SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS: CIVIL TERM : PART 18

KENNETH DUMAS

Plaintiff,

- against -

IND.# 39028/07

MYRTLE AVENUE BUILDINGS, LLC AND MYRTLE AVENUE OWNERS, LLC,

Defendant

360 Adams Street
Brooklyn, New York, 11201
June 1, 2011

B E F O R E : HONORABLE BERNADETTE BAYNE,
Justice (and a jury)

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

FOR THE PLAINTIFF:

SACKS AND SACKS
150 Broadway
New York , New York 10038
BY: HOWARD R. BOROWICK, ESQ.

FOR THE DEFENDANT:

LEWIS, BRISBOIS, BISGAARD & SMITH LLP
77 WATER STREET, 21ST FLOOR
New York, NY 10005
By: ALAN KAMINSKY, ESQ.

Nadonna Ferguson, RPR
Official Court Reporter

THE COURT: The case of Kenneth Dumas versus Myrtle Avenue Builders LLC and Myrtle Avenue Builders LLC. What is the index number?

THE CLERK: 39028 of '07.

THE COURT: Appearances.

MR. BOROWICK: For the plaintiff, Sacks and Sacks by Howard Borowick.

MR. KAMINSKY: Alan Kaminsky of Lewis Brisbois Bisgaard & Smith for the defendant.

(Whereupon, the following was only requested to be transcribed)

to rail but stop it now. All right.

MR. BOROWICK: I a at least.

THE COURT: Get in your seat. Get in your seat. Get in your place. Now, the ruling was made. That is it.

(Whereupon, there was a five-minute recess was taken)

THE COURT: Ready?

MR. BOROWICK: Judge, I wanted to mark as an exhibit, the Bellevue records.

(Whereupon, Plaintiff's 1, was marked for identification)

THE COURT: Plaintiff's 1 is the Bellevue records. Is that the record? Is it certified?

MR. BOROWICK: Yes.

THE COURT: It is certified.

MR. KAMINSKY: I stipulate to it.

MR. BOROWICK: I am just marking the certification page.

THE COURT: That is the Bellevue. Plaintiff's 1 in evidence.

(Whereupon, Plaintiff's 1, was moved into evidence)

COURT OFFICER: That is the Bellevue Hospital record.

THE COURT: Yes.

MR. BOROWICK: My application is for a mistrial.

THE COURT: You want a mistrial. Based on what?

MR. BOROWICK: Based on the fact that counsel said to the jury that everything I said was an exaggeration and then lied about how the accident happened.

THE COURT: And what did I tell the jury.

MR. BOROWICK: You said in a general way --

THE COURT: I told them that whatever the two of you say, whatever Mr. Kaminsky say is not evidence. In the strongest term.

MR. BOROWICK: This isn't argument, Judge.

THE COURT: Your motion is denied. Let's move on.

THE COURT: We must leave at one o'clock and must dismiss the staff at 4:30 in the afternoon because of the budgetary constraints. So remember that. They are not allowed to get any overtime.

COURT OFFICER: You ready.

THE COURT: Bring them in.

COURT OFFICER: All rise. Jury entering.

(Whereupon, the jury is entering the courtroom)

THE COURT: All here and accounted for. Jurors, you may be seated. Mr. Borowick, call your first witness.

MR. BOROWICK: Your honor, at the very outset, I would like to I have offered into evidence as Exhibit 1 in evidence the Bellevue Hospital Record reflecting the hospitalization by my client at Bellevue.

THE COURT: It is accepted by the court.

MR. BOROWICK: Your honor, I'm going to read from portions of it and I will identify those portions. It is certified to be the accurate record and with regards to the portion of the record. I will read them as they come up. In the radiological documentation sheet from the day of the accident 9/27 of '07. Procedures were performed in the nature of a CAT Scan of the head, cervical spine and chest. That upon discharge, Mr. Dumas needed assistance in walking, standing, transferring, walking stairs, and bathing. That he had pain and wound issues. That in the emergency record, there was complaint of pleuritis, which is the chest inflammation. A head lac, I'm not going -- that is a head laceration. Back pain. There is in the record where they do a diagnosis at the outset, the initial assessment form. It indicates why did you come to the hospital. Patient fell 30 feet or it is scribble line. It is probably approximately 30 feet. There is a -- excuse me, one second, your honor. In the hospital record, there is a trauma note. Fall with mild concussion. TBI, which is short hand for traumatic brain injury. There are medication records which indicate morphine sulphate was given and that is the parallel.

With that, your honor, I would call the Plaintiff as my first witness.

MR. KAMINSKY: Your honor, before he does that since he read from the hospital records may I have an opportunity to do the same.

THE COURT: No, you will do it on your case.

MR. KAMINSKY: Okay.

COURT OFFICER: This way, please. Remain standing and raise your right hand.

K E N N E T H D U M A S, after having first been duly sworn by the Court Clerk, was examined and testified as follows:

THE WITNESS: I do.

THE CLERK: Please put your hand down. In a loud and clear voice, state your name and address.

THE WITNESS: Kenneth Dumas, 240 Prospect Park West, Brooklyn, New York 11215,.

THE COURT: You may be seated. Proceed Mr. Borowick.

MR. BOROWICK: Thank you, your honor.

DIRECT EXAMINATION

BY MR. BOROWICK:

Q Mr. Dumas, I will ask you a series of questions and I will ask you to speak up. You don't have a microphone. And try to project to the back of the room. I am not yelling at you, but I am going to try to set an example and I want you to address your remarks to the jury because they have to get a sense of you see you and hear you. So please keep your voice up. If I ask

you questions that is convoluted or complex, which I do --

THE COURT: Well, try not to do that.

MR. BOROWICK: I will need that discipline, Judge.

THE COURT: Okay.

Q Will you state, for the record, your date of birth?

A 2/14/79.

Q How old are you now?

A Thirty-two.

Q Tell the jury where you grow up?

A Brooklyn, New York.

Q And would you tell the jury your educational background? Where you went to school?

A I went to eight years of Catholic School, grammar school. Four years of catholic high school.

Q Which schools did you go to?

A Holy Name for grammar school and Bishop Ford.

Q While you were in school, what were your interest?

A Um basketball primarily um, and just do good in school.

Q Let me ask you about your home. Who did you live with when you were in say, middle school or high school, elementary school?

A My grandmother and my stepfather.

Q And tell us about your parents?

A Well, my mother raised me until I was five. My father abandon me, my biological father. Um, my mother was suffering

from mental illness throughout her life, so I went -- when I was five years old, I went to live with my grandmother.

MR. KAMINSKY: Objection.

THE COURT: I'll allow it.

A I went to go live with my grandmother and stepfather.

Q Tell me about your grandmother. Did she work?

A No.

Q How about your stepfather?

A He was a retired marine.

Q And did he work?

A No.

Q Would you tell the jury when your mother was institutionalized -- by the way, is she still alive?

MR. KAMINSKY: Objection.

A She passed away.

THE COURT: No, no, no, Mr. Borowick. I allowed that little background but that's about it.

MR. BOROWICK: It goes to another issue.

THE COURT: The Court has ruled. I allowed, it but that is it.

Q Would you tell the jury, Mr. Dumas, when you -- after you graduated high school, did you try college at all?

A Yes, I did. I went to Batavia, Genesee Community College.

Q What were your direction, what were your goal?

A I wanted to play basketball.
Q Professionally?
A Professionally, yes. That was my primary intention.
Q Did you end up going to the NBA?
A No.
Q The CBA?
A No.
Q Did there come a time when you gave up that dream?
A Yes.
Q What did you do next?
A Um, I went -- I transferred schools and I took some biology courses. I eventually kind of failed out. I realize school wasn't for me.
Q Okay.
A Being in school wasn't for me.
Q Did you fail out or make that decision?
A Well, gradually the courses got harder and I just -- it wasn't for me.
Q So what did you do?
A I went to move to Miami to work.
Q Did you have an opportunity for employment down there.
A Yes.
Q Tell us?
A I worked in a deli. My uncle was a manager of a market out in South Beach, so I decided to give it a try.

Q And um what kind of money did you make?
A Just minimum wages. Eight bucks an hour.
Q And was that strenuous work?
A Well, I was on my feet all day, you know.
Q I guess -- did you ever have a job where you had an office job or a clerical job?
A No.
Q After you worked in the deli for the store that your uncle managed, what other jobs have you had?
A Well, I decided that being a deli clerk wasn't for me. And um there was another job across the street in a restaurant and.
Q Anything more significant? Did you make a lot of money doing that?
A I made a dollar more and that was it.
Q And at some point, did you return to New York?
A Yes.
Q What brought you back to New York?
A My grandmother started getting sick and my grandfather passed away while I was in Florida, my stepfather passed away.
Q When you went back to New York, where did you live?
A In Brooklyn.
Q You still live in the same place?
A Yes.
Q Would you tell the jury, tell us a little bit about the

configuration of the place where you live?

A I live in an apartment. In order to get into the apartment, you have to go up 14 steps. I live on the second floor.

Q And who do you live with?

A My grandmother.

Q Now, for the period of time that you lived with your grandmother having returned from Florida, when did that period start? In other words, when did you come back?

A I'm sorry.

Q When did you come back from Florida?

A When?

Q Yes.

A I believe a year, right.

Q If you know it?

A Um '01, 2001.

Q When you got back in '01, what type of work did you do while you were living with your grandmother?

A Well, my uncle gave me an opportunity. He was speaking to me about an opportunity about working construction, iron work and I decided to give it a try.

Q And were you, did you enter the union immediately or something else?

A He got me a job on worker's permit. And I was excited about that.

Q What does that mean, "on worker's permit?"

A Well, when you first start, you are not a member of the union. You are eligible to work and you pay a fee and you can just, you know, you can do iron work.

Q Okay. And when you began to do iron work, was that your first experience in construction and the trade or had you ever worked in some trade before?

A Well, I used to help my friend, he had a paint company around the neighborhood. And that is it pretty much.

Q So let's talk about the iron work. When you began to do iron work on permit, what types of things did you do?

A When I first started, I did whatever they tell me to do.

Q What local was that?

A Local 40.

Q And what is the name of the local?

A Name of the local?

Q Yes. Besides the number, does it have a name?

A Union Iron Workers.

Q And are they different types of iron workers that are iron workers. In other words, are they structural?

A There are structural ornamental and reinforcement.

Q Now, as a worker on permit, were you in the apprenticeship school at that point?

A No.

Q So when you were working on permit, how would you get work?

A Well, you would have to sign, you know, sign your name in the hole and wait for your name to be called. But in my case, my uncle knew the foreman and got me a job but on permit work was sporadic. It was no guarantee work because I wasn't a member.

Q Did you have to defer to apprentices in the union or journeyman in the union?

A Yes.

Q You didn't get any preference over them?

A I didn't get any preference towards them.

Q When you did the work, however sporadic it was, tell me the type of exertions required by structural iron workers.

A Climbing, walking, lifting, bending. And you know iron work, I realize was -- it was a natural talent that I had. Something I was naturally good at. I was naturally a strong kid. I was agile. A hard worker. Hard work ethics.

Q How tall are you?

A Six feet.

Q How much did you weigh when you were working in '05, '06, '07?

A 200.

Q How much do you weigh now?

A 150.

Q And when you were working and you were in that body

type, what did you do to keep fit?

A I lift weights, played basketball, played hand ball, swimming.

Q Was there anything about playing basketball, playing hand ball swimming or even doing the iron work? Whatever they ask you to do, was there any way in which you were limited at all?

A No.

Q Did you have any disabling conditions which limited your exertions that you described before in any way?

A No.

Q Was there anything they asked you to do that you couldn't do?

A No.

Q Was there anything they asked you to do that you wouldn't do.

A No.

Q How about getting coffee, did they ask you to get coffee?

A Yes.

Q Did you do that?

A I did, yes.

Q What types of -- what types of tools, even as an apprentice on permit, what types of tools an iron worker works did you actually do?

A Well, I had a tool belt, a crescent wrench, spud wrench, bull pins, a beater and -- whatever the journeymen, iron workers needed, I would help them out. And eventually, as I got to work more hours, they gave me more responsibility to work. I worked with hell dogs, busted rivets. Plumbed up the building. Plumbed up means keeping the building straight. If it was leaning to the right or left side. Bolting up meaning getting bolts. When the connectors would connect the steel together, I would come and I would bolt up. Mainly, I would help the journeymen and I would only occasionally work, you know, I get a chance to try out the work.

I did also the detail work where you have to read the prints and come back after the bolter uppers did the job, inspect the iron. And if another plate needed to be welded, you know, an iron worker would come and weld the plate. All I would do pretty much was, you know, get -- burn the steel, set it up in a certain shape and the iron worker would weld it together and I would set up the torch. The torch to burn steel.

Q Did you actually burn steel or weld while you were working on permit?

A I never welded, but I burn steel.

Q Would you tell the jury at some point were you invited to join the actual union?

A Yes.

Q When was that? Let's get a time frame here. You

started working when you were on permit. When was that?

A That was '02. I started in '02 and up until '06.

Q And in '06, what happened?

A '06, I took a written test and I pass the written test. So technically, as you take the written test, you have to pass a physical and a drug test. And I passed. And um, I must say I was -- that was the best day of my life because I knew that I was doing something that I was naturally good at and I excelled at and it gave me a sense of purpose.

Q Now, Mr. Dumas, when you got into the union, you said you had the written test and the drug test. And I think you said a physical. What was the physical. What was involved in the physical that you had to pass to get into the union?

A You had to climb up a column?

Q Describe what that is.

A A column is -- first before you erect steel, you have to put a column in. The column it goes straight up. Maybe 10 feet, 20 feet. There is different sizes. And then um with a column, what we had to do is a column go up and then another on the side called a header beam would come in to connect to that. And we would make the structure and keep doing that. And what we had to do as an apprentice on a test was climb up this column and prove that we can climb up this column. It is not easy. It is very, very difficult to do. I had to lift. I had to get a gun, which is called an air gun lift up this heavy object and use it.

I had to pull up a crate of bolts all different type of materials to show my strength. I had to use chain fall. And a chain fall is something that where a hook is connected to a head beam and then another hook would be on the bottom of that hook. And whatever you want to lift up, be it a beam, a roster belt, you hook get this chain to hook around the piece of steel and use that chain fall to lift up the steel. And that was what I was doing. That is what I had to do for school for the test.

Q And after you passed, did you get into Local 40?

A 361, actually.

Q What is the different between 40 and 361?

A Territorial. Forty would be Manhattan, and Westchester. And then 361 would be Brooklyn, Queens, Long Island.

Q How did life change for you when you got into the union. Into the apprenticeship program?

A Well, it just took off for me. You know, my life took off. Because I had that stability that I have been looking throughout my life. Working these dead-end jobs and finally lie I had an opportunity to have benefits, health benefits, and the strength of the union to back me up. And plus the money was good. The money was good.

Q Had you ever earn before you became a union apprentice, have you ever earned 10, 15, 20, 25, 30, 35, 40, ever earn that kind of money an hour?

A No.

Q You ever had a pension?

A No.

Q You ever had a health plan?

A No.

Q Did you ever have an annuity?

A No.

MR. KAMINSKY: Objection to all of the leading questions.

THE COURT: Yes, this is your witness. You have been leading him from day one. Ask the question and let him answer.

Q Tell us about the apprenticeship school?

A They would teach you the basic of iron working. A lot of it was studying from a book. We would tie knots, test on knots. Measurements. Mathematics. You know, rulers. Um, they would point out the different, specifically different types of tools that consist of iron work, which is a lot of different tools. Um, there is an area where it is similar to a job site. And we would burn steel. First to see if we can burn straight like a straight line. Teach you how to put the goggle on and --

Q Let me just stop you for a moment. Where was the school?

A In Queens.

Q How often did you go to school?

A Twice a week.

Q And was that -- were you working as well as going to school or did school prevent you from working?

A I was working as well as going to school.

Q When you -- during that time frame, were you still living with your grandmother?

A Yes.

Q Was she able to take care of herself during that period of time?

MR. KAMINSKY: Objection.

THE COURT: Sustained.

A No.

THE COURT: Members of the jury, strike it from the record. Disregard that last question and answer.

Q How important was it for you emotionally to be living with your grandmother?

MR. KAMINSKY: Objection.

THE COURT: Sustained.

Q How important was it emotionally for you --

THE COURT: When you make an objection, if you don't stand before the Court, then I don't hear you.

MR. KAMINSKY: Understood, your honor.

THE COURT: Okay.

Q How important was it to you if, at all, emotionally to provide assistance and help for your grandmother?

MR. KAMINSKY: Objection.

THE COURT: Sustained.

Q Are you able now --

THE COURT: Sustained.

Q Has anything changed now?

THE COURT: Objection sustained. Not about the grandmother.

Q So what were your hours of work when you were working as an apprentice? What were the daily, when you start when you finish?

A Eight hours. And sometimes I would get overtime, time and a half. I would work Saturdays, sometimes Sunday also.

Q When you were working, what was a typical day without overtime?

A Um, eight hours. Eight hours of hard work.

Q And when you would get off of work, what time of day would that actually be on a regular day?

A Three o'clock.

Q And after three o'clock, you said that some days you would go to school. How many days a week was school?

A Well, first year apprentice, it would be Tuesday and Thursday. After -- school would start from five and end at seven. It would be two hours twice a week.

Q And was that different as -- did you ever make it to second year apprentice before your accident?

A Yes.

Q And what was the second year schedule?

A Um, same thing.

Q Now, tell me how available was the work when you became a union apprentice?

A It was pretty much consistent. Off the charts. Whenever -- there was no more sporadic work like when I was on permit. It was no more of that. It was constantly work.

Q And what projects -- give us an example of what projects or projects you were on once you became a union apprentice?

A I first started on the BQE. Brooklyn/Queens Expressway. We did reinforcement steel, grinding burning down taking out the old beams in the highway, putting new beams and we did this all across the span of twenty blocks.

Q How long did that job last for you?

A Two years.

Q And during those two years, um, was the work seasonal? Did you work in the winter, did you work in the summer. Tell the jury what times of the year you work?

A All year round.

Q How cold did it have to be before they told you to stay home?

A Below zero.

Q And how hot did it have to be before they told you to

stay home?

A Over a hundred.

Q When you did the work, was there anything in those two years on the Brooklyn Queens Expressway job, was there anything that you refused to do?

A No.

Q Was there anything that you could not do?

A No.

Q Were you physically limited in any way by any condition in your body?

A No.

Q Did you have any -- we were talking a little bit about scoliosis. Before this case arose, did you ever hear the word scoliosis?

A No.

Q Did anybody ever tell you that you had scoliosis?

A No.

Q Is your back -- is your spine curve in any way. If I asked you to take off your shirt, I am not asking you. But if I did, would you have any curvature that is visible in your back?

A I may have, yes.

Q Anything that significant?

A No.

Q Has it ever restricted you. Is it in your low back or in your shoulder area?

A I think my shoulder area.

Q Has it ever restraint you or limited you in any way of lifting steel?

A No.

Q Did it ever cause you any pain or discomfort when you were working?

A No.

Q When you were playing basketball?

A No.

Q Um, before this accident, had you been treated at all for anything related to your spine?

A No.

Q Scoliosis or anything?

A No.

Q Since this accident, have you ever been treated for scoliosis or anything related to any curvature in your spine?

A No.

Q Let's talk about your knee.

Did you ever have any concern for any, either of your knees before this accident occurred?

A Yes.

Q Explain that to the jury?

A I felt a mass behind my knee. And like in the back of my leg. And I was concerned about cancer. I have a history. My grandmother had cancer, my mother had cancer, so I really didn't

want --

MR. KAMINSKY: Objection.

THE COURT: Well, he said he had a history. Go ahead.

A So I was concerned about that and I wanted to get an MRI. I requested an MRI by my doctor. And um, there was nothing. The MRI showed nothing.

Q Well, you are not a doctor, so we will hear that later. I just wanted to ask you, was any treatment done for you relating to anything about that mass?

A No.

Q Did you miss a single day of work because of any limitation, pain, discomfort, anything relating to that mass?

A No.

Q Was there anything at work that you were unable to do fatigue wise? Did your knee tired out at all because of this mass?

A No.

Q Other than feeling it, did you notice anything else about the mechanics of your walking, climbing, lifting, squatting or anything like that?

A No.

MR. KAMINSKY: Objecting to the leading questions.

THE COURT: You continue to lead, you know that. Try not to lead him. It is your witness.

Q Did you suffer from any medical condition other than -- putting orthopedist aside. Did you ever had any heart condition?

A No.

Q Any respiratory problem?

A No.

Q Any persistent headaches or anything like that?

A No.

Q Were you under the care -- up until the day of the accident, were you being treated under the care of any orthopedist?

A No.

Q Orthopedic surgeon?

A No.

Q Neurologist?

A No.

Q Neurological surgeon?

A No.

Q Spine surgeon?

A No.

MR. KAMINSKY: Objection, your honor.

THE COURT: You are doing it again.

MR. BOROWICK: I'm just asking him about specialty.

THE COURT: If it calls for yes or no, it comes under the heading of leading. You know that. So try to

couch the questions so you don't fall into that of leading.

Q Let me bring it altogether. Was there any doctor that you were being treated by at the time of the accident?

A No.

Q Did you ever have physical therapy in your life before this accident?

A No.

Q Any pain medication that you arrived at the time or before the accident.

A No.

Q Anti-inflammatories?

A No.

Q Injections into any part of your body of steroidal substances?

A No.

Q Did you suffer from an alcohol abuse issue?

A No.

MR. KAMINSKY: Objection, your honor.

Q Drug abuse?

A No.

THE COURT: Let's move on.

Q Had you ever had any non-sports related injuries that required a doctor's attention, consistent doctor's attention. Non-sports?

A Non-sports like working.

Q Yes?

A I swing a beater a while back. You know, I pulled a muscle and I went to go check that out.

Q Did it knock you out of work for any period of time?

A No.

Q Any sports related injuries at all that were of any significance. I don't mean did you turn your ankle. Anything that took you out of commission?

A No.

Q Tell us about the job that you were involved in as an iron worker. And now we are talking about generally the job where your accident happened?

A It was a building, structural building. I believe a condominium. At the time of the accident, it was two floors were going up. Around two to three floors.

Q Was it a structural steel building or a concrete steel building?

A Structural deal.

Q Tell the jury what the different is?

A Well, concrete is just concrete. Structural steel is first we lay the steel out and then we lay out metal decking, which is the ground beneath the concrete for each floor. So that is what we did. And concrete building would just be concrete on each floor. It would be no steel.

Q Now, as of the day before the accident, you described

the work day and what it involve. Tell me what an off day in your life was. What did you enjoy doing when you weren't working?

A Um, just hanging out with friends, going out. Playing sports primarily basketball. Working out. Consistently I work out four to five times a week. I always help out -- my main problem was my grandmother. She is a part of my life and I will always be there for her. And, of course, going out weekends. You know, going to --

Q Did you have guy friends?

A Yes.

Q Did you have girlfriends?

A Yes.

Q Were you content as of the day before this accident with your life?

MR. KAMINSKY: Objection your honor.

THE COURT: Well, I'll allow it.

A Yes.

Q Now um, let me ask you because it has been brought up. I want to bring your attention to something that happened in 2004. You heard Mr. Kaminsky discuss it, the conviction of leaving the scene of an accident?

MR. KAMINSKY: Misstatement, your honor. It's a misstatement.

THE COURT: Let's -- it is five to one. We will

do it after lunch. We will do it after lunch. Members of the jury, I'm going to let you go to lunch. It is five minutes to one. I am going to ask you to get back here by 2:15 promptly so that we can continue the trial. Remember don't discuss the case amongst yourselves or with anyone else because you haven't heard everything all right. Keep an open mind. Enjoy your lunch. See you at 2:15.

COURT OFFICER: Jurors, I will open the door.

(Whereupon, the jury is exiting the courtroom).

MR. BOROWICK: Judge, do we have to leave the courtroom.

THE COURT: Yes.

(Whereupon, there was a luncheon recess held in the proceedings, at which time Admelinda Rubio relieves Nadonna Ferguson as the official court reporter)

THE COURT: Give your appearances.

MR. BOROWICK: Plaintiff, by Howard Borowick.

MR. KAMINSKY: Alan Kaminsky.

THE COURT: Before we broke, I think Mr. Borowick, you were about to ask questions of your witness, Kenneth Dumas, about the incident of 2004 and we broke. There was an objection.

Why was there an objection?

MR. BOROWICK; I was introducing the topic -- I will rephrase it. We are going to interrupt for an expert with the Court's permission and indulgence to take an expert. We will get back to that question.

THE COURT: Now, I told you what was my ruling, I told you I was going to allow you to question him, also about the underlying facts. I told you I was going to allow you to do that.

MR. KAMINSKY: No objection.

MR. BOROWICK: I would like to mark this Plaintiff's 2.

MR. KAMINSKY: No objection.

MR. BOROWICK: I will need the easel for the exhibits.

THE COURT: What is that?

MR. BOROWICK: Anatomical graphics of the knee surgery, hip surgery, the future surgery.

MR. KAMINSKY: I am going to object to these. I think it is unfairly prejudicial. I don't think it is necessary for this type of illustration to be presented to the jury.

Clearly, it is intended to inflame the jury. I think the doctor is more than capable to give a description of the surgery he performed. His records are in evidence.

THE COURT: Let me see.

MR. KAMINSKY: This is clearly designed to show bloody and graphic detail as to the alleged nature of the arthroscopic surgery. It is totally inappropriate.

THE COURT: Let him use the film.

MR. BOROWICK: Can I be heard?

THE COURT: You are always heard.

MR. BOROWICK: It sounded like you were making a resolution or decision.

THE COURT: Yes, let me hear you.

MR. BOROWICK: The fact that counsel thinks it is prejudicial, that's everything he offers is going to be prejudicial to me just like everything I offer is going to affect the case in

his disinterest; that's number 1.

Number 2, these are not intended to inflame anything. As a matter of fact, they are tempered by having less blood than anything. These are muscles and it is not intended to inflame, it is intended to educate.

I will tell you that in every single case I have with Mr. Kaminsky, these come in, usually without objection but the fact that we want to educate the jury, the doctor's testimony is not sufficient. The standard for demonstrative evidence.

THE COURT: Let me tell you what we are going to do: The arthroscopic surgery, fine. The total hip does not come in.

MR. BOROWICK: How could the jury --

THE COURT: That's the ruling.

MR. BOROWICK: Can I lay a foundation for it. If I lay a foundation for what is involved -- whether or not he needs one?

THE COURT: What is his specialty, this doctor?

MR. BOROWICK: Orthopedic spine surgeon who does these surgeries.

THE COURT: He did not do -- he did the

arthroscopic surgery in this case.

MR. BOROWICK: He did the arthroscopic surgery. He is of the opinion as other doctors that the patient needs and will need hip replacement. He has a 50 year old hip. It is generating bone on bone. When the doctor describes to the jury what is going to be necessary, how can the jury possibly understand that. They are hearing it for the first time. They don't have any medical training. A picture is worth a thousand words.

THE COURT: Not the rip replacement. I am going to allow the arthroscopic surgery, even though it shows way above what x-ray or MRI or one of those would show.

We do have MRI's and we can show it on the shadowbox.

What are the others?

MR. BOROWICK: There is a hip replacement, there is the knee arthroscopy and the other one has to do with the other expert. But, the total hip replacement is a dramatic procedure that he is going to go through.

THE COURT: In four years, he did not go through it yet. Let's put it away. He can testify about it and give his opinion, but we just won't

show it.

THE COURT OFFICER: It will be 3 and 4 in evidence, your Honor.

MR. KAMINSKY: I assume this is for identification purposes only.

MR. BOROWICK: I am not offering it for identification purposes. I am offering it, if they want to take it in the back during evidence, they take it.

THE COURT: It is for demonstrative evidence so they don't take it in. If they take it in, there is no one to explain it to them. That's why it probably should not be allowed.

I will allow him to point to certain parts, but not the total hip.

This is for demonstrative evidence, so they could be educated more. Usually, it does not have all those colorings to show, usually it is not that --

MR. BOROWICK: We make it as geographically as possible.

THE COURT: I don't know about correct.

MR. BOROWICK: It is correct except it is less bloody than the surgeries are. There is nothing in there other than it is less bloody.

THE COURT: I will allow what he did.

You have the MRI films, we have the shadowbox.

THE COURT OFFICER: It is marked for ID, 3 and 4.

THE COURT: What was 2?

MR. BOROWICK: Dr. Touliopoulous's office chart.

3 is arthroscopy graphic, then -- sorry. It is the knee arthroscopy graphic and 4 is the hip.

I have a model for identification of the hip that I would offer as 5 for identification, consistent with your ruling.

THE COURT: Yes. You can show that.

Bring the jury in.

MR. BOROWICK: Based on your ruling, I will mark the films and use them. This will be the hip.

THE COURT OFFICER: Number 6 for ID.

THE COURT: For ID, because the doctor will not be here to show it to them, he will show it to them now.

6 is the knee or hip?

MR. BOROWICK: 6 and 7 are the hip.

THE COURT: They are both the hip.

MR. BOROWICK: They are both the hip. My offer is for evidence.

THE COURT: I don't know if we can do it for evidence, because we won't have the doctor to point out to them.

MR. BOROWICK: He will have, during the --

THE COURT: Of course but when he is not here, that's why it is only for identification. 6 and 7 are MRI's correct?

MR. BOROWICK: Correct.

THE COURT OFFICER: Jury entering.

THE COURT: All are accounted for. You may be seated.

Members of the jury, when I spoke to you yesterday, I told you that there are times when we will take witnesses out of order, remember I told you so Mr. Dumas was on the stand. We will take a doctor in between then he will continue, because doctors usually are supposed to be saving lives and doing their best for us in their offices and the hospitals, so we try to get them in and get them out.

Mr. Borowick, call the witness.

MR. BOROWICK: Dr. Steven Touliopoulous.

S T E V E N T O U L I O P O U L O U S, called as a

witness having been duly sworn was examined and testified as follows:

THE CLERK: State your name and business address.

THE WITNESS: Steven Touliopoulous with a V. My address is 36 Seventh Avenue, Suite 502, New York, New York 10011.

THE COURT: You may be seated.

DIRECT EXAMINATION

BY MR. BOROWICK:

MR. BOROWICK: May I proceed?

THE COURT: Proceed, yes.

Q. Good afternoon, how are you sir?

A. Good afternoon. Well.

Q. I am going to ask you to keep your voice up, direct your remarks to the jury panel. And if there is a question I ask that is more complex that a human can answer, please let me know and I will try to rephrase it.

What is your occupation?

A. I am an orthopedic surgeon.

Q. What is an orthopedic surgeon?

A. Orthopedic surgeon is a doctor that specializes in disorders of muscloskeletal system, bones, ligaments tendons and joints.

Q. What background, education that you have that permits you to refer to yourself as orthopedic surgeon?

A. I went to college at Columbia University near New York. I majored in chemical engineering. I received a Masters in bio-engineering from Columbia. I went to medical school at SUNY Downstate here in Brooklyn. And after completing medical school, I stayed on at that same institution to perform my orthopedic training. After that, I did an extra year training in a fellowship in orthopedic medicine at Lenox Hill Hospital.

Q. During any of your tenure in your training, did you have an opportunity to work in emergency room?

A. Yes.

Q. Explain to those of us who watch ER what goes on in an emergency room, the purpose of an emergency room and the limitations, if any of an emergency room?

A. Well during my training at Downstate, when I was a resident, I spent a whole month in the ER of Kings County Hospital, where I was a physician seeing patients come in with multiple trauma.

The purpose of a trauma center, like Bellevue or Kings County Hospital, is to treat injuries that are potentially life-threatening.

Q. Doctor, did you have occasion to meet with

Kenneth Dumas?

A. Yes.

Q. Did he become your patient at some point?

A. Yes.

Q. When was the first time that you met with and examined Mr. Dumas?

A. It was October 8th, 2007.

Q. When was the last time that you evaluated Mr. Dumas?

A. April 28th, 2011.

Q. April 28th, 2011?

A. That's correct.

Q. For the period of time of three and-a-half years as his treating physician, have you seen him consistently; for example, in '07, '08, '09, 10 and this year?

A. He was seen consistently by myself as well my partner Dr. Merola.

Q. Did you over the course of that time, have an opportunity to examine him on each of the occasions you saw him?

A. Yes.

Q. Did you have in those opportunities, an opportunity to assess what medical treatment he needed?

A. Yes.

Q. Did you Medicate him at all?

A. Yes.

Q. Did you prescribe any physical --

THE COURT: No, do not lead the doctor.

Q. What types of medications over the course of the last three and-a-half years have you prescribed for him?

A. Well he has needed narcotic medication, and the one that we have been prescribing mostly, Vicodin, which is a strong analgesic medication used for pain, but it does have side affects of sedation, nausea and constipation.

Q. What is physical therapy in the realm of orthopedic surgery world?

A. Physical therapy prescribed to patients with orthopedic injuries to help regain their function. By function, I mean, their range of motion of the joint, their strength and their ability to use either their arm or leg.

Q. Is physical therapy always an effective remedy?

A. No, it is not.

Q. Is it ever?

A. It is, at times, yes.

Q. Medication, is it always an effective remedy?

A. Medication can help pain. Frequently it could take the edge of pain off, although, it does not cure the problem. The problem is still there.

Q. Is there a protocol in the orthopedic world as far as an appropriate approach to a problem or a condition going from less evasive to more evasive, conservative, to aggressive, is there such a protocol?

A. Yes.

Q. If there is, will you describe it to the jury?

A. Yes. There are some injuries that need immediate surgery. Such as, fractured hip, there are other surgeries treated conservatively with hopes they will get better with time and with medication and with therapy.

Over a period of time, we observe the progression, if the patient is not getting better or if they are getting worse, despite what we call non-operative treatment, we would discuss surgical intervention, if we believe that may help the patient.

Q. Now, with -- have you had patients that with medication, time and rest has eliminated their symptoms and complaints?

A. Yes.

Q. Have you had patients where physical therapy and time eliminated their symptoms and complaints?

A. Yes.

Q. Have you had patients like that?

A. Yes.

Q. Have you had patients that you operated on, where your goal was accomplished as far as the operation was concerned and also their symptoms and complaints were eliminated?

A. Yes.

Q. Have you had occasions where your goal in surgery was accomplished, in other words --

MR. KAMINSKY: Objection.

THE COURT: Let's get to this case. Come on.

Q. In other words where joints --

THE COURT: The objection is sustained. Rephrase the question and let's get to the case at hand.

Q. In this case, and we will get to the particulars of it, did you perform surgery on Mr. Dumas?

A. Yes, I did.

Q. In the surgery, whatever the goal of the surgery or surgeries were, was that goal accomplished?

A. Well, when we perform surgery, our goal is to make the patient better but we have to have realistic expectations so I always tell patients there is good

chance that your pain, stability of function and motion will get better but don't expect it to be new that you will still have some symptoms, hopefully whatever residual effects the patient has are not significant but it can vary from patient to patient, it depends on how successful the surgery is and what we find during the surgery.

Q. When, if for example, you operate on a meniscal tear, if the goal of the operation is to repair the tear, it would be a success if the tear was repaired, right?

A. It would be, the surgeon leaving the operating room would consider that successful but we don't know six months later how the patient is going to feel. It may be successful for the patient they maybe happy or he may still have problems with the knee.

Q. I guess the question I am asking is, like you said, there are patients that with your surgery, over time and rehab, they get better.

Are there patients which, who after their surgery, even with rehab and medication don't get better?

A. Yes.

Q. So, let me ask you this: With regard to patients of yours, what is the range and types of

surgery that you do, then we will get to Mr. Dumas?

A. Sure. I am general surgeon with subspecialty in sports medicine, the majority I do are injuries of the joints; such as, shoulder, elbow, hip, knee. I also perform surgeries on fractures, as well as patients that needs hip and knee replacements.

Q. Do you treat traumatic injuries, congenital injuries or conditions or both?

A. Both.

Q. What is the difference between a traumatic injury and a congenital condition?

A. Traumatic injury is basically the patient was normal before the event, had an accident and then had a problem whereas a congenital problem is something that a patient is born with and can deteriorate over time.

Q. Are traumatic injuries necessarily symptomatic?

A. You can, after a trauma, patients usually have symptoms, they may not occur right away, sometimes it may take a few days for a patient to fully appreciate the full degree of the injury. At other times, the symptoms, may be minimal.

Q. Have you treated patients who have sustained industrial accidents, meaning on the job?

A. Yes.

Q. How many -- have you ever treated iron workers before?

A. Yes, I have.

Q. On how many occasions would you say that you have operated on iron workers?

A. It is hard to give an exact number. I had referrals of iron workers I have treated. I do operate on a fair number of them but it still makes up a small percentage of my entire practice.

Q. How much of your practice is compromised of patients who are iron workers, construction people?

A. There are a lot more construction workers than iron workers.

Q. When you have a patient who has sustained a traumatic injury in an industrial setting, are there occasions where you have to come to court like today to explain to juries what your treatment has been and what your opinions are?

A. Yes.

Q. When you have to come to court to do that, do you charge a fee for your time away from surgery, the operating room and your office?

A. Yes.

Q. Are you charging me a fee, based on your appearance here today as opposed to the operating room?

A. Yes.

Q. When was the last time you did surgery?

A. Let's see, I did surgery on Friday.

Q. And, that was before the holiday week?

A. Yes.

Q. Tell me, in connection with your treatment over the last three and-a-half years of Ken Dumas, have you maintained a chart, based upon your care?

A. Yes.

Q. Is it your obligation by law to keep this chart?

A. Yes, it is.

Q. Have you brought your own copy to court as well as furnished a subpoenaed copy the Court?

A. That is correct.

Q. If you don't mind, you could use your copy and I will use the copy in evidence, exhibit 2 and I will be ask asking you questions, if you need to refer to that document because it is in evidence, you can feel free to do so, just kind of let us know if you are, if you need to.

A. Sure.

Q. Tell us, when you first met with Mr. Dumas, how did he come to be your patient?

A. He was referred to me by a colleague, Dr.

Andrew.

Q. At the time he referred you to him, was Dr. Andrew Merola a partner of yours?

A. He was not formally a partner, more or a less, a consultant in my practice.

Q. Did you have a practice to refer patients to each other, depending upon their injuries?

A. Yes, Dr. Merola specialized in injuries of the spine, where I specialize in injuries of the extremities. So if he were to see a patient with an extremity injury, he would refer the patient to me.

Q. Back to your experience in the hospital setting, let me ask you about diagnostic tests, so that when I ask you during the discussion about Mr. Dumas and his treatment, it will be in context.

Tell the jury in order of efficacy with regard to particular injuries, the hierarchy of objective testing?

A. Yes, there are tests that we perform as orthopedic surgeons to evaluate injuries of the muscloskeletal system. Our primary test is x-ray.

An x-ray is a quick test. It is a test that can be performed in the office setting and it has -- it does have limitations. It is a good test to evaluate arthritis problems as well fracture injuries, but it is

limited in that it does not show injuries of the soft tissues.

If you have a torn muscle, cartilage or ligament, you will not be able to pick that up on a simple x-ray.

Q. What is a CAT scan?

A. A CAT scan also uses radiation to evaluate bone structures. It is a test that can be used for abdomen and chest. As orthopedic surgeons, we use it to look at boney injuries and structures of the extremities.

Q. How effective is it in evaluating injuries or conditions related to soft tissue as you said, muscle, ligaments, nerves that kind of thing?

A. It is also very limited. It is perhaps slightly better than x-ray but it is extremely limited to soft tissue injuries.

Q. So if you have an injury to cartilage, ligaments, tendons, discs, any of those things, would you rely on an x-ray or CAT scan for an evaluation of soft tissues?

A. No, I would not.

Q. So, now let's step it up, let's go to the MRI.

Describe to the jury what MRI is, what is good about it and what are its limitations?

A. It uses magnets instead of x-ray beams to look inside the body. That is the benefit of not looking at bones, even though, x-ray is better for bones.

An MRI, it also looks at ligaments, tendons and cartilage. Even though with those structures, there is some limitation to an MRI.

Q. In what way are MRI scans of different joints limited?

A. An MRI maybe fairly accurate to see things, such as you have a completely torn tendon. It is, I would say more than 90 percent accurate to pick that up. If you have a ligament, that maybe stretched out and completely torn. It could frequently miss that problem.

Q. How are MRI's done, is it like a simple picture or is it something else?

A. Well, usually, you have to lie down in a machine. Film is inserted in the tube and the magnets are spun around. They affect the molecules. That gives you a picture.

Q. Is it one picture or more than one picture?

A. There can be multiple pictures.

Q. When you read an MRI, by the way, are you familiar with reading MRI's?

A. Yes.

Q. How often do you have MRI's done and how often

do you read them yourself?

A. I have MRI's done on a daily basis when I am seeing patients and I read my MRI's since I am trained to read them.

Q. If there is a symptom, if a patient complains subjectively of a symptom, are these tests there to -- strike that.

What is the difference between objective, and subjective, in the context of a clinical exam?

A. Subjective is basically, what the patient tells you what is wrong with them.

When the patient comes to the doctor, the doctor asks what happens, what hurts, what makes it worse, what helps it.

Objective is part of the physical examination. Those are things that we write down when we examine the patient. Those are objective physical findings.

Q. After a patient makes complaints and then after you do a physical examination, do you always know whether or not there is a fracture or ligament tears or anything like that?

A. No. You can have a suspicion on examination sometimes, but you also have the benefit of other tests that may help you in your diagnosis.

Q. When you do your clinical exam, after someone

gives you their subjective complaints -- have you ever heard the term of "clinical correlation"?

A. Yes.

Q. What is that?

A. It is when there is a correlation between what the patient tells you, which you will see on exam, and perhaps even what you find on the testing.

Q. As part of your job, as a diagnostician, is the goal of your investigation to clinically correlate the complaints?

A. Yes.

Q. The patient comes in, makes complaints, you do an exam, you send them out for tests. What is the next step?

A. The next step, you try to formulate a diagnosis and then you treat the patient according to your, what you think the diagnosis is.

Q. Are those objective tests we mentioned, x-ray, CT exam and MRI, will they show up every injury in the types of joint surgeries that you do?

A. No, they will not.

Q. Is there anything that will identify to a certainty, if there is such a thing, an injury to a meniscus, a ligament, anything in the body?

A. Yes. Well, even on MRI's that are accurate

sometimes miss something.

What we call the "gold standard" is to actually perform an arthroscopy when referring to the problem with a joint, where we actually go in with a camera, with little holes in the joint, actually, look at the ligaments and the cartilage and the tendons, whatever else is available to us to look at.

Q. Short of arthroscopic surgery, when you do an MRI of a particular joint, are there some joints that an MRI is more or less reliable with?

A. Yes. An MRI tends to be less reliable, particularly, with hip joints in diagnosing problems with the cartilage and the labrum.

Q. So Mr. Dumas comes in, do you take a history?

A. Yes.

Q. In his case, what was the history that he gave about why he was there and if there is a description about the particulars of an event, other than the elevation. Please leave that out.

A. Sure.

Q. Based on legal ruling that we have.

Go ahead.

A. He again was referred to me by Dr. Merola because of his extremity injuries. He was, at this time, I believe, when I saw him in 2007, he was 28 years

of age, he is right-hand dominant, and he was injured on September 26th, 2007, while working as a iron worker, when he fell approximately three stories.

He injured his neck and back in this accident, but was referred to me for injuries to his left shoulder, left hip, left knee and left ankle, as well as his right chin. He reported to me that he was seen at Bellevue Hospital and was diagnosed with two left group fractures. He denied any prior history of trauma to his left shoulder, left hip or left knee, although, he did report a history of left ankle sprain in the past.

He reported to me having headaches, and he was taking Vicodin for pain. He had back pain that radiated, shooting down his left-lower extremity. He was walking with a limp at this time and had difficulty sleeping at night.

Q. I want you to -- have you had an opportunity to review the hospital record from Bellevue for the admission and for the visits that he made to the clinic following the admission all before he saw you?

A. Yes.

Q. In that hospital record, what were they treating him for, principally?

A. Their concern were the rib fracture and the air that leaked out his lung which can be

life-threatening condition, that was their primary concern obviously when the patient was at Bellevue Hospital.

Q. I want you to assume, based on the hospital record which is in evidence as Exhibit 1, and I will read certain portions of it to -- did you read the entire record?

A. Yes.

Q. So, there are certain things I want to highlight because I want you to explain as a former emergency room attending, I want you to explain certain things.

In the hospital record, it indicates that he is on -- he is being medicated with morphine, at times hydrocodone, hydrocodine, Fentanyl. What type of medications, class of medications are those?

A. Those are narcotics, they are actually potent narcotics. Usually, with something like Fentanyl, it is administered in hospital setting.

Q. Will you tell the jury when someone is on any combination of those, how does that affect their cognition?

A. Well, it sedates them. The benefit it helps the pain, it helps severe pain but the downside is that it can cause sedation, confusion, change in mentation.

Q. Now I want you to assume that during the hospitalization for the fractured ribs and pneumothorax.

Explain to the jury what pneumothorax is?

A. Basically, it is when air leaks out from the lung. The air is encased in our lungs and in this particular case, the rib fracture punctured the lung and caused the air to leak out of the lung. We call that pneumothorax.

Q. I want you to assume he was treated with bedrest, with immobilization of his neck and his back and he was on fluids, I want you to assume that he continued to be on bedrest until he was discharged and was discharged the following day. I want you to assume those things.

Would there be -- strike that. Jump ahead for a second.

What parts of his body did you operate on him?

A. I operated on his left knee.

Q. If he is in bed, immobilized so that his rib fractures can heal or begin to heal and that his pneumothorax can resolve, would there be any pressure either on his hip or his knees such that would create symptoms for him, necessarily?

A. No. Obviously, he is bedridden. If he sustained hip and knee injury, especially if he is on

narcotic medication, he probably would not be aware of that until a later time.

Q. Assuming the principal diagnoses in that hospital record are concussion, secondary to fall parenthesis, TBI, mild concussion, TBI and fractured ribs with pneumothorax, does that, in the setting of emergency room, or one overnight observation, does that preclude that he had extremity issues, soft tissue injury?

A. No.

Q. Explain that.

A. Again, these are physicians that are not orthopedic surgeons that are treating this patient's potentially life-threatening injuries. Their concern would not be a sprain of his left ankle or injuries to hip and knee, especially if there are no fractures.

Q. Are you saying they don't care about his hip or knee?

A. I am not saying they don't care about that. It is not priority. We have to prioritize treatment. We have to treat what is most important first and then work our way down. In multi-trauma patients, you cannot fix everything at once.

Q. Did they, in that one or 24 hour hospitalization, did they attend to his hip, or his

lower extremities, did they attend to those, notwithstanding that there were no fractures or positive exams or that he was bed-ridden?

A. Sorry.

Q. Sorry.

Notwithstanding that he had not yet gotten out his bed, notwithstanding that his principal injuries were to his chest and his head, did they pay any attention to his lower extremities?

A. Yes, they did.

Q. Is that just because they had nothing to do or would there be a reason for those doctors with Mr. Dumas to do all the scans they did of his leg, hip, his back, his neck, chest, his head?

A. No, there would have been complaints, as you evaluate areas where you have suspicion of injury. In this case, they x-rayed his femur, which is not something you ordinarily do unless you have suspicion there may be an injury in that area.

Q. Would an abrasion of lower extremities give them a history of the 30 foot fall or three story fall or a 20 foot fall or 15 foot fall, would those kinds of, would that kind of history, together with abrasions and the mechanics of a fall dictate to you, as an emergency room doctor what tests or what suspicions have arisen?

A. Yes, I if I saw abrasions on a certain part of the body and I had suspicion of possible injury, I would more than likely order an x-ray of that area.

Q. Assuming he did x-rays and assuming he did some CAT scans and they were all negative, does that mean, as a result of this fall, from two or three stories, he did not have any injuries to the soft tissues in his knee or hip?

MR. KAMINSKY: Objection.

THE COURT: Sustained.

Q. Does one follow the other necessarily.

MR. KAMINSKY: Objection.

THE COURT: Sustained.

What did I tell you when you object when you are sitting.

MR. KAMINSKY: Sorry.

THE COURT: Sustained.

Q. Did they do the tests of other parts of his body besides his rib and his head?

A. Yes.

Q. Based upon your review of the record, were there reasons to do the testing of those areas: his leg, his back, his neck?

A. Yes.

Q. And, are these simple routine tests they do

whenever anybody falls from a height or are they specific to complaints and clinical findings?

A. Usually specific to the physical findings and complaints.

Q. So, after a day in bed with the morphine and the other medications, I want you to assume that he is discharged -- the accident was on the 26th of September, discharged on the 27th of September, were the tests to his lower extremity, his back and chest, other than doing that, were there indications in the hospital record that indicated on discharge he was having some problems attributable to his legs?

MR. KAMINSKY: Your Honor, I object to these questions.

THE COURT: In the hospital record, does it say that?

THE WITNESS: Yes.

THE COURT: Overruled. I will allow it.

Q. I will read from the portion of the discharge record, where it refers to management of care and it is the date of his discharge that with regard to walking, and standing, he needs assistance; with regard to transferring, he needs assistance; climbing stairs, needs assistance; bathing, he needs assistance.

Would these observations by qualified

healthcare providers in the family be subjective to you of more than just rib fractures and pneumothorax and a conclusion?

A. Yes.

Q. Why?

A. Well, if you have a rib fracture, it is painful but usually you can walk and you would not need crutches or a cane to help you walk; in fact, crutches which lean on your ribs can aggravate your rib pain. This signifies that the patient had injuries to his lower extremities that made it difficult for him to bear weight and fortunately required assistance to walk.

Q. Can you tell the jury when he needs, as per the same record, he needs crutches and a cane and I will read it directly:

Special instructions, crutch walking and walking with cane were taught. His symptoms were shortness of breath, nausea, vomiting, abdominal pain increased, rib pain unrelieved by prescribed medication.

What does that tell you about what was going on the 27th of September in 2007?

A. The guy was in bad shape. He had poorly controlled pain, the medications were not working. He could barely take care of himself.

Q. What about the walking, the teaching of cane

and crutch walking, why would they do that if a guy has bad ribs?

A. Well, again, he had difficulty walking because of problems with his leg and this does not have anything to do with his rib injury, it has something to do with his injuries to his lower extremity.

Q. Does the fact that he had rib injuries does that affect his abilities to cane walk and crutch walk?

A. Yes, it does. As I said earlier, the crutches would actually aggravate his rib pain.

Q. Why would they give him something that would aggravate his rib pain?

MR. KAMINSKY: Objection.

THE COURT: Sustained.

Q. Did they do a good job treating him at Bellevue?

THE COURT: Sustained.

Q. Did they do a thorough workup with regard to his rib and head, hip injuries?

THE COURT: Sustained.

Q. How would you describe his workup?

THE COURT: Sustained. Do don't do that. This doctor is not here to criticize. He is not here for that. He is here to report on his examination and whatever. Don't do that.

MR. BOROWICK: I have no interest in him criticizing anybody.

THE COURT: I will not allow him to answer. Next question.

Q. Was there any reason in the hospital to do a more thorough workup of the leg injuries, than they did?

MR. KAMINSKY: Objection.

THE COURT: Sustained.

Q. If you were in the emergency room, would you have done --

THE COURT: Sustained.

Q. He gets out of the hospital on the 27th, and he goes back a couple of times, according to the record, he ultimately comes to you on the 6th?

A. The 8th.

Q. When he comes to you, what are his complaints?

A. Again, he had complaints of his neck and back, as well as his left shoulder, left hip, left knee, left ankle and right shin.

Q. Tell the jury what clinical examination you did following his giving you his history and your taking his symptoms?

A. Sure. After the history, I examined the patient. I noticed that he had a moderate to significant antalgic gait, meaning he had moderate to

stiffening limb.

Q. Was he favoring one side or the other?

A. He would be favoring a side I do not specifically list that, would have been favoring his -- his left side was injured.

Q. When we use that term "favoring", what does that mean, where his weight is being borne?

A. When you are limited in your ability to put weight on one leg, the other leg has to bear the brunt of the weight. The other leg has more pressure, it has to do more work for the patient to walk.

Q. Beyond the antalgic gait you describe, in the rest of your examination and finding, if you make a significant finding, please explain to the jury what significance that is and how it helps you assess a patient?

A. Yes.

Had moderate to stiffening spasm of his cervical thoracic and lumbar spine basically his entire spine was in spasm. I was focused on his extremities.

We will go to the shoulder first. When I examined the shoulder, he was positive Hawkins and Neer's impingement signs. These are tests to evaluate irritation to the rotator cuff of the shoulder performed by raising the arm up and turning the arm in certain

directions.

The apprehension and relocation tests are positive. These are tests to evaluate the little ligaments of the shoulder. The patient brings the arm backwards, you will see if they have pain.

The other tests were tests for shoulder motion. His ability to do forward flexion, motion in this plane was limited to 90 degrees. Normal would be over his head. Abduction, motion to the sideways was limited 80 degrees, normally it would be over his head.

External rotation, which is the ability to bring the arm out, was limited to 30. Normally, it is 60 degrees.

Internal rotation, his ability to reach up his back was limited. He could only reach his rear pocket. Normally you can reach your upper back area.

Q. Hold your place for a second. I am going to ask you about those shoulder findings you made of limitation of motion in those planes, as part of your profession, career and particular expertise, are you able to connect the mechanics of an accident to a particular injury in a way that it would allow you to assess the causation?

A. Yes.

Q. Describe to the jury how the mechanics of a

particular accident help you to do that?

A. Of this particular accident or in general?

Q. We will get to this particular accident in a moment.

A. The mechanics of joint injuries with a history of direct trauma or twisting to a joint, those are two ways that you can injure the ligament, cartilage to a particular joint.

Q. I want you to assume that my client was, fell off in, fell from an elevation of two to three stories in a motion where his arms were outstretched and ultimately contacted a ladder on the way down and a concrete floor covered with pipes, down at the bottom, I want you to assume that prior to that, he never had any limitations, symptom, condition, treatment of either of his shoulders and that these symptoms that you found within, say, eight days, nine days, ten days, those are not only symptoms but your clinical findings, do you have an opinion as to whether or not those were caused in this accident?

MR. KAMINSKY: Objection.

THE COURT: Overruled. I will allow it.

A. I do have an opinion.

Q. What is your opinion?

A. That they were caused by the accident.

Q. Let's go to the next part of your examination.

Actually, I want to ask you to forego the discussion about his lower back and his head and anything related to his spine, because Dr. Merola will be here but focus your attention on his knees and hips?

A. Sure.

To finish up with the shoulder he had stiffening and weakness in the rotator cuff when I tested them. Then we moved on to the examination of the left hip. We felt tenderness on palpation --

Q. What is palpation?

A. Basically, means touching, pushing on the body parts. When we tested the lateral side which is the outside of the hip, as well as posterior region, which is the back region, the C sign was positive.

C-sign is when you ask the patient where does it hurt. He makes a C-with his hand and he cups it around his hip. This signifies there is internal problem inside the hip joint.

There was tenderness along the bursa area, which again was on the outside, the inferior. There is a degree of increased rotation of his hip being able to turn outward compared to the other side.

The importance of that, this signifies the ligaments. His hip may have been stretched out in the

accident. That caused looseness of the hip joint, that it actually rolls up than the lateral side.

Q. What complaints was he making, what symptoms was he reporting about his hip and the etiology of those symptoms?

A. Again, he had a pain in his hip. He was limping at this time, trouble sleeping, and he reported injuring this in the accident.

Q. Have you ever reviewed any document that suggested that he had a prior hip injury condition requiring any treatment or resulting in any limitation?

A. No.

Q. By the way, with the shoulders, with the hip, with the knee, is there any significance to the pre-accident state of the patient and the onset of the symptoms post-accident when you were considering causation?

A. Yes.

Q. Explain that to the jury?

A. Well, if patient did have a pre-existing problem, it would be helpful for us to know that, we need to determine how much worse is the problem from the accident and whether, what new injuries may have occurred from the trauma.

Q. When you examined his hip, and did you make

any positive findings, which mean, on your own, not based on or by virtue of the subjective complaints, were you able to, with your hands and your experience objectify any problems with his hip?

A. Yes.

Q. What problems, what signs or findings?

A. The external rotation that he had, that is something, I have the patient lie down on his back.

Q. I am going to stop you and ask the officer to hand you this exhibit. I think it is deemed marked 5. Explain the testing that you did and what your findings were?

A. Sure. This is a model of the pelvis, right and left hips.

The hip joint is a bone, socket joint, it is deep socket and a large ball, around the socket you have something called labrum, cartridge, hip joint. Between that and the hip, is your ligaments, and your capsule. So on examination, the patient when he was lying on the table, his left leg, entire leg turned outward, signifying the ligaments of the front of the hip were stretched out and the hip which normally would be in a neutral position at rest was turned outward.

Q. With his symptoms and your clinical findings of his hip injury, if he had that injury before his

accident, would he have been able to work for years as an iron worker, climbing steel, squatting bending, lifting and normally playing basketball etc?

MR. KAMINSKY: Objection.

THE COURT: Overruled. You may answer?

A. No, he would not have been.

Q. Did you assess his condition at the time of your first clinical exam or did you send him for any testing?

A. I had an impression when I first saw him. I also send him for testing also.

Q. With regard to the hip, when you sent him for testing, what type of testing did you send him for?

A. He had initially had a regular MRI scan of the hip.

Q. Can we agree there was no fracture in his hip?

A. Yes.

Q. Did the MRI show any pathology, any disease or damage in his hip joint?

A. It showed damage in the hip joint.

Q. Would you describe what the MRI showed?

A. It showed a tear of his labrum. The labrum is that rubber structure that surrounds the cup and helps deepen the cup, adding stability to the hip joint so that the ball will more likely stay in the cup.

Q. Would you tell the jury whether or not in your examination of the MRI --

MR. BOROWICK: Why don't I do this: I am going to ask, with the Court's permission, that we have the shadowbox used and these exhibits which are now Exhibits 6 and 7 -- is there any way we can get it on to this cable because it is very far and it is not very big?

THE COURT: We will see -- if you can't see, let me know jurors, because we usually put it up here. If you can't see, let me know.

You may step out.

THE COURT OFFICER: Previously mark 6 and 7, two MRI's.

Q. Are those MRI's of the hip?

A. Yes, they are.

Q. I don't know if the jury can see, I can't see it.

THE COURT: Put it in there.

Can all the jurors see the MRI in the shadowbox, can you see?

JUROR: We can see but we don't know what we are looking at.

THE COURT: There is no electricity, stand up here. Remember you are the ones who will make

the decision. You must see.

Q. Choose the optimum site that would show your findings, show it to the jury. Stand to the side while you are pointing.

A. This is an MRI scan of the patient's left hip. It was performed February 21, 2008 on patient Kenneth Dumas.

These structures here are the muscles that surround the hip joint. These darker structures are actually the bone and I am going to draw your attention to this black triangular structure here and that is the labrum, that is the structure that helps to cushion and stabilize the hip.

You see this white signal here, between the black triangle and this bone, that is the actual tear of the labrum. Ordinarily, there is no white signal between the labrum and the bone. And you could see here in the posterior labrum, this a black triangle, that there is actually no signal because it is not torn.

In the interior labrum, you see this white line, it is small finding but significant finding in that the labrum is torn and this results in pain and dysfunction.

Q. You may resume your seat.

THE COURT: Jurors resume your seat.

Q. Let me ask you: Doctor, in your evaluation of the patient's hip, with the MRI and the clinical findings that you made on exam, and the history of his premorbid state, did you assess whether or not, whether he did or did not, did he have any pre-existing pathology of that hip, pre-accident?

A. Of the hip.

Q. Of the hip.

A. There was no clinical evidence, meaning there was no point of history of problems with this hip when the patient reported to me in the office. There was no clinical evidence, there was no radiographic evidence meaning x-ray or MRI that would show he had pre-existing or congenital, a problem he was born with, problem in his hip.

Q. Counsel, in his openings, suggested it would be proof that he had a degenerating hip at the time of this accident. I want you to assume that in his 28 years, he never had treatment for his hip, never had injections, physical therapy, medications, disability, physical limitation, notwithstanding heavy labor work and significant athletic skills and experience.

Do you have an opinion with reasonable degree of medical certainty, having looked at that MRI, is there any sign other than the torn labrum that there was

any pathology there?

A. No other evidence.

Q. So, with regard to his hip, how did you treat that?

A. Well, we treated, we gave him time to try to get better, although we, I knew there was a good chance that he would have needed surgery eventually. However, surgery is always the last resort, so we wanted him to try to get better on his own, let it heal as best as it can and knowing if it did not heal, would need a surgery.

Q. Did you employ physical therapy?

A. Yes.

Q. What type of physical therapy did you employ towards his treatment?

A. Well, you know when he came to see me, his hip was weak and stiff. The therapy was to help regain as much motion and strength as possible in his hip joint.

Q. Were you able to do that with physical therapy?

A. I believe, therapy, perhaps helped his motion a little bit but it overall did not make a big difference as far as his recovery.

Q. What about his level of pain, when he came to you, did he have in addition to the limitations in all

those different planes that you mentioned, did he have any pain from his hip?

A. He had pain up to the time of the surgery of nine out of ten. One of the visits I have prior surgery, I asked him how bad is your hip pain and he told me it was nine out of ten. Ten being the worse possible pain level.

Q. Let's face it, there are some people who come into your office, I am sure that are whiners, have a lawsuit going or trying to get narcotic medication, do you have to, as part of your assessment process, determine whether or not the person's symptoms coincide with your findings or his symptoms are anatomically consistent?

A. Absolutely. Especially, if considering a surgery, I want to know that the symptoms are real and the surgery is necessary.

Q. When did you first -- with regard to that, over the course of the four years or three and-a-half years that you have been Mr. Dumas's treating orthopedic surgeon, have you assessed whether or not his complaints, subjective complaints correlate to your clinical findings?

A. Yes.

Q. Have you ever thought, in any, on any

opportunity that you have had to see him, have you ever assessed him to exaggerate?

A. No, the opposite. The guy always expressed interest to go back to work. Other parts of his body that were injured, he reported to me they got better such as his shoulder and ankle. He was focused on the parts that were still bothering him.

Q. As a patient for 3 and-a-half years, did he do everything you asked him to do?

A. Yes.

Q. Was he cooperative?

A. Yes.

Q. Compliant?

A. Yes.

Q. Tell the jury when it came time for the surgery, did the surgery happen as soon as you decided it was necessary, or was there a gap in time?

A. There was a certain gap in time.

Q. I am going to ask you, when for the first time, having begun treatment in October of '07 when did you feel surgery was the road you were going to take?

A. I have to refer to my records.

THE COURT: You may.

Q. Maybe I can short-cut it?

A. I appreciate that.

Q. Assuming your hip surgery that you performed was in January of 2010, about a year and a half ago, how long a gap had there been from the time that you believed his surgeon recommended the surgery to the time when that occurred?

A. Well, I more than likely would have recommended surgery after seeing his MRI, which was 2008. But, of course, he had other injuries and other problems that we had to deal with.

Q. Did you do knee surgery before the hip surgery?

A. Yes.

Q. Do you have to coordinate as his doctor and do you have to assess what is the worst and address that or do you try to address them all at the same time?

A. We try to assess what is worse. When both things are worse, you have to flip a coin.

Q. What was worse in this case, his hip or knee?

A. I think they were both bad but we did his knee surgery first.

Q. Tell the jury, let's go to the knee now. I want you to tell the jury from the beginning when he walked into your office with the antalgic limp what complaints he made about the knee and what exam and clinical findings you found before the testing was done?

A. Again he had complaints of knee pain caused because of his limp. He had complaints of knee pain, he was limping at this time. On examination, I found that he was -- he had water in his knee, consistent with a trauma. He had a mild to moderate effusion.

What effusion is, it basically is fluid in the joint.

Q. What is the body function, when the body reacts with injury, with effusion or fluid in the area of the injury, what is the goal, the body's goal or nature's goal in effusion?

A. It is kind of like, if you get poked in the eye and your eye waters, it is the body's response that something is wrong or traumatic event, it creates effusion to make the knee swollen to make it stiff so that you actually don't use it, so it tries to heal.

Q. When you examined the knee and you found the effusion, was it in his right knee, left knee or both?

A. Left knee.

Q. Tell the jury what other findings you made?

A. There was medial and lateral joint line tenderness. In other words, when I palpated his joint line, which is a test we do to test for meniscal pain, that it created pain. We also found that the lachman test and the anterior draw test were positive.

These are tests that are specific for the anterior cruciate ligament.

Q. We are way ahead of ourselves.

I am going to ask you, with the Court's permission, if you can step down and using these graphics, which are marked for identification, if you would use them, give us a little bit the anatomy of the knee, then we will do the knee, what was damaged, what was done.

First we will look at Exhibit 3 for identification.

A. These are diagrams of the knee, and this is a left knee. Here is the small bone, it is on the outside. And, it is recap of the anatomy of the knee. It is made up three bones: The femur, lower part of the femur, upper part of the shin bone, the tibia and the kneecap.

Q. What is femoral condyle?

A. Femoral condyle, there is the medial which is the end of the femur and they make up the upper part and there is the lateral condyle, lateral femoral condyle and medial femoral condyle.

Q. And you said the tibia is the shin bone.

What is the surface that articulates in that joint, what is the surface called?

A. This is the articular cartilage. Unless, you are vegetarian if you see the end of a chicken bone, it is that white shiney thing, it covers the bone, it looks like this.

The meniscus is a disc like substance, analogous to the labrum in the hip, which helps to cushion the knee joint. The condyles bear some weight on the meniscus. When we are walking, some weight goes on the articular cartilage.

Q. What is the part of the tibia that articulates with the joint, what is that called?

A. That is called the upper part of the tibia that articulates with the femoral condyles, it is called tibia plateau. The knee, as you can see.

The hip has a deep socket, the knee does not, it relies heavily on ligaments to keep the knee in place so it does not dislocate.

The main ligaments of the knee are the medial and lateral ligaments which are the inside and outside of the knee respectively as cruciate ligaments. They call it cruciate because they make a cross. It is in the center. This is a good diagram of that. Those ligaments help stabilize it.

Q. Now, when some athlete has a sports-related injury, he tears his ACL. What does that mean?

A. He hurts his anterior cruciate ligament, it is a ligament hurt in accidents, could be sporting accidents, car accident, work accident.

It is a significant amount that can be hurt with direct trauma to the knee or some sort of twisting of the knee.

Q. The ACL or the other one, what is the other one that works with the cross?

A. Posterior cruciate ligament.

Q. PCL and ACL, do they have a specific function with regard to functioning of the knee?

A. Yes.

Q. Tell the jury why they are significant?

A. They help stabilize the knee. People who do not have a functioning cruciate ligament, significant symptoms of pain, swelling, stiffness and mechanical symptoms such as buckling, locking when walking, that is when the knee gives out.

Q. Did, in your assessment of Mr. Dumas --

THE COURT: If you are finished with diagram, take your seat.

MR. BOROWICK: I am not finished.

Well then get to the diagram. I don't want him lecturing to the jury outside of the witness stand.

Q. Let's finish with the diagram.

Will you tell the jury when you ultimately had to do surgery on his left knee for what condition or conditions and what were the, what was done and what the procedure was that you did?

A. There are two main conditions that we did for surgery. One was a tear of his medial meniscus. There are two menisci. One is on this medial and one is on the outside called the lateral meniscus. He had a tear of the medial meniscus resulting from this accident.

Q. Did that show up on the MRI?

A. Yes, it did.

Q. How did you repair that?

A. We performed arthroscopic meniscectomy.

We performed this through two holes and we go in with the camera -- and it is depicted well here, one hole and the other hole. We have a shaver and we shave the meniscus tear and we use a biter to bite those pieces. Unfortunately, rarely is it something that can be fixed. Usually, it has to be removed. It is avascular, it does not have a good blood supply. If we stitch it up, it will not heal.

Q. Did you stitch it up?

A. It was not worth stitching it up.

Q. If meniscus is not salvageable and you have to

remove it or part of it, does that change the mechanics of the joint?

A. Yes, it does.

Q. Explain to the jury how it changes the mechanics of the joint and what -- how that affects a person in real life?

A. Well, as I said earlier, the meniscus is a cushion, basically, of the knee. And, it is there for a reason. It helps to relieve the stresses on the cartilage and bone. So without the cushion on, there is going to be more pressure on the medial foramen condyle.

Q. From anything you saw whether before in the office or when you went into his knee and viewed it directly, was there anything about that knee that was existing pre-accident?

A. No.

Q. Have you examined patients where they will have degenerating --

THE COURT: Take your seat.

MR. BOROWICK: I want to keep him --

THE COURT: Then don't go with other patients. Ask him about Mr. Dumas, then when he takes his seat, you can ask general questions. Finish with the diagram.

Q. Tell us what else you found when you went into

his knee other than the medial meniscal tear?

A. We found an injury to the anterior cruciate ligaments.

Q. Had that shown up on MRI?

A. No.

Q. How do you explain that?

A. As I said earlier, the MRI is a good test but it is a test also that can miss certain things.

Whereas it is fairly accurate to diagnose a meniscus tear and it may be fairly accurate to diagnosis a full ACL tear, it is relatively inaccurate to diagnose a stretched out ACL or ACL that maybe partially torn because the MRI sees fibers that are still attached and functional.

Q. Let me ask you this: When the MRI came back with meniscal tear but no ACL mention, what clinical findings did you have that suggested that there would be more than meniscal tear?

A. I knew from the first visit his ACL had a problem. I performed the Lachman test, the anterior drawer test, and the pivot shift test and they all produced positive findings.

So I knew from the get-go that there was a problem with the ACL, it did not surprise me that the MRI did not show me that, but it was confirmed when we

did the surgery.

Q. When you went into the surgery, during the surgery, what was it that you saw, the tear and what did you do for it?

A. We saw a tear, the partial tear in the area where the ligament attached to the femur bone, the femoral bone here. We did something called anterior cruciate ligament, ACL reconstruction, so we removed the dysfunction remanent of the ACL and we reconstructed it. We put in a new tendon, which would be converted to ligament. We use the achilles tendon of cadaver, it is a heel tendon of somebody that passed away.

We made additional incisions, we drill holes in the bone, and we put in the cadaver ligaments with screws to hold it in place otherwise it may loosen, holding that. It will be incorporated by the patient's body and be a functional new ACL.

Q. This was done with arthroscopic tools?

A. Yes. The meniscectomy was performed arthroscopically.

THE COURT: Take your seat.

A. And ACL was performed with additional small incisions in order for to us drill the holes and put the ligament in the body.

Q. Leading up to the surgery in his knee in '09,

what were his complaints -- strike that.

Leading up to the surgery in '09, what modalities of treatment had you exhausted in the treatment, there was no other modality?

A. We tried assisted devices such as cane, anti-inflammatory medications, physical therapy and narcotic medications.

Q. Did any of them provide other than temporary relief?

A. No.

Q. Did any of them return him to function?

A. No.

Q. Did any of them improve his knee condition?

A. None of them improved his knee condition for a significant period of time.

Q. Was his meniscal tear and ACL injury painful?

A. Yes.

Q. Is that a painful injury?

A. Yes, it is.

Q. Tell the jury how painful was it and what things did you do to elicit the painful response.

MR. KAMINSKY: Objection.

THE COURT: Overruled.

You will have cross-examination. Go ahead?

A. Can you repeat the question.

Q. Let me rephrase it. It was a little convoluted.

What test did you perform that elicited a painful response?

A. We performed the pivot shift test. It is a test to test the ACL that produced the pain and apprehension. We performed the meniscal signs, which is test for meniscal tear, that also produced pain.

Q. Would you tell the jury the surgery that you did, was it successful, in other words, did you affect the change in his meniscus that you wanted?

A. It was successful in what we did after. We cleaned the meniscus tear and we reconstructed his ACL.

Q. When I asked you or when you say the surgery or the procedures were successful, did the surgery or procedures you perform eliminate his pain?

A. It did not eliminate his pain, no.

Q. Did it return him to function?

A. It did not return to normal function, no.

Q. Did it make it, his knee, such that he would be able to climb iron, climb stairs, squat, lift heavy items --

MR. KAMINSKY: Objection.

Q. Did it return to that level of function?

THE COURT: Leave the iron part, because I don't know his --

MR. BOROWICK: Familiarity. Okay I will leave it out.

Q. Are you familiar with the work that iron workers do?

A. Yes.

Q. How are you familiar with the work that iron workers do?

A. I have had prior patients that I have treated, I ask them what do you as an iron worker.

Q. How many patients would you say -- I hate to cut you off but we want to finish.

How many patients would you say over the course of your decades of treatment -- are you a doctor for more than 20 years?

A. Almost 20 years.

Q. For whatever period of time you are a doctor, how many construction or iron workers would you say you treated?

A. Again, it will be dozens.

Q. In treating the dozens of iron workers that you treated, are you familiar with the kind of exertions they do and kinds of positions they have to be in to do their jobs?

MR. KAMINSKY: Objection.

THE COURT: I will allow it.

A. Yes.

Q. In what way was his repaired knee still limited in what he could do, if that was his only be injury as an iron worker?

MR. KAMINSKY: Objection.

THE COURT: Sustained. Tell us how it was limited. Period.

A. He had, although, it did help him to a certain degree, he did have symptoms of stiffness, discomfort, swelling, intermittent episodes of looseness to his knee.

Q. How would that affect somebody trying to climb iron, squat, lift heavy objects or even go up the stairs.

MR. KAMINSKY: Objection.

THE COURT: Overruled.

A. Obviously, someone who has a loose knee is at risk for the knee to give out, to walk on beams, debris, to walk up ladders and inclines is at risk. His knee is stiff which would make it difficult for him to kneel and squat.

Q. With regard to the hip scope that you did after the knee scope in 2009. The scope assisted

surgery that you did, when you did the hip surgery, would you describe it and come down with the Court's permission. Take us through the hip surgery, what you did to repair it?

A. These are pictures of the hip joint. Again, we performed an arthroscopy of the hip. Meaning, we made small incisions around the hip to be able to put our instruments into the joint. We performed several procedures.

We found damage to the articular cartilage to his hip, in the cup. Remember, the hip is a ball and socket. The ball or socket was damaged to significant degree. There was basically an area where there was bone and no cartilage covering the bone.

Q. How is it that you can say with reasonable degree of medical certainty that other than the labral tear occurring in this accident, he had a -- how do you know it was not pre-existent?

A. If he had these findings, he would have pain, that he would not have been able to perform his job duties.

Q. When you did the MRI and it showed the labral tear, how would a labral tear affect damage on a cartilage?

A. The labral tear and cartilage damage was in

the same area. The trauma of the accident damaged this area with the cartilage as well as the labrum. It caused a tear here and chipping of the cartilage, also, stretching the ligaments, which is this structure here around the hip.

And over time, because of the mechanics, this is a hip that is no longer moving properly because of the damage to labrum and cartilage, you can develop secondary problems. The problem he can develop gradually over a period of years is something we call "femoro-acetabular impingement." because the hip is moving differently, the bones are moving differently, you form a bone spur.

Q. When you did the MRI, when the MRI was done, was there any evidence of any degenerative process going on in the area of the labrum other than the labral tear?

A. There was no degenerative process. The labral tear, I would not call degenerative.

Q. Was there any pathology going on in that hip joint when the MRI was done after the accident?

THE COURT: If you are talking about the MRI, take your seat.

Q. Let me rephrase it.

Other than the labral tear, which you indicated was caused in this accident, was there

anything else shown in the MRI that indicated any degenerative process that resembled what you saw when you went into the hip?

A. No.

Q. Do you have an opinion with reasonable degree of medical certainty as to whether or not any problem with his hip that he has experienced since you saw him for the first time is in any way pre-existing this accident?

A. I do have an opinion.

Q. What is your opinion?

A. My opinion is that there was nothing pre-existing.

Q. Do you have an opinion with reasonable degree of medical certainty as to whether or not the damage to his meniscus and the damage to his ACL, which you found clinically and then arthroscopically, did any of that pre-exist his accident in September of '07?

A. No.

Q. When you went into his knee in '09, other than damage which was consequential from the meniscal tear, did you see any damage that was long-standing pre '07?

A. No.

Q. Now, having done his, the scope on his hip, and having done the arthroscopically assisted surgery on

his knee, is he ready to go back to work?

A. No, he is not.

Q. Can he do anything that requires standing, prolonged standing, prolonged sitting, lifting, climbing anything like that?

A. No.

Q. Why not?

A. He has ongoing symptoms. Right now, his knee still has problems majority of the pain is in his left hip. We are blaming the damage to his cartilage that he has there. This is irreversible damage even though we cleaned it, it is still there over period of time, years. It will progress, it will wear out. It will result in increasing pain and arthritis in the joints.

Q. Now, other than his left knee and left hip as a result of his antalgic gait and the pressure when he is favoring and protecting his left side, has he developed any other conditions as a consequence of the injuries and treatment?

A. Yes, he has.

Q. Tell the jury?

A. He has developed problems in his right knee. This is from a prolonged period of walking, because of his knee and hip injury, right knee meniscal tear. What we recommended is surgery for that.

Q. In your opinion, what future -- do you have an opinion as to whether or not he will require future surgery, let's start with his hip?

A. Yes.

Q. Explain to the jury what is in store for Mr. Dumas with regard to his hip?

A. Sure.

Again, his hip has an area where there is bear bone, this is a progressive problem, it develops into progressive arthritis. He is a very young gentleman to have this serious problem.

Over the next couple of years, we expect the arthritis to progress to the point he will need a total hip replacement.

Q. What is involved in total hip replacement, give us thumbnail how it is done.

MR. KAMINSKY: Objection. This is speculation.

THE COURT: Let me rule.

Overruled.

You treated him and you examined him and you did the surgery?

THE WITNESS: Yes.

THE COURT: I will allow it.

Q. Explain to the jury what the procedure is?

A. I will refer to the model again. Hip replacement is actually surgery where you address arthritis of the hip joints. You remove the ball and you shave down the cup. You put in a metal cup and a metal ball for the patient to walk on, either a plastic or metal liner between the ball and the socket.

Q. Is that considered serious surgery?

A. Evasive surgery than arthroscopy.

Q. What is the rehab time for that?

A. To do the surgery, you have to make a regular incision, you have to go down between muscles. There is more pain involved, long recovery because of the dissection involved to do the surgery.

Q. When you say you take off the hip and you -- I forgot the word you used, did you say ream it out?

A. I may have used ream.

Q. When you do that to the cup to make room for the metal cup, when you take off the ball, how do you do that?

A. We are kind of like carpenters, we use power tools. We have a saw that we use to remove the head, we have to cut the bone here with a saw. Then, we ream, we drill the shaft of the bone to accommodate the stem that we put down the shaft. Then for the cup, we use a reamer. It is a ball, it actually smooths and planes

out the arthritis so it can fit in a cup.

Q. When, is it your opinion, that he will need the hip replacement?

A. I would say the next two to five years.

Q. How long do those replacements last?

A. They wear out. It is metal. It will wear out. The younger somebody is, the more they are going to work, the more it is going to wear out, the faster it is going to wear out. We say on average 15 years, but in this case, probably will be less.

Q. What is your experience, based on your experience -- have you ever done hip replacements?

A. Yes.

Q. How many would you say?

A. Hundreds.

Q. Based on your experience doing hip replacements and based on your treatment of Mr. Dumas over the last, almost three and-a-half years, how many hip replacements or how many revisions after the hip replacements, which would be done in the next two, five years, how many revisions would you have to do?

A. It would be on average, every 15 years.

Q. So if he is 32 now and you do it by the time he is 35, to take an average 15 years from then would be 50 years then another 15 years from then would be 65.

If he lives through his life expectancy, in his late 70's, have you ever seen anybody go through or have a hip replacement in three or four revisions?

A. Yes. Unfortunately, the revisions are more difficult, they don't last as long, so there is very good chance that he will need three to four hip replacements.

Q. With the knee, does he need any further treatment with regard to his left knee, you told us about the right knee, he needs a scope on the right knee, but what about the left knee that you repaired, is that home-free?

A. No. It has ongoing problems. Right now, we kind of have it on the back burner, because his hip is still very much a problem. But it is something that is a problem and will need further care.

Q. What type of followup care is he going to need with regard to his left knee?

A. Matter of medications, and intermittent injections as well as bracing.

Q. Can you tell us, if as a young man of 28, besides having a very physical job, he enjoyed playing basketball, handball with his friends, that he was active, he had an active social life, with regard to the physical aspects of his non work-life, do you have an

opinion with reasonable degree of medical certainty as to whether or not he will be able to resume those aspects of his life, not the social life, go to movies is another thing, but the activities part?

A. No, as far as being active, athletic, he will be limited by his knee, so he will not be able to perform activities such as basketball or soccer. Even with a hip replacement, obviously, he will still have issues with the knee. With hip replacement, you don't want to run with it. If you run with hip replacement, you will wear it faster.

Q. I want you to assume that he lives in an apartment building where there is no elevator but he has to walk up stairs, 14 stairs. Is that type of activity, good exercise for him or is it acting on that joint, those joints?

A. Stair climbing does put increased stresses on the hip and knee and his hip problem and the area where he has the arthritis from he hip trauma is in the front of the hip. When you are walking up the stairs and bending your hip to go up the stairs, you are putting more pressure on the area that is causing arthritis.

Q. With regard to his ability to ever do construction work again, do you have an opinion with reasonable degree of medical certainty as to whether

over the last three and-a-half years he has been able to do construction work?

A. I have an opinion.

Q. What is that?

A. He is not able.

Q. At the present time, do you have an opinion with a reasonable degree of medical certainty as to whether or not he could do any manual labor type of work that requires being on his feet or lifting, crouching, climbing, anything like that?

A. I do have an opinion.

Q. Do you have an opinion within a reasonable degree of medical certainty as to whether or not in the future, he will ever be physically able to sustain a job in manual labor or construction?

MR. KAMINSKY: Objection.

THE COURT: Overruled. You may answer.

A. I have an opinion.

Q. What is that?

A. He will not be able to.

Q. As to the hip and knee, do they affect his ability for lengths of time?

A. Yes.

Q. In what way?

A. Again, as I mentioned earlier, the -- sitting

is very difficult. Especially with respect to the hip injury, because when you are sitting, your hip is flexed forward, there is more contact in the area that has arthritis, even something as simple as sitting in the chair can be painful with this condition.

Q. If he sits on a hard bench, how about that?

A. That's also difficult.

Q. Now with regard to -- you are not suggesting by the way, that he cannot ever do any kind of work at all, are you?

A. No, I am not.

Q. Did you find him to be a motivated individual?

A. Yes.

Q. Intelligent individual?

A. Yes.

Q. His last visit to you, what were his complaints, now 3 and-a-half years later, what were your findings and what was your treatment?

A. Again, he had pain in his back that radiated to his left thigh, numbness to his left thigh, had difficulty -- let me start over. He had ongoing problems with both his left hip and left knee. His left hip affected more than his left knee, his left knee had symptoms of stiffness, discomfort, swelling and intermittent episodes of looseness.

His hip had soreness, intermittent pain, aggravated with prolonged arthrostatic pain, either standing or walking. He had difficulty lifting objects, of weight, because of these problems.

Q. Did you do any treatment for him, did you offer any treatment?

A. Yes, I did.

Q. What did you do?

A. Because of the ongoing and the severity of his hip problems, I offered a hip injection of cortisone on that date.

Q. Did he take it?

A. Yes, he did.

MR. BOROWICK: Nothing further.

THE COURT: Mr. Kaminsky.

CROSS EXAMINATION

BY MR. KAMINSKY:

Q. You said that Mr. Dumas cannot do any extended period of sitting. Are you aware that Mr. Dumas had been sitting in court all day? Yes or no.

Are you aware he has been sitting in court all day?

THE COURT: No, just yes or no. Are you aware.

A. He has been sitting in court during my

testimony, yes.

Q. Are you aware that he was here this morning?

A. I was not aware of that.

Q. You said you have done hundreds of hip replacements?

A. Yes.

Q. Have any of those people returned to the workforce in any capacity or at home bedridden, if you know?

A. As a general question?

Q. Have any of them gone back to work?

A. Obviously, depending on --

Q. Is that a yes?

A. Yes.

MR. BOROWICK: Objection.

THE COURT: This is cross-examination, I will allow it.

A. Answer is yes.

Q. As far as the types of surgeries you performed -- before we get into that, Mr. Borowick asked you if you are being compensated in work but he did not ask you how much.

A. Yes.

Q. How much are you being compensated for court today?

A. 750 an hour.

Q. Is there a minimum?

A. No.

Q. So, from your involvement in the case, up to today, can you give us an idea how much you received in compensation or will receive in compensation?

A. I have not received anything in compensation yet.

Q. Do you know what your total compensation will be or is expected to be?

A. I don't know what the total amount will be, no.

Q. Have you come to court or written reports or treated any other patients in relation to that?

A. Yes.

Q. Approximately how many?

A. It is hard to give you exact number or approximate number.

I treated iron workers. It is probably more than a dozen.

Q. I would like to ask you about the surgeries that have been done, in other words, that maybe done or you think maybe required, you did what is called an arthroscopic surgery of his knee, correct?

A. That is correct.

Q. Would I be correct in saying that was performed on an outpatient basis?

A. That is correct.

Q. In other words, he was not admitted to the hospital, he came in, he did the surgery and he left?

A. Yes.

Q. Would it also be fair to say that the surgery performed on his hip was an arthroscopic surgery?

A. Yes.

Q. The same thing, he came into your office or you met with him, he went through the surgery and he went home, correct?

A. Not in the office but in the hospital, yes.

Q. He was not admitted overnight?

A. That is correct.

Q. As far as arthroscopic surgery, would you agree with other orthopedic surgeons who will say on a scale of 1 to 10, 10 being the most serious?

MR. BOROWICK: Objection.

THE COURT: Overruled.

Q. You asked a lot of questions.

MR. BOROWICK: This has to do with what other surgeons said?

THE COURT: Sit down. If you can answer the question, you may answer. If you cannot, you

say you can not.

Q. Arthroscopic would be about two, would you agree with that, just if you agree or disagree?

A. I would not agree with that.

Q. Would you agree with me that athletes have arthroscopic surgery, are you aware of athletes who had arthroscopic surgery and resumed their career?

A. Some do, some don't.

Q. Are you aware of athletes that resume their career? Yes or no.

A. Yes.

Q. What does the term "degenerative changes" mean?

A. Degenerative means basically, depends on the context, but it would be some wearing of that area.

Q. Is it something that would occur over time?

A. It can occur over time. It can occur over time. It can occur part of the time.

Q. The word "degenerative" means condition gets worse over time?

A. If it is a degenerative condition, progressive condition, the answer would be yes.

Q. Indication of degenerative condition before this accident, would that suggest a pre-existing condition? Yes or no.

MR. BOROWICK: Objection.

THE COURT: Overruled.

MR. BOROWICK: Judge, I don't understand that question.

THE COURT: Overruled. And sit down.

Q. Do you understand my question?

A. I do not --

THE COURT: Do you understand the question?

A. I can't answer it because it is too vague.

THE COURT: That's it. You cannot answer it.

Q. If there were any films that were taken of the plaintiff before the occurrence that showed degenerative changes, would that indicate the existence of a prior injury? Yes or no.

A. I would say not necessarily.

Q. Are you aware of any films taken of the plaintiff before the accident that showed degenerative changes?

A. I am aware of an MRI scan that was performed of the left knee.

Q. What did that MRI scan taken shortly before the accident show as far as degenerative changes are concerned?

A. I believe it made notation of medial meniscus. I am not sure of the exact terminology that they used but I do think that they did mention degenerative signal or changes.

Q. Degenerative signal, that's what it said. A degenerative signal that pre-dates this accident, obviously, existed before the accident, you could come to no other conclusion?

A. That is correct.

Q. What is scoliosis?

A. Curvature of the spine. It affects the thoracic lumbar spines. However, I have to say that almost nobody has a completely straight spine, almost every one has some degree of curvature to their spine.

Q. What is scoliosis?

A. That's what I am trying to explain, when the curvature exceeds a certain degree, it would be called scoliosis.

Q. Is there a difference between --

THE COURT: You know what, I am sending the jury home. You two want to talk, members of the jury, let's go home.

You don't in the middle stop and talk to counsel. Members of the jury, we will come back 10 o'clock tomorrow morning.

MR. BOROWICK: Your Honor --

THE COURT: You too doctor. 10 o'clock tomorrow morning.

MR. BOROWICK: Judge please.

THE COURT: You only have five minutes in any event. I told you --

MR. BOROWICK: We have a spine doctor that is coming in.

That's all I was mentioning to him.

THE COURT: Come on.

MR. BOROWICK: We have to reschedule his surgeries and the expense involved is enormous.

Just because I said a word to him.

THE COURT: Look at the time.

MR. BOROWICK: There is 12 minutes left.

THE COURT: I told you that the --

MR. BOROWICK: There is 12 minutes.

THE COURT: I told you because of budgetary constraints, we must leave at 4:30, it is almost 20 after. You only have 5 minutes.

MR. BOROWICK: It is 15 minutes after. I was mentioning to Mr. Kaminsky, if he does not mind we have a spine surgeon coming in. Why does that mean I have to spend --

THE COURT: Come in 10 o'clock. The

record is closed. Good night.

MR. BOROWICK: That is unfair.

* * * * *

The foregoing is hereby certified to be a true and accurate transcript of the proceedings as transcribed from the stenographic notes.

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ADMELINDA J. RUBIO, RPR

Senior Court Reporter

_____

NADONNA BLANDING

Senior Court Reporter