SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: PART 4

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JULIO ABREU,

Plaintiff,

-against- Index No. 20092/96

THE CITY OF NEW YORK,

Defendant

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Supreme Courthouse
88-11 Sutphin Boulevard
Jamaica, New York 11435
April 10, 2003

B E F O R E:

THE HONORABLE MARGUERITE A. GRAYS
J U S T I C E

A P P E A R A N C E S:

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Spanish Interpreter - Enrique Paguaga

LAURIE DEBIASI
Senior Court Reporter

report. They wait until the middle of the trial, the middle of the damages portion, to make any objections when they knew all along that they didn't have them and they were going to object to it. It's typical sandbagging, and they just wait until the last minute and then try and preclude evidence that is proper and that will give the jury the full picture of what is going on in this case.

THE COURT: All right. We will now bring in the jury.

COURT OFFICER: All rise. Jury entering.

(Whereupon, the jury entered the courtroom.)

THE COURT: You may be seated. Good afternoon, ladies and gentlemen of the jury. We will now continue with the case. Counsel, you may call your next witness.

MR. EVALL: The plaintiff calls Dr. Jeffrey Kaplan to the stand.

COURT CLERK: Doctor. Sir, step up into the witness box. Remain standing. Raise your right hand.

(Whereupon, the witness takes the witness stand.)

J E F F R E Y K A P L A N, M D, called as a witness by and on behalf of the Plaintiff, after having been first duly sworn, was examined and testified as follows:

COURT CLERK: You may be seated. Sir, state your name.

THE WITNESS: It's Jeffrey Kaplan, K-A-P-L-A-N.

COURT CLERK: Address, please.

THE WITNESS: 159 East 69th Street is my business address.

COURT CLERK: Thank you. Keep your voice up, please.

THE COURT: You may inquire.

MR. EVALL: Thank you, Judge.

DIRECT EXAMINATION

BY MR. EVALL:

Q Sir, are you an orthopedic surgeon duly licensed to practice medicine in the State of New York?

A Yes, I am.

Q Can you tell us how long you have been so licensed?

A In New York I have been licensed since 1995.

Q Can you take a few moments and tell this Court and this jury a little bit about your background, your education, your credentials?

MR. KOSSEGI: Judge, Counsel will stipulate to the doctor's expert credentials.

MR. EVALL: I don't take a stipulation. I think it's fair for the jury to hear his credentials.

A As far as my background and education, I went to Yale University. After graduating there, I went to medical school here in the City at Columbia. After four years of medical school, I did a training program in orthopedic surgery at five years. I did that at a place called the Campbell Clinic in Memphis, Tennessee. It's actually the first orthopedic training program in the country. Following that, I practiced in Tennessee and Mississippi for a short period and moved back to New York in 1995 where I have been in private practice ever since.

As we said, I am an orthopedic surgeon. Orthopedics is the study of bones and joints and injuries or damage to the bones and joints as well as the supporting structures, like the muscles and tendons and ligaments. I am a board certified in orthopedic surgery. That's an extra certification.

After you finished college, medical school, and residency, you then take a series of examinations. So I am a diplomate of American Board of Orthopedic Surgery. My practice is in Manhattan. I am on the staff of several hospitals. Those include Mount Sinai, Cabrini Medical Center, New York University Downtown Hospital, St. Luke's, and Roosevelt Hospital.

At those hospitals, I am on the attending staff, which means that in addition to doing my surgeries there, I

teach the residents. Those are the guys who have graduated medical school and are training in specific areas. I teach them orthopedic surgery techniques, as well as attend their rounds and give presentations and talks in their rounds when called on.

Q In your practice have you come to be the doctor for Mr. Abreu?

A Yes.

Q Okay. Can you tell us briefly what the field of orthopedics and orthopedic surgery entails before we go into what happened to him?

A Sure. As I said, orthopedics is the study of bones and joints and the supporting structures of the bones and joints, and it is the study of treatment for injuries or wear and tear problems of the joints. Some joints have age appropriate changes, wear out over time. And then sometimes the body is injured, and when there is a trauma or an injury to the body that involves the bones or joints or muscles, tendons, and ligaments, it is generally treated by an orthopedic surgeon.

And the term or practice of orthopedic surgery does not only include surgery, but it also includes the conservative treatment of those injuries, so that includes advice, recommendations for physical therapy, prescriptions, medications, both by mouth and by injection, and then surgery

for treatment. I am -- I am a member of the American Trauma Association which studies trauma to the body and the main portion of my practice has to do with trauma injuries.

Q Now, Doctor, did you bring your file on Mr. Abreu with you today?

A Yes, I did.

Q Okay. And did you did you have occasion to take X-rays of Mr. Abreu in the course of treating him?

A Yes.

Q For how many years have you been treating Mr. Abreu?

A He has been treated in our office since July of 1996.

Q And in your regular course of your practice as an orthopedic surgeon, do you take notes when the people come in for each visit?

A Yes.

Q And what is your practice as far as how the notes are written down? Do you handwrite them; do you dictate them; what do you do?

A Whenever we see a patient -- and when I say "we" there are several doctors in my practice at this point. We are four orthopedic surgeons and a neurologists, and we each see patients, and we often see each other's patients as a matter of coverage. So we keep notes in a chart that we usually dictate directly after seeing the patient or while seeing the patient

just to make a record of each visit, so that we can follow along and see how the patient has been doing over time.

Because one thing that you will see about orthopedic injuries is that they are really a process. You have the injury, and then it heals over time or it doesn't heal over time. It gets better over time or it doesn't get better over time. But it's a process, so we keep notes so that we can follow each other's findings throughout the course of treatment.

Q Are these records kept in the ordinary course of business as an orthopedic surgeon?

A Yes, they are.

Q Is it part of the your business as an orthopedic surgeon to keep and maintain these records?

A Not only is it a part of my business, it's required by law.

Q And the entries that you made and the other doctors made, are they made as part of the record at or near the time the patient is seen?

A Yes.

Q Now, can you tell us what was Mr. Abreu's complaint when he first came into the office?

A The first time he was seen in the office, as I said, was in July of 1996, and he was complaining of severe pain about his left leg and the foot and ankle area.

MR. KOSSEGI: Objection, Judge.

THE COURT: Basis?

MR. KOSSEGI: Can we approach?

THE COURT: Certainly.

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

THE COURT: You may proceed.

Q You may continue.

A So at that first visit he was complaining of severe pain in his leg on the left as well as around the foot and ankle area.

THE COURT: One second, Counsel. Doctor, I am just going to ask you to please close your files that you have in front of you. If you don't recall any of the answers to the questions, just let the Court know that you don't recall and you need to refresh your recollection, and then you may review your file.

THE WITNESS: Okay.

THE COURT: All right. You may proceed.

Q Now, Doctor, are you the first doctor in that group that saw Mr. Abreu?

A No, the first time he came in he was seen by my senior partner, Dr. Jonathan Korn.

Q At some point, did your office obtain a history as to what happened to Mr. Abreu to cause these problems?

A Yes.

Q And what was your understanding of the history?

A My understanding of the history, because I eventually started seeing him after, I believe, his second visit, was that he had fallen into a -- I don't know what you call it -- a concrete recess and had an injury where his leg fell into the recess, for lack of a better word, the hole which --

MR. KOSSEGI: Objection, Judge.

THE COURT: Overruled. I will allow it.

A And his leg hit the side of the recess, and he fell sustaining an injury both by hitting as well as a twisting type injury to the leg.

Q And did you obtain a history that he was seen at Elmhurst Hospital?

A Yes.

Q What was done for him at the first visit, Doctor?

A First visit at my office or Elmhurst Hospital?

Q Okay. Let's take it -- let's start at the beginning. What was done for him at Elmhurst Hospital?

A My understanding is he was placed in a cast at Elmhurst Hospital initially. He then was placed in a brace after the cast came off.

Q What was done for him when he first came to your office?

A When he was first in our office, he had physical examination. He had X-rays. I am just going to refer to my notes, if you don't mind. I just wanted to make sure he was not placed back in a brace. No. And that was the initial treatment. He was advised that he would need physical therapy and likely need other tests, other diagnostic tests.

Q And was he -- did he begin physical therapy?

A Yes, he did.

Q Do you know where?

A He had some physical therapy at our office with a physical therapist who was working for us at the time, and I believe he had some physical therapy prior to that as well.

Q Do you know the type of fracture that he had?

A Yes, I do.

Q And what was that?

A He had a fracture of his lower leg, between the knee and the ankle. It's called the shinbone in common terms, but in medical terms there are two bones in the lower leg. One is called the tibia -- that's the larger bone, and one is the fibula -- and there actually is a model if I could use that.

THE COURT: Yes, you may.

Q Did you bring with you a model?

A I did.

Q Would it help you to explain to this jury, this Court, and both attorneys as to what happened to Mr. Abreu?

A Yes, I think it would, yes.

MR. EVALL: With your Honor's permission.

THE COURT: Certainly.

A This is a model of the lower leg. This would be the knee and the foot down here, and these would be the five toes (indicating). The shinbone, as is commonly known, is the tibia. It's the larger bone in the lower leg. Next to it is the fibula, and this is the smaller bone in the lower leg.

The major weight bearing bone of the lower leg is the tibia. The fibula serves the purpose to hold the ankle bone in place, form sort of a fork or an arch around the foot, and that allows for proper motion of the ankle by holding it in place when it's normal.

Mr. Abreu had a fracture through the tibia as well as through the fibula, so he had a both bone lower leg fracture. The -- again, the important thing to know is that this is a -- the treatment of this is a process, and the way that bones grow back together is by putting down calcium to hold the bone steady.

And in Mr. Abreu's case, the type of fracture he had that involves both the bones often heals by forming a lot of calcium and actually sticking these two bones together as opposed to having them be apart. And that can become a problem, as it has in Mr. Abreu, in that he doesn't have motion in a portion of the ankle joint that normally moves, which is

the joint between the tibia and fibula here (indicating), because he is locked together. And I'll show you that later I think if I show you some X-rays.

Q Doctor, so I don't have to say it each time, but all my questions are within a reasonable degree of medical certainty, so if I don't say it each time or if I simply forget or to save a little time, I am going to ask you some questions, but I want you your answer to be within a reasonable degree of medical certainty.

Now, were X-rays taken of Mr. Abreu when he came in?

A Yes.

Q And as part of your practice, do you keep the X-rays after you take them?

A Yes.

Q And as part of your practice are the X-rays taken in your office?

A Yes.

Q Are they taken under your direction?

A Yes, they are.

Q And then you just simply walk from the X-ray room into another room -- or are the X-rays taken on-site or off-site?

A The X-rays are taken on-site across from the examining rooms. They are developed in the same location, and

we have an X-ray board where you can look at X-rays and discuss them among the doctors or with the patients.

Q And did you do that for Mr. Abreu?

A Yes.

Q But have you been doing that since you have been treating him?

A Generally, yes.

Q And did you bring with you all the X-rays that you have taken?

A I did.

Q Doctor, can you take us through from the fall to the type of fracture it was; does it have a name?

A Again, it's called a tibia and fibula fracture. His fracture was displaced, meaning there was a spiral fracture through the bone, meaning it wasn't a clean break across. It was a spiral fracture. The bone was off, meaning not lined up, called displaced. It had to be straightened back together manually, meaning that the way that's done is really the old-fashioned way.

One person holds the upper leg, one person holds the lower leg, and the leg is manipulated to move the bone ends back together to try to get bone on bone, and then he was placed in a cast, which immobilizes the ankle as well as the knee. Because as we talked about earlier, these bones are the bones at the ankle and the knee and any motion here can move

grow in and solidify everything.

Q Assuming we heard testimony from Mr. Abreu that he was in that cast for a period of almost six months, is that consistent with the type of fracture he had?

A It depends on how the fracture unites, and the term "unites" means to have that calcium grow in and make everything solid. And yes, six months is a reasonable period of time. These often heal quite slowly, and so he was probably in this long leg cast for a period of time until they started to see calcium grow in. And then after that, he is changed to a shorter cast to support and protect the bone, but it allows knee motion, again, so you don't get stiff.

Q So when Mr. Abreu came to your office for the first time and the X-rays were taken, did the X-rays show a knee in good condition?

MR. KOSSEGI: Objection, Judge.

THE COURT: Basis?

MR. KOSSEGI: The X-rays hasn't been received in evidence.

THE COURT: Overruled. I will allow it.

A My X-rays -- the X-rays taken in our office show the fracture. Where the fracture was, they show a large amount of new bone formation, calcium being laid down. But again, this, as I say, is a process. Even when he first came to us, he did have bone uniting the bone together, the two fractures

together, but it was not to completion. So it was not a healed fracture. Over time you see more calcium being laid down. This is a process.

Q Would it assist you in showing the jury using the X-rays the process that was going on?

A I believe it would.

MR. EVALL: I think we have a shadow box under the table there. With Court's permission.

A This is an X-ray taken July 31 of 1996, and what I am going to show you has the two pictures of Mr. Abreu's leg. And what we are looking at is one picture taken this way (indicating), so that you see the shinbone as well as the fibula here. And this is taken turned to the side. You can see the side of the ankle here (indicating). That sort of orients you.

So we are looking this way, okay (indicating). And what you see in the mid-portion of the lower leg is you can still see the fracture line in the tibia here (indicating). You can see new bone growth, which is this fluffy white area in between the bones growing like that (indicating). You can see the fracture -- where the fracture was in the tibia -- I'm sorry -- in the fibula. If you follow the normal sides of the fibula down, which is usually nice and smooth, it follows down. You see you lose that nice smooth look when you get down to here. There is a sharp end to that line. That is where the

fracture was in the fibula, and you see above that some of that fluffy white calcium (indicating).

This is -- this is taken about six months after the accident. And you still see the fracture line, and you see some bone forming to unite these or make them grow together. So this bone has grown together somewhat, but is it healed, as I was asked? It's not completely healed at this point.

Q Are we dealing with the joint at all in this case, the ankle joint?

A Well, we are dealing with the joint. We are not dealing with a joint that most people think of when they think of the knee, the ankle, the foot. We are dealing with a portion of the ankle joint, which is this joint between the end of the tibia and the end of the fibula. The joint is responsible for allowing the ankle to move up and down and to stay in place. I am going to show you.

This is the foot and ankle bone. This is called the talus (indicating). You can see the talus is wider in front than it is in back. This joint holds the foot onto the leg, and it normally, as the foot goes up and down -- as the fat part of the tibia goes into the joint and as the thin part goes into the joint as you go down -- this joint normally pistons in and out. So that is the function of this joint.

When you have a situation where these two bones grow together, which will I show you in another X-ray, it

happens over time. At this fracture, this locks down and this doesn't allow for motion all the way up, because it literally blocks the front portion, the fat portion of this joint -- of this bone rather -- from moving into the joint. It simply isn't wide enough (indicating.) So Mr. Abreu has lost motion at his ankle joint even though the fracture is well above and on the tibia and right in the distal tibia/fibula joint in the ankle.

Q Is that fact that he has lost motion a competent producing cause of pain?

A It is a cause of pain as the joint won't allow this bone to come in. It literally abuts the bone like a door stop, and that is painful, especially when you are walking because this is when the joint is supposed to work best. Use the heel strike, your foot goes down, and you bend over before you toe off. This is all of your body weight placed upon and centered about the ankle joint, so that is painful.

You have got in Mr. Abreu's case close to 200 pounds centered on that small area of bone and supporting soft tissues. And if it doesn't accept the motion the way it should, then it will stress those tissues and it will cause pain.

Q Now, is that -- the fact that it's not working properly as a result of the official fracture?

A It is --

MR. KOSSEGI: Judge objection.

THE COURT: Basis?

MR. KOSSEGI: Calls for speculation, Judge.

THE COURT: Overruled. I will allow it.

A It is a result of the fracture and the process of the bone uniting to try to solidify itself and be strong.

Q And did there come a time where Mr. Abreu came back to the office for more treatment?

A Yes.

Q Now, before we get to that. Assuming we heard this morning that Mr. Abreu came to your office in 1996; he has some therapy; he went to Dominican Republic; he tried to get better; and then he didn't come back to your office until I think approximately 1999; based on your experience as an orthopedic surgeon, is that unique in what people do?

MR. KOSSEGI: Objection.

THE COURT: Sustained.

Q Is there anything about that that Mr. Abreu did anything wrong in trying to get better, in trying to let it get better on his own for a period of time?

THE COURT: Sustained.

Q Is there anything about that that Mr. Abreu took a few years off from going to doctors that would lead you to believe that what you find later is because of a delay in treatment?

MR. KOSSEGI: Objection.

THE COURT: Overruled. I will allow it.

A No. In fact, one of the things that I have been saying is that you will see on these X-rays, this is a process that while the bone is trying to solidify itself and stabilize itself, the actual dysfunction in the ankle is something that you will be able to tell on X-rays gets worse over time. So this is a process. I think two years of getting worse is reasonable to then come back to the doctor. At this point, he is out of a cast, and he is ambulating, walking with pain, but he gets worse over time, so I think that's reasonable.

Q Does Mr. Abreu have any control over the bone growth?

A No.

Q Does he have any control over what's going on in the joint?

MR. KOSSEGI: Objection.

THE COURT: Overruled. I will allow it.

A Not as far as the process of the fracture at this point, as well as the soft tissue, supporting tissue injury, which becomes more and more problematic to him.

Q So now let's take us to the next visit. I think it's 1999.

A That's correct.

Q What, if any, complaints was Mr. Abreu making at

that time?

THE COURT: Counsel, are you through with the shadow box at this point?

MR. EVALL: Well, there is no point bringing it down, Judge. I am going to ask him did the X-rays show us, so we will go back and forth so we can all see what is going on.

A In 1999, he was complaining of severe pain, mostly about the ankle at that time, and he had some symptoms of instability as I recall, yes. He had -- and that was when he first started in our office, starting to show symptoms of ankle instability. What ankle instability means, that is usually a diagnosis not of a bone of the supporting soft tissues.

His complaint was he was having a lot of pain and his ankle kept twisting on him, and that generally indicates that the supporting soft tissue, the ligaments, the muscles, the tendons are being affected, and that will happen as the mechanics of the ankle change. And you will see that by that time, things have already started to really grow together and solidify here, and that puts stress on the ligaments and supporting soft tissues allowing for the foot to turn in an abnormal way.

Q Can you show us on an X-ray what you are referring to?

A This is from November of 1999. This is the same

type of X-ray, meaning this is facing the front, this is facing the side (indicating). And I am going to pull it to the side this way (indicating), and I am going to turn this X-ray around so it's going to look like it's backwards, but I just turned it around to put these next to each other.

And you can see the progress, the increase, and this is still early. This continues to occur over time, but you can see that this stuff that was fluffy and a little bit gray in here is now quite visible. It's a rather large bone spur. You can still see where the fracture occurred (indicating), and you can see how this has become sclerotic. Sclerotic means more white, more dense bone and is starting to really grow to go here (indicating). This is starting to become one bone as opposed to two separate bones here.

Q Now, what medical significance, if any, does that have to Mr. Abreu?

A To Mr. Abreu, that indicates that he has less motion through this distal tibiofibula joint. This joint between the two bones (indicating). And that again will affect his ankle motion. Because he will have abnormal mechanics in the ankle, he will be putting more stress on the supporting soft tissues, things like the ligaments this case, which has been progressively problematic to him and has eventually brought him to surgery at this point.

MR. KOSSEGI: Objection. Witness testifying to

the X-rays on the --

THE COURT: Overruled. I will allow it.

Q That growth that you are showing us, could that growth be -- within a reasonable degree of medical certainty, is that bone growth a competent producing cause of pain?

A Yes, it is, because it's not actually the bone growth, but it's a reason the bone grew as a competent cause. This is actually the body's cause of being somewhat unstable. It is trying to solidify itself by hardening soft tissue by putting down calcium, and the effect then becomes that the joint doesn't move normally, and you get the abnormal stresses that I described to you earlier.

Q And those are painful?

A Those are painful, yes.

Q At that point, was surgery being discussed?

A At that point, he --

MR. KOSSEGI: Objection.

THE COURT: Sustained.

Q At that point, had you recommended surgery, doctor?

A At that point, my partner, Dr. Korn, indicated that he felt that he was showing signs of instability and told Mr. Abreu that he would likely need surgery, yes.

Q Now, did you -- okay. When was that, sir?

A When was he told that -- he first told him he may

have to have surgery?

Q Yes.

A That was 11 of '99.

Q Was that reflected in the note?

A Yes.

Q And can you tell us what it says?

A It says -- can I read it? It says, "Ankle repair should be performed, but it is most likely that ankle fusion will be needed." That says -- an ankle fusion is a bony procedure to stabilize the ankle.

MR. KOSSEGI: I object to this, Judge.

THE COURT: Sustained.

Q Doctor, instead of reading, if you can do it from memory, do so. If not, you are allowed to look at your notes refresh your recollection. Put the notes down, and then tell us what it says. It's a little formal, but it's the way we have to do it.

A Basically it says that he needs some sort of surgery to stabilize the ankle joint, because it's subject to these abnormal stresses. Dr. Korn indicates that he discussed several possibilities. One is an ankle fusion, which is a salvage procedure where you actually remove the ankle joint by taking off the surfaces of the joint and make the bone grow together or fuse together the two sides of the bone into one bone.

The other is a ligament reconstruction which is a soft tissue procedure to go in and tighten up the soft tissue. The ligament is a rope-like structure that goes from one bone to the other. It acts like a seatbelt to hold things together. Often times these are stressed and stretched with abnormal forces, especially the type I was describing before where you are putting all of your weight on an area that doesn't want to move. And so the first procedure, which is not a salvage procedure, is to go in and try to tighten up the ligaments to try to get the stability of the ankle back.

Q In weight of severity, would the ankle fusion be a more severe process than the ligament surgery?

A Well, I don't like the term "in weight of severity," but the ankle fusion, as I described, salvage procedure, once you do that procedure, you have fused the bones together. There is no going back. There is no way of recreating that ankle joint.

The soft tissue procedure leaves the ankle joint so there will be some motion at the ankle and attempts to get rid of instability at the ankle and try to give some relief of pain simply relieving the soft tissues, and that can be reversed, if need be.

Q Did there come a time that that ligament surgery was performed?

A Yes.

Q Who did that surgery?

A I did that surgery.

Q And when did you do that?

A Let me refresh my memory of the date. It was on March 21 of 2001.

Q Where was that done?

A That was done at Cabrini Medical Center.

Q You yourself did that surgery?

A I did that surgery, yes.

Q Would you tell the jury and this Honorable Court what it consisted of?

A The surgery was a ligament reconstruction of the ankle. There are a group of ligaments, which I said is a rope-like structure that holds bone to bone, that goes from the fibula to the talus. So from the lower leg to the foot, there is also a group of ligaments that goes from the tibia to the lower leg to the talus and the foot. These ligaments help to stabilize the joint in the motion called inversion and eversion of the ankle. Inversion is turning in. Eversion is turning out of the foot.

Mr. Abreu has put abnormal stresses on the ankle, flexion and extension of the ankle. In doing so, that stretches out these structures that go between the foot and the ankle. And so he was having a secondary consequence of having the stretched out soft tissues, and that was that his foot was

Q You were the surgeon, correct?

A That's correct.

Q Was Mr. Abreu under general anesthesia or local or something else?

A He was under general anesthesia for this procedure.

Q Just briefly, what does that mean?

A General anesthesia means putting the patient to sleep so that they are not awake during the procedure. They are given two types of medicine. One is analgesic, which means a medicine to you don't feel pain. And anesthesia is a medicine that puts you to sleep so you are not aware of your surroundings. With general anesthesia, you are placed on a breathing machine. A tube is put down your throat, and you are placed on a breathing machine that actually breathes for you during a procedure because you are that asleep.

Q How long of an operation was it, Doctor?

A I don't know. The standard operation like this generally lasts about an hour and a half to two hours.

Q Was he able -- to go home after the operation, or was he kept in a hospital?

A I believe he went home after the operation.

Q When he went home, was there a cast on him or anything else?

A Yes. You go home following this procedure in order to allow the ligaments to scar down. And as I say, they were

replanted into the bone to allow that to solidify. The patient is placed in a cast mainly to keep them from inverting and everting the foot, which would stretch the ligament.

Q After the surgery, did he come back to you for follow-up visits?

A Yes, he did.

Q Did he have complaints at that time?

A Following the surgery, he had complaints of postoperative pains as you would expect. When the cast was eventually taken off, he had stiffness of the ankle, that in the inversion plain is expected and actually a good thing following the surgery because it needs increased stability. And he continued to have complaints of pain in the area of the fracture and the fracture filling in at the -- what we call -- the distal/tibia/fibula joint, which means the joint at the end of these two bones that I was showing you on the X-ray.

Q Did you continue to monitor that situation with X-rays?

A Yes.

Q Can you take us -- let's put the shadow box up and take us through it X-ray by X-ray, you know, if you can, Doctor.

A I have a lot of X-rays. I --

Q Okay. Let me do this then --

A I will show you the most recent I think will be the

most helpful.

Q I will defer to you then.

A Okay. As I say, I have a number of X-rays, but they all show a similar progress. This is the most recent X-ray (indicating), and I have two sets of X-rays. One is of the ankle, and one is of the lower leg. Actually, let me show you the lower leg so --

Q When was it taken, Doctor?

A This was taken yesterday. This was 4/9/03 and this is the -- this is the one from November of '99 that we have up here (indicating). And again, I am just going to refer you to the area that's normally between two bones here as well as the joint (indicating). And I am going to show you how at this point in this progress -- I will put that back up.

This has gotten darker here, and you can see here at the distal tibiofibula joint way down below that these two bones have changed markedly in their process. Here is the -- I will turn this one around just to show you (indicating). As in '99, you can see a definite gap between the two bones where that joint normally is between the tibia and fibula.

Q Is there a supposed to be a gap there?

A There is supposed to be a gap there just like there is on this model that allows these bones to piston in and out as the joint moves up and down. And now, over time, you can

see very definitely that these bones have just frankly grown together, and there is no motion at that joint. Here is the ankle just down below, and there is no motion here. So that is a joint that is completely abnormal, and it has a partial fusion already.

Q Now, is that partial fusion that his body did, is that as a result of the initial fracture?

A Yes. That is a process --

MR. KOSSEGI: Objection, Judge.

THE COURT: Overruled.

Q You can answer.

A That is a progressive change that has occurred over time in the area where the bone normally puts down calcium to try to solidify the bone. And in Mr. Abreu's case, it has put down so much calcium to actually make those two bones grow together.

Q What is the medical significance of those two bones growing together?

A The medical significance is he now has a fusion of a portion of the ankle joint, posttraumatic fusion.

Q What do you mean by "posttraumatic"?

A Posttraumatic means simply it happened as a result of the trauma.

Q Within a reasonable degree of medical certainty, is the findings that you have there, that he has a partial fusion

as a result of a trauma, is that caused by the accident of January 18, 1996?

A Yes, absolutely.

Q Okay. Is there anything that Mr. Abreu could have done to prevent what was going on in that area of his body?

MR. KOSSEGI: Objection.

THE COURT: Overruled. I will allow it.

A There is nothing that I can think of that would prevent this from occurring. This is the natural process that you saw starting from the first X-rays that I showed you where he still had the fracture line visible, and the body is simply trying to stabilize that, solidify everything. And in doing so it has had to basically weld these two bones together in order to get stability.

Q Did Mr. Abreu have any control over that?

MR. KOSSEGI: Objection.

Q Was he able to make it stop or get faster or slower, that welding?

THE COURT: Sustained.

Q What medical significance does the welding, the fusion, have to his ability to walk without pain?

A Well, again, it makes it so that his ankle joint does not function normally, so he put the abnormal stresses on the ankle with each step. That is concentrating force in an abnormal way, which is a producer of pain. So he will have

pain with each step that he walks.

Q Now, assuming we heard testimony that he works eight hours a day 40 hours a week, that he works at one of the airports, and he actually has to handle some of the baggage, but also assuming we heard this morning that when he gets home, he is in a lot of pain, is that consistent with the injury?

A That is consistent with the injury as well as the history that he continues to give me.

Q You did a surgery on a soft tissue?

A That's right.

Q Is there anything about that surgery that could have prevented what happened with the bone?

A Well, the --

MR. KOSSEGI: Objection.

THE COURT: Basis?

MR. KOSSEGI: Improper foundation.

THE COURT: Overruled. I will allow it.

A That surgery would not have prevented what happened to the bone. The goal of the surgery again was to try to stabilize the ankle that was a result of what had happened to the bone.

Q Was there anything that you or Dr. Korn or any other doctors that you worked with could have done earlier to prevent what we are seeing here?

MR. KOSSEGI: Objection.

THE COURT: Sustained as to form.

Q Can you think of anything that was available to the medical community from 1999 through yesterday that could have been done to prevent the bone fusion within his body that occurred?

MR. KOSSEGI: Objection.

THE COURT: Sustained.

Q Do you know of any method that would have prevented this --

MR. KOSSEGI: Objection.

THE COURT: Overruled. I will allow it.

A Not with a hundred percent certainty, no. This is -- he had the standard of care to treat this fracture. He had a bad fracture, and this was the result.

Q Now, what -- do you have a diagnosis for what he suffers from now?

A Yes. At this point, he has -- had a fracture of the distal tibia and fibula and now has a cross union or a fusion between the distal tibia. Distal means the end of the bone as opposed to the upper portion.

MR. KOSSEGI: Objection, Judge. I would object to any of the testimony from the X-rays that were taken yesterday.

THE COURT: Overruled. I will allow it.

A A fusion of the distal tibia and fibula with an

ankle joint fracture, meaning loss of motion at the ankle, painful gait, meaning painful walk, and symptoms of posttraumatic arthritis. Arthritis is an injury to the joint that causes pain, swelling, and abnormal motion. This is posttraumatic arthritis, meaning it happened as a result of an injury as opposed to wear and tear arthritis or rheumatoid arthritis, which happens as a result of age or blood problems. This is traumatic arthritis, which has occurred.

Q Within a reasonable degree of medical certainty, is this traumatic arthritis that you are talking about caused from the accident?

A Yes, absolutely.

Q Can you point out the area of traumatic arthritis to the jury?

A The traumatic arthritis is the abnormality within the distal/tibia/fibula joint which is, as I say, a joint that moves open and shut, which is now cross united. That's an abnormality of this joint which causes pain, swelling, and abnormal motion, which are the hallmarks of posttraumatic arthritis.

Q Do you have an opinion within a reasonable degree of medical certainty as to what the future holds to this area of his body?

A Yes. It is a -- I am just going to switch X-rays here to something I didn't get to, but I think it shows a very

nice view of this joint, and the ankle joint that it is part of. Here is the ankle and distal tibiofibula joint (indicating), and this little thing that looks like an anchor, that's how we put the ligament back in the bone. You put it in with a metal anchor that holds it in place.

MR. KOSSEGI: Objection. It is not the result of a question.

THE COURT: Sustained.

Q When was that X-ray taken, Doctor?

A This X-ray was taken yesterday.

Q As part of surgery, is that something you had to put in the body?

A Yes.

Q Is that part of the X-ray?

A That is the metal anchor that you see in the fibula.

Q What was the purpose of that?

A The purpose of the metal anchor in the fibula? When we shortened the fibula, we see it back into bone, so it would hold tight and it would hopefully ingrow or become reattached to the bone. But the reason for putting this X-ray up was not only to show that, but to show the cross union of the distal tibia and fibula, tibia and fibula, at the ankle and to show you that this really is all the same joint.

And the question was what is the -- what is going to be the end result of this. As there is more and more

abnormal motion at this joint. The motion in -- with abnormal forces will cause wear and tear of the joint, and it will cause it to wear and tear at a rate quicker than it normally would than just with aging and lead to persistent progressive posttraumatic arthritis, where it is not only formed and fused, but in the ankle joint adjacent to it, and then he will likely need the surgery that Dr. Korn talked to him about early on, which is the ankle fusion, which is the treatment for that.

Q Within a reasonable degree of medical certainty, he will need an ankle fusion?

A Yes, it's likely that he will.

Q Can you -- do you have a prognosis as to when?

A I think it's very difficult to give a prognosis, especially in a case like this where the -- the joint between the tibia and talus still has good cartilage, good surface, but the joint is not functioning properly, so I think it's difficult to say.

Q With a reasonable degree of medical certainty, would it be within the next five years?

MR. KOSSEGI: Objection.

THE COURT: Basis?

MR. KOSSEGI: Asked and answered, Judge. He said he couldn't say as to when the surgery was going to be.

THE COURT: Sustained.

MR. EVALL: Judge, I am allowed to propose a little bit.

THE COURT: Please move on to your next question.

Q Within a reasonable degree of medical certainty, will he need an ankle fusion before his expected life expectancy, which is approximately 77 years old?

MR. KOSSEGI: Objection.

THE COURT: Overruled. I will allow it.

A Yes, I believe it is reasonable to expect that he will need a surgical procedure at the ankle. And as I said, an ankle fusion within the next ten years, ten to fifteen years, I think, is reasonable.

Q And can you tell this jury what that would entail?

A Again, that is causing a fusion between the major bones of the ankle, which are the tibia and the fibula, which in this case would require shaving of the cartilage surface to expose bone on both the tibia and fibula, and then putting those two raw bone ends together and placing some metal hardware, some orthopedic screws, between these two bones to compress them together and try to get them to unite just as this has, like a fracture, like an injury, to grow together solidly. That would reduce the pain at the ankle joint, which is a major weight-bearing joint, by making no motion at that ankle joint.

The problem becomes that in getting rid of that pain -- and this is a surgery that is done for pain -- the patient, Mr. Abreu, in this case, is able to walk, except that all of the force of movement is then transferred to the adjacent joints. So they can get extra wear and tear in the mid foot and the knee, and then you sort of slowly start the process again. So it's -- that's another reason that it's a salvage procedure, because while it does decrease the pain, it also gets rid of all of the motion at the ankle joint, inversion and extension.

Q Do you do that type of surgery?

A I do it quite frequently. I did one yesterday.

Q Are you familiar with the reasonable cost of that type of surgery?

A Yes.

Q What is that cost, Doctor?

A Ankle fusion, depending on what type of hardware is used and what type of fixation -- meaning holding the bone together -- is used, can cost between 8500 and $10,000.

Q And would there be a period of recuperation necessary?

A There is six to twelve weeks in a cast, non-weight bearing for approximately six weeks, and then progressing to physical therapy to try to rebuild the muscles in the quadriceps, the thighs, and lower leg and foot.

Q And are you familiar with a fair, reasonable cost of the surgery that you performed on his ankle?

A Yes.

Q And how much was that, Doctor?

A That procedure with this type of fixation is generally $7500 for the surgery.

Q And does the hospital have its own charges?

A The hospital will charge --

MR. KOSSEGI: Objection.

THE COURT: Overruled.

A A hospital charge for an outpatient procedure to use the room and the equipment is generally in the area of 1200 to $1800, and then there is the anesthesia doctor charge of approximately $1100.

Q And for the fusion of the ankle, there would be an anesthesiologist?

A There would be an additional anesthesia charge, and that's a longer procedure, so that would be more in the area of 1500 to $1800.

Q How long would he need physical therapy after that?

A Usually six to twelve weeks.

Q And are you familiar with a reasonable -- fair and reasonable charge for the physical therapy?

A Yes, I am.

Q And what is that, sir?

A Physical therapy is generally a hundred to hundred fifty dollars a visit. A six-week session of twice a week is twelve to eighteen hundred dollars.

Q Now, how many times in total has your office seen Mr. Abreu?

A I will just have to check my notes for that. I have approximately 25 times.

Q Do you know whether an appointment is scheduled for Mr. Abreu in the future?

A I made an appointment, I believe, in the middle of next month, yes.

Q At this point, what are you attempting to do for Mr. Abreu?

A Basically, attempting conservative treatment and following the progress of his injuries. He takes oral medication. I have, in the past, modified his shoes. He is getting other problems that are related to this like heel pain, things like that. Attempting to work with heel cushions, very conservative things. Things that need frequent follow up.

Q By the way, is Dr. Korn board certified?

A Dr. Korn is board certified, sure.

Q Within a reasonable degree of medical certainty, is the condition as you have explained it to us in Mr. Abreu's left foot and ankle permanent?

A Yes. Not only is it permanent, it's progressive.

Q And just so we are all clear, progressive getting better or progressive getting worse?

A Progressive expected to get worse and worse over time.

Q Within a reasonable degree of medical certainty, are the injuries that you have examined, his ankle and the X-rays, are the injuries that you found competently produced pain?

A Yes --

MR. KOSSEGI: Objection.

THE COURT: Sustained as to form.

Q Yes, I got a little lost in that question. Sorry. Within a reasonable degree of medical certainty, the findings that you make about his ankle, do they produce pain?

A Yes, they do.

Q Assuming you have heard testimony from Mr. Abreu that the cold weather and rainy weather makes it hurt worse, is that consistent with this type of injury?

A That is consistent with arthritic pain and, in this case, posttraumatic arthritic pain.

Q Were there any times that you found swelling of Mr. Abreu's ankle?

A Yes.

Q Okay. And can you tell us what caused the swelling?

A Swelling is due to abnormal tissues and loss of muscle. The muscles work not only to move the bones and the

joints and give strength, but also the motion of the muscle causes an aid to circulation. When the muscles don't work as well because of abnormal joints, they are not as strong because of loss of motion, you often get swelling, especially in the legs where the fluid tends to pool as opposed to being pumped back to the heart.

Q Are you familiar with the term boggy swelling?

A That's boggy.

Q Sorry?

A Boggy swelling. It simply means --

Q Do you find that -- what is it?

A That has been described in Julio's ankle, and that is swelling -- that is sort of chronic swelling. That is not as opposed to acute swelling. It sort of swells, and then the tissues go back to normal size. Boggy swelling has to do with a description of chronic swelling or long-term swelling, so that the skin and soft tissues actually stretch a little bit and accommodate to that swelling, so that when you push on the skin, it doesn't -- it's not tense or taught as it would be with acute swelling, but is actually presses in and is doughy, and that is really an indication of ongoing swelling.

Q And did you find that?

A That has been described in his ankle, yes.

Q Assuming we have heard testimony from Mr. Abreu that he uses a cane, is that consistent with his injury?

A Yes. I actually asked him about this yesterday because he came in with a cane, and he has used a cane certainly on many of the occasions that I have seen him. He says that now he mostly uses it with long periods of walking or especially, as yesterday, when it was snowy outside. He is a little edgy around the snow and doesn't feel stable.

Q Assuming that he testified that when he goes to work at the airport he puts a cane in the office, but then he works for approximately eight hours lugging baggage and driving when he can and standing and actually carrying things when he has to, would that type of activity inflame the posttraumatic arthritis?

A I think it activates it again. It causes abnormal stresses on the bones and joints and soft tissues and causes pain.

Q By the way, Doctor, have you ever testified in any case that I have been involved in before?

A No, I haven't.

Q Doctor, are you being compensated for your time away from your office today?

A I canceled my office hours to be here, canceled the patients I had scheduled this afternoon, and I am charging a fee of $5500.

MR. EVALL: Just give me one moment to look through my notes.

Q While I am looking through my notes, Doctor, are there any other X-rays that you feel are important to show this jury?

A I think those give a good sense of the posttraumatic arthritis, the progress towards the fusion, and of course, the surgery that was done.

Q We have here X-rays from Elmhurst Hospital. Can you look through these and see if there is one or two or whatever you need that would show this jury and this Honorable Court what his leg looked like on the day of the actual accident?

A I think these are -- these are representative of what his leg looked like. And there are many more, but these aren't necessarily going to show us anything new. Do you want to look at these?

Q I just ask you to put up whatever amount of X-rays you need to show the jury what Elmhurst Hospital took, to show us what they looked like.

THE COURT: At this juncture, are we marking any of these for identification purposes?

MR. EVALL: No, your Honor. Not if I don't have to.

MR. KOSSEGI: I object if they are not in evidence, Judge.

THE COURT: At this juncture, we are going to mark -- they will be marked as Plaintiff's 19 through 23

for identification purposes only.

(Whereupon, the X-rays were marked as Plaintiff's Exhibits 19 through 23 for identification by the Reporter.)

A This is an X-ray from Elmhurst Hospital. These are from early on in Mr. Abreu's course, and I picked them quickly hoping to get one from the day of the accident. It looks like I did not, but this is a -- actually, this one is. This is from 1/18/96. This is number 22. This shows Mr. Abreu's leg in a cast (indicating) --

THE COURT: Can you just indicate for the record, Doctor, which exhibit you are referring to?

A Twenty-two. This is Mr. Abreu's leg in a cast. And again I am just going to show you, what you are looking at is the leg like this (indicating). Here is the large bone -- the fibula -- and the small bone -- the tibia -- and you see where the break is in the bone, and how it's sort of a spiral, like that (indicating) and displaced, meaning the bone has separated.

You can see the fracture in the fibula here again in that same area we showed before going across. This is not -- this is when he was first placed in a cast. You can see that in the emergency room that it wasn't quite straight, even in the cast, so what they did was they -- emergency room. This is 22. This is the same day. They adjusted the cast a little

bit by cutting it --

MR. KOSSEGI: I'm sorry. This is 22? That's what you said before.

A Sorry. 21. Thank you. This is from straight ahead, again, the fibula and tibia. You can see the fracture here and here (indicating), and you can see that they are getting into better alignment. What they have drawn here is that they are two degrees off still in alignment later in the course of his treatment -- later in course of his treatment despite the cast treatment.

You can see that on 3/29 of '96. So three months or two months into his treatment, this is with the cast off, you don't see that cast going around it, but he has already started to lay down some bone. So this is the -- this is sort of where he is stuck. There has been a little bit of movement, and that's very common because when there is a fracture, the leg swells, you put a cast on it.

It is nice and tight and firm, and the swelling goes down and you get a little toggle. But he is still in pretty good alignment, and it is a little tilted back. There is little separation of bone, and you start to fill it in there is a little fuzzy, cloudy, white material where the fracture ends. This is in March.

Now this is April, Number 23. This is from April 19 of '96, and again, you sort of see a progress of more

filling in, but still a bit off as far as the straightness of the leg. And this is the way that it will eventually heal, with a little bit of abnormality to it.

Q Now, Doctor, earlier you had said that they tried to, I believe your term was "reduce the fracture"?

A That's correct.

Q And you said that they do it the old-fashioned way, where somebody holds you down. And what does the other person do?

A Well, it's not -- the term "reduce the fracture" means to reduce the deformity of the fracture, and the term is just that you reduce the fracture, and it is the old-fashioned way. Someone is holding the body and the major part of the fracture while another person is manipulating -- in this case -- the lower leg to try to get the bones to line back up and get the bone on bone the way you saw it here.

Q Is that painful to the person who suffered the fracture?

A That is extremely painful to the person who suffered the fracture.

Q Doctor, assuming we have heard testimony from Mr. Abreu that he was walking and his left foot went down and suddenly it was in something and it hurt terribly, is that consistent -- would this be consistent with the fracture that you see on his X-rays?

A Yes.

Q Assuming we have heard testimony that Mr. Abreu goes home from work and tries to rest his leg and to stay off it and -- now, is that consistent with proper care that you could do at home for yourself?

MR. KOSSEGI: Objection, Judge. Asked and answered.

THE COURT: Sustained.

Q What, if anything, can he do at home to help alleviate the pain?

MR. KOSSEGI: Objection.

THE COURT: Sustained.

Q Is there anything that he can do at home to help relief the pain he feels, especially after working all day?

MR. KOSSEGI: Objection.

THE COURT: Sustained.

Q Do you know of anything that someone can do for themselves when they are home that would help relieve the pain or swelling?

MR. KOSSEGI: Objection.

THE COURT: Sustained.

MR. EVALL: Can I have the grounds, Judge?

THE COURT: Please move on, Counsel.

Q In your years of being an orthopedic surgeon, have you had the occasion to treat people with similar fractures

than Mr. Abreu?

A Yes. Many, many.

Q Have you made recommendations to them as to what they can do to help themselves?

MR. KOSSEGI: Objection.

THE COURT: Please rise when you address the court, Counsel.

MR. KOSSEGI: Sorry.

THE COURT: The basis?

MR. KOSSEGI: It's leading the witness, Judge. It's not a proper foundation.

THE COURT: Overruled.

Q You may answer the question.

A Yes. This is, again, part of conservative care of orthopedic surgery, and it's the recommendations that I have given to Mr. Abreu as well as other patients. They are things like antiinflammatory medications, which include aspirin, Motrin, Tylenol. Things like that. Mr. Abreu is taking aspirin daily. Elevation and rest of the legs, trying to bring some of the swelling down because swelling itself and stretching of tissues itself is painful. Those are the main recommendations for him.

Q Assuming we heard testimony that Mr. Abreu used to play baseball and basketball and could walk for many blocks without pain and assuming we heard testimony that now he is

afraid to try baseball and basketball and can only walk a short distance, is that consistent with the injury he has?

A Yes, it is.

MR. KOSSEGI: Objection, Judge. Hypothetical.

THE COURT: I will allow it.

A It is consistent with the history and loss of motion and the pain associated with that loss of motion.

Q At the risk of repeating myself -- because once you leave I can't ask you anything -- the fracture as we see it in the X-rays from the emergency room and the X-rays that you took and the surgery that you performed and the surgery that you said he is going to need and all the care and treatment you have given him, are they all as a result of the fracture he has sustained on January 1, 1996?

MR. KOSSEGI: Objection, Judge. Asked and answered.

THE COURT: Overruled.

MR. KOSSEGI: Cumulative.

A Yes. I believe that given the history of the type of injury he had, the fracture that he had in the emergency room, which is consistent with that injury and the sequelae we have seen it follow, we have seen the progress. We have seen on the X-rays. They are all from the X-ray of January 18.

Q You used the word "sequelae," I was coming to that in my notes. Traumatic arthritis, is that a separate injury or

is that the normal sequelae of this type of fracture or something else?

MR. KOSSEGI: Objection.

THE COURT: Overruled. I will allow it.

A Posttraumatic arthritis is exactly what it sounds. It is the normal result of trauma, and we use the term posttraumatic arthritis to separate it from wear and tear arthritis, blood-borne arthritis, things like that. This is an injury to a joint and abnormalities in a joint with findings of swelling, pain, limited motion, that is due directly to the trauma.

Q Have you ever testified on any cases that Subin Associates, the law firm Mr. Abreu went into that I am working for, has done in the past?

A Yes, I have.

Q What -- withdrawn.

Do you have people in your office that speak Spanish?

A I have four full-time translators. There are people that work in my office that also speak fluent Spanish, and they are there all the time, yes.

Q Did you speak to Mr. Abreu through a Spanish interpreter when he came to you?

A Both through a Spanish interpreter who I said was present at all times, as well as the medical Spanish that I

speak.

MR. EVALL: Thank you very much, Doctor.

MR. KOSSEGI: May we approach, Judge?

THE COURT: Certainly.

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

THE COURT: Ladies and gentlemen of the jury, I think we are going to take a quick break at this juncture. Please do not discuss the case among yourselves. Do not discuss the case with others. If anyone attempts to interfere with you during the recess, please notify my court officer who will, in turn, notify me. You are not to discuss that fact or any other fact you feel necessary to bring to my attention with your fellow jurors.

Don't begin deliberations as of yet. We are still taking in testimony. You have to hear the summations, my charge to you on the law, and then only after an interchange of views with your fellow jurors will you be able to reach a verdict in this matter. With that, we are going to take about a five-minute recess.

COURT OFFICER: All rise.

(Whereupon, the jury exits the courtroom.)

THE COURT: Thank you, Doctor. You may stand

down.

THE COURT: Off the record.

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

COURT CLERK: All rise. Queens Supreme Court Part 4 is now back in session.

THE COURT: Ready to proceed?

MR. KOSSEGI: Yes, Judge.

THE COURT: Doctor, please resume your seat on the stand.

MR. EVALL: Judge, I just want to do one thing before -- I want to offer the X-rays from Elmhurst into evidence.

THE COURT: Off the record.

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

COURT CLERK: All rise. Jury entering.

(Whereupon, the jury entered the courtroom.)

THE COURT: You may be seated.

Counsel?

MR. EVALL: At this time, I just offer the Elmhurst X-rays that were marked into evidence, your Honor.

THE COURT: Any objection?

MR. KOSSEGI: No objection, Judge.

THE COURT: What was previously marked as Plaintiff's 19 through 23 for identification purposes only will now be received into evidence as Plaintiff's 19 through 23.

(Whereupon, the X-rays were marked as Plaintiff's Exhibits 19 through 23 in evidence by the Reporter.)

THE COURT: You may inquire.

CROSS-EXAMINATION

BY MR. KOSSEGI:

Q Good afternoon, Doctor.

A Hi.

Q Now, those X-rays that you were showing us before that your office took, you supervised those X-rays or someone in your office?

A Yes.

Q Okay. And you said it was in the same building, correct?

A Yes.

Q And it's part of your normal diagnosis and treatment to take those X-rays; isn't that so?

A Yes.

Q And it's part of your visits with Mr. Abreu that you would take regular X-rays and check his progress?

A On some occasions, yes.

Q And in fact, you just saw him yesterday; isn't that so?

A That's correct.

Q And you took X-rays yesterday?

A I did.

Q And that was part of your diagnosis and treatment as well; isn't that so?

A Yes.

Q And that X-ray was taken under your supervision too, correct?

A Yes.

MR. KOSSEGI: Judge, I would offer those X-rays into evidence at this time.

MR. EVALL: No objection.

THE COURT: Are you referring to all the X-rays, Counsel?

MR. KOSSEGI: Just the one the doctors referred to from April 9, November of '99, and July of '96.

THE COURT: The X-rays will be admitted to evidence as Defendant's A through E on consent of the parties.

(Whereupon, the X-rays were marked as Court Exhibits A through E in evidence by the Reporter.)

THE COURT: You may proceed.

MR. KOSSEGI: Thank you, Judge.

Q Now, Doctor, you first saw Mr. Abreu yourself on January 6, 2000, correct?

A I believe I saw him earlier than that. I believe it was -- no, you are correct. January 6, 2000.

Q And you personally never saw him before that day; isn't that so?

A I first saw him January 6, 2000.

Q And the accident happened back on January 18 of 1996?

A That's correct.

Q So that was almost four years since the accident when you first saw him; isn't that correct?

A That's right.

Q Approximately a thousand days?

A I have no idea.

Q Okay. And I believe you have diagnosed him with kissing osteophytes; isn't that correct?

A That's not a diagnosis.

Q You observed kissing osteophytes appearing from X-rays?

A That is an X-ray finding of bone growing together where an osteophyte is a bone spur, so kissing osteophytes is two bones grow that look like they are very close to one another.

Q And one of the main causes of osteophytes is osteoarthritis; isn't that correct?

A Not in this case. You are speaking of bone spurs that occur in a joint. This is osteophytes that have occurred because of new bone growth.

Q I am just speaking generally though with osteophytes.

A You are talking apples and oranges. You are being misleading.

Q And actually, when Dr. Korn saw him in November of 1999, he diagnosed the plaintiff with a stress fracture; isn't that correct?

A That is incorrect. He had a X-ray finding that he thought was consistent with his stress fracture, which, in fact, it is not. He is absolutely wrong, and that is reflected in our notes. He was looking at the two osteophytes that were coming close to one another seeing the line between them and thought that that may represent a fracture; however, that --

Q So Dr. Korn --

A However, that isn't the case.

Q So Dr. Korn saw a stress fracture on the X-rays in November of '99 or reported at a stress fracture in his notes?

A That's correct. He felt these two lines represented a stress fracture. They do not.

Q And you -- and the doctor was incorrect as you just

stated. You saw that he did not -- the plaintiff did not have a stress fracture when you examined him in January of 2000, correct?

A Clearly, I never mentioned a stress fracture before. I feel that Dr. Korn did not interpret that correctly, and that's reflected in my notes.

Q And you testified on direct that the left ankle instability was caused by the accident; isn't that so?

A That is correct.

Q And you determined -- and you found this left ankle instability when you first saw him on January 6, 2000?

A I did.

Q And that's -- you put this -- you dictated these notes in the report; isn't that correct?

A In my day notes, yes.

Q Okay. And you put your -- you put what you saw in that examination in your dictation; isn't that correct?

A That's correct.

Q And you never stated in that dictation that the -- this left ankle instability was caused by plaintiff's accident on January 18 of 1996; isn't that so?

A On that day, no, I absolutely did not.

Q And that was dictated on the same day that you saw him; isn't that correct?

A That is correct.

Q Almost -- now almost four years after the accident, right?

A That's correct. The accident.

Q And you also performed the X-rays for the ligament repair with respect to Mr. Abreu, correct?

A Yes.

Q You did an operative report; is that correct?

A Yes, I did, correct.

Q Nowhere in the operative report do you say that the left ankle instability is caused by this accident; is that correct?

A That would not be an appropriate thing to put in an operative report. I don't think I put it in an operative report other than I would put it was raining on day of surgery.

Q It wasn't in the operative report, was it, Doctor, is the question?

A Of course not is the answer.

Q Now, you never reviewed any of plaintiff's medicals from prior to January 18, 1996, did you?

A Not that I recall.

Q And you never asked -- you never ordered them, did you?

A Not that I recall, no.

Q And the plaintiff fractured, as you told us on direct, his tib fib back on -- you know, it's shortened name of

terms -- back on January 18, 1996; is that correct?

A Yes, left tibiofibula. That's correct.

Q I think you called it the shinbone?

A That's the medical term.

Q It was casted for five months?

A It was casted for a long period of time, yes.

Q And that was a proper treatment in your -- to a reasonable degree of medical certainty at that time?

A I believe it was a proper option. There is more than one option for treating this.

Q As you showed us, the fractures began to heal in those X-rays, correct?

A They began to grow together, that's correct.

Q And there was no stress fractures as we already discussed, correct?

A I do not believe that there was. There was a traumatic fracture.

Q And you also said there was bone growth as a result of this, correct?

A That's correct.

Q And isn't it true -- bone growth is another term -- osteophytes is another term for bone growth; isn't that so?

A No. Osteophyte is bone spur.

Q And bone spur is bone shooting up; isn't it, Doctor?

A It's an X-ray description of a shape of a bone,

which is generally pointed or peeked.

Q And osteophytes can also be caused by degenerative causes; isn't that true?

A At joints. This is not at the joint. This was in the middle of the bone where there was a fracture. Again, you are talking apples and oranges.

Q Now, you said that you are currently treating the plaintiff conservatively; isn't that correct?

A That is correct.

Q And the hopes -- one hopes with conservative treatment -- the purpose of conservative treatment is to hope one will get better without taking extreme measures; isn't that correct?

A Right. Or make the pain palatable until an extreme measure is needed.

Q But in this case, the measures need not be extreme, hopefully, Doctor?

A Is it possible? Anything is possible. Is it likely? No.

Q And you yourself couldn't determine with a reasonable degree of medical certainty when the plaintiff would perhaps need an ankle fusion; isn't that correct?

A Not the exact time, correct.

Q The way you describe it, whenever the plaintiff walks he has pain; isn't that what you described with the

X-rays?

A I said his X-rays show a finding that is consistent with pain, because he has an abnormal gate that is stressing -- puts abnormal stress on his ankle, yes.

Q So whenever he would walk, he would put abnormal stress on his ankle?

A That is correct.

Q So based -- whenever he takes a step, it's causing stress to his ankle?

A It is, yes.

Q Okay. So it's pretty amazing that he can work eight hours a day, isn't that so, putting all this stress on his ankle?

A I think it speaks well for his character.

Q And based on your surgery, the surgery came out to be as well as expected, correct?

A Yes.

Q He recovered to the full extent possible?

A With regard to the soft tissue repair, absolutely.

Q And that -- he only stayed in the hospital for one day during that surgery; is that correct?

A I believe that's correct.

Q It's called outpatient surgery?

A I believe it was outpatient surgery. As I say, I haven't looked at the records recently regarding it. Some

people stay overnight. Some people go home the same day.

Q Is it also called ambulatory surgery?

A It can be, although he is not walking.

Q And were you seeing the plaintiff back in October of 2001?

A Was I seeing him in October of 2001?

Q Was he getting continuing treatment from your office?

A October of 2001, yes.

Q That was one of the many -- one of the 25 times?

A Yes.

Q And from the first time your office saw him in July of 1996, he was not seen until November of 1999, isn't that correct, the second time?

A The second time was November of '99.

Q And that is when Dr. Korn was treating him, correct?

A Yes, Dr. Korn saw him those first two times.

Q And isn't it true that the plaintiff was referred by his attorneys in this case?

A I don't believe so, but I have no record of that.

Q You, in fact, have testified for his attorney's records, Subin & Associates, in the past; isn't that so?

A I believe on one or two other occasions, yes.

Q And you got paid on those one or two other occasions as well?

A I get paid if I cancel my office and come to court. It's part of being an orthopedic surgeon. People get involved in lawsuits.

Q And you said you got paid $5500 for this afternoon's testimony?

A For canceling my office and keeping my office running, yes.

Q And if I kept you here until tomorrow, you would get another $5500?

A I don't know.

Q Well it's 5,500 per afternoon; isn't that so?

A It depends on if I have to cancel my office or not.

Q So if you were -- let's say you took off. You didn't have any patients in your office/, you wouldn't get paid for testifying today?

A I would not show up today, right.

MR. EVALL: Objection to form. He is not being paid to testify. He is being paid for his time.

THE COURT: Sustained.

Q And you have testified besides -- you have testified for other attorneys besides Subin & Associates, correct?

A I testified for other attorneys, I have testified at the request of federal court judges. I have testified at the request of arbiters. It's part of being an orthopedic surgeon.

People get hurt and get involved in lawsuits, and oftentimes I am asked to testify.

Q Would you say mainly you testify in personal injury actions; isn't that so?

A Mainly, certainly. That's mainly what comes to court when someone gets injured and you are an orthopedic surgeon. That only follows and makes sense, doesn't it?

Q You get paid to give your expert testimony; isn't that correct?

A I get paid for my time, sir, just like everyone else who works.

Q 5500. That's a lot of time.

MR. EVALL: Objection, your Honor.

THE COURT: Sustained. That is stricken from the record.

Q Now, you haven't seen the plaintiff every time he came to your office; isn't that true?

MR. EVALL: Objection to continually calling him "the plaintiff." He has a name, your Honor.

THE COURT: Overruled. I will allow it.

Q You didn't see the plaintiff, Mr. Abreu, every time he came to your office; isn't that so?

A Mr. Abreu was seen by a number of different physicians, as I explained, in my office.

Q How many different doctors do you have in your

office?

A At this time, we have four orthopedic surgeons and a neurologist. When he first started coming to our office, we had a large group of physicians, and I will have to just refresh my memory to tell you how many. Somewhere around one, two, three, four, five, six, seven, eight physicians.

Q And Mr. Abreu has seen a Dr. Finkelstein (phonetic); isn't that true?

A That is correct.

Q Has he seen anyone else in your office besides Dr. Finkelstein, Dr. Korn, and yourself?

A I don't recall.

Q It looks like he has seen Dr. Crohn (phonetic) as well, who was another orthopedic surgeon.

Now, in your report from yesterday --

MR. EVALL: Objection to the term "report." It's his office notes.

THE COURT: Sustained as to form.

MR. KOSSEGI: I will withdraw the question.

Q And those other times you testified for Subin & Associates, did they refer the clients to you on those occasions?

A I have no idea. I don't keep track of things like that. I have no idea. I don't believe they referred to me. For that, you would have to ask my patients.

Q But I am asking about the one or two other occasions. You are not sure?

A No idea.

Q Who would keep such documents, Doctor?

A No idea. I don't know if anybody would.

Q So currently, the fracture that -- from the fib tib healed that the plaintiff received, correct?

A As I have said many times, the fracture has definitely grown together. It is not healed in a normal position, and it is healed with extra bone that has caused it to fuse the tibia and fibula, and that distal tibiofibula joint.

Q There is no break in the bone; isn't that so?

A There is no only no break. There is abnormal stability to the bone.

Q And the spiral fracture, there is no longer spiral fracture; is that correct?

A There is no longer any break in the bone.

Q This is no longer displaced, Doctor?

A It is abnormal shape, but displacement says that bones are being separated as it was -- excuse me -- as it was when it happened, but there is no more separation. That's correct.

Q Thank you, Doctor. As a result of the casting; isn't that so?

A As a result of the treatment, that's right.

Q And the plaintiff, as a result of your surgery, the tendon is still in place that you replaced, isn't that correct, the ligament?

A The ligament, yes.

Q And it's still supporting it the way it is supposed to?

A Hopefully, yes.

MR. KOSSEGI: I have nothing further.

THE COURT: Any redirect?

MR. EVALL: Just briefly.

REDIRECT EXAMINATION

BY MR. EVALL:

Q Doctor, do you have a copy of your operative report in your file?

A Yes, I do.

Q Can you take it out. Let's talk about it for a minute.

A Okay.

Q Okay. So defendant's attorney asked you if you wrote in sum and substance is it from the accident, and you said, no, you didn't; correct?

A That's correct.

Q But in the preoperative diagnosis, there is a -- you write something, correct?

A Yes.

Q And what is it that you wrote?

A The preoperative diagnosis is a section of the operative report that indicates what you are doing the surgery for. Oftentimes after you finish the surgery, you find something in addition to what you are expecting or something completely different. My preoperative diagnosis was left ankle instability with post -- left ankle instability, posttraumatic, with rupture of the anterior talofibular ligament and articulation of the calcaneofibular ligament, and those are the rope-like structures that help stabilize the ankle.

Q I don't want to go over stuff we already went over. I want to point out something. Posttraumatic, what did you mean when you used it in regard to this operative report?

MR. KOSSEGI: Objection.

THE COURT: Overruled. I will allow it.

A Again, that does not mean it is a wear and tear injury. It is from an accident. And in this case, the accident from January 18, 1996.

MR. EVALL: Thank you very much, Doctor.

THE COURT: Anything further?

MR. KOSSEGI: No, Judge.

THE COURT: Thank you, Doctor. You may stand down.

THE WITNESS: Thank you very much.

(Whereupon, at this time, the witness is excused from the stand.)

THE COURT: At this time, ladies and gentlemen of the jury, I think it's a good time to break for the day. So with that, please do not discuss the case among yourselves. Do not discuss the case with others. If anyone attempts to interfere with you during the recess, you are to notify my court officer who will, in turn, notify me. You are not to discuss that fact or any other fact you feel necessary to bring to my attention with your fellow jurors.

Please do not begin your deliberations. The case is still continuing. You have to hear the summations by counsel, the charge on the law, and then only after interchange with views with your fellow jurors will you be able to reach a verdict in this matter. Please do not visit the scene or the location of this incident. Substantial changes have occurred since this accident happened.

With that, everyone have a good night. We will see you tomorrow morning at 9:30 a.m.

COURT OFFICER: All rise.

(Whereupon, the jury exits the courtroom.)

(Whereupon, the trial was adjourned to Friday, April 11, 2003, at 9:30 a.m.)