you tell me how often you treat people with people who are injured in accidents such as Ora Rafaelova?

A I'm not sure how often. Frequently neck and back pain come from traumatic injury and because I specialize in neck and back pain, most of those patients will come to my office seeking treatment.

Q How often do you testify in court?

A Usually I come to court once or twice a month.

Q Can you give us an idea of how often you testify for people who have been injured and how often you testify for defendants?

A Most of the time I testify -- three quarter of the time it's for the plaintiff, either a patient that I have been treating or I've been retained by the plaintiff as an expert witness. The remaining 25 percent I'm retained by the defense as an expert witness.

Q Are you being paid for your time today?

A Yes, I am. My fee for time away from the office is $500 per hour.

THE COURT: Per hour did you say.

THE WITNESS: Correct.

THE COURT: Is that door-to-door?

THE WITNESS: It includes travel time, yes.

Q Did there come a time that you saw Ora Rafaelova?

A Yes, there was.

Q When did you see Ora?

A I first saw her on March 22 of 1999. I brought the records from my office.

Q Would you like to refresh your memory and look at your records?

A Certainly.

Q Did you examine her?

A Yes, I took a comprehensive history. I did a physical examination. I reviewed prior medical records from her treating physicians and reviewed MRI films.

THE COURT: I am sorry, Doctor. I didn't catch the date.

THE WITNESS: March 22, 1999.

THE COURT: This was the first time you saw her.

THE WITNESS: That's the only time I saw her, yes.

Q Did you examine her?

A Yes, I did.

Q And what did your examination include?

A I did a comprehensive physical examination including a general physical exam of the heart and the lungs and specifically a neurologic examination to determine if there is any dysfunction of the neurologic system specifically in motor exam to determine if there was any weakness, reflex examination to determine if there are any changes in the reflexes, a sensory examination to determine if there was any loss of sensory perception and a mechanical examination of the spine to determine if there was any spasm or positive orthopedic provocative maneuvers.

Q When you first saw Ora, what were her complaints?

A Basically, the patient had indicated that she had been involved in a motor vehicle accident on August 20 of 1996. The patient had received emergency room attention at Columbia Presbyterian Hospital emergency room.

She subsequently was seen at the Argos Medical PC and had received rehabilitation. The patient indicated that she was still having problems despite the time that had passed as well as the therapy that she had received and specifically her complaints included lower back pain.

She was still having pain and swelling on her nose.

The patient had difficulty performing certain activities of her usual daily routine and specifically she was having problems standing.

Q Now, can you please describe the tests that you did and what your findings were?

A The pertinent positive findings on the physical examination was that of five minus weakness of the hip flexors. The hip flexors are the muscles that raise the knee up to the chest. Motor strength is graded and neurologic evaluation on a scale of zero to five with five being full strength and zero being complete paralysis. She was five minus which indicates that she lacks full strength.

The patient had evidence of tenderness in the lumbosacral spine. The lumbosacral is the lower back, basically the spine just above and in between the buttocks region.

The patient had a positive straight leg raise testing at 60 degrees on both sides. A straight leg raise test is a objective orthopedic maneuver which is performed by having an individual sit down and slowly raising their leg upwards. This stretches the nerves that travel down the leg and puts pressure on the spine. If this is positive, it's an indication that there is an underlying injury to the lower back region.

In this case it was positive on both sides at 60 degrees. Normally an individual should be able to straight leg raise to 80 or 90 degrees.

Q You said you had the – you said you had done the straight leg test and you also mentioned another one?

A No, that was the only one.

Q Now, you said that you reviewed some records before you did the examination?

A Correct.

Q And what records were those?

A They were the treating records from the Argos Medical PC.

Q Are these the type of records that you normally rely upon in the normal course of business in your profession in making a diagnosis?

A Yes, I do.

Q Did you take Ora's history when she came to you?

A Yes, I did.

Q And what were your findings as to her history?

A Basically, as I had indicated, the patient was involved in an accident, hurt her back, went to the hospital, got some treatment, came in, was still having back pain.

Q What did the physical therapy consist of?

A I don't know that I had the physical therapy notes. So, I'm not exactly sure.

Q Did she have any diagnostic testing?

A Yes, she did.

Q Could you tell me what a diagnostic test is?

A A diagnostic test refers to an evaluation which is performed in order to establish a diagnosis or define the nature of the condition. A diagnostic test is an objective evaluation as opposed to a subjective evaluation.

So, for example, if an individual comes into my office and says I'm having lower back pain, I as an outside observer can't know whether or not that patient is actually having lower back pain. That's what's known as a subjective complaint, one which emanates from an individual itself or a symptom.

An objective finding is one which can be reproduced by a clinical examiner who evaluates the patient at a similar time who has similar clinical training or background. So, a straight leg raise tests is objective.

Q Can you explain what an MRI is?

A MRI is a testing using strong magnetic fields and computers. Basically an individual is placed into a magnetic chamber and strong magnetic fields are passed through the body. The computer measures how these magnetic forces are -- how they pass through the body and creates a natural picture image.

The computer can take these images and create different slices and orient them in different ways so that an examiner can get a three dimensional idea of what he is looking at.

An MRI is very affective for looking at soft tissue such as the muscles, the nerves and the disk as opposed to an x-ray which is very good at looking at the bones.

Q Did you review Ora's Rafaelova's films?

A Yes, I did.

Q Can you please tell us when those films were taken?

A The films of the lumbar spine were taken on October 29 of 1996 and there were also films of the cervical spine or neck that were performed on October 3 of '96?

THE COURT: Those were not taken by you, right, Doctor?

THE WITNESS: No, these films were performed by Neuro and Body Medical Imaging PC and they had been ordered by her previous treating physicians at the Argos Medical PC.

Q Doctor, what did the film reveal?

A The MRI film of the lumbar spine revealed a bulging disk at the level of L5 S1. The lower spine – the spine is made up of separate bones which sit on top of each other and are numbered one through five in the lower back. In between them is a piece of soft cartilage known as a disk which is numbered according to the number of the bones that it's between. So, the disk which is between the L5 S1 bone is known as the L5 S1 disk.

I've brought a small model of the spine which I think would help to illustrate some of the anatomy.

Q Thank you, Doctor.

A Basically the spinal column is made up of separate bones known as vertebrae. Each one of these structures, this top structure that I'm holding in my hand now is the vertebrae. It sits on top of a vertebrae below it and it sits below a vertebrae on top of it. It's kept together by a series of ligament or tough fibrous connective tissue.

In between each of the bones is a piece of cartilage known as disks which provides support yet allows for flexibility in the spine so an individual is able to bend forwards, backwards, sideways and to twist.

The spinal column in the human being basically has two functions. One is to provide support so that an individual can stand up right and if there is an access for connection of the limbs.

The second purpose is to protect the spinal cord and the nervous system because nerve tissue is very fragile and once its damaged, it cannot be repaired.

The disk in themselves are kept in place by a series of ligaments. Sometimes these disk can slip out of place.

If the ligaments are stretched, the disk will bulge outward. If the ligaments are torn, a piece of that cartilage will protrude through and that's known as disk herniation.

Now, disk bulges and disk herniation sometimes are normal findings. It's part of the aging process. Part of degenerative bone disease.

THE COURT: You mean as we get older, we have degenerative disk?

THE WITNESS: That's possible. As an individual proceeds throughout their lifetime, there's basically wear and tear that occurs on the spine. Every time you walk, sit, jump, you - spine takes a little bit of a pounding. What happened is you develop osteoarthritis or degenerative spine disease. All adults have this problem but most people will never experience any difficulty with it.

Moreover this process, the degenerative joint disease can also render an area more susceptible to injury.

Now, a disk which bulges or herniates slowly or over the course of time progressively usually does not cause problems because the body has time to react and adjust to it. A disk which occurs because of an acute event like a car accident which stretches or tears, those ligaments causes problems because it occurs acutely and there is severe damage that occurs to the supporting structures like the ligaments and the disk, not small increments, but all at once.

Q Thank you, Doctor.

How many bulging disk did Ora have?

A The only disk that I was able to identify that was bulging at the L5 S1 region.

Q Doctor, could you please explain again where that region is?

A If I could stand up. It's the area of your lower back just above the tailbone, in between the two buttocks.

Q Doctor, how old was Ora at the time of your examination?

A At the time I saw her, she was 26 years old. At the time of the accident she was 24.

Q And would an individual of 24 or 26 experience degeneration?

A That's probably the age when it first begins, in young adulthood, but I wouldn't expect that this person, Ms. Rafaelova, who never had any problems before didn't lead a particularly physically demanding lifestyle would have any disk degenerative changes nor have any degenerative disk bulges.

Q Did you review any records of any prior neck in ??injuries or any prior medical conditions to her neck or back?

A I specifically asked her if she had ever had a problem with her neck or back and she indicated that she had not or that she had never been hurt in any other accident pertaining to her neck or back. So there were no records that I'm aware of pertaining to her neck or back.

Q To the best of your knowledge, did she have any prior conditions to her neck and back that were not from an accident?

A As far as I know, she did not have any problems or any conditions and specifically denied it.

Q Doctor, I'm going to ask you a hypothetical question. I'm going to ask you to assume hypothetically that Ora was involved in a car accident, the car which experienced a heavy impact during which time she was jerked forward and back and her back in the process hit the seat.

Doctor, I ask you do you have an opinion based upon a reasonable degree of medical certainty whether such an accident is the competent producing cause of this injury?

A Yes, I do. With a reasonable degree of certainty, the patient's disk bulge, the injury that she sustained was caused by the motor vehicle accident itself. This type of disk injury is very typical following a car accident where there are forces that come to bear on the spine causing basically a whip lash, front and back which puts stress on those limits and can tear or stretch them.

Q Can you show us a film where the bulging disk is located?

A Certainly. I'm going to need the shadow box please.

This is one of the MRI sheets. Basically to explain what we're looking at, this is what is known as a sagittal view. You are cutting the spine up into slices.

If this is the spine, imagine that you would cut it long ways and take a look at each slice.

So, what you're seeing here in the back, this is the front. This is the back. This is the top. This is the bottom. This white spike like structure is actually the spinal cord and the nerve roots. These squarish shaped objects are the front of the vertebral body itself. These white elliptical shapes in between are the disks.

Now, the MRI, using different magnetic fields and different orientation can give you a three dimensional picture of the area which is in question. These are what's known as T-2 weighted images and they show water, very bright. The disk show up very bright because they have a very high water content. The spinal cord shows up very bright because there is cerebral spinal fluid surrounding the nerve roots in the spinal cord itself.

This is what is known on my view as T-1 weight image. It's actually the same exact size but using a different magnetic field. You see a difference in the brightness and this is because this shows the soft tissue structures better. It doesn't show the water quite as bright. These are what is known as the axial images.

So, now if you took the spine and cut it up like you would cut up a salami, you would look at each slice. What you see here, these two large gray parts are the paraspinous musculature or the muscles around the spine. This round structure is actually the vertebral body and the disk. This smaller round structure is the spinal canal where the spinal cord and the nerve roots come down and this is the back of the vertebrae or the lamina. The nerve roots exit at each side.

What we see on these films, first of all, on the T-2 image is that the water content of all the disk is good and it's about the same for all of them.

This is an important finding because if an individual who has degenerative joint disease, osteoarthritis, they would be drying out of the disk. So, the fact that there is no drying out is a strong indication that there was no preexisting degenerative joint disease.

On the T-2 image, you see that the disk at the level of L5 S1, that is to say, the disk that's between the S1 vertebrae and the L5 vertebrae is abnormal. It looks different from the disk above it and that's because it is bulging out backwards. It has been somewhat squared and the ligaments that normally keep it in place have been stretched and that's why it's pushing outward.

The axial images this shows the cuts at the levels that it's going through. Up here is L3, 5 and down here is L5 S1 and if you look at the L5 S1 level, you will see from the back of the vertebrae itself that there is something pushing outward and moving the thecal sac or the bag which contains the nerve roots and the fluid backwards and this is the disk bulge.

So, this study provides us objective evidence that there is pathology at that level of L5 S1 as well as the fact that this pathology appears to be acute.

There is no evidence of anything that's been there for a long time.

Q Doctor, what does this mean for Ora?

A Basically it means that this patient is going to experience pain. This patient is going to have problems. She's going to have good days and she's going to have bad days. It's normal. She's going to have difficulty with this injury.

Furthermore, because this spine has been rendered abnormal, it's not going to deal with the every day stresses properly and it's going to be the site of degenerative joint disease, osteoarthritis as she gets older.

Q Did you make any recommendation for Ora?

A Yes. I spoke with Ora about the treatment that she had received and recommended that she do certain exercises at home. I told her how to do stretching and strengthening exercises. I recommended that she take antiinflammatory agent and we discussed the possibility in the future of surgery or steroid injection around the disk.

MS. CONDE da SILVEIRA: I have no further questions.

Thank you, Doctor.

THE COURT: Your witness.

You saw her once; is that correct?

THE WITNESS: That's correct.

CROSS-EXAMINATION

BY MR. DREYER:

Q Good afternoon, Doctor.

Now, your specialty is in neurology and pain management, correct?

A Correct.

Q You are not Board Certified in orthopedics?

A In orthopedics, no.

Q You are not an orthopedic surgeon, are you?

A No, I'm not.

Q You are not even an orthopedist?

A I think I just answered that, no.

THE COURT: You did, doctor.

Q Now, the accident that Ms. Rafaelova experienced happened in August of '96, correct?

A Correct, August 20 of 1996.

Q You didn't see her at all in 1996 though?

A That's correct.

Q Didn't treat her in 1997?

A That's correct.

Q In fact, you didn't see her until March of '99?

A March 22, 1999, correct.

Q Who referred Ms. Rafaelova over to you?

A She was referred by her law firm for an evaluation.

Q Now, you testified to the MRIs that were taken in October, 1996, correct?

A Yes.

Q You did not review any MRIs Ms. Rafaelova had ever taken before the accident?

A As far as I know, there was none to review.

Q So, you have no idea what her condition was before the accident, correct?

A No, that's not correct.

Q You're basing your determination of what her condition was before the accident based on her testimony, correct?

A No, based on what she told me when I saw her, based upon the records of the other doctors that treated her.

Q But it's possible that this condition existed before the accident, correct?

A I'm not sure that I can answer that. Anything's possible but as far as I know it didn't exist. She didn't have any problems. There are no records to indicate that there were any problems. There are no MRIs before this. There were no accident reports before this. There was no indication that she was in an accident before this.

Is it possible, I can't answer that? Is it probable, no.

Q You mentioned a report that you prepared in March of '99, correct?

A Correct.

Q Now, you mentioned that you noted some weakness ??n the shoulder abductor and hip flexors, correct?

A Correct.

Q Did you also note that the remainder of her strength was intact throughout?

A Yes.

Q And that the volume and tone of her muscles were within normal limits?

A Correct.

Q There was no dysmetria?

A Yes.

Q You also performed sensory test on, Ms. Rafaelova, correct?

A Correct.

Q And the results of those tests were all normal?

A Correct.

Q Now, you testified about your recommendation as far as her future treatment, correct?

A Correct.

Q You recommended that she engage in home stretching, correct?

A Stretching and strengthening.

Q And your recommendations are included in your report of March of 1999, correct?

A Correct.

Q And does that report say anything about future surgery being recommended?

A No.

Q Does it say anything about steroid treatment in your report?

A No.

Q The only thing as far as your report in March of '99 says that you recommend home stretching and over-the-counter pain treatment?

A The report specifically says I instructed Ms. Rafaelova for stretching. I recommended that she take over-the-counter antiinflammatory agents as needed for pain.

Q Other than March 12, 1999, you never saw Ms. Rafaelova?

A That's correct.

Q You never treated her for anything after you saw her?

A I think that's obvious.

MR. DREYER: I just want to make sure the record is clear.

CROSS-EXAMINATION

BY MR. WADE:

Q Good afternoon, Doctor.

A Hello.

Q You testified earlier about a straight leg test?

A Correct.

Q Is that an objective or subjective test?

A Objective.

Q What is done? Can you describe for the jury what is the straight leg test?

A The patient is seated on a table. The leg is raised slowly until the patient can't tolerate it any more and the patient's reaction to the straight leg raise test is observed and the test is repeated to make sure that it's reliable.

Q Is any type of mechanical device attached to her leg?

A No. What's attached is known as a goniometry. It's sort of a protractor which measures ankles.

Q How do you know when she's experiencing pain?

A When she can't move it any more.

Q Does she tell you that hurts in that position?

A That would be one of the things. She would express that she's having pain.

The patient is also evaluated to see if there is any grimacing or other signs of pain. All of these were positive.

Q So, it's based on her either verbal cues or facial expression?

A No, that's part of it.

Q Part of it. What's the other part?

A It's the measurement as well as the inability to actually move it beyond that point.

Q Okay. So, once she says or indicates facially that she's experiencing pain, that's when you know it's at that level, correct?

A She's experiencing pain. I'm not going to do it any further.

Q That's an objective test?

A Yes.

MR. WADE: Thank you.

REDIRECT EXAMINATION

BY MS. CONDE da SILVEIRA:

Q Doctor, please once again run down the objective tests that you performed during the examination.

A Objectively the patient had motor weakness or loss of power in the hip flexors and the patient had the positive straight leg raise testing and the patient had the positive MRI finding.

Subjectively, she had the complaints of pain, the complaints of difficulty standing.

Q And the MRI that you're speaking of is the one that you just showed to the jury?

A Correct.

MS. CONDE da SILVEIRA: Okay. I have no further questions.

THE COURT: Doctor, can I see your little –

THE WITNESS: Certainly.

THE COURT: Just so the jurors and I have a better idea, this sort of reddish tissue like membrane like thing, what is this?

THE WITNESS: That's actually the disk and the disk is made up of the nucleus pulposus which is soft fluid like cartilage and the ankylose fibrose which is a tougher ligament like structure which is actually in continuity with the ligaments that run up and down the spine.

THE COURT: So, when you say in continuity with the ligament that run up and down the spine there, red ligament or disk is in continuity with these more yellowish –

THE WITNESS: Well, actually – the yellowish structures would be the nerve roots that come out at each level adjacent to the disk. The ligaments that I'm referring to are not actually on this model but imagine that there were strands running up and down all the way around the vertebrae. These would constitute the anterior longitudinal ligament and the posterior longitudinal ligament.

In this case it was the posterior longitudinal ligament that was stretched because of a flex extension type injury to the spine and the disk bulges out against that ligament which has been stretched beyond its elastic ligament.

THE COURT: And such an injury, such a stress can occur in a variety of fashion -- can be the result of a variety of activities or trauma to the back?

THE WITNESS: The most common causes are wear and tear or micro trauma, little forces that occur every day over the course of time and accumulate or an acute trauma such as a car accident or some type of fall from a height.

THE COURT: Now, you talked about L and S. When you were talking about the location in L and S, the specific location of the injury in question, correct?

THE WITNESS: Correct.

THE COURT: When you say L, what do you mean?

THE WITNESS: L refers to lumbar or the lower back S referring to sacral or the portion just above the tailbone. The lower back is commonly referred to as lumbosacral spine.

THE COURT: That's L5 S1?

THE WITNESS: L5 S1 would be the point in the lower back basically just above the -- it's easier to point. I'm not sure that the common – basically above the division between the butt cheeks.

THE COURT: And how often as a result of that type of injury is there a complete recovery?

THE WITNESS: I couldn't give you an exact number but often times an individual will have a disk bulge or herniation and will recover either spontaneously or will recover with therapy. There are also times when a patient doesn't recover. It depends on the severity of the disk bulge itself, the mechanism of it and the individual. If a person has a generous spinal canal, there is a lot of room there so that if something is bulging out, it's not stressing on another structure. Then they are more likely to be less symptomatic.

THE COURT: Thank you very much, Doctor. You're excused.

(Witness excused)