2006 WL 6153356 (N.Y.Sup.) (Expert Trial Transcript)
Supreme Court of New York.
Kings County

Andrzej ZIMNOCH and Maria Zimnoch, Plaintiffs,
v.
BRIDGE VIEW PALACE, LLC, Defendants.

No. 47730/03.
November 16, 2006.

Testimony of Doctor Kaplan

Case Type: Premises Liability >> Fall from Elevation
Case Type: Premises Liability >> Residential Property
Case Type: Premises Liability >> Slip/Trip & Fall
Jurisdiction: Kings County, New York
Name of Expert: Dr. **Jeffrey Kaplan**
Area of Expertise: Health Care-Physicians & Health Professionals >> Orthopedic Surgeon

Representing: Plaintiff

Appearances:

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Before: Honorable Arthur M. Schack, Justice.

JUDITH BRUSCA

OFFICIAL COURT REPORTER

When I graduated from college I went to medical school in the city, Columbia "University:

After medical school I did a training program in orthopedic surgery, a five-year training program called residency. I did that at Campbell Clinic, which is Memphis, Tennessee, first orthopedic training program in the country.

THE COURT: COURT: Where were you born?

THE WITNESS: Memphis.

THE COURT: I hear that little bit of a southern drawl.

A Following that I practiced in Tennessee and Mississippi for a short period of time and moved back to New York in 1995 where I've been in private practice ever since.

Q Are you board certified in orthopedic surgery?

A I am. Board certification is simply a certification you can receive after college, medical school and residency training. You're eligible to take several tests over a number of years. If you pass those tests that are given by a panel of experts, in my case orthopedic surgeons called the American Board of Orthopedic Surgeons then they give you a diploma from their organization and deem you a board certified orthopedic surgeon.

Q Do you maintain hospital privileges here in New York?

A Yes.

Q Can you tell us at what hospitals?

A I'm on the staff of Mt. Sinai, Cabrini Medical Center, New York University, Downtown Hospital and Roosevelt and St. Luke's Hospital. I'm an attending on those staffs.

That is where I do my surgeries, that is where I teach the residents, medical students techniques of orthopedic surgery.

THE COURT: And that is where your patients could be admitted.

THE WITNESS: Yes.

Q Have you ever testified and been qualified as an expert in orthopedics?

THE COURT: Also define orthopedics.

Q Doctor, your speciality is in the practice of orthopedics?

A Orthopedic surgery.

Q Tell us what orthopedic surgery is.

A Orthopedic surgery is the study of bones and joints and the supporting structure of the bones, joints, muscles, tendons, ligaments, cartilage, nerves. It has to do with treatment of injuries or abnormalities to those body parts.

As an orthopedist you treat those things what is called conservatively with physical therapy, with medication, with exercises.

As an orthopedic surgeon if those things don't work then surgery can be recommended, and performed.

Q Doctor, have you ever testified and been qualified as an expert in New York State in orthopedics before?

A Yes, I have.

MR. RYAN: Your Honor, at this time I would offer Doctor Kaplan as an expert in the field of orthopedic surgery.

THE COURT: Any objection?

MR. PALMER: No.

THE COURT: He is deemed to be an expert in the field of orthopedics and medicine.

MR. PALMER: Orthopedic surgery?

THE COURT: Orthopedics is a very broad field. There might be orthopedics who no longer perform surgery.

MR. PALMER: Plaintiff's counsel said orthopedic surgery.

THE COURT: I think he could be deemed an expert in the broad field of orthopedics as well as surgery on bodies, soft tissues, etc.

Let me explain to the jury what that means when someone is deemed to be an expert. It means a lay witness, a person who is not necessarily expert in the field, is not allowed to give an opinion. They are allowed to say what they observed, saw, heard.

An expert is somebody with special knowledge, whether it be somewhere in the arts or science, who is allowed to give an opinion based upon the facts of the case. A hypothetical is given to that expert by the attorneys and that is to assist you in making and rendering your verdict.

When I give you the instructions to you on the law you can accept everything the expert says, you can accept what you believe to be true or reject what you don't believe to be true. It is here to assist you.

Just because an expert says so doesn't mean it's gospel. So let's proceed.

MR. RYAN: Thank you Judge.

Q Doctor, are you being compensated for your time here today?

A My office is being compensated for cancelling my office this afternoon.

Q How much is that?

A Fee of $5,500.00 dollars.

Q Did there come a time when the Plaintiff in this case, Andrzej Zimnoch, came to your office for medical care?

A Yes.

Q And do you recall when it was that he came to your office for the first time?

A If I could pull my notes out there.

THE COURT: You may refer to your notes to refresh your recollection.

A He was first treated in my office in December, December 2nd of 2003.

Q Doctor, before we get to that, could you just tell us -- you're in a medical practice. Can you tell us what that medical practice consists of?

A Sure.

THE COURT: What is the name?

A The name of the practice is NY Ortho Sports Medicine and Trauma. It consists of at this time two orthopedic surgeons, a neurologist, pain management specialist and physical therapist and supporting staff.

THE COURT: THE COURT: What is a neurologist?

We know what an orthopedist is. What is a neurologist?

A A doctor who has been through college and medical school and then did a training program in neurology or the study of the nervous system of the body, the brain, nerves which go to the hands and to the feet, legs and arms and deals with injuries and abnormalities to those areas and testing to those injuries and abnormalities of those areas.

THE COURT: Also pain management.

THE WITNESS: Yes.

THE COURT: Explain to the jury what that doctor does.

A A pain management Doctor is a doctor who deals specifically with pain problems and attempting to reduce a patient's pain and usually that is either after a doctor of anesthesia, one of the guys who puts you to sleep for surgery, who has now changed his specialty or focused his specialty on treating patients with painful injuries. Or it can be an orthopedist, a neurologist or an internist, general medicine doctor. Any of those specialties can qualify as a pain management specialist.

Q Before you saw Mr. Zimnoch on December 2nd, 2003 did you have an opportunity to review any records of his treatment prior to coming to your office?

A Prior to coming to my office he was seen by a Doctor Lurch, who had seen him at the time of his injury for a laceration on his right arm.

Q Now, did you get a history from Mr. Zimnoch when you first saw him?

A Yes.

Q What was that history?

A The history which I received was that he had fallen from a height while working on November 10th, 2003, so a couple of weeks prior to seeing him that he had had a laceration to his right hand.

He had been taken to Doctor Lurch's office for care, had some sutures put in and had begun some physical therapy.

Q Doctor, could you just tell us what is the significance of the history as it relates to your treatment of the patient?

A History is simply asking the patient what happened to them that brings them to your office and what has been going on since that time.

It is sort of an attempt to understand what things were injured, when they became painful, how they are affecting the patient at the time I saw him.

Q Now, what complaints, if any, did Mr. Zimnoch make to you on that first visit?

A When I saw him he was having complaints of severe back pain, low back pain. He was complaining of some sensation problems, numbness and tingling in the hands, both right and left.

He was complaining of pain radiating into his feet, all the way to his toes.

He was complaining of pain with activities like bending, sitting for any period of time, having to bend over to put his shoes on he was finding very painful.

He was complaining of some decrease sensation around the cut or laceration on his right arm. And he was having neck pain that was radiating not only to his arms, but also up to his head at that point.

Q Doctor, what significance, if any, was it that he was complaining of the numbness, tingling and radiating pain in his lower extremities or his legs?

A This was felt to be a symptom that was likely coming from his low back as opposed to numbness and tingling coming from something in the legs.

If you have certain injuries to the low back it can irritate or effect the nerves that run from the spinal column, spinal cord, down into the legs. You can actually feel the symptoms, the sensations in the legs.

We all heard of the spinal column, which is the nerves that come out of the brain, and there are branches that come off of that spinal column, go out through the spine and in the low back down through the legs. From the neck they go out through your arms.

Symptoms he was having of numbness and tingling running down to his feet we felt was more likely coming from his back because he was also having severe back pain at that time.

Q Would that be similar to whatever significance you may have found to the radiating pain to his upper arm?

A Yes, he was also complaining of neck pain. A portion of his pain that was in his arms and the tingling sensation was felt likely to be from his neck.

He also had the laceration on the right hand with some numbness and tingling around the laceration itself the cut itself.

Q At the time you saw him had all of the sutures from the laceration been removed?

A Let's see. I believe they had.

Q Doctor, did you perform an examination of Mr. Zimnoch on that first visit?

A I did.

Q Could you tell us what your examination consisted of?

A Examination has several parts. Number one is taking a history.

Number two, examining the patient, doing a physical examination of the patient.

When I examined Mr. Zimnoch he had muscular tenderness and tightness around the neck, what we call paraspinus musculature, which means muscles right around the spine, both on the right and left.

Tenderness at the base of the skull. He had pain with motion in his neck in flexion, which is bending forward and as well as leaning back and moving side-to-side.

Q Could I interrupt you. With respect to your examination of the neck, what conclusion did you arrive at, if any?

A With respect to the diagnosis for that?

Q Yes, for his neck.

A I felt that he had muscular spasm in his neck and what I called cervical pain.

The neck is called the cervical area, so I diagnosed him at that time with post-traumatic cervical pain syndrome with muscular spasm, as well as what I call cervical headaches, meaning headaches that you get because of muscular tightness and abnormality in the neck.

Q Your examination. You examined his back and lumbar area?

A I did. In his low back he also had muscular spasm, muscular tightness and tenderness.

He had what is called a positive straight leg raising test, which is with the patient either sitting down or lying down you pull their leg out straight. Normally we can go up to about ninety degrees. If a patient was sitting their leg would come out straight. Most people can do that.

If there is an abnormality in the back that is causing leg symptoms and you try to pull a person's leg out it literally stretches those nerves coming out of the back and running down the leg. They are like wires. You stretch them by doing that.

If you have a symptom of pain in the back radiating down the leg with that maneuver it's called a positive straight leg raising. It's an indication of leg pain that is due to back pain because you're literally stretching the nerves in the back.

His feeling sensation was okay. In the lower leg he had some decrease. He has decrease sensation in the posterior aspect in the back of the thigh and lower leg.

Q What significance, if any, is that?

A Again, that is an indication of a nerve problem. The nerves run out of the back and go down the legs, give several things to the leg. They go to the skin and you get sensation, you get feeling through the nerves. They go to the muscles and they make the muscles strong, make them move.

And he had decrease sensation in the back of the legs, which was consistent with and goes along with an injury to the back that has caused a problem to the leg.

Q Did you also have an opportunity to observe the healed laceration on his forearm?

A At that point it was a healing laceration. He had some dry blood on it, a scab.

Q Is there a scar left over from that?

A At this point?

Q Yes.

A He has a flat scar on the arm.

Q Is that something that is permanent?

A Scar is permanent, yes.

Q Just before we go on. You mentioned when you examined the lumbar area, the lower back, you found muscular spasm. What is spasm and what significance does it have?

A Muscular spasm is involuntary tightness of the muscles. It's not simply tightening up. It's the body and the brain tightening up the muscles in an involuntary way. You're not doing it; the body is doing it.

The reason that we get muscle spasm when there has been an injury like this is if the body is trying to reduce motion of the bones and joints and reduce irritation of the nerves. It's like putting a back brace on to stop your motion. The body does it

involuntarily. It can do it in the neck and back.

Q Doctor, did you take any x-rays or have any x-rays performed on that first visit?

A Yes, I did.

Q And could you tell us what areas of the body were x-rayed and what was found?

A I x-rayed his neck, his low back and I x-rayed his right forearm. X-ray of the right forearm was normal.

X-rays really show the bones, and his injury did not go down to bone at the forearm.

I x-rayed his neck and his low back. In both places there was evidence of muscular spasms. There is straightening of the normal curve of the spine.

Normally, if we stand everyone has a little bit of sway back. Everyone has a little arch to their neck.

In the case where there is muscle spasm, if you look at an x-ray you see the bones of the back lined up all on top of each other like a rod.

Q Did you make any recommendations as a result of this examination of Mr. Zimnoch on that date, Doctor?

A At that time we had Mr. Zimnoch continue with some of his treatment.

I'm just looking for the back page of this, my last page here.

At that time we asked -- Mr. Zimnoch was placed in some therapy, physical therapy, continuing with his physical therapy. He was started on a medication called Voltarin, a medication for pain.

He was placed in a back brace, a lumbar corset, which is an attempt to again, brace the body just like a muscle spasm does in the hopes it will let some of the muscle spasm release because the back brace will take over that function.

Additionally, a request was made for authorization for MRI studies of both the neck and low back to look for injuries or abnormalities that could be causing this radiating pain.

Q Now, Doctor, the physical therapy you recommended or prescribed, was that for both the cervical and lumbar region?

A Yes.

Q What was your purpose or hoping in describing physical therapy for Mr. Zimnoch?

A Purpose is to strengthen up the back and the neck, to rehabilitate the muscles which have been in spasm and try to relieve some of the pain that was associated with the injury.

Q Doctor, after completion of your exam did you make a diagnosis with respect to Mr. Zimnoch?

A The diagnosis when we first saw him was a post-traumatic low back or lumbar pain with muscular spasm and symptoms of what we call radiculopathy.

Radiculopathy is simply the medical term for that radiating pain that we feel is from either the neck or back.

Q Did there come a time when Mr. Zimnoch, in fact, had the MRIs of the neck and back as you prescribed?

A Yes.

Q Do you know when they were taken?

A They were performed on March 12th of 2004.

Q Doctor, do you have copies or the originals of those MRIs with you?

A I do.

MR. RYAN: With the Court's consent I see we have a shadow box in the courtroom. I would ask if Doctor Kaplan be permitted to step down and show the jury the MRIs.

THE COURT: Approach for a minute counsel.

(Discussion held at the bench, off the record.)

A I was going to show you some MRI studies.

THE COURT: Mr. Palmer, you're free to move to wherever you feel comfortable. Take a seat next to the jury if you want over there to look or the other side.

MR. PALMER: Thank you.

THE COURT: If you want to take notes it's up to you.

A And an MRI is a special imaging study. Looks like an x-ray when you look at it here. It's actually done with a sophisticated computer and magnet.

It shows information that the magnet gets from the body and puts it into a computer and makes a picture. It looks like in this case a spine.

I'm going to show you pictures of Mr. Zimnoch's neck, the cervical spine, and his low back, the lumbar spine. What we are going to be looking at is a spine.

THE COURT: Members of the jury, the model in the Doctor's hand, the attorneys agreed is an aid. It's a model of the human spine.

THE WITNESS: Correct.

A This is the lumbar spine low back. The low back bones are about this big and stand one on top of the other.

In between each bone is a little cushion called a disk. And the disk is sort of like a pillow, its got an outside pillow case and inside some stuffing and it allows for a little motion in the spine, also has the spine.

Behind the big bone in the disk called vertebra lives the spinal column. This is the nerve cord that runs out of the base of the brain and all the way down your back.

As I told you before it branches out in many places. All the way down from the brain starts off, branches out into your arms, then it branches into your chest and down to your legs. These are called the nerves or the nerve roots.

You could see they are well protected by the spine. There is hard bone all around it. That is a good thing if you get hit because it protects you like a bony cage, but it can be potentially a problematic thing if there is as in this case one of these soft disks moves out of place.

If a disk moves out of place like that and goes back, a herniated disk, what could happen is a nerve root gets pushed or impinged upon by the bone around it and that could cause a pinching of the nerve.

You don't even have to have the disk pressing directly on the nerve because, as I said, there is some motion through the disk. If the motion is abnormal because the disk is abnormal that can irritate them and cause very similar symptoms as having a pinched nerve.

Now, in Mr. Zimnoch's case, he does have on MRI several herniated disks. This is an MRI -- that was an MRI that was performed March 12th, 2004.

Q Is that a cervical or lumbar?

A Lumbar.

MR. RYAN: At this time to save a little bit of time I would like to offer this -- my understanding is the Doctor is going to show the jury one sheet of the lumbar MRI and one sheet of the cervical.

I request the lumbar be marked 7 in evidence and cervical be marked as 8 in evidence.

THE COURT: Do you have any objection to that going into evidence?

MR. PALMER: No. In fact, I want it all in there.

THE COURT: There was a 4532 exchange; am I correct?

MR. PALMER: Yes.

THE COURT: Let's mark them both.

MR. RYAN: Yes.

THE COURT: I ask the officer to mark them appropriately.

(So marked.)

A So what we are looking at is the spine from the side. And the special thing of an MRI is that because it's not taking a direct picture of the spine, it's actually just getting all the information from the spine, putting that information to a computer and then making pictures. It can make pictures in many different ways, which means when we look at this --

This is all Mr. Zimnoch's spine. This is starting one side of his spine. The next picture is as if we were to look inside of the spine and remove the portion we just looked at. Almost as if we were able to flip through a book, look at different pages, as we open up the spine and move from one side to the other side.

This is not the entire study. This is the lumbar spine and there are five lumbar vertebra. They sit on top of the tailbone or the sacrum. The sacrum or tailbone is this triangular shape set of bones here.

Above that is the fifth lumbar vertebra, the lowest that is called L5. Above that is L4, fourth lumbar vertebra up to LI.

When we look -- let's just take this, this is about the middle of the spine, a little to the side. Normally the disk, as in this model, normally the disk lies flush with the back of the bone and the nerve sits right in front of it and there is room for the nerve or nerve cord.

On this, I'll just pick here, you could see as an example. If the upper area, the disk, the white part between the square bones is flush with the back of that bone. When you come down lower you start to see a little protrusion or pushing backwards.

As you know here by looking at this that is right into the area where the nerve cord normally lives. This is the nerve cord here just behind.

So, you have x-ray picture, an MRI picture of what we call a herniated disk. This is actually a piece of disk pushed into where the nerve cord is. Actually, this one is touching the nerve root, so that is L5 S1.

Above that we have a similar picture, not even as big, but a similar picture of herniation L4 L5.

Above that you have a picture of an abnormal disk here which the radiologist calls it disk bulge, which meaning the disk has not popped out, the stuffing hasn't come out of the pillow case, but the pillow case and the disk inside are pushing backwards.

Again, all of those are in the area where the nerve cord lives or normally occupies.

So these are two what they are calling herniated disks and you could see this is a herniated disk, this is a herniated disk, that is on boarder of bulge and herniation. And different doctors will call it different things.

Clearly, this is in the nerve cord and abnormality of the disk.

Q The herniations that you have seen and found as the radiologist did at L4 L5 and L5 S1, are they competent producing cause of pain?

A Yes.

Q That is the involvement with the nerve that you spoke about earlier?

A Disk abnormalities and injuries could be painful for many reasons.

Number one, they could push on the nerve root or they can irritate the nerve roots, which causes that radiating pain.

Additionally, the disks themselves, the outside portion of the disk, as well as the small joints of the back have nerve fibers in them.

Abnormalities or inflammation of the disk can be painful or the small joints in the back can be painful if there is abnormal motion.

All of those things can be causes of pain.

Q Now we are going to see Plaintiff's 8 in evidence, which is one of the cervical MRIs of Mr. Zimnoch.

A That is right. This again is Mr. Zimnoch's neck. This is his brain up here at the top part of the picture. This is actually a good shot here. This is the base of the skull and brain.

You could see the nerve cord comes right out of the brain and down the back. That is this dark cord actually covered in fluid around it. That is why you see this white, which is fluid in front and back.

Then we look at the bones. The bones, remember, is the square part here. So in this picture we are looking at, if we were to slice this open right in half and open it up you see the bone in front. You see the nerve cord and then see some more bone here.

If you follow the nerve cord down, this one, you could see quite well, all of that fluid in front of the nerve cord down. It disappears at that level and that is because there is a disk pushing out into the area where the spinal cord lives.

That is the level of C5 -- I'm sorry, C6 and C7. This is cervical 2 vertebra, 2, 3, 4, 5, 6, 7. That is a big herniated disk at C6 and C7, between the sixth and seventh cervical vertebra.

Additionally, you could see that here. You could see another disk above it a little more to the side. This is more in the midline, more in the middle. The other is a little more to the side.

Q Doctor, same question with respect to those herniations in the cervical area; are they competent producing causes of pain?

A Yes, they can be competent producing causes of pain. They can cause pain, push on the nerve cord to irritate nerve roots. They can be painful because of the nerves around the disks, the structure like the pillow case around the disk, and they can be painful because of inflammation, because of abnormal motion, the small joints of the disk -- spine, rather.

Q Doctor, I may need your help. One second. We have the lumbar MRI is number 7?

A This one.

Q Doctor, of the herniations that you found, which the radiologist found in the lumbar and cervical spine, would that be consistent with the history of a fall from approximately two feet, given to by Mr. Zimnoch, and landing on his back on a concrete floor?

A Yes.

Q Do you have an opinion with a reasonable degree of medical certainty whether such an injury can result in such a fall to Mr. Zimnoch?

A Yes. My opinion is that a fall from that height can cause an injury to the disks. It can cause herniation and bulging of the disks as well.

Q You're still seeing Mr. Zimnoch today?

A Yes.

Q How frequently does he come to your office?

A He is seen in our office approximately every six weeks or so.

Q If he is not seen by you he is seen by one of the other practitioners in your office?

A Yes.

Q Did you during the course of your treatment recommend any further tests be done on Mr. Zimnoch?

A During the course of his treatment he had tests called EMG, which is a nerve study. That helps define how much of the nerve is being pinched or if the nerve is being permanently damaged by a disk or abnormality in the spine or if nerve symptoms are coming from outside of the spine, meaning as in Mr. Zimnoch's case, he had a laceration to his right-hand, he still has some numbness and tingling, right arm rather, still has numbness and tingling in his right hand.

While I believe a portion of that is coming from his neck, he doesn't have permanent damage that can be documented in his neck. Although, he has permanent symptoms in his neck on the EMG. A portion of that is coming from simply the laceration as well.

In the low back the EMG study, the nerve study, does show that the level of one of these nerve roots called L4-5 nerve root, L4-5 disk, there is an injury to that nerve that is bad enough to show up on this electrodiagnostic study, this EMG test, just at the level where one of the large disk herniations of the back is.

Q Doctor, would you agree that an EMG is the state of the art today in diagnosing a nerve damage?

A Yes.

Q And, Doctor, could you just tell us briefly what does it mean to clinically correlate an injury to a diagnostic test?

A Clinically correlating an injury to a diagnostic test simply means you look at an injury and I come up with a diagnosis.

Then I go about trying to narrow down my diagnosis by doing certain tests to try to get a test that shows, in fact, my diagnosis is accurate.

I felt Mr. Zimnoch had a herniated disk to his neck and low back so we sent him for an MRI. There were findings that correlate with my diagnosis because of his symptoms.

We sent him for an EMG to see how badly the disk was affecting the nerve or if it was permanently affecting it. When I say permanently I mean affecting it all the time.

In the low back he's got affect all the time on the nerve root at L4-5 so it shows up.

C6-7 disk in his neck is not caused what is classically a radiculopathy by the EMG, but he does have symptoms of radiculopathy so there is not an EMG correlation for that nerve root, but there is clinical correlation for that disk injury.

Q During the course of your treatment of Mr. Zimnoch was he seen by Doctor Scerlip?

A Yes.

Q Is he the pain management doctor you referred to earlier?

A Yes.

Q What was your reason for you referring Mr. Zimnoch to see Doctor Scerlip?

A One of the treatments that a pain management physician can perform is called --

MR. PALMER: Objection. Do I need to object?

THE COURT: What are you objecting to?

MR. PALMER: We had a previous discussion.

THE COURT: I thought I made a record. You have a continuing objection. You're overruled.

Q You can continue Doctor.

A Doctor Scerlip is a pain management physician who does a technique called lumbar and cervical neck and low back epidural steroid injections.

He injects steroids into the spine to bathe the nerve root and nerve cord as well as the disk to try to get rid of inflammation and hopefully, decrease some of the symptoms associates with injuries, abnormalities and inflammation in the nerve cord.

I sent him to Doctor Scerlip because when you fail conservative treatment, meaning medications, and Mr. Zimnoch is taking multiple medications, when you fail physical therapy, when you fail a lot of physical therapy then the next step in the treatment ladder would be this epidural steroid injections. He has had a series of these to the neck and low back.

Q When you say a series, Doctor, how many in each area?

A I'm sorry, a series is three injections given approximately a week to two weeks apart.

Q In your opinion what has been Mr. Zimnoch's reaction to the epidural injections and has he shown any improvement as a result?

A He has had following the injection some relief of his pain. In the low back he had three injections. He got initially about fifty percent relief of his pain. That lasted for a period of time. That pain has returned to some degree.

Doctor Scerlip in our notes, in our office notes, indicates that he will likely need -- he has already recommended that he have further evaluation coming January, which is when he will be ready for steroids again.

You can't give steroids all the time. He is already recommending in the future he will need another injection of the neck and likely another injection of the back. That would be ongoing treatment for this cervical and lumbar pain.

The natural history of this is that it works for a period of time and either people have long-lasting relief or they have short-lasting relief.

Mr. Zimnoch had some good relief initially, about fifty percent, and is now having return of symptoms.

Next step in the treatment ladder is surgical consultation and we have avoided that at this point.

Q You mentioned that Mr. Zimnoch had been taking -- is presently taking various medications. If I could just ask you to just tell us about the -- I'm sorry.

Mr. Zimnoch mentioned certain medications that he is presently taking. There were four of them. I'll give you the names and can you tell us your purpose in prescribing them for him?

A Yes.

Q Mr. Zimnoch mentioned he was taking Ambien.

A Ambien is a sleep medication that people who have difficulty sleeping can take. It helps one become tired even if pain keeps you restless.

Q Next was Tylenol number 3.

A Tylenol number 3 is a narcotic pain medication. Number 3 indicates it's Tylenol mixed with cocaine, which is a narcotic.

Q Paxcil.

A Paxcil is an anti-depressant medication and used often in people with chronic pain.

Q Lyrica.

A Lyrica is a relatively new medication that is used for symptoms of what is called disk parathesia, which is pain in the arms or legs caused by irritated nerves in your back, in this case. It calms down the firing of the nerves and helps to decrease the intensity of symptoms.

Q Doctor, I would like you to assume Mr. Zimnoch has testified here in court that immediately after his accident he had a laceration in the area of the right forearm and that he felt pain in his neck and back as a result of the fall.

He was taken by a coworker to Manhattan Medical in Greenpoint and while in Manhattan Medical made no complaints about the neck and back pain. Mr. Zimnoch stated he was more concerned at that time about the laceration.

I would also like you to assume Mr. Zimnoch testified he thought his neck and back pain was transitory in nature and would, I guess, go away or resolve itself over a period of time.

He testified the neck and back pain got progressively worse.

Approximately three weeks after the accident he consulted with you primarily with respect to the neck and back pain.

What significance, if any, is that Doctor?

A The only significance of that is the type of injury to the cervical and lumbar spine can be immediately painful and often can get worse over time, especially as the body begins to react to the injuries with inflammation.

Inflammation can be in and of itself a source of pain. Also, as the disk can be injured at the time of the accident it can extend over time as you start to do things like walk, sit for periods of time.

The disk is like a pillow. It has an outside casing and inside stuffing. It's the stuffing pushing out from the disk that caused the pain running down the legs and the arms. So a tear in what we are calling the pillow case actually called annulus can occur immediately.

As you start to load the spine by sitting, by walking, by bending doing, things as simple as tying your shoes, you can cause that injury to progress and for the center of the disk to extrude over time and cause the ongoing and worsen the symptoms that we see.

Q During the course of your treatment with Mr. Zimnoch and in review of his records have you seen any indication or do the records indicate any prior back or neck problems with Mr. Zimnoch?

A No. In fact, the first time we saw him we went through his past medical history, which was not significant for back and neck problems.

Q I'm going to ask you to describe a term we are probably going to hear during the course of the trial; a degenerative condition of the cervical and lumbar spine.

Can you define what you understand and in medical terms what is a degenerative condition?

A The term degenerative simply means it occurs over time.

When I first saw Mr. Zimnoch my x-rays that I took on that day showed no degenerative change in his neck or his back. The x-rays are simply pictures of the bone.

When we were granted approval we were able to get MRIs of the low back.

By the time the MRIs were gotten, some four or five months after his injury, there is some evidence of degenerative change which, I believe, occurred over that period of time; that is loss of water contents of the disks. That is one of the things you look for in a disk. Some look nice and white. That means they have a lot of water. That is what the MRI shows, a lot of water as a big white.

Down in the lower part the disk look desiccated or drier, not as much water. That can occur over time. That is a degenerative change.

My feeling is again this is a degenerative change, but one that occurred from the time of the injury through the time that the MRIs were performed over time.

Q In your opinion was the competent producing cause of that degenerative change the accident that Mr. Zimnoch had on November 10th, 2003?

A In my opinion and again, it goes back to this clinical correlation, I'm looking at the history. Mr. Zimnoch worked up until the day of the injury without complaints of pain, never had treatment for his back, didn't take medications for his back.

Following the accident he began to have pain in the back, which is still present today. It's associated with back pain, findings on MRI, findings in the low back on EMG that are all consistent with an injury to the back and neck.

Q Doctor, what is a prognosis?

A Prognosis is a term that means looking into the medical crystal ball and try to predict what is going to happen down the road to the patient.

Q Have you formed a prognosis with respect to Mr. Zimnoch's medical future?

A Yes.

Q What is your prognosis?

A My prognosis for his future is what I call a poor prognosis, meaning I think that he will continue to have back pain. I think that over time the type of treatment that is available, physical therapy, injections, medications, they will continue to get worse over time.

I think at some point he will be evaluated for spinal surgery because of these disks in his low back. And that is my prognosis for him.

Q Doctor, do you have an opinion as to whether or not the injuries sustained by Mr. Zimnoch to his cervical and lumbar spine are permanent?

A Absolutely permanent.

Q Now, Doctor, you know that prior to this accident Mr. Zimnoch had worked in the field of construction and for a number of years immediately prior to this accident worked as a mason bricklayer.

Do you have an opinion with a reasonable degree of medical certainty whether Mr. Zimnoch can return at anytime in the near future or in the future to his former profession as a mason bricklayer?

A I would recommend that he does not. I'm not a vocationalist, I can't tell them what they can or can't do.

As a physician I tell them what I think they shouldn't do because they would cause further injury.

Lifting, bending, climbing, standing for long periods of time, stooping, crawling would increase the symptoms.

Q Would you agree Mr. Zimnoch may be a candidate for sedentary employment?

A I believe he is a candidates for sedentary employment. I believe he will have symptoms. That means you are not lifting a lot. As long as he could have frequent breaks to walk around, do things, bend, stretch, attend physical therapy, I think he could do some sedentary employment, sure.

Q I'm going to show you what has been marked as Plaintiff's exhibit 5. I'm going to ask you what that is, Doctor.

A This is Mr. Zimnoch's bill from my office.

Q Does that contain all the medical charges that Mr. Zimnoch has incurred during the course of your treatment with him?

A It does.

MR. RYAN: Your Honor, at this time I request that be put into evidence.

THE COURT: Have you seen that?

MR. PALMER: I thought we discussed these off the record.

THE COURT: It's going into evidence as we discussed. I'll note your objection. It's been marked now.

MR. RYAN: It has.

(So marked.)

Q Finally, Doctor, are you familiar with the reasonable and customary charges charged in the Metropolitan area in New York for cervical and lumbar MRIs?

A Yes, I am.

Q I'm going to show you a certified bill marked Plaintiff's exhibit 6 from Doctor Jacob Lichy who performed the cervical and lumbar MRIs in this case. The total balance on the bill is $2800.00 dollars.

Do you have an opinion as to whether or not that bill was reasonable and customary charges for cervical and lumbar MRIs in the Metropolitan area?

MR. PALMER: Objection.

THE COURT: What is the specific objection?

MR. PALMER: He is testifying as to someone else's record.

THE COURT: No. He said his understanding was reasonable and customary in the New York area.

He knows what is reasonable and customary; is that correct. Doctor?

THE WITNESS: Yes I do know what is reasonable and customary.

MR. RYAN: At this time I request those two bills, Plaintiff's 5 and 6 be put into evidence.

THE COURT: We will note for the record Mr. Palmer has an ongoing objection.

MR. PALMER: Correct.

THE COURT: Overruled. They are in evidence.

(So marked.)

Q Mr. Zimnoch is still receiving physical therapy today based upon your prescription?

A Yes.

Q What is the cost of a typical physical therapy session such as the one that Mr. Zimnoch is going through?

A Mr. Zimnoch's physical therapy and physical therapy in general is usually $100.00 to $150.00 a visit, depending on what things are done because you're charged for massage, exercising. Generally $100.00 to $150.00.

Q If we do the math Mr. Zimnoch testified he has been going to physical therapy for two years two times a week and since then has been going at a rate of once a week.

Each visit would be approximately somewhere between $100.00 and $150.00 per session?

A Yes.

Q Doctor, what are the costs of the epidural injections that you prescribed for Mr. Zimnoch for the cervical and lumbar spine?

A Usual and customary rate for an injection is about $1,200.00 dollars for the epidural steroid injection. That is for the injection, for medication, things like that.

Again, that is a series of three. In this case neck and low back, so times six.

Q Each epidural injection is $1,200.00 dollars?

A Yes.

Q Series of three for the lumbar would be $3,600.00 dollars and same for cervical?

A Yes.

Q With respect to the medications you prescribed for Mr. Zimnoch over the period of time, Mr. Zimnoch testified he has been taking Ambien for the last two years.

Do you have an opinion based upon reasonable and customary charges a prescription for Ambien would cost?

A I believe Ambien for a month supply is approximately $60.00 dollars.

Q You testified with respect to Tylenol 3 he has been taking for two years. What would be the monthly charge?

A Monthly supply of Tylenol 3, which he takes several times a day, as opposed to Ambien is once a day, is approximately $90.00 dollars.

Q Paxcil on a daily basis?

A Paxcil, about $90.00 dollars.

Q Would that be for a month?

A Yes.

Q What is the monthly charge for prescription of

Lyrica?

A Lyrica, depending on the dose, can be anywhere from $225.00 dollars per month to $375.00 per month.

Q Now, with respect to any future treatment that you would prescribe for Mr. Zimnoch, Doctor, you mentioned Doctor

Scerlip has been talking about further epidural injections. Is that something you can foresee in the future?

A Yes, I believe he will have those again. He got some relief. The goal is to give him some relief. I believe he should have those. He is a candidate again, according to our notes, January.

Q That would be a series of three cervical and three lumbar at the same cost you previously mentioned?

A That's right. He will be evaluated at that time.

Q How about any further prescriptions for the future?

A I believe he will need continued new prescriptions for pain, sleep, inflammation.

Q For how long a period of time?

A For the rest of his life, I believe.

Q A monthly charge of how much, Doctor?

A Medications?

Q Yes.

A Same fees we just went through.

Q For the same four medications?

A They may change over time as new things come out.

Lyrica is a relatively new medicine. Yes, that is my best guess.

Q You foresee the approximate monthly cost we just went through as being the same in the future?

A Sure.

Q In terms of any physical therapy, do you have an opinion as to whether Mr. Zimnoch should continue his course of physical therapy?

A I believe he should continue in his course of physical therapy.

Again, a lot of the pain associated with disk abnormalities has to do with the spine moving abnormally. To keep your core, your lumbar muscles, your cervical muscles as strong as possible it requires doing exercises and specific types of exercises. Those are best addressed with a physical therapist and normal therapy. He is doing it once a week at this point.

Q That would be also at a rate at once a week. You recommend that rate continue?

A In general.

Q For how long?

A Over the course of his life.

Q Cost between $100.00 and $150.00?

A Probably increase over the course of his life, yes.

MR. RYAN: Thank you.

THE COURT: We will take a break. Everybody can stretch their legs. Jurors please follow the instructions of the court officer.

Don't discuss the case amongst yourselves.

(The jury leaves the courtroom.)

THE COURT: Let the record reflect the jury has now left the room. We will take a short break.

(A recess is taken.)

(The jury enters the courtroom.)

(The witness resumes the witness stand.)

THE COURT: Mr. Palmer, it's your witness.

MR. PALMER: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. PALMER:

Q Good afternoon Doctor Kaplan.

A Good afternoon.

Q We haven't met before; correct?

A No.

Q In fact, we have never spoken before?

A Not that I know of, no.

Q Your testimony in this courtroom today

Have you spoken to Mr. Ryan?

A Yes.

Q When?

A I spoke to him today outside.

Q First time you met him?

A No, I've spoken to him. I thought you meant with regard to this case.

Q For this case, Mr. Zimnoch's matter.

A Yes.

Q You have spoken to him before today?

A Only he told me it was coming up, asked me what my availability was and we spoke about the case today.

Q Just notification?

A Yes.

Q Did you ever speak to anyone from Mr. Ryan's office about this case before your conversation with Mr. Ryan?

A Only when they request a report from me.

Q Your practice has how many different individuals in it?

A We have nineteen support staff, four doctors, physical therapist and a physician's assistant.

Q Is Doctor Scerlip one of the members of your staff?

A Yes.

Q And Doctor Crone also?

A Doctor Crone also.

Q How many times have you yourself examined Mr. Zimnoch?

A I believe I have seen him about four times. I haven't counted.

Q Approximately how many?

A About four, five times.

Q And do you remember when the most recent time was?

A The most recent time I believe was April.

Q April of this year?

A Let's see. I believe it was April of 2005.

Q I'm trying to get a general sense.

A Yes. I'm sorry, I saw him briefly September of '06, a couple of months ago.

Q First time was back in December of '03?

A First time was in December of '03.

Q Before Mr. Zimnoch came to you he had been to another doctor; correct?

A Several times he had been to Doctor Lurch.

Q Do you have any of Doctor Lurch's records in your file?

A I do not.

Q The file you brought here with you today is your complete file?

A It's his medical file, yes.

Q Is there something else besides that?

A There is billing information, things like that. That is electronically kept.

Q In terms of the actual medical records that's it?

A Yes.

Q Plus, of course, the films?

A That is part of the medical records.

Q You have a bunch of patients yourself who are essentially patients that came to you as the doctor for the very first time?

A Yes.

Q They give you a history?

A Yes.

Q The history that the patient gives you, that is crucial; correct?

A You have to define crucial for me. It's nice if the history is accurate. It helps me again figure out what has been going on, but I've been trained as a physician, I've been a doctor since 1989, so crucial, I don't know what that means. I take good history.

Q You take good history?

A I try to.

Q Why?

A To get the information as I described before and orient myself to the injuries.

Q You need accurate information; right?

A Sure.

Q Accurate information gives you accurate assessment?

A Accurate history, accurate information obviously helps you figure out better what is going on.

Q You heard the phrase "garbage in garbage out"?

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A Yeah, I've heard that phrase.

Q It's more in the field of computers; correct?

A I'm sorry.

Q It's more in the field of computers; correct?

THE COURT: We are dealing with a person.

A I don't know what I heard it in context with.

Q Let me try it this way. If Mr. Zimnoch lied to you about the history of his accident, fair to say everything you recommended to him afterward would be suspect?

MR. RYAN: Objection, your Honor.

THE COURT: What is the objection?

MR. RYAN: What is the basis for the objection?

THE COURT: What is the basis?

MR. RYAN: What is the basis of the question?

THE COURT: I think he is asking for an opinion as a diagnostician.

THE COURT: I'll allow that line of questioning.

If someone lies to a doctor or gives a history, what does that mean?

A I believe the question was if he lied to me would that change my opinion on his injuries and things like that?

Absolutely not. I believe he has neck and back pain. I believe he has symptoms that go along with back and neck pain. I believe he has findings that go along with neck and back pain.

As the Judge alluded to, he is a patient. I've known him over years and my doctors have known him over the years and I've grown to know him.

This is a guy that worked for years. He has part of his hand missing and he continued to work in the labor field. I wouldn't consider that garbage.

Q Has he ever lied to you?

A Not that I know of.

Q How would you know if he lied to you?

A If I found out he was lying to me. Same way that everyone who deals with everyone finds out.

Q Based on your dealings with them?

A Based on your dealings, based on what you find out. I've never had any reason to believe he is lying.

Q For example, have you ever heard anyone say that, in fact, Mr. Zimnoch did not fall?

A I have not.

Q Have you seen Doctor Lurch's records?

A I have not seen Doctor Lurch's records.

Q You're his treating doctor, you've been treating him about three years now?

A Correct.

Q In fact, you haven't bothered to get the original records of the first doctor?

A If you would have brought it to read, my first report, I called Doctor Lurch's office and asked for the records and they did not send that.

Q I did read it.

A I know what it said. I contacted his office.

Q Said you called him.

A It says initially I have attempted to contact Doctor Lurch today and he was not available. His office would not send his records.

Q If you --

MR. RYAN: Would you let the Doctor finish.

A There was an attempt to get the records. Often times records don't come through.

Q Can you read that back again for the jury?

A I've attempted to contact Doctor Lurch today. He was not available.

Q That's it; right?

A That's correct.

Q That is what is in your notes?

A Correct.

Q And since that December 2, 2003 is there any other reference in your notes any attempt to contact Doctor Lurch?

A No. At that point I began treating him.

Q Would you expect, Doctor, that the first history that the patient gives to another medical professional would be the most accurate?

A Absolutely not, number one.

Number two, I wasn't there when he gave Doctor Lurch the record. He may have said he fell and Doctor Lurch may have

recorded it wrong. I can't speak for Doctor Lurch. I don't know if he has a Polish translator in his office as I do. I don't know the circumstances.

THE COURT: You don't speak Polish.

THE WITNESS: Some medical Polish. I have a translator in my office. I have two Polish speaking and many times three Polish speaking people in my office. I want to make sure the communications take place.

Q In fact, your receptionist speak Polish?

A One -- actually two.

Q A nurse that speaks Polish?

A Medical Polish like I do. I know how to ask someone if they have pain and in what body part.

Q Did you know the nurse and receptionist in Doctor Lurch's office speaks Polish?

A I --

Q Do you?

A I don't know. I don't know whether or not he had a Polish translator.

THE COURT: Let the witness respond.

Q You brought the MRI films here today, sir?

A Yes.

THE COURT: The films that are in evidence?

MR. PALMER: Yes.

Q You also mentioned when Mr. Zimnoch originally came to you with x-rays --

A Correct.

Q There are films?

A Correct.

Q Where are those films?

A Sitting right next to me.

Q Those x-ray films, you said you compared those x-ray films to the MRI films?

A Not at all.

Q Did you compare what was on the x-ray films what was on the MRI films?

A I said there is no evidence of bony degenerative, bony degenerative change. The reason, forgetting the MRI, in addition to the bones you could see the soft tissue, the disk, the nerves. When I first saw him there is no degenerative change in the

bones.

Q Would the x-ray films show degenerative changes?

A They would show degenerative changes of the bone, absolutely.

Q Would MRI films show degenerative changes?

A Yes, absolutely.

Q Isn't it true, Doctor, that the MRI films are significantly better at showing those changes than the x-ray films?

A In the disks and in the soft tissue, not necessarily in the bone, no. No, not significantly. Absolutely not.

Q The changes that you're referring to in Mr. Zimnoch's case, those are changes in his bones; correct?

A I'm referring to some degenerative changes in the bone that you see on MRI, as well as degenerative changes that you see in the soft tissue. Those are charges, I believe, occurred from the time of his accident until the time of the MRI.

Q You're saying the ones in the soft tissue are from the time the x-ray films --

A From the time of the injury.

Q To the time --

A Yes.

Q But the ones you're seeing in the bone are what?

A If there is any evidence of MRI changes of the bone those also are not seen in the initial x-rays.

Q X-ray films, MRI films do not show the same thing; am I correct?

A You're not correct. MRI and x-ray films both show bone. X-ray films only show bone for the most part. You could see some soft tissue. We use them to look at bone.

MRI shows bone, but it's really best at showing soft tissue and we talked about fluid contents in soft tissue.

Q Are you a trained radiologist?

A I am not a trained radiologist.

Q What is a radiologist.

A A radiologist is a doctor who following medical school does a training program in radiology, in reading of x-rays. Most radiologists don't ever see the patient.

So that a doctor like myself, part of my orthopedic training is also in reading x-rays and MRIs and imaging studies because it's important to correlate those things to the patient.

Q In this particular patient is it fair to say in both cases, both with the x-rays -- withdrawn.

The x-rays that you have in your file, did you actually take those yourself or someone else?

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A They are taken in my office by my radiology technician under my direction.

Q You have an in-house specialist?

A In-house radiologist technician. You have to have a license to do that, to take a picture.

THE COURT: That person is not a medical doctor.

THE WITNESS: Right.

THE COURT: Works under your supervision?

THE WITNESS: As with every orthopedist, we read our own x-rays from our office.

Q Did you have the x-rays read by a radiologist?

A Absolutely not.

Q And the MRIs, those were done in your office?

A Absolutely not. Those are done by Doctor Lichy with a special machine at an MRI facility and this MRI facility is called Lenox Hill Radiology and Doctor Lichy is a board certified radiologist who reads these films.

Q You actually had Doctor Lichy read those radiology reports, those MRI films?

A I don't have Doctor Lichy do anything. I have the patient get the MRI, the doctor that runs that facility reads the films. The films are received by the doctor so the doctor can also look at them. Sometimes there is a disagreement between the radiologist and physician about the reading of the film.

Again, I've had the benefit of seeing the patient, seeing where he hurts and if I see something that doctor Lichy may have scanned and missed I may often call him and say this looks like so and so to me, do you see that?

Oh yeah, there is something there or no, I don't see something there.

In this case I don't disagree. I don't think there was that conversation.

Q Fair to say different doctors and different radiologists will very often disagree on what was shown in an MRI film?

A I would say not very often, but doctors do disagree on reading of MRIs and things. The films are sent to me so I could look at them.

Q You also mentioned some EMG studies were done?

A Yes.

Q Are those a result of any kinds of films?

A No.

Q Any kinds of photographic evidence?

A No.

Q And those EMG studies were done by whom?

A By Doctor Bopana, who generates a report, which is basically a series of numbers and grafts.

THE COURT: Doctor Bopana is a neurologist?

THE WITNESS: In my office, yes.

Q Looking at the MRI films alone, if you didn't have the x-ray films, would you be able to say whether what is shown on the MRI films is a result of degenerative disease or traumatic?

A You mean simply if someone handed me the pictures?

Q Just the MRI films.

A This is the point I was trying to make before. Absolutely not. If you just look at the films and you just examine the patient you don't have the information.

I tell the patient, they bring me a MRI, someone told me I have a torn such and such, here is my MRI.

I said I don't operate on MRIs; I have to examine the patient.

Same is true with this MRI. Looking at the films you could see some degenerative changes. You need to look at history, x-rays taken, treatment that has been given up to this point to really get the whole picture.

Q You say you would or would not be able to see degenerative change?

A You could see degenerative change, absolutely. You don't know the history, whether they were over ten years or four months.

Q So it could be, like you said, ten years or four months?

A Sure.

Q It could be there, you wouldn't know?

A Sure.

Q In this case you're saying when you compare the x-ray films to the MRI films you were able to determine that, in fact, what is shown on the MRI films started after the accident?

A Not at all what I'm saying. Let me rephrase it. I said it three times. I guess I'm confusing you.

Given the history, which is that he had no treatment for pain, no pain prior to the accident and he has been complaining of pain, he had treatment that he has responded to somewhat appropriately over the course of time and given the fact on my initial x-rays there is no degenerative change seen. On the MRI you're starting to see some degenerative change.

I believe that that change occurred in that period of time. That is my opinion with a reasonable degree of medical certainty, which is what I'm called to do. No one could answer a hundred percent.

Q I'm trying to focus on the x-ray films and the MRI films. I asked you about the MRI films. You went through the history.

I'm trying to compare the x-ray films, the physical evidence, not what the patient said, the physical evidence, one piece of physical evidence film to the other one.

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A I suppose the difference here is you're speaking as a lawyer and I'm speaking as a doctor. And I have to because films, I don't operate on, I don't treat them. I use them as a piece of medical evidence, a piece of medical supporting testing.

You can't make a determination just by looking at the films unless there is something like a fracture. But there is no degenerative change noted on my x-rays on the first day he is seen. And there is some degenerative change that occurs over time. There is no history, which is the only way to look at a film and really to know well what the diagnosis should be.

Q By history you're talking about what the patient reports?

A What the patient reports and the fact that I have no history of treatment prior to this with regard to back injuries, neck injuries and that he has worked up until that time. That is the history I use. That is what goes into my calculation to come up with a diagnosis and with a treatment plan and prognosis. That is the way a physician finds things out. You can't just look at a film.

Q I'm going to try to focus on the films again. Then you tell me you can't answer it and we will leave it at that.

A I can't answer it if you're only going to base it on the films.

Q If you just were to compare the x-ray films that you have there with the MRI films you wouldn't be able to tell when the disease that is shown in those films start; correct?

A You certainly won't be able to tell when the disk disease started. Again, the MRI is the one that is showing the disk.

When you look at the films from four months after the injury there is certainly some disk injury; I don't think anyone will dispute that. There is a disk abnormality. I showed it to you on the shadow box; it's there.

The exact timing of when it got to the point that it was there in March of '04, I don't know the exact progress.

What you asked me to do is try to determine when it began. To the best of my ability I can look back at my films, which are only x-ray films only showing bones. There are no degenerative changes.

When I go to the MRIs you have certainly degenerative change in the disk and some degenerative change, I believe, in the bone. You could see it on the MRI.

Q Why do you quantify by saying you believe?

A Because as you said, every doctor will say something different, depending on how many times they have seen the patient, how well they know the patient, if they decide they want to consider the history or simply they are a radiologists who has never seen the patient and simply recording.

Number one, that is what the law requires when an x-ray or any type of imaging film is taken, a report is supposed to be generated.

In my office when I take x-rays I put that report in my notes.

When an MRI is taken in a MRI facility they have on staff a radiologist that looks at the MRI so a report is generated.

Q Do you have a written report of the x-ray films?

A In my notes I have.

Q Is there a separate report besides your notes?

THE COURT: You read the x-rays; right?

THE WITNESS: Yes.

THE COURT: Approach.

(Discussion held at the bench, off the record.)

Q Just to be clear, Doctor, there is no separate report of the x-ray besides your notes; right?

A You mean on a separate report?

Q Yes, separate report.

THE COURT: Talking about by a physician other than Doctor Kaplan.

A Other than myself, no. I'm qualified to read x-rays such as every orthopedic surgeon. And every orthopedic surgeon does it the same, x-ray of the lumbar spine, x-ray of the right forearm, x-ray of the cervical spine, x-ray of the lumbar spine, x-ray of the right forearm. It's right in the paragraph.

Q May I see that?

A Yes.

(Handing.)

Q Now, this is the only report you have of these x-rays. Do you have any notes on those x-rays?

MR. RYAN: Asked and answered three times.

MR. PALMER: There are different things in the file.

THE COURT: Is that the only report on the x-rays you prepared?

THE WITNESS: This would be the report on the x-rays for that day.

Also be noted in my note for that day, which is the exact same wording, x-rays of the forearm, x-rays of the lumbar spine, x-rays of the cervical spine from that day. They may be mentioned in another report, but they are always in my notes.

Q There is nothing in those notes, am I correct, Doctor, that tells us what is shown on those x-ray films?

A May I just read them? I don't know how to answer that.

THE COURT: Take a look.

A X-rays of the --

THE COURT: Don't read. Just answer the question. Answer his question.

A It says they show no fractures. No dislocations. X-rays of the lumbar spine show straightening of the normal lumbar lordosis with loss of normal curvature.

X-rays of the cervical spine also shows straightening of the normal curvature with loss of normal cervical lordosis.

Q What I'm trying to get, that when you were testifying before what was shown on x-ray film you talked about, I thought it

was changes in the bones compared to the MRI films, but I didn't see that written in your notes. That is what I'm trying to get at.

A This note and these x-rays were taken in December of 2003. There are no degenerative changes on these x-rays.

The MRI is a separate issue that was taken four months later, five months later. Those show some degenerative changes.

Q The MRI films don't tell you when those degenerative change begin?

A Correct.

Q They can begin ten years before or four months before?

A They certainly could have. My opinion is they did not.

Q You come to that opinion from talking and getting history from Mr. Zimnoch; correct?

MR. RYAN: Can we move on? We have been over this.

THE COURT: Can we go on?

MR. RYAN: It's been asked and answered three times.

THE COURT: I sustained the answer.

MR. PALMER: Do you know what the answer was?

THE COURT: For what?

MR. PALMER: For the question I just asked?

THE COURT: We have been through this. I'm not the witness. I'm not on trial.

MR. PALMER: You sustained the objection.

THE COURT: Because it's been asked and answered.

MR. PALMER: It wasn't asked and answered.

THE COURT: Let's do it a final time. Ask the question.

MR. PALMER: Could I have the Reporter read it back so I don't mess it up?

THE COURT: Read it back please.

(The Reporter read back as requested.)

THE COURT: MR. PALMER: That is the question.

THE COURT: About how --

MR. PALMER: I take it it's in the record.

THE COURT: Am I correct you spoke to the patient, you got a history?

THE WITNESS: That is correct.

Q And part of that history is, in fact, that he said he fell; correct, Doctor?

A That's correct.

Q And if, in fact, he did not fall then the history he gave you is incorrect?

A That portion of the history, if, in fact, he did not fall would be incorrect, obviously. That is a hypothetical, yes.

Q And your conclusions, based on that hypothetical fall history, his conclusion would also be false?

MR. RYAN: It would be nice if -- objection.

THE COURT: Sustained.

You get a history from a patient. You're going to make your own examination, do your own clinical testing in a hypothetical sense.

Isn't it possible you could determine that the information received in a history is inaccurate or you've been lied to or misinformed, etc. because based upon your actual physical examination there are no findings?

THE WITNESS: That is absolutely right. This is the way that these injuries occurred, these abnormalities in the lumbar spine occur from things like a fall, so I base that, yes, on the history, on the likelihood that that mechanism of history reported to me can cause this type of injury.

Q What abnormality are you talking about?

A Abnormality in the disk and complaint of pain associated with those injuries or abnormalities.

Q Isn't it true complaint of pain, as Mr. Zimnoch said, also come from degenerative disk disease?

A They can, absolutely. As we talked about there is an element of degeneration which occurs once the disk is injured.

Q Degenerative disk disease, it wears out over time?

A Means changes in the disk over time.

Q Not from a car accident or a fall or anything like that? As you get older there is pressing and you get pain?

A Again, degenerative change is anything that occurs over time. Has to start sometime. Sometimes it starts with a car accident, fall.

It is a change in the structure of the tissue, in this case the disk, that happens over time. That is the meaning of degenerative disk change. Doesn't mean it's not the cause. It can be and seen later, the actual trauma.

Q Fair to say the average forty-five year old person walking around does, in fact, have some kind of degenerative changes in their disks?

A Average forty-five year old has degenerative changes probably all about their body. We all age over time.

Q I'm talking about the disks. In the disks, correct?

A I don't know if that study has ever been done. I can tell you certainly not your average person of age thirty, I know that study has been done.

Q Not thirty.

A May I please finish?

At age thirty that has been done. If you're asking me for accurate information I'll tell --

Q You're saying --

MR. RYAN: Can he finish?

THE COURT: Let him finish.

A At age thirty significantly less than half the people, about one in every three, had disk degenerative changes on MRI. That is probably -- as we all age it's probably more with age.

I don't know when you say the average person. I doubt if it's fifty percent.

Q At age thirty what is the number?

A About a third.

Q One third. How about someone working in the construction industry?

A I don't know the answer to that.

THE COURT: You're not familiar with any studies about forty-one year old construction workers.

THE WITNESS: Exactly.

Q You have no opinion about that?

A I have no opinion about it. I have an opinion; it's not based on anything I've read.

Q A medical opinion?

A Personal opinion.

THE COURT: In terms of medical opinions is it fair to say as people get older because of life experiences and aging process, I'm going to call it wear and tear on your body, the chances increase there is some kind of degenerative disk problem?

THE WITNESS: Absolutely.

Q Doctor, in your medical opinion would the onset of those changes be greater in people who are working in the construction industry?

A It's a combination of what you do, your activities and genetics. I don't think you could make it generally.

Q What activities would you think is significant in increasing that?

A Any type of repetitive motion, lifting, things like that.

Q Like in the construction industry?

A Like in many industries, sure.

Q But Mr. Zimnoch is in construction.

A I understand.

Q You understand. Do you agree?

THE COURT: Agree with what?

Q In the construction industry you would more likely have an onset of those changes, people who work in the construction industry?

A No. Some people, and I have a lot of construction workers that are patients, some had no degenerative changes at age fifty and sixty. You can't believe how good someone's spine looks at seventy. Some people have unbelievable changes at age twenty who don't work in construction.

I think it's a combination of genetics and what you do. In general it makes intuitive sense to me, no studies. If you do repetitive activity, lots of lifting. If you're a marathon runner you'll have some more degenerative changes. Depends on --

THE COURT: A good example. Let's pick a marathon runner. Because of constant pounding, runs 100 miles, 150 miles a week, if somebody does that repetitive movement of the feet in running you might see more knee damage as opposed to the average person?

THE WITNESS: Yes, but again, it's genetics. Those people are in excellent shape. And a lot of overweight people who do no activity will also have knee problems at the same age. It's genetics and activity.

THE COURT: Would life-style be a better word?

THE WITNESS: Probably, yes.

Q Now, Doctor, the things that you have in the pile that you brought here today, fair to say that those are all the things you rely on in coming to your conclusion?

A Yes. For the most part, yes.

Q Now, Mr. Ryan asked you -- withdrawn.

You have in your file a report from Doctor Merlin Lloyd. Did you ever see that?

A Yes, I have this report.

Q Can you say how that report came to be in your file?

A This report was --

THE COURT: THE COURT: Why don't you approach.

(Discussion held at the bench, off the record.) Strike any reference to Doctor Lloyd.

MR. PALMER: Can we approach again?

THE COURT: Yes.

(Discussion held at the bench, off the record.)

Q Fair to say, Doctor, that the file that you have here with you, you rely on all the things in your file to come to your medical conclusions?

A Not all. Some are not medical things.

Q Some are, for example, extraneous, stuff that finds their way into your file?

A Some of the things are not medically reliable, I think.

Q Do you have anything in the file before you that is not medically reliable?

MR. RYAN: Objection.

THE COURT: Sustained.

THE COURT: Ask him about his findings, not what other people possibly have found out.

Q You do you keep things in your medical file that are not medically --

MR. RYAN: Objection.

THE COURT: Sustained. Whatever is in his file is in his file. Even lawyers have things. They have some piece of paper that ends up in their file. I think a professional person --

MR. PALMER: This is medical file on Mr. Zimnoch.

THE COURT: Ask the Doctor about his findings, not possibly what other people have found out and maybe ended up in his file.

Q Possible, Doctor Kaplan, again medical opinion, that in this case what Mr. Zimnoch is complaining about is really an aggravation of a preexisting degenerative disk condition?

A Is it possible? Yes, it's certainly possible that if he had a degenerative change and then had an accident on top of it he would actually be more likely to have symptoms from the problem. So, yes, it's certainly possible.

But as I say, I didn't see any degenerative change in his back from my first x-ray, which was close to the accident, and there were degenerative changes later, I believe.

Q I thought x-rays don't show degenerative changes?

A My x-rays show no degenerative changes. You could see degenerative changes on bone if they are there, but there is not.

Q You didn't write it in any of the reports?

A It's not there. I also didn't write it was white and two different times --

Q Wouldn't it be very important for you as a medical doctor, professional, a patient comes to you and complains about back pain, you do the x-rays?

A Correct.

Q Something as significant as changes in the bone and you don't write that in your note at all?

A There are no changes in the bone. I write what there is. There is a change in the curve, significant for muscle spasm. You can't put down everything that is not or I would have a telephone book for my records.

The fact there are no degenerative changes is not a significant positive finding that I would normally note.

Q Is it a significant finding at all?

A It is a very significant finding. If there were degenerative changes I would have noted it that, in fact, is a positive finding that would be significant.

The fact there are no degenerative changes is not as significant to me as the straightening of the curvature, which shows there was muscular spasm there indicating an injury, indicating some trauma and some reaction of the body to that. That is the positive finding.

Q And your conclusion was that that trauma must have been the fall that Mr. Zimnoch complaints about; correct?

A My opinion is that the trauma and the muscular spasm is consistent with a fall, as he complained about, that's right.

Q Now, he also reported to you that he had no prior back history, any complaints of pain or back injury?

A No injuries to the back and no treatment to the back.

Q Did he also say he never had any back pain before?

A I don't recall. Most people had back pain by the age of --

Q Possible he may have told you he had back pain before the date of this accident, but you just don't remember?

A Significant to me is he never had significant back pain and treatment before the injury. That is what I list, no significant past history.

Q Yes or no. Fair to say Mr. Zimnoch could have told you that he had back pain before the date of this injury, but it's just not in your file and you just don't remember? Yes or no.

A I can't answer that yes or no. Possible he told me he had back pain ten years ago that resolved or that he has cramps sometimes, but he definitely told me no significant history of back pain that required treatment or lasted for a significant period of time, which is what I go over with the patient.

Q That he had no significant history of back pain; true?

A That's correct.

Q Is that written in your file anywhere?

A It's written he has no significant history.

Q But he came to you and complains about his back?

A That's correct.

Q Now, with regards to the bills that counsel asked you about, Doctor, do you have any kinds of lien on the file?

MR. RYAN: Objection, your Honor.

THE COURT: Sustained.

Q Do you have any interest in any recovery that Mr. Zimnoch would make in this case?

MR. RYAN: Objection.

THE COURT: Sustained.

Q Do you have an outstanding bill from Mr. Zimnoch's treatment?

A All of my bills have been submitted to the proper paying entity.

Q And they have all been paid?

A Not to date, no because we have seen him recently.

Q Basically you get paid as they are submitted?

A That is the way things work.

THE COURT: And the amount in your bill, that is the outstanding balance to your practice?

THE WITNESS: This records the amount that we bill, been paid.

THE COURT: That is what is outstanding to your practice?

THE WITNESS: Correct.

Q That is the amount that hasn't been paid yet because of the time?

A Correct.

THE COURT: For whatever reason it hasn't been

[Note: Page 224 missing in original document]

BY MR. PALMER:

Q Fair to say if Mr. Zimnoch had the injuries he complains of and he was working he would be forced to take time off of work periodically?

A I don't know.

MR. PALMER: Thank you.

THE COURT: Witness excused. I ask the lawyers to approach.

(Witness excused.)

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